



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 920 OF 2013**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 31<sup>st</sup> July, 2017)**

**ROGERS SULTANI BWOSI.....CLAIMANT**

**VERSUS**

**G4S SECURITY SERVICES KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed suit through the firm of Khayega Chivai & Company Advocates seeking damages for unlawful refusal to make bonus payment due to him upon resignation.
2. He contends that he was employed by the Respondent as a Courier Services Director, by virtue of an offer of employment dated 11.2.2011 which the Claimant accepted on 15<sup>th</sup> February, 2011. That under this Contract the Claimant's performance was reviewed over a period of 6 months and his employment was confirmed with effect from 16.6.2011.
3. He further contends that under clause 4 of the letter of appointment, he became eligible to participate in the bonus scheme of the Respondent which ran annually.
4. He stated that he was an employee of the Respondent under the terms of the letter of appointment until 31.12.2012 when he left employment voluntarily. That at the time of resignation, his salary had risen from Kshs. 600,000/= to Kshs. 645,000/= per month.
5. The Claimant avers that the Respondent communicated to him the bonus objectives, targets as well as the rules for eligibility for a bonus which were as follows:

Bonus Objectives	Targets	Completion date	Percentage of Bonus
Country Profit Target	Kshs. 7,272,740,000	31 Dec 2012	25%
Country Stretch Target	Kshs. 764,127,000	31 Dec 2012	25%
Personal Objective A	To achieve 90% completion of the Strategic bonus objectives as outlined in the G4S Kenya Strategic Bonus Plan as completed and published in January, 2012 and signed by all G4S Kenya Directors	Per timeline	30%

Personal Objective B	To achieve an average DSO days of 45 or less for the Q3 and Q4 as measured by the Debt Collection Department and published monthly in the G4S Kenya Key Performance indicators	Per timeline	10%
Personal Objective C	Complete the successful implementation of a Track & Trace System in the Courier Business	Per timeline	10%
Total score points			100%

6. The Claimant avers that he worked diligently all year and met the targets and objectives that had been set, and thereby became eligible to be paid the bonus, calculated at 30% of his annual salary. He contends that the bonus scheme created an obligation for him to work diligently and meet all the set targets which he did and the Respondent is duty bound to pay him 30% of his annual pay which amounts to Kshs. 2,322,000/=.

7. It is the Claimant's position that the other Directors and Managers have received their bonuses, but his enquiries directed at the Respondent's Managing Director have been met with evasive answers. He prays for the Court to award him the bonus as claimed together with interest thereon.

8. The Respondent filed a Memorandum of Response wherein they admit the employment relationship and the Contract governing it. They state that clause 4 of the Contract stipulated that the participation in the Bonus Scheme was subject to the rules of the bonus scheme and on the conditions that the Company achieved its objectives for the year that the employee achieved his objectives and the bonus was declared.

9. They further state that the Annual Bonus Scheme was only payable to employees who were in the Respondent's employment as at the time it was declared. That the scheme specifically provided that:

***- The Bonuses will be paid after the financial results have been audited in 2013;***

***- If, as at the date due for payment of the 2012 Bonus, an employee is no longer employed by the Company or either the employee or the company has given notice to terminate his/her employment, he or she shall have no right to a bonus or a pro-rated bonus.***

10. The Respondent therefore denies that the Claimant was entitled to bonus payment for the year 2012, in the sum claimed or at all as he was not in their employment after December, 2012, and so he was not entitled to the bonus declared in 2013.

11. In evidence the Claimant led evidence as per the Claim and added that in the year 2012, the Respondent achieved 70% of its objectives to the tune of 432,000,000 and his group achieved 300,000,000 of that amount. That he met his targets making him eligible for the bonus. He stated that upon resignation he expected to be paid his bonus for the year 2012 which the Respondent refused to pay.

12. He further stated that upon demanding for payment through his lawyers the Respondent replied by sending a copy of the bonus scheme rules which he had never seen before. That the said rules were not addressed to anyone in particular nor were they signed by anyone. He prays, for the claim to be allowed as drawn.

13. In cross examination the Claimant admitted that he was aware that he was eligible to participate in the Bonus Scheme subject to the Bonus Scheme Rules. That he achieved all targets but on resignation the books of accounts had not been declared.

14. In evidence the Respondent's witness led evidence as per their Memorandum of Response and maintained that the Claimant was aware of the Bonus Scheme Rules.

### **Submissions**

15. The Claimant submits that Section 107 of the Evidence Act is to the effect that he who alleges a fact must prove. That the Claimant states that he established an Employment relationship and a bonus scheme for which he qualified. The Conditions precedent to the payment of the bonus were met by the Claimant which fact they state was not denied by the Respondent. These conditions were that:

- *The company achieves its profit objectives for the year.*
- *The employee achieves his own personal objectives as agreed with his Manager.*
- *The bonus is declared.*

16. The third condition the Claimant submits is an exemption clause which should not form the basis of denying him the bonus that he had earned for the year 2012. They rely on the case of **Mombasa ELRC 117 of 2013 Thomas Sika Nzivo Vs. Bamburi Cement** where Rika J stated:

*“Bonus is performance based. It is a variable incentive... it is aimed at rewarding superior performance.”*

17. The Claimant is of the view that the he was only subject to the conditions in the employment contract and the bonus objectives for 2012. Further that resignation does not disentitle an employee from benefits accrued as he had worked diligently and met his objectives and the Company also achieved its objectives. They rely on **Industrial Cause No. 1346 of 2010 James Chutha Gatherer vs. Nation Media Group Limited** to buttress this position.

18. The Claimant submits that the Rules which contained the exemption clause were not addressed to the Claimant nor were they signed by the issuer thereof. They did not even have a specific date and as such they cannot be said to amount to a notice recognized in law.

19. Finally the Claimant states that when it comes to analysis of clauses in a contract, it is procedural to seek guidance from the general law of contract. In **Simon Honeyball & John Bowers, Textbook on Labour Law, 7<sup>th</sup> Edition, Oxford University Press** states as follows:

*“The existence of implied and imposed terms, and statutory regulation, over and above the rather meager terms expressly agreed by the parties in an employment relationship paints a picture very little different to the situation that exists when entering into many commercial contracts for consumer goods, for example. All that these factors show is that the background world, for which the traditional rules of contract and the elements of a contract developed has changed markedly, but it does not show that the employment contract is in any respect different in this regard from any other contractual relationship.”*

20. The Claimant prays for the Claim to be allowed as drawn.

21. The Respondent on the other hand submits that clause 4 of the contract of Employment was mandatory as such the Bonus could only be paid if each and every condition therein was met. On 14.2.2012, which the Claimant produce, the Respondent communicated to the Claimant on the Bonus objectives and clearly required the Claimant to make reference to the Annual Bonus Scheme Document. That Clause 5 thereof provided:

- *Bonuses will be paid after the financial results have been audited in 2013;*
- *If, as at the date due for payment of the 2012 bonus, an employee is no longer employed by the*

***Company or either the employee or the company has given notice to terminate his/her employment, he or she shall have no right to a bonus or a pro-rated payment.***

22. That the Claimant was not in employment as at December 2012 and the bonus was declared in 2013 and the Claimant had not been reviewed to have an objective analysis of his performance for the year 2012. Further that the payment of bonus is at the discretion of the employer and they cite the case of **Stephen K Kachila vs. Bamburi Cement Limited (2015) eKLR** to assert this position.

23. They further rely on the case of **Nicholas Mbuya & 4 Others Vs. Alice Gesare Moninda (2015) eKLR** where the Court of Appeal stated as follows:

***“It would then appear that where a bonus dispute arises, such dispute is left exclusively to the province of the agreement between the parties. As such, bonus liability (if any) must be construed within the meaning and intent accorded by the parties under their contract.... Nonetheless it should be remembered that parties are bound by their contracts and a Court can and should only award what is sought and proven within the confines of the law and the contract of employment.”***

24. The Respondent state that the Claimant has not met the mandatory requirements of the Bonus Scheme and as such the Claim should be dismissed with costs.

25. In determining whether, the claim by the Claimant are tenable or not, I refer to the contract of agreement before the parties herein. The contract of agreement is dated 11<sup>th</sup> February 2011 and paragraph 4 of the contract states as follows:

***“Bonus Scheme***

***As a member of senior management staff, you will be eligible to participate in the bonus scheme in accordance with the rules of the scheme; the scheme provides a bonus opportunity of up to 30% of your annual pay. However, bonus is only payable upon the condition that the company achieves its profit objectives for the year, that you achieve your own personal objectives as agreed with your manager and that the bonus is declared”. (emphasis is mine).***

26. The 3 conditions above were the ones that would determine if a bonus payment would be made or not. There is no other condition set for such payments in the employment contract.

27. The Respondents insist that there were rules developed for the bonus scheme which is their Appendix 2. Appendix 2 is titled Annual Bonus Scheme 1<sup>st</sup> January 2012 to 31<sup>st</sup> December 2012. It indicates as follows:

***“if as at the date due for payment of the 2012 bonus, an employee is no longer employed by the Company or either the employee or the Company has given notice to terminate his/her employment, he or she shall have no right to a bonus or a pro-rated bonus”.***

28. Indeed this notice has a January 2012 date but it is not signed by anyone nor is there any indication that it was brought to the attention of the Claimant in year 2012, before he resigned from the employment of the Respondent. It is also not on any letter head of the Respondent to prove authenticity as a viable document from the Respondents. This document in my view has little probative value in the circumstances.

29. Assuming that the above document is valid, it would be negating the express provision of the contract of employment which provides for the express conditions upon which the bonus is paid.

30. Section 10(5) of Employment Act states as follows:

***”Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with***

***the employee, revise the contract to reflect the change and notify the employee of the change in writing”.***

**31.** This provides that a provision in the Employment contract can only be changed after due consultation with an employee. There was no consultation with the Claimant even if the Respondent desired to change a provision in the contract.

**32.** It is therefore my finding that this Court can only place due reliance upon the Employment contract and based on the same the Claimant fulfilled the conditions of the award for the bonus which the Respondent have not denied save that the bonus was declared in 2013 when he was no longer an employee. This argument cannot stand because an employee cannot be denied benefits that accrue within an employment contract even if the payments are made late.

**33.** In the circumstances I find that the Claimant has established his claim and I award him Kshs.2,322,000/= bonus payment as prayed.

**34.** The Respondent will also pay interest on this amount with effect from the date of this Judgment plus costs of this case.

Read in open Court this **31<sup>st</sup> day of July, 2017.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Mirungu holding brief for Makori for the Respondent – Present

Khayega for the Claimant – Present