Case Number:	Cause Number 1813 of 2011
Date Delivered:	16 Sep 2014
Case Class:	Civil
Court:	Employment and Labour Relations Court at Nairobi
Case Action:	Award
Judge:	James Rika
Citation:	David Wanjau Muhoro v Ol Pejeta Ranching Limited [2014] eKLR
Advocates:	Mr. C. Onyony Advocate, instructed by Onyony & Company Advocates, for the Claimant Mr. Harrison Okeche & Ms. Lorraine Oyombe Advocates, instructed by the Federation of Kenya Employers [F.K.E.] Advocates for the Respondent
Case Summary:	function toggle(elementId) { var ele = document.getElementById(elementId); if(ele.style.display == "block") { ele.style.display = "none"; } else { ele.style.display = "block"; } } **Scope of the right to equal pay for equal work** **David Wanjau Muhoro v Ol Pejeta Ranching limited** **In the Industrial Court at Nairobi** **Cause number 1813 of 2011** **Rika J, J** **September 16, 2014** **Reported by Teddy Musiga and Getrude Serem**

Brief facts

The respondent terminated the claimant's contract of employment on grounds that the claimant neglected his duties leading to fraudulent activities in the Finance department where he was the Finance manager. However, the claimant disputed the validity of the termination reason, fairness of the termination procedure and also claimed that he was denied equal pay for equal work, or work of equal value while he was in employment. Specifically, he claimed that he was subjected to unlawful discrimination because he was a black person. He alleged that white managerial staffs, holding similar responsibilities to his and other black managers, were paid disproportionately higher salaries. White managers earned about Ksh. 500,000/= per month while black managers earned approximately Ksh. 200,000/=

Issues

I. Whether the process of termination of the employment of the claimant was irregular, unfair and contrary to the contract of employment and labour laws.
II. Whether there existed circumstances in which an employee's negligence amounted to gross misconduct thus warranting summary dismissal.
III. Whether employers could withhold employees' salary as a form of disciplinary sanction.
IV. What is the scope of the right to equal pay for equal work or work of equal value?
V. Whether the time limitation of three years for instituting claims under the Employment Act could be applied in instances the dispute arose out of accrued benefits over a long time.

Labour Law – *employment –termination of employment – summary dismissal of employee on grounds of negligence - whether there existed circumstances in which an employee's negligence amounted to gross misconduct thus warranting summary dismissal – Employment Act 2007 section 44(4)(c),*

Labour Law – *fair labour practices – equal work for equal pay – fair remuneration of employees – claim for discrimination alleging disparities in payment for equal work by different employees –* Constitution of Kenya, 2010,Article 41 *Employment Act,* section 44 **.**

constitutional law -*Fundamental rights & freedoms – right to equal work for equal pay – scope of the right to equal work for equal pay -* Constitution of Kenya, 2010, article 41

HELD

1. Courts had been reluctant to find that an employee's act of negligence amounted to gross misconduct that merited summary dismissal, in the absence of deliberate and intentional wrongdoing. (*Dietman v Brent* LBC [1987] IRLR 259; *London Borough of Hackney v Benn* [1996] CA)
2. In dealing with employment disputes, courts had to exercise caution in adopting judicial precedents as not all the circumstances in each case were similar to the other. Employment relationships were unique and each case was to be analysed on its own unique facts. Facts, in each case of negligence, with all the extenuating circumstances, were to be considered to ascertain if the conduct or omission by the Employee was sufficiently serious to merit dismissal.
3. Section 44(4)(c) provided the elements of the negligence for which an employer could summarily dismiss an employee on account of gross misconduct as:

a. Willful neglect by the Employee to perform any work which was his duty to perform.
b. Careless and improper performance by the Employee of any work, which from its nature it was his duty, under his contract,

to have performed carefully and properly.

4. The Claimant could not have been willfully negligent, or performed his duty carelessly and improperly, he had advised the Respondent from as early as 2005, on the weaknesses of its Accounting System. The Auditors' Reports, the Cumming Report, the evidence of the CEO and that of the Claimant before the Auditors, all pointed at an institutional failure rather than an individual failure. There was no way the claimant could have exercised greater supervisory control to avoid fraud in the absence of the implementation of reforms to the accounting system which the claimant had been advocating for since 2005.
5. The termination of the employee's employment was not based on valid and fair reason since the respondents failed to prove the reasons for termination of the claimant's employment contract under section 43 of the Employment Act; It did not establish on the part of the claimant willful negligence, or careless and improper performance of duty under section 44(4) (c) of the Act and did not demonstrate valid or fair reason for termination under section 45 of the Act.
6. The principle of fair hearing required that the employee had sufficient opportunity to prepare. This entailed:

a. The Right to sufficient time to prepare. Time however, was not the totality of sufficiency of opportunity.
b. The right to fully understand the charges. General charges such asdishonesty, fraud andfraudulent activities were vague and offered the employee no opportunity to respond intelligibly, or at all.

c. The right to documentation. The Employee had a right to be given the documents the Employerintended to rely on at the hearing, as well as other documents the Employee requested for.

7. Employers could not withhold Employee's

salaries as a form of a disciplinary sanction. It added on to the gravity of the procedural irregularity, when the Employee's salary was used as a weapon against him.

8. The law did not contemplate the conversion of an Employee's annual leave entitlement into anything else, other than cash. Compulsory leave was essentially a suspension of the Employee from Employment, pending investigation of the employment offence, and the outcome of the disciplinary process. Annual leave could not be converted into suspension by whatever name that suspension could be characterized. Annual leave was voluntarily taken by the Employee, at such time as was agreed with the Employer. It was not meant to be involuntary.
9. The concept of "Equal pay for equal work or work of equal value"could be simplified as the fundamental right of every worker, to receive equal pay, for the sameor similarwork. That could entail equal pay for doing completely different work, but which was, based on objective criteria, of equal value.
10. Equal pay for equal work or work of equal value was recognized as a fundamental human right. That right was now recognized under Article 41 of the Constitution of Kenya. The International Labour Organization (ILO) Declaration of Philadelphia of 1944, which was part of the ILO Constitution, affirmed that all human beings, irrespective of race, had the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, and of economic security and equal opportunity.
11. The Equal Remuneration Convention, 1951 and the Discrimination (Employment and Occupation) Convention, 1958 prohibited distinctions, exclusions or preferences made on various grounds including race. However, disparity in pay was permitted when there were objective differences in the value of work to be performed. The concept required a means of measuring and comparing different jobs,

on the basis of objective criteria such as skills, working conditions, responsibilities and effort.

12. Qualified employees had to be paid equal equally when they performed the same or virtually the same work, in equivalent conditions. Work of equal value was work which was different in content, involving different responsibilities, requiring different skills or qualifications.
13. In determining the value or worth of a job, employers had to undertake objective job evaluation that was free from bias. Two types of job evaluation methods [JEM] existed. The first was the Global or Ranking Methods, the second was the Analytical job evaluation;

    i. Under the Global or Ranking Methods, the jobs were ranked on the basis of the importance of the job requirements. The whole job rather than the individual component was evaluated. This identified the characteristics of the job-holder with the characteristics of the job itself. The ranking methods ascertained the importance of the jobs within the Organization, but did not determine the difference in value between them.

    ii. Analytical Job Evaluation Methods broke jobs down into components, or factors, and sub-factors, and attributed points to them. The factors included skills and qualifications acquired through education, training or experience; responsibility for equipment, money and people; effort, which could be physical or mental; and work conditions which encompassed physical and psychological aspects. By determining the numerical value of a job, analytical job evaluation methods showed whether two different jobs had the same value or not. Different jobs that had the same numerical value were entitled to equal remuneration.

14. Whenever an employee was found to have

suffered wage or salary disparity based on reasons which were not objective and permissible such as race, the consequences of unequal pay had to be reversed. The employee had to receive compensation and where possible, courts could impose sanctions such as fines, to deter continuing or future pay discrimination. Other mechanisms included shifting the burden of proof to the employer through legislation since the employee could not have access to employment records to establish a claim for discrimination.

15. Section 5 of the Employment Act, 2007 which contained antidiscrimination law, required employers to promote equality of opportunity and to strive to eliminate direct and indirect discrimination. It also specified what could not amount to discrimination. It was not discrimination for instance if the acts or decisions of the Employer were based on the inherent requirements of the job. Section 5(7) of the Employment Act provided that the employer bore the burden of proving that discrimination had not taken place as alleged, and that the discriminatory act or omission was not based on any grounds specified on that section.
16. The test of proving discrimination against an employee was comprised of the following steps:

    a. The Employee by preponderance of evidence had to establish a *prima facie* case of discrimination.
    b. The Employer had to rebut the presumption, by introducing evidence of legitimate nondiscriminatory reason for its actions.
    c. The Court at the end had to examine if the reasons offered by the

Employer was pretextual, and if they were pretextual, then discrimination could be the correct diagnosis in the circumstances.

17. In the instant matter, the claimant did more than merely show a prima facie case that

he was subjected to unequal pay, based on his race. On the other hand, the respondent failed to discharge its obligations in showing nondiscriminatory reasons for the disparity between the claimant's salary and other employees.

18. In remedying employment wrongs, claims for unpaid wages and salaries could not be treated as claims for special damages in civil claims. Focus of the court had to be on what was reasonable in each case particularly as employment records which were necessary in specific proof were legally in the custody of the employer.
19. Whereas section 90 of the Employment Act provided for limitation of time at three years for disputes arising out of the Employment Act, the period in employment was a continuous period, with employment benefits vesting in the employee, and obligations on the part of the employer attaching over time. There were accrued benefits which could not be isolated and subjected to a different date of accrual. At the date of termination, the employee had to be accorded all benefits arising under a contract of employment. Therefore the assertion by the respondent that the claimant should have sued when the pay decision was made instead of waiting beyond the 3 years period to raise the issue of pay disparity could not stand.

The termination was unfair and unlawful.

The Claimant was discriminated against by the Respondent, on account of his race, and paid an unequal pay for equal work, or work of equal value.

The Respondent was to within 30 days of the delivery of this Award, pay to the Claimant 12 months' gross salary in compensation for unfair termination at Ksh. 3,489,084; Ksh. 18,256,947 in cumulative pay disparity, and damages for discrimination; Ksh. 559,148 being the balance of annual leave pay- total Ksh. 22,305,179.

The amount was to be paid less PAYE tax.

	No order on the costs and Interest.
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	Award
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 1813 OF 2011

BETWEEN

DAVID WANJAU MUHORO ……CLAIMANT

VERSUS

OL PEJETA RANCHING LIMITED ……RESPONDENT

Rika J

CCs. Elizabeth Anyango, Leah Muthaka & Edward Kidemi

Mr. C. Onyony Advocate, instructed by Onyony & Company Advocates, for the Claimant

Mr. Harrison Okeche & Ms. Lorraine Oyombe Advocates, instructed by the Federation of Kenya Employers [F.K.E.] Advocates for the Respondent

---

ISSUES IN DISPUTE: 1. UNFAIR AND UNLAWFUL TERMINATION OF EMPLOYMENT

2. WAGE INEQUALITY BASED ON RACIAL DISCRIMINATION

3. PROOF AND REMEDIES IN EMPLOYMENT DISCRIMINATION

AWARD

Synopsis

1. This Claim is brought by Mr. David Wanjau Muhoro, who is a former Finance Manager of Ol Pejeta Ranching Limited. Ol Pejeta is a registered limited liability company, resident in Kenya, whose core business is livestock ranching, wildlife conservation, and tourism. The Claimant was employed on 1st October 1984, initially as an Accounts Clerk, by Chibuku Products Limited which was a subsidiary of the Respondent's Predecessor, Lonrho East Africa Limited. The Respondent terminated the Claimant's contract of employment with effect from 7th December 2009, alleging the Claimant neglected his duties leading to fraudulent activities in the Finance Department. The Claimant earned a monthly basic salary of Kshs. 215,767, on termination. His gross monthly pay at the time was Kshs. 290,757, as indicated in his pay slip for the month of November 2009.

2. The Claimant disputes the validity of the termination reason, fairness of the termination procedure, and claims he was denied equal pay for equal work, or work of equal value, while in employment, ostensibly because he is a Black Person. *He claims a staggering total of Kshs. 98,680,037 as terminal benefits, underpaid or unpaid salaries and benefits, and compensation for unfair termination; a declaration that termination was unfair and unlawful; an order for payment of actual pecuniary loss*

suffered as a result of termination from the date of termination, to the date of payment; interest; a declaration that disciplinary proceedings were unfair, unjust and a nullity; a declaration that the act of the Respondent withholding the evidence forming the basis of termination is unfair, unlawful and against the rules of natural justice; a declaration that the act of the Respondent of underpaying/ non-payment and withholding the Claimant's basic pay and allowances was unlawful, illegal and amounts to breach of contract; a declaration that the act of discrimination in the place of work between White and Black Departmental Managers is unconstitutional, unlawful and illegal and amounts to breach of contract or employment and deprivation of property; an order for payment of legal costs; an order for payment of other costs; and any other relief the Court may deem fair and fit to grant.

3. The Claimant filed the Statement of Claim on 27th October 2011. Subsequently, he filed Supplementary Claims, Additional Bundles of Documents, Authorities and Closing Submissions. The Respondent filed its Statement of Response on 8th February 2012. Further documents filed by the Respondent include Supplementary Response, Additional Bundles of Documents, Authorities and Closing Submissions. The Court record is quite bulky.

4. The Claimant testified on 8th October 2012, 30th April 2013, 23rd May 2013, 24th June 2013, and 22nd July 2013 when he closed his case. The Respondent gave evidence through its Chief Finance Officer Joseph Kariuki on 22nd July 2013; its Nurse Attendant Phillip Ndegwa Macharia on 27th September 2013; the Human Resource Manager Apollo Kiarie who testified on 27th September 2013, 2nd December 2013, and 17th January 2014; and its Chief Executive Officer Richard Vigne, who testified on 7th February 2014 when the hearing wound up. Learned Advocates for the respective Parties, underscored their Clients' positions in a brief address to the Court made on 8th July 2014. The Court, with the concurrence of the Advocates, advised its Award would be read on notice.

Claimant's case

5. Muhoro testified he worked for 25 years, and rose from the position of an Accounts Clerk, to the high position of Finance Manager through hard work. His contract was terminated without notice or warning. He was not heard. The Respondent acted in violation of the Employment Act 2007, the Constitution of Kenya, Fundamental International Labour Conventions and Declarations, the International Convention on the Elimination of all Forms of Racial Discrimination [ICERD], and the Company's Human Resources Procedure and Policy Manual.

6. Fauna and Flora International acquired 100% shares from Lonrho Africa, in Ol Pejeta Ranching Holdings Netherlands BV, which owned Ol Pejeta Ranching Limited, on 29th September 2004. The Respondent wished to continue employing the Claimant as the Finance Manager, based on past appraisals. The Claimant continued serving as the Finance Manager.

7. On business transfer, the Employees were advised that '' *all staff remain employed by Ol Pejeta Ranching Limited together with all accrued service. Terms and conditions remain the same as per existing contracts and operations will continue as normal.''* There was a general notice in these terms issued to all staff, dated 29th September 2004, signed by General Manager Richard Vigne. There was a specific letter of the same date, written to the Claimant by Richard Vigne, giving the same information. These terms and conditions included remuneration, allowances, commissions and other privileges, granted to the Claimant over the years, as a result of his exemplary service.

8. Ol Pejeta's objectives included, ''*to maintain a working environment for Employees of Ol Pejeta that does not discriminate against anyone on any grounds, including but not limited to, race, gender, gender identification, age, marital status, disability, sexual orientation, religion, conscience, culture, language,*

birth, pregnancy or height and weight.''

9. On 4th November 2009, the Claimant was summoned by the Chief Executive Officer [CEO] and the Chief Finance Officer [CFO]. He was informed that the CFO had uncovered fraudulent transactions involving an Accounts Department Subordinate Employee and some Customers. The Employee had admitted fraud in writing. Auditors had been commissioned and the Claimant was asked to cooperate with the Audit, which he agreed to do. On 5th November 2009, the Claimant was ordered out of his office on the allegation that money had been stolen from the Respondent by its Accountants. He was sent on compulsory leave on 7th November 2009 to allow Audit.

10. The Report by Audit Firm UHY Kenya, dated 20th November 2009, exonerated the Claimant from wrongdoing. The Respondent called the Claimant to a disciplinary hearing on 2nd December 2009. The Claimant had not yet been availed the Audit Report. His entire salary for November 2009 was withheld by the Respondent. He asked for deferment of the disciplinary hearing to enable him have and study the Audit Report. The date was reset for 7th December 2009. On this date he still had not been supplied with the Audit Report. The Disciplinary Panel dismissed him on 7th December 2009, and directed that his November 2009 be released to him.

11. He appealed against the decision to the Board Chairman. His Appeal was rejected without any hearing. He was advised by the Respondent that, '' *the Board has taken note and considered the issues you have raised as the basis of your appeal. However, the Company has clear evidence of loss of money in the department whilst under your immediate supervision. Such evidence will be presented to you and the appropriate authorities at the appropriate time as you were advised at the disciplinary meeting.''* He testified the Respondent scorned his right of appeal.

12. The Respondent called for a second Audit carried out by the Firm of PricewaterhouseCoopers [PWC] Kenya Limited. The Respondent invited the Claimant to participate in this second Audit, notwithstanding that the Claimant had already left employment. The second Report dated 20th July 2010, again failed to find fault with the Claimant.

13. The alleged fraud was reported to the Nanyuki Police Station. The Occurrence Book showed those reported by the Respondent to have been involved, to be Charles Kimani Mwathi and Peter Thuku; no mention was made of the Claimant.

14. Consequent upon the termination of the Claimant's contract of employment, he was unable to repay sundry outstanding loans standing at over Kshs. 2 million, and could not be employed by another Company, Homegrown Limited, as a result of the bad reference from Ol Pejeta.

15. After termination, the Claimant made several demands upon the Respondent to make amends. The Respondent paid him only a sum of Kshs. 740,016, and forwarded the Certificate of Service, through the Laikipia District Labour Office, after the various demands. The Respondent disregarded most of the demands, compelling the Claimant to seek the intervention of the Court.

16. During his service with the Respondent, the Claimant was subjected to unlawful discrimination based on his colour. White Managerial Staff, holding similar responsibilities to the Claimant and other Black Managers, were paid disproportionately higher salaries. The difference in the salary between the Claimant as Finance Manager and the White Livestock Manager for the years between 2004 and 2009 was Kshs. 18,265,947.

17. The total sum of Kshs. 98,680,037 contained in the Claimant's prayers consist salary and allowance

the Claimant would have earned up to the mandatory retirement age of 60 years. He was 50 years on termination, and using a multiplier of 10 years, tabulated this item at Kshs. 51,716,586, which carries the bulk of the monetary claims. Others include service pay calculated at 18 days' salary for 25 years completed in service at Kshs. 5,172,255; compensation for unfair termination at 12 months' gross salary which include N.S.S.F contributions and Company Pension Contribution, at Kshs. 5,171,658; incorporeal loss at Kshs. 1,000,000; loss of earning capacity at Kshs. 1,000,000; contractual underpayment for 7 days worked at Kshs. 38,963; unpaid leave days at Kshs. 574,695; contractual underpayments of salary at Kshs. 16,353,589; and the difference in salary, between him and the Livestock Manager for the period between 2004 and 2009, which the Claimant terms as 'discriminated salaries,' amounting to Kshs. 18,265,947. The Claimant gave his total figure at Kshs.98,680,037.

18. Muhoro testified his relationship with the Respondent was initially cordial. Given the opportunity, he would have discounted the UHY Audit Report. Anything which was not paid for through a cheque was said to be fraudulent. He was not shown physical entries of fictitious credit notes. The CEO approved the transactions and it was inconceivable they would turn out to be fraudulent. The PricewaterhouseCoopers Report, which came six months after the Claimant's contract was terminated, discredited the UHY Report. Bank charges had not been taken into account in the Audit. The UHY Report was characterized as an exploratory exercise. KPMG Audit Firm had been doing the Annual Audits for the Respondent. No questions had arisen from KPMG Reports for the period during which the loss was said to have taken place.

19. The CEO confirmed to the Auditors that the Claimant signed reconciliation of records, and the CEO likewise signed the records. The Auditors observed that the Respondent expected too much of the Claimant. The Financial Policies and Procedures Manual gave budgeting guidelines. Annual budgeting was prepared by the Managers, and Departmental Managers would know if there were fictitious reports.

20. The Human Resource Policy and Procedures Manual had a Clause on termination of Non-Unionisable Employees' contracts. This procedure was not followed in the Claimant's case. He was not heard as provided for under the Manual. The clause on discharge from employment was not followed. The Claimant was not paid his terminal benefits in accordance with the Manual.

21. Muhoro explained that when he worked under Lonrho, there was in place a good salary structure. Richard Vigne was at the time the Administration Manager. At the time of the business transfer, he was the General Manager. He became the CEO after sale, and immediately raised the salaries of the White Managers.

22. The salary of the White Livestock Manager Giles Prettejohn was Kshs. 120,000 per month, before the transfer of business in 2004. After transfer, it was raised to a consolidated package of Kshs. 464,000 per month. The Claimant moved from Kshs. 115,000 per month, to Kshs. 148,000, then 160,000. White Managers earned about Kshs. 500,000 per month at the time the Claimant left the Respondent. Black Managers earned approximately Kshs. 200,000.

23. An Independent International Evaluator from Zimbabwe was appointed by Fauna and Flora International, to assess the performance of the Respondent. His Report confirmed there were historical disparities in the Employees' salaries which were being addressed. The CEO was not, according to the Claimant, observing the core objectives of the Ol Pejeta Ranching, as laid down by the Fauna and Flora International. The Evaluation was carried out in November 2009 when the Claimant was on forced leave. The Report absolved the Claimant from the allegations made against him by the Respondent.

24. The CEO had realized the Claimant was performing well, but being underpaid. Fauna and Flora

International's Donor, the Arcus Foundation, had asked to see the Claimant's contract in 2007. At this point it was agreed between the Parties what could be reviewed, to bridge the gap between the White Managers and the Black Managers. This was the genesis of the contract between the Claimant and the Respondent dated 29th September 2004.

25. Ol Pejeta wished to kill two birds with one stone. By writing the letter in 2007, and backdating to 2004, the Respondent intended to show that the Claimant earned the amount of Kshs. 160,000, indicated in the contract dated 29th September 2004. This was to answer the Arcus queries. The Claimant based his claim for underpayments on this contract, which he testified, did not in any case, bring his salary anywhere near what his White Colleagues earned.

26. With effect from 1st November 2004, the Claimant gave a summary of increments of salary in percentages of 28%, 8.1%, 10%, 5.11%, 1.622%, 9%, 3.15% and 2.18%, which worked out against actual basic pay received, revised basic pay, contract basic pay and revised contract pay, running up to the date of termination, gave him a total underpayment of Kshs. 4,481,698.75. By the time of termination in November 2009, he testified he ought to have been earning Kshs. 298,842.10 per month, which was still way below the intention of the salary harmonization. He seeks to be paid the total arrears of his rightful salary.

27. Muhoro testified that he had asked for an explanation from the Respondent with regard to payment of utilities allowance. He was paid a fixed sum of Kshs. 11,300 as utilities after his complaint, and testified this was the beginning of his problems with the Respondent. Payment was made one month before termination.

28. The Respondent alleged that the Claimant had burnt evidence on the 5th November 2009. Waste papers were normally disposed of by burning at the incinerator. The CEO and CFO said they would therefore close the whole Accounts Office. It was then that the Claimant was sent on compulsory leave.

29. He appealed against the decision of termination, on 8th December 2009. The Human Resource Manual required the Respondent to dispose of the Appeal within 48 hours. The Respondent only communicated the rejection of the Appeal to the Claimant, on 16th December 2009.

30. The Claimant stated that he held CPA 1 –Kenya qualification, and was the most experienced Manager, having served the longest, at 25 years. It was argued by the Respondent that Prettejohn was a Consultant before 2004. The Claimant disputed this, saying Prettejohn was a regular Employee of the Respondent before 2004. The Claimant sought from KPMG Audit Firm, and was availed Ol Pejeta Tax Optimization Review for June 2007. The Advice was that a Worker, who was granted annual leave and other such benefits, would be deemed to be in an employer-employee relationship.

31. The claim for service pay was discussed between the Parties. The Claimant was advised accrued service would be paid. The staff notice advising Employees about continuity in service, after the transfer of business, assured Employees they would move with all accrued service and terms and conditions of service. The Ol Pejeta Ranching Limited Staff Retirement Benefits Rules gave the normal retirement age as 60 years. Even without adopting the CBA which applied to Unionisable Staff, it was clear the normal retirement age at the Respondent, was 60 years. There were unremitted contributions, because of the underpayments.

32. It was not true that house allowance was introduced at the Respondent in 2006 as alleged in the Statement of Response; it was there even before this. The Claimant testified that at the time he oversaw the Accounts Department, it had various challenges. There were only four Employees working there;

there was no internal controls unit, although the Claimant had asked for one; and after he left, more than ten Employees were recruited in the Accounts Department.

33. The Claimant alleged that the Logistics Manager Brian Haworth was allowed to hive off an entire Department from Muhoro's Finance Department, and was also allowed to employ his Son-in-Law. Andrew Batian Craig, the Wildlife Manager too, employed a relative. These indiscretions had effects on the level of salaries applicable to White Managers.

34. The Claimant pointed out to the Court that he requested from the Respondent, through a Notice to Produce, backed up by a judicial command, employment contracts and pay slips for all Management Staff from 2004 to 2009; letters of salary adjustments form 1998 to 2009; certified copies of academic documents, degrees, diplomas and university transcripts of all Managers; certified copies of form P9A from KRA for all Managers; and withholding tax certificates. The Respondent did not produce these documents as particularized in the Notice to Produce.

35. Muhoro stated White Managers Giles Prettejohn, Ann Olivercronna, and Richard Vigne enjoyed disproportionately high salary increments, compared to the Black Managers. As of 31st October 2004, Prettejohn earned Kshs. 120,000 per month; Ann Olivercronna earned Kshs. 115,500; and Richard Vigne enjoyed a monthly salary of Kshs. 222,337. At this date, Muhoro was at just about at par with Olivercronna, earning Kshs. 115,000. By November 2004, Prettejohn's salary had improved by a staggering Kshs. 344,000 to Kshs. 464,000 per month; Ann Olivercronna was paid Kshs. 370,000; while Richard Vigne received Kshs. 494,875. David Muhoro received a token increment of Kshs. 33,000, earning Kshs. 148,000 per month.

36. The basic salary assigned to Prettejohn on 1st November 2004 of Kshs. 464,000 per month, became the entry point for new White Managers employed after 2004. Brian Haworth who joined the Respondent on 1st January 2005, and Batian Craig who joined on 1st April 2005, were paid Kshs. 464,000 per month.

37. After the Claimant filed this Claim, and in the course of the hearing, salaries for the Black Managers were adjusted. As of 31st July 2009 Black Manager Martin Mulama earned Kshs. 375,000; Apollo Kiarie earned Kshs. 211,900; Joseph Leringato earned Kshs. 211,300; Joseph Kariuki earned Kshs. 230,000; and David Muhoro was paid Kshs. 211,300 monthly. The adjustments as of 31st October 2012, saw Mulama earn Kshs. 611,000; Kiarie Kshs. 457,000; Leringato Kshs.449,000; and Kariuki Kshs.552,000. Muhoro had already left employment, and did not therefore enjoy these remarkably improved salaries for the Black Managers.

38. There had been discussions about the disparity in the Management salaries, involving the CEO and the Human Resources Manager. E-mail messages passing between the CEO and Apollo Kiarie on the subject, were availed to the Court by the Claimant. In a message dated 18th May 2007 to Apollo Kiarie, the CEO Richard Vigne stated '' *I feel in particular the following are somewhat underpaid and performing well: Muhoro, Leringato, Hill.''* Earlier on 12th April 2007, Richard Vigne wrote to Apollo Kiarie that, '' *the differential between the salaries of [in particular] Kiarie and Muhoro when compared to the rest of the management team- is something we wish to discuss, [assuming you continue to do a good job!!! ''* Apollo Kiarie in the end forwarded these e-mail exchanges to the Claimant with the comment 'for your eyes only!' The Claimant testified the Respondent acknowledged the presence of pay disparity.

39. Cross-examined at length, the Claimant testified he worked for Ol Pejeta, for 25 years. He entered employment as an Accounts Clerk, and left while in the position of Finance Manager. He held CPA 1 Section 1 on entry and CPA 1 Section 2 on exit. He was an A-level Graduate. He had 3 Employees

under him as Finance Manager who were Assistant Accountants, holding CPA Section 1.

40. The Respondent confused the ground for termination, citing negligence on the part of the Claimant, and normal termination on other occasion. The UHY Audit Report was exploratory, not conclusive. It pointed out there were weak supervisory controls. Muhoro explained the Section was understaffed and could not operate optimally. There was inadequacy of staff, and therefore inadequate segregation of duties.

41. The Report of PricewaterhouseCoopers Limited concluded the Respondent lost Kshs. 9.6 million. The Report found Claimant's Assistants, Mr. Mwathi and Mr. Thuku, were responsible for the loss. The Claimant was not found to be substantively involved, but negligent. He explained to the CEO and the Auditors that he was overburdened, an explanation which was accepted.

42. He was on 1st December 2009, invited to attend the disciplinary hearing, scheduled for 2nd December 2009. He asked to be given the Auditor's Report beforehand. He eventually attended the hearing on 7th December 2009 under protest, accompanied by Mr. Mulama who was the Chimpanzee Manager. The CEO, CFO, HR Manager comprised the Panel.

43. The Claimant's salary for November 2009 was retained by the Respondent, and released after it was shown the Claimant was not negligent. The action against him was harsh, and contrary to the Human Resource Manual. The Manual recognized negligence as a form of misconduct. He was however issued termination notice, and taken through a regular termination. The Manual stated Employees dismissed for reasons other than gross misconduct were entitled to notice and severance pay. The Respondent stated it was not possible to effect summary dismissal; the Claimant's contract was therefore terminated normally.

44. During the era of Lonrho, the salary structure was reasonable. The Claimant was in Grade 6. Grades were scrapped after the business was transferred. The White Managers at the Claimant's level were paid better rates than him. Discrimination started in 2004. Giles Prettejohn earned Kshs. 120,000 per month as at 31st October 2004. Ann Olivercronna earned Kshs. 115, 500, and David Muhoro Kshs. 115,000 as of the same date.

45. Olivercronna was the Chimpanzee Manager, while Prettejohn was the Livestock Manager. The Claimant did not know what qualifications these two White Managers held. These were the only White Managers at the time, treated favourably. Discrimination was on the salary increments.

46. By 2009, Prettejohn earned Kshs. 503,258 per month. Anne Olivercronna had by then left employment. Martin Mulama was the highest paid Black Manager. He was experienced having served the Kenya Wildlife Service, and was pursuing a Doctorate Degree. Joseph Kariuki the Black CFO earned more than the Claimant. Kariuki had worked for a Hotel in Zanzibar, and had 16 years' experience in finance. Sandra Haworth the White Public Relations Manager earned less than the Claimant. She held a Masters degree. Brian Haworth the Logistics Manager earned more than the CEO. The Claimant testified he did work of equal value. He did not know what comprised work of equal value. His job was not evaluated.

47. The International Evaluator Cumming, mentioned discrimination in his Report. He referred to historical salary disparities. The Claimant agreed this could be reference to the disparity between Management and Unionisable Staff salaries. It included disparity in Managers' salaries. It could be read that the disparity was based on race. The Report did not mention the Claimant.

48. The Claimant testified the CEO acknowledged in 2007, that the Claimant was underpaid. Muhoro received a minor increment. In 2007, he earned Kshs. 188,000 per month. By termination in December 2009, he earned Kshs. 215,000 per month. He did not agree that the CEO, in light of this, looked at the disparity. The CEO did not bridge the gap.

49. The CEO considered several persons including the Claimant and Paul Leringato, for increment. The Claimant's salary was negotiated, increment made and backdated, but not paid. The contract dated 29th September 2004, did not refer to the year 2007.

50. The salary under the contract was given as Kshs. 160,000 per month. Effective from 1st November 2004, the Claimant's salary was given at Kshs. 148,000. In March 2005, the pay slip shows the Claimant received the rate of Kshs. 160,000 per month.

51. The increment from Kshs. 115,000 to Kshs. 148,000 presented percentage increment of 28%, Muhoro testified. According to his calculations, he should have earned a 28% raise based on the Kshs. 160,000 given in the contract of 29th September 2004. His actual salary was Kshs. 115,000. He was entitled to two percentage raises of 28%, in September 2004 and November 2004. This was his understanding. The result was that he would still be earning what he termed as peanuts, compared to what his White Colleagues earned. He deduced subsequent percentage increments of 8.1% [January 2005], 10% [November 2005], 5.11% [31st October 2006], 1.622% [31st January 2007], 9% [October 2007], 3.15% [24th July 2009] and 2.18% [31st October 2009], from the pay slips for the respective periods. His underpayments are based on the backdated salary offered to him in the contract, based on the percentage increments which were made.

52. Muhoro testified the CEO did away with the job grading. Giles Prettejohn and Muhoro were supposed to be in same Grade M6. Prettejohn was characterized as a Consultant. He and the Claimant were Departmental Heads, carrying out almost similar duties. Grade M6 earned a high of 140,000 Kenyan pounds annually and a low of 75,000 Kenyan Pounds p.a. Two Employees could be in the same Grade, and earn different rates. Ann Olivercronna had a raise of 220% to Kshs. 370,000 per month, Prettejohn had 286% raise, while the Claimant had a mere 28% increment. Olivercronna was the Chimpanzee Manager. Mulama took over from her. The Chimpanzee Manager could earn more than a Finance Manager.

53. The Claimant did not have any document reducing his salary from Kshs. 160,000 to Kshs. 148,000. The pension was paid at 7.5% of the basic pay. It would increase if the basic was raised. This is how he justified his claim for additional pension. He lived in a rented house between September 2004 and 31st March 2006. He was entitled to house rent allowance under his contract. One was entitled if not living within the Ranch. He was allocated a Lodge, which he viewed as another form of discrimination, as the adjacent premises were occupied by other Workers. There were condoms littered all over the place by Subordinate Employees. Muhoro could not bring his family to live there. He started to earn house rent allowance of Kshs. 10,000 on 30th April 2006. He claims the difference of Kshs. 500 per month, because in his contract prior to 2004, he earned a rate of Kshs. 10,500 as house rent allowance. The Lonrho terms were carried forward on transfer of business.

54. Utility allowance was paid under Lonrho. The Claimant did not receive this from January 2007 to September 2009. School fees for at least two Children was payable to the Claimant by the Employer, under the Lonrho contract. He claims for leave for December 2006 to April 2008. Leave travel allowance was based on his initial contract. Mileage and extra mileage allowances were included in the contract. He claims extra mileage based on the law of averages, because the Respondent confiscated his documents, including his diary. Managers were entitled to telephone allowances. The Claimant lodged

this claim with the Respondent and was advised not to pursue it. Then General Manager Richard Vigne was the authorizing Officer.

55. The initial contract gave the Claimant Medical Benefits at Kshs. 25,000. He claims variance of Kshs. 14,000 having utilized Kshs. 11,000. Muhoro agreed he made a demand before filing of the Claim, through the Law Firm of Gichure & Company Advocates, in a letter dated 7th October 2010. He did not agree entirely with the claim made by his previous Advocates which was in the sum of Kshs. 35,908,006. He denied that his present Claim before this Court is exaggerated.

56. Redirected, the Claimant told the Court that Lonrho terms and conditions of service were well structured, guided Management, and no Manager could operate outside of those terms and conditions of service. Discrimination entered the scene after the Lonrho contracts were disregarded. The Claimant went on working in the position of Finance Manager after the business transfer.

57. Grade M6 was occupied by the Top Management. Olivercronna and Prettejohn were found by the Respondent's Tax Advisors KPMG to be regular Employees, and not Consultants. Salaries for White Managers exceeded Basic Salary Scales Guidelines. Martin Mulama was employed one year after the transfer of business and had a new entry point.

58. It was not the Claimant who was negligent. He advised the Respondent on the faults in its Accounting System. The CEO overruled the Claimant and went for the cheaper Pastel System. Harmonization was aimed at curing historical disparity. Richard Vigne told the Claimant his allowances were discretionary, yet they were grounded on the contract of employment. The Claimant lodged a claim for pension. He has not been paid to-date. He was told the pay roll had not been closed. He testified on further cross-examination that salaries would be increased without any letters from the CEO. He did not recall when he stopped serving as the Personnel Manager. He continued to agitate for harmonization. Muhoro closed his evidence with the clarification that the CEO had to authorize increments. The Claimant would not implement salary increments without the CEO's authority. All pay slips in the Court Record came from the Respondent. He prays the Court to uphold his Claim.

Respondent's case

59. The Respondent agrees the Claimant was its Employee. He was employed as an Accounts Clerk in 1984. At the time of termination on 7th December 2009, he was the Finance Manager, earning a monthly basic salary of Kshs. 215,767, house rent allowance of Kshs. 10,300, utilities allowance of Kshs. 11,130 and mileage allowance of Kshs. 53,560.

60. His initial Employer was Chibuku Products Limited, a Subsidiary of Lonrho Agribusiness, which owned Ol Pejeta Ranching Limited as well as East African Tanning Extract Limited [EATEC]. The Claimant worked for the Group, and was frequently moved from one Company to the other.

61. He settled at Ol Pejeta Ranching Limited in Nanyuki sometime in 1990, where he worked up to the time of termination. He was the Chief Accountant in 2004, when the business was transferred to Fauna and Flora International. He was throughout a Member of the Management Staff, with specific terms and conditions of employment.

62. In May 2009, the Respondent recruited a Chief Finance Officer to take over the duties previously handled by the Claimant. There was increased donor funding for the Respondent. It was necessary for the Respondent to have a Professional Finance Manager of high caliber with knowledge and experience in finance.

63. In October 2009, the new CFO noted unexplained entries in the accounts books, and on further scrutiny, observed systematic manipulation of figures. Accounts Assistant Charles Mwathi admitted being involved in fraudulent entries, in particular, the entries relating to the Respondent's Customer, 'Kungu Maitu Butchery.'

64. On 2nd November 2009, the Claimant gave a bagful of accounting documents to Subordinate Staff Phillip Ndegwa to burn. In a meeting convened on 4th November 2009 by the CEO, the Claimant, in the presence of the CFO denied knowledge of fraudulent activities within his Department. Ndegwa named the Claimant as the person who instructed him to burn the documents.

65. Muhoro was placed on compulsory leave and advised this would be offset against his annual leave days. The Respondent commissioned an Audit by UHY Kenya Limited, which unearthed serious fraud, covering the period January 2008 to 30th September 2009. The Respondent had sustained loss of approximately Kshs. 10 million.

66. The Claimant was invited to a disciplinary hearing on 2nd December 2009, rescheduled to 7th December 2009 upon his request. He was informed of his right to be accompanied by a workmate. He was accompanied by Martin Mulama, the Chimpanzee Manager. The Panel was made up of the CEO, CFO and the HRM. The Claimant undertook to make reparation to the Respondent for any loss sustained through his negligence. The Respondent determined the Claimant's continued service was untenable. His contract was terminated with effect from 7th December 2009.

67. Subsequently the Claimant received Kshs. 740,046 through the District Labour Office Nanyuki in terminal benefits. These comprised salary to 7th December 2009; accrued annual leave less the days taken on compulsory leave; 3 months' salary in lieu of notice; and November 2009 salary which had been withheld.

68. He appealed to the Respondent's Board against dismissal. The decision was upheld. A second Audit carried out by PricewaterhouseCoopers limited confirmed the Respondent lost Kshs. 9,560,000. The Claimant was dismissed for his negligence. He was given the chance to defend himself. The Respondent acted within the law.

69. There was no proof given by the Claimant of discrimination against him based on race. Salary differentials were not proof of discrimination. One of the Black Managers earned more than some of the White Managers. The Managers named by the Claimant were not shown to have been doing the same job, while earning different salaries. The Claimant did not state the Managers' qualifications, job complement, responsibilities and job complexities. Muhoro did not raise the issue of discrimination during employment, at the disciplinary hearing or the Labour Office. Each Employee was paid in accordance with their qualifications and responsibility.

70. There were several salary revisions. It was not possible that the Claimant's salary was revised to Kshs. 160,000 and house rent allowance to Kshs. 10,000 per month, on 29th September 2004, and then adjusted from Kshs. 115,785 to 148,000 on 1st November 2004. House allowance was only introduced in 2006 for the whole company, and there can be no underpayments arising from this. In any event such a claim is time –barred under the Law.

71. Muhoro was in charge of salaries until 2006, and it is inconceivable that he would underpay himself. His claims for underpayment of salary from 2004, is baseless. His claim for anticipatory salaries to the date of retirement of 60 years is speculative, and plea for compensation for unfair termination unsustainable, termination having been fair in all aspects.

72. He was a Member of the Pension Scheme, and knew he was not qualified to receive service pay. His demands are frivolous and without foundation. Giles Prettejohn was a Consultant before 2004, and the Claimant had no reason to compare his terms with those of Prettejohn

73. Mr. Joseph Kariuki testified he is the Chief Finance Officer of the Respondent. He holds CPA, B.sc in Finance and Accounting and was pursuing MBA. Muhoro was the Finance Manager at the time Kariuki joined. The Claimant reported to Kariuki.

74. He found on joining the Respondent that Customers obtained goods on credit from the Respondent, but never paid their debts. Their debts were written off. This was during the period 2008 and 2009 when the Claimant was in charge. The CFO established that Accounts Assistants Mwathi, Thuku and Lucy, wrote off these debts. The Claimant was their overall Supervisor. He did not identify these falsified entries. Supervisory control was lacking.

75. The new CFO brought the anomalies to the attention of the CEO. Investigations were carried out. The Claimant denied knowledge of the fraud. Audit Firm UHY was commissioned to interrogate the books of account. The Audit Report confirmed the presence of the fraud, and concluded there was insufficient supervisory control.

76. There was a second confirmatory Report by PricewaterhouseCoopers limited in 2010. Both Reports agreed fraud took place. Muhoro was suspended. Before his suspension, he instructed a subordinate Employee Mr. Ndegwa to burn account records.

77. The Claimant attended a disciplinary hearing. The CFO was part of the Panel. Muhoro offered to repay any money lost by the Respondent through fraud. The Claimant was not exonerated in any of the Audit Reports. He was dismissed for reasons the CFO characterized as residing in the grey zone between negligence, and complicity in the fraud.

78. Questioned by the Claimant's Advocate, the CFO told the Court he joined the Respondent in the year 2009. He earned about Kshs. 300,000 on joining the Respondent, and about Kshs. 600,000, by the time he gave evidence in July 2013. There were progressive increments of salary. He held CPA and B.sc in Finance on joining and enlisted for MBA in 2009. He was not aware of the order issued by the Court for the Respondent to produce all Managers' testimonials and certificates.

79. Weak supervisory controls did not necessarily emanate from the Pastel Accounting System. KPMG carried out annual Audits. It did not uncover the fraud. There is a difference between a Statutory Audit and an Investigatory Audit.

80. The CFO did not consult Muhoro on uncovering the fraud. UHY was commissioned in October/November 2009. The CFO attended the Disciplinary Session as Head of Finance. Others in attendance included Muhoro, the HR Manager, the CEO and the Chimpanzee Manager Martin Mulama. The UHY Report was exploratory, the PricewaterhouseCoopers' confirmatory. The difference was in depth and scope.

81. Only Lucy Waweru among the Accounts' Staff, survived the aftermath of the fraud. The CFO testified he worked with the Claimant for about six months. He could not say if the Claimant's contract was terminated fairly. He did not intend to get the Claimant out of the Company. He was recruited to strengthen the Department. Kariuki denied that he was in any way related to the Staff of UHY, or that he was paid anything by UHY. The burning of papers on the instructions of the Claimant was suspicious.

82. The UHY reported more than Kshs. 10 million was lost, while PricewaterhouseCoopers put the loss at Kshs. 9.6 million. This was not a material variance. The UHY Report was yet to be verified at the time of the Claimant's exit. The CFO was not able to say why dismissal took place before the UHY Report was verified. He did not know where the remnants of the papers which were burnt were taken. Muhoro said he was ready to pay what was found to be missing to the Respondent. The CFO did not know why the Respondent did not take up his offer, instead opting for termination of his contract.

83. The CFO emphasized on redirection that the two Audit Reports were not materially different. In either Report, there was a finding of negligence. The CFO testified he was not asked to exhibit his testimonials and certificates. He did not make the decision against the Claimant on termination of the contract of employment.

84. Phillip Ndegwa Macharia worked as a General labourer at the time the dispute arose. He worked under the Claimant. He was called by the Claimant, given a bagful of papers, and told to burn them. He did not know what was in the bag. He was told by the Claimant to burn the papers to ashes. Before this, Ndegwa had burnt other papers, but not at the request of any person.

85. Ndegwa testified on cross-examination that he was given the papers on 2nd November 2009. His duties involved cleaning, and making tea. Some papers did not burn out; they were thrown away. Apollo Kiarie did not tell Ndegwa why it was necessary for him to record a statement. Burning of papers was a regular way of disposing of wastepaper.

86. Apollo Ng'ang'a Kiarie testified he joined the Respondent on 3rd July 2006. There was no Human Resource Department before this year. The Finance Manager exercised this role, administering the payroll, among other functions.

87. Managers had individual contracts of employment. The Claimant was not under the CBA governing Unionisable Staff. The terms and conditions of employment under Lonrho were reduced into fresh letters of employment issued to the Employees. The Claimant was issued a contract dated 29th September 2004. Other terms outside this contract could not apply.

88. His employment was terminated for negligence. Employees under him stole money from the Respondent. Between Kshs. 9 million and Kshs. 10 million was stolen. The Claimant denied knowledge of the fraud.

89. The UHY report concluded money was lost through weak supervisory controls. The second Audit concluded the Claimant did not do the actual posting, but neglected his supervisory duty. The Claimant was given a hearing, in the presence of a workmate Mulama, and was lawfully and fairly dismissed from his position.

90. Managers negotiated their individual terms and conditions of employment with the Respondent. There were no clear job grades. The Human Resources Manager negotiated his own terms, and did not see how discrimination would arise.

91. There were White Managers who earned less than Black Managers. The highest salary for a Black Manager in 2009 was Kshs. 375,744 per month. Brendan Hill a White Manager earned Kshs. 345,345 per month, while Sandra Haworth earned Kshs. 218,360. Skills and qualifications were factors; the colour of one's skin was not. Mulama was a Bio-conservationist.

92. The e-mail exchanges between Kiarie and the CEO which were forwarded by the Kiarie to Muhoro

did on their face value, show disparity. Kiarie testified however that these e-mails indicated there was agitation for everyone to get better pay. There was nothing about race. The harmonization of salaries was about all Managers, regardless of their race.

93. Utility allowance was availed to the Managers prior to the year 2007. In 2007, it was incorporated in the gross salary. The Claimant's monthly salary is shown to have risen from Kshs. 185,000 to Kshs. 188,000 after this adjustment. This was nothing to do with race.

94. Kiarie could not comprehend how Muhoro arrived at his percentage increments after 2004. The CEO worked out the increments in accordance with the overall budget. There were no percentage increments. Letters on increment did not have any percentages.

95. Muhoro had about 59 days of pending annual leave on termination. The Respondent deducted the days spent on compulsory leave. The balance was 39 days, which the Respondent factored in the terminal benefits paid to the Claimant.

96. He earned Kshs. 10,000 in house rent allowance by the time Kiarie joined. By termination, it was about Kshs. 12,000 a month. His claim for arrears of house rent allowance has no basis in the contract or employment policy. He is owed nothing as house rent allowance.

97. Pension was remitted in full. The Scheme was monitored by Administrator ICEA, and complied with the Regulator RBA Rules in full. Fund Managers issue statements. Senior Managers were not entitled to traveling allowance. They were paid mileage allowance even while on leave.

98. No manager was paid education fees. It was neither in the contract, nor in the policy. His claim for mileage and extra mileage is misplaced. He would log in mileage and file claim. The policy changed and fixed mileage was paid. The Claimant enjoyed this. He did not lodge any mileage or telephone claims which were not honoured. Service pay was payable to Unionisable Employee under the CBA. Muhoro was covered under the Pension Scheme. He was the Scheme Chairman and Trustee. The Staff were granted a modest facility of Kshs. 11,000 annually in medical allowance.

99. The Human Resource Manager told the Court further on cross-examination that Ndegwa recorded his statement after the burning of the documents. Documents were burnt on 2nd November 2009. The statement was taken on 5th/ 6th November 2009. What remained of the destroyed documents was not available to the Court.

100. Normal Audits were done by KPMG annually. KPMG did the 2008/2009 Audit. The UHY Audit did not find any documents to have been missing. Paragraph 9 of the Response stated the Claimant was the Chief Accountant in 2004. Kiarie agreed Muhoro was not the Chief Accountant; he was the Finance Manager.

101. The Witness agreed that the Claimant's contract of 29th September 2004 set the Claimant's salary at Kshs. 160,000. He did not know why he was paid Kshs. 115,785 per month, in view of this contract. Kiarie testified this was not *lawful or fair.*

102. The CFO was employed in May 2009. He took over the role of the Claimant in finance management. The Human Resource Manager, Kiarie, did not give the Claimant a letter defining his new role. Mwathi who made the false entries in the books was dismissed in December 2009. The UHY Report was ready before the disciplinary hearing. A copy was given to the Claimant on the date of the hearing. Kiarie explained that exposure of the Report earlier than on the date of the disciplinary hearing,

would have prejudiced criminal investigations.

103. It is true the Claimant undertook to make good any loss suffered by the Respondent. The Respondent did not make any demands on the Claimant to make good his undertaking. The Respondent recovered a sum of Kshs. 178,445 from the Claimant in November 2009. It was returned to Muhoro after it was discovered the Claimant did not cause the loss.

104. The Company changed hands in September 2004. The Five-Year Assessment Report and Fifth Annual Evaluation Report, by International Consultant David H.M. Cumming [Cumming Report], mentioned that Ol Pejeta was an Equal Opportunity Employer. It recognized there were historical disparities in salaries. According to Kiarie the disparity was in comparison to other Conservancies. He conceded his view was not reflected in the Cumming Report.

105. Kiarie stated the Cumming Report covered the period 2004 to 2009. There were e-mails between him and the CEO on salary disparities, exchanged in 2007. The e-mails mentioned salary differentials specifically with regard to Muhoro and Kiarie. The Managers were agitating for better salaries. They earned different salaries. Kiarie shared the e-mails with Muhoro because Muhoro was his friend.

106. Brendan Hill was referred to as the Construction Superintendent, not Manager. Prettejohn's percentage increment on responsibility was given at 12%, and the Claimant's at 10 % in terms of responsibility and seniority. The Claimant's increment on experience was assessed at 12.5%. His salary at Kshs. 188,000 was not the highest. *The salaries were not in harmony, but were fair within the market,* Kiarie testified.

107. Giles Prettejohn the Livestock Manager joined the Respondent in 2004. Ann Olivercronna the Chimpanzee Manager worked with Muhoro under Lonrho. Kiarie was not able to say why there was a huge salary disparity between Muhoro and these White Managers. Kiarie stated that Prettejohn was initially on a contract working for 10 days a month. He was employed in full in September 2004, earning Kshs. 464,000 per month. Muhoro should have been paid Kshs. 160,000 after the changeover, Kiarie told the Court.

108. The Human Resource Manual preserved the rights and privileges of Employees in event of changeover in the Company. The Manual was approved in April 2009. There was no letter withdrawing the benefits and privileges on transfer of business. There was a collective notice to all Employees and letters to individual Employees on 29th September 2004, assuring preservation of the terms and conditions of service.

109. Kiarie had not seen the terms and conditions of employment under Lonrho, before he appeared in Court to testify. He did not know which grade Muhoro was in. There were no grades at the time Kiarie was employed. He took over the payroll in 2007, and there has been no job grading to-date. Cumming did not specify who the salary disparities related to. Disparities were not based on race. Mulama earned almost double what Kiarie earned, because he had technical knowledge.

110. The Claimant appealed to the Board against termination. Appeal was declined. The CEO stated it was not possible to summarily dismiss the Claimant, because he was not directly involved with theft. His contract was therefore terminated regularly. The letter of termination however, referred to Section 44[4] [c] and [g] of the Employment Act, which deals with summary dismissal. Kiarie confirmed the Claimant left on regular termination, and was paid terminal benefits. Summary dismissal was reduced to normal termination and benefits paid.

111. The Witness testified he was unfamiliar with the Lonrho terms and conditions of employment, and would not know what the Claimant earned as house rent allowance. The rights accrued to the Employees were carried forward under the Fauna and Flora International owned Ol Pejeta.

112. In closing his evidence on redirection, Kiarie testified that the Claimant accepted the terms and conditions of employment imposed by the contract on 29th September 2004. The only letters after this contract were on annual increments. The Claimant handled the payroll and would know if there were underpayments. He was on leave the whole of November 2009. His balance of annual leave days was properly computed and paid to him. Management Staff did not receive service pay; they were paid pension. Service pay in any event would not be paid to Employees guilty of gross misconduct.

113. CEO Richard Vigne testified the Respondent uncovered significant fraud resulting in loss of millions of Kshs. The Claimant had direct responsibility in administration of the Department where the loss occurred. He was negligent. The CEO and the CFO informed the Claimant there was going to be an investigation carried out.

114. All the Employees in the Claimant's docket were placed on compulsory leave. Auditors were called in. UHY Audit Firm confirmed loss in excess of Kshs. 10 million. It was attributed to weak supervisory controls.

115. The Claimant was thereafter invited to a disciplinary hearing on 2nd December 2009, which was at his request, deferred to the 7th December 2009. He was heard in the company of his workmate Martin Mulama. Vigne chaired the Panel.

116. Muhoro asked for a copy of the UHY Report. It was given to him. He threw it back at the Panel, saying he was ready to repay all the lost money. UHY Report was exploratory. A second forensic Audit by PricewaterhouseCoopers Limited confirmed the loss. The Reports confirmed the Claimant was negligent. The Respondent decided to terminate the Claimant's contract and gave him the specific reason of negligence, as the justification for the decision.

117. There was no discrimination based on race in determining the salary levels for Managers. Prettejohn was a Consultant prior to September 2004. He was confirmed after the business transfer. Ann Olivercronna was likewise a Consultant. Both were specialists in their areas. Olivercronna worked part-time before. She became full-time afterwards.

118. The Respondent was concerned about its business growth. There were concerns about Muhoro's qualifications. Prettejohn had a degree in agriculture with 35 years' experience in livestock breeding. Olivercronna had a degree in Zoology, and experience with the Chimpanzees. The CEO was not sure what certificates Muhoro held, but wanted to keep faith in him.

119. The Cumming Report did not say there was disparity in salaries based on race. It stated there were historical disparities between Junior Employees' salaries and those of the Management. In the e-mail on disparity to Apollo Kiarie, the CEO pointed out that there was disparity with regard to Muhoro, Leringato, and Hill. The first two were Blacks, the last White.

120. The terms and conditions applicable under Lonrho did not apply after the transfer of business. All Management Staff, including the CEO, got fresh terms and conditions of employment. New contracts issued. No Employee was forced to sign the new contracts. Education benefit was under Lonrho. It has never been paid to anyone under Fauna and Flora International.

121. On cross-examination the CEO testified the CFO took over from Muhoro in May 2009. The Company was growing and the Claimant would not be able to meet the demands of the Finance Portfolio. There was no specific appraisal of the Claimant by the Respondent, leading to this conclusion. The CEO assessed Muhoro on day to day basis. Appraisal ceased in 1999. The last appraisal was for 1997/98, captured in the Forms exhibited by the Claimant.

122. The Claimant started changing his aptitude for work in 2005. He complained he had medical issues. He had significant business interest in Nanyuki. The CEO learnt about these after the Claimant's dismissal. The Claimant had received many verbal warnings.

123. Accounting documents were burnt. The CEO did not know where the remaining documents from the rubble went to. He did not know if the Auditors referred to missing documents in their Reports. The Claimant did not apply to go on compulsory leave. Compulsory leave was not meant to be a form of punishment.

124. The CEO, CFO and the Claimant signed cheques. Vigne did not know if there were cheque transactions involved in the fraud. He did not know if the Auditors mentioned cheques in their Reports. The Claimant's salary was reinstated, but the CEO was not able to say when it was reinstated. Prettejohn and Olivercronna had Degrees. The CEO testified he could avail copies of the certificates.

125. The Claimant had been advised by the Respondent on being placed on compulsory leave, that he would be contacted once the audit exercise was over. The UHY Report was ready by 20th November 2009. It was not forwarded to the Claimant, because the Respondent had concerns about his burning of the records. Vigne did not remember if Muhoro asked for the Report.

126. The CEO confirmed he, the Claimant, Mulama, the CFO and the HR Manager attended the disciplinary hearing. The Claimant appealed against the termination to the Respondent's Board. The CEO advised the Respondent he would be availed evidence of his wrongdoing after termination. This was because the Respondent intended to initiate criminal prosecution against the Claimant, and evidence would be given at the prosecution. The CEO acknowledged he wrote stating it was not possible to find direct involvement of the Claimant in the fraud. Mwathi and Thuku were directly involved. Richard Vigne described the criminal investigations as '*ongoing.'* Relying on legal advice, the Respondent commuted the Claimant's dismissal to a regular termination.

127. The Report by PricewaterhouseCoopers pointed out that the Respondent expected too much from the Claimant, and that he was overburdened. There were critical supervisory controls which he failed to exercise. He was negligent, the CEO testified.

128. The Notice given to the Staff on transfer of business advised all terms and conditions of service would remain the same. The individual letters to the Employees gave the same advice. No Employee was excluded in this arrangement. The contract issued to the Claimant on 29th September 2004 did not indicate that previous terms were revoked.

129. The pay slips for September and October 2004 did not reflect a salary of Kshs. 160,000, was paid to the Claimant, as given in the contract. Between September 2004 and January 2005, the Claimant was underpaid. Muhoro was not responsible for increment decisions. The CEO explained that the contract of 29th September 2004 took time to be ratified by the Board, hence the delay in implementing the salary increment to Kshs. 160,000 per month in favour of the Claimant.

130. The Claimant's pay slip for December 2006 showed payment for utilities was included. It gave the

Claimant's job grade as MG6. This was a hangover from the Lonrho contract. Grading stopped with the business transfer. There were 6 Departments at Ol Pejeta. They were not formally ranked, but in terms of importance to the Respondent, Tourism and Wildlife would come first.

131. In 2007, the Respondent established a system to determine increments. In terms of seniority and responsibility, the Claimant was ranked at the top, at 12.5% and 10% respectively. Many factors came into play in determining the incremental percentages.

132. It was not true that Paul Leringato was paid gratuity on leaving the Respondent; what he was paid was notice pay. The Cumming Report confirmed the achievement of a nondiscriminatory employment environment, as part of the Objectives of the Respondent. There were historical disparities according to the Report, but these were, according to Richard Vigne, between the Management Staff and the Junior Staff. They were not disparities based on race.

133. It was true the CEO exchanged e-mails with the HR Manager Apollo Kiarie about the salary disparities. He acknowledged the rate paid to Muhoro and Kiarie was not commensurate with their roles. This was not a confirmation that the Claimant was underpaid, and that the CEO was aware of the underpayment. Discussions had been ongoing from 2004. Other Managers other than the two were mentioned, including Leringato and Hill. Vigne denied that he was involved in the creation of false files in 2008, aimed at misleading an Evaluation exercise, which was due to be carried out by Mr. Cumming in 2008.

134. Richard Vigne stated on redirection that the Claimant was awarded salary increments after the concerns on disparities were expressed, in the e-mails between the CEO and the HR Manager. The e-mail referring to the creation of false files was the responsibility of the Procurement Officer, not the CEO. The Auditors concluded the Claimant should have been reviewing entries. The Respondent held it was not possible to effect summary dismissal. It did not mean the Claimant was absolved from wrongdoing. He was not dismissed for stealing but for negligence. The CFO was recruited because the Company was growing; it was not done so as to push the Claimant out of employment. The Finance Docket was split, as the Company had grown. The CEO testified the Claim is unmeritorious and should be dismissed with costs to the Respondent.

Closing Arguments

135. The Claimant submits his contract was not terminated for a valid and fair reason. The decision was not arrived at fairly. He was not supplied with the UHY Report before attending the disciplinary hearing. He was not given adequate opportunity to challenge the UHY Report, and when availed a copy, on the hearing date, was able to point out certain weaknesses in the Report. The Report by PricewaterhouseCoopers was generated after the termination, in the year 2010. This Report nevertheless concluded the Claimant was overburdened in the discharge of his role. All transactions were approved by the Livestock Manager and the CEO. Annual budget was prepared with the participation of Departmental Managers, who would be aware of any false entries.

136. The salary disparities and discrimination of the Claimant after the business was transferred, were well documented. The rates earned by his White Colleagues Prettejohn and Olivercronna before and after the transfer were not in dispute. These White Managers enjoyed increment of more that 200%, while the Claimant was awarded a 28.7% pay rise. There was no regard to qualification or experience. White Managers employed their kin and kith. The Claimant submits he established a case for payment of underpaid salaries and benefits, based on the contract given to him by Lonrho and its Successor, the Fauna and Flora International owned- Ol Pejeta Ranching Limited.

137. Discrimination, whether direct or indirect, on among others, the reason of race, is prohibited under Section 5[3] of the Employment Act 2007; ILO Declaration on Fundamental Principles and Rights at Work; ILO Convention 100 of 1951 on Equal Remuneration; ILO Convention 111 of 1958 on Discrimination[Employment and Occupation]; ILO Convention 122 of 1964 on Employment Policy; ILO Convention 158 on Termination of Employment; and the UN International Convention on the Elimination of all Forms of Discrimination.

138. Among the Decisions relied upon by the Claimant are: *Leonard Dingler Employee Representative Council v. Leonard Dingler [PTY] Limited and Others [1998] 19ILJ 285[LC] – on unfair salary inequality;* Mutale v. Lorcom Twenty Two CC [*2009] 30 ILJ 634- on salary inequality based on race; Magothe v. Premier of the Northwest Province and Another [2009]30 ILJ 605 [LC]- on the justification for suspension pending investigation of an employment offence; Industrial Court of Kenya Cause No. 267 of 2009 between Dennis Adongo v. Bob Morgan Services Limited on damages for unlawful and unfair termination; Industrial Court of Kenya Cause No. 21 of 2003 between Bakery Union v. Deepa Industries Limited- on the fairness of termination procedure; Nairobi H.C.C.C No. 635 of 2007 between Beuatta Anselmo Maali v. Ethiopian Airlines- on pleading salary increments as a case for special damages; Kisumu Court of Appeal No. 336 of 2005 between Gad Ojwando v. Prof. Nimrod Bwibo and Others- which upheld the right of an Employee unlawfully retired, to be paid benefits, salary and allowances until the age of retirement; Nairobi H.C. Pet. No. 341 of 2011 between Samuel Momanyi v. the AG and SDV Transami Kenya Limited- on the need to align the Employment Act 2007 to the Constitution of Kenya so as to avoid discrimination among Employees' salaries based on personal characteristics; South African Labour Court Case of Dlamini and Others v. Green Four Security [LD67/03, D671/2003] [2006] ZAL 4 [25th April 2006] – on discrimination based on bona fide occupational requirement and inherent requirement of the job; Industrial Court of Kenya Cause No. 849 of 2011 between Justus Atulo Ashioya v. 'A' Security Team Limited- on payment of back wages in light of statutory limitations of time; Industrial Court of Kenya Cause No. 703 of 2010 between Grace Kazungu v. the N.S.S.F – on damages payable on discrimination; and Nanyuki C.M.C.C. No. 18 of 2010 between Peter Kingori Thuku v. Ol Pejeta Ranching- where the Claimant, former Accounts Assistant working for the Respondent herein under the Claimant, obtained a Judgment against the Respondent in a Claim for wrongful dismissal emanating from the same incident as caused the Claimant's own dismissal.*

139. The Respondent submits that Unioinisable Employees were advised, on transfer of business, that terms and conditions of service would remain the same. The Claimant was advised his terms and conditions of service would stay the same, as per existing contract. He was given the contract dated 29th September 2004, placing his salary at Kshs. 160,000, which was effective from January 2005. His salary was raised from Kshs. 115,785 to Kshs. 148,000 per month, on 1st November 2004. It continued to be reviewed progressively.

140. It was confirmed by the Auditors that fraud took place because of weak supervisory controls. Colossal sums were lost due to the Claimant's negligence. The Claimant conceded liability and offered to pay the Respondent its lost money. The Claimant was heard, his contract terminated, and he was paid full terminal benefits. He was heard in the presence of Martin Mulama, a workmate of his choice, in accordance with the Employment Act. Employee's negligence, in discharge of functions, is a valid ground for termination of employment.

141. He did not provide basis for additional payment of terminal benefits. Some of his claims are time-barred. He was not discriminated on race. The law recognizes affirmative discrimination. The Claimant compared his salary to Prettejohn's and Olivercronna's who previously worked as Consultants. The White Managers held superior qualifications and skills to the Claimant's and their roles were central to the core business of the Enterprise.

142. The Respondent relies on the following Decisions from various jurisdictions in amplification of its position: *Industrial Court of Kenya Cause No 603 [N] of 2009 between Peter Maina Kimani v. Mwalimu Cooperative Society- which found negligent performance of duty by an Employee to comprise valid ground for termination; Industrial Court of Kenya* Cause No. 487 of 2013 between Josphat Ingosi Andulu and Another v. Nightingale Rukuba *and [same Court]* Cause No. 88 of 2013 between Ndao Mahupa v. Crown Petroleum [K] Limited [2013] e-KLR- *both adopting the view that claims arising from the period before the statutory limitation on filing on employment claims, should be severed from the rest of the Claim and discarded; Industrial Court of Kenya* Cause No. 473 of 2011 between Miguna Miguna v. the AG *and [same Court]* Cause No. 4 of 2012 between Fredrick Ouma v. Spectre International- *on the principle of lawful discrimination in salaries among Employees serving in the same capacities based on seniority, experience and/or inherent requirement of the job; South Africa Labour Court Case of* Michael Louw v. Golden Arrow Bus Service[Pty] Limited No. C37/97- *on equal pay for equal work, or work of equal value, which held it is allowed to pay disparate salaries for equal work of equal value, the only prohibition being in the grounding for such disparity on illegitimate reasons i.e. race or sex discrimination; and, Kenya Court of Appeal* Civil Appeal No. 108 of 2010 between the KRA v. Menginya Salim- *where the Court held it was wrong to award exemplary damages, where no oppressive, arbitrary or unconstitutional action had been taken by the servants of the Government, or the Respondent's conduct was not shown to have been calculated to make a profit for himself which might well exceed the compensation payable to the Claimant.*

Court Findings and Award

143. There are three broad issues for determination as drawn by the Claimant in his Statement of Claim. These are:

a. *Whether the Claimant's contract of employment was terminated for valid and fair reasons and the termination decision arrived at fairly;*

b. *Whether in the course of employment, the Claimant was paid equal pay for equal work or work or equal value, and whether he was discriminated against on the basis of his being Black;*

c. *Whether the Claimant merits the prayers contained in his Statement of Claim*

The Claimant does not cite racial discrimination as the reason which brought his employment relationship with the Respondent to an end. Discrimination on the basis of race is alleged to have taken place, during employment, and affected the Claimant's salary and allowances. The Court shall therefore deal with the first issue, which is a claim for unfair and unlawful termination, unaffected by racial discrimination.

A. *Was termination made for valid and fair reasons, and arrived at fairly"*

[i] Validity and Fairness of Reason

144. The principal facts establishing and terminating the employment relationship are undisputed. David Muhoro was initially employed by Chibuku Products Limited, a Subsidiary of Lonrho Agribusiness, as an Accounts Clerk, on 1st October 1984. Lonrho Agribusiness owned Ol Pejeta Ranching Limited as well as East Africa Tanning Extract Limited. The Claimant was moved around these Subsidiaries, before settling down at the Ol Pejeta Ranching Limited in Nanyuki, sometime in 1990. There, he rose to become the Finance Manager. In September 2004, the Ol Pejeta Ranching Limited was transferred from Lonrho to Fauna and Flora International. The Claimant transitioned under the new owners, in the same capacity of Finance Manager. He worked up to 7th December 2009, when his contract was terminated by the Respondent, on account of negligence. He earned a gross salary of Kshs. 290,757 on departure, as shown in his pay slip for November 2009.

145. The Respondent established the position of Chief Finance Officer in May 2009. Mr. Kariuki was recruited to fill the position. The new position assumed the functions hitherto exercised by the Claimant as the Finance Manager. The Claimant in effect was placed under the CFO. The Respondent explained that these changes were necessary, as it had received increased donor funding, and needed greater financial management in an expanded Organization, a need which the Respondent felt, the Claimant was unable to deliver.

146. It was the new man Kariuki, who in the course of reviewing accounts in October 2009, noted there were unexplained entries in the Respondent's books. He informed the CEO. An exploratory audit was carried out by the Firm of UHY. In the meantime Account Assistants Thuku and Mwathi, together with the Finance Manager the Claimant herein, were placed on compulsory leave on 6th November 2009.

147. The UHY principal findings were that the Respondent lost funds which the Auditor estimated to be more than Kshs. 10 million through fraud. This was during the period between 1st January 2008 and 30th September 2009. Fraud was attributed to weak internal control system especially, weak supervisory control; inadequate segregation of duties within the Accounts Office; and collusion between Conservancy Staff and some Customers. UHY recommended in-depth audit. The Claimant's and his Assistants' contracts of employment were terminated based on the UHY interim Audit.

148. The confirmatory and forensic audit was carried out by PricewaterhouseCoopers Limited upon engagement by the Respondent on 14th April 2010. The gist of the suspicion upon which the audit centred was in the Respondent's Debtor Accounts. Various postings in favour of certain Customers appeared not to represent genuine receipts.

149. PricewaterhouseCoopers [PWC] confirmed loss was sustained by the Respondent, estimating this at Kshs. 9.5 million. There is therefore no doubt that a fraud took place at the Respondent's Business for the audit period, and it was confirmed the Respondent sustained enormous loss estimated at the very least, at Kshs. 9.5 million. Two successive Audits concluded the presence of fraud.

150. The PWC Report absolved the Claimant from having made any of the suspicious entries. It did however conclude that '' *his actions or non-actions point to at best a failure to discharge his duties to the level expected, and at worst point to possible negligence.''*

151. Muhoro, who was interviewed by PWC even though no longer in employment in the year 2010, told PWC he was overburdened and did not have time to go through everything his Juniors were doing. The

CEO confirmed to PWC that Muhoro was overburdened. The Respondent retained the Audit Firm KPMG for purposes of the Annual Audits.

152. PWC consulted KPMG who advised that the Respondent may have been expecting too much of Mr. Muhoro, if he was expected to be in charge *inter alia*, of the Respondent's finance strategy, budgeting, financial reporting whilst simultaneously fulfilling the role of Chief Accountant.

153. Courts have been reluctant to find an Employee's act of negligence to amount to gross misconduct meriting summary dismissal, in the absence of deliberate and intentional wrongdoing. This was the holding in the English case of ***Dietman v. Brent LBC [1987] IRLR 259.***

154. In another English case, ***London Borough of Hackney v. Benn [1996] CA [UR],*** an Employee was found to have been fairly dismissed for gross misconduct, although the negligent conduct, for which she was charged, did not have the elements of deliberate and intentional wrongdoing. In this case the Employee was accused of failing to manage her department's budget properly. The Employer alleged the Employee, more or less like Muhoro, failed to provide leadership.

155. The ***Industrial Court of Kenya in*** Cause No. 837 of 2011 between Miriam Siwa v. Postbank Limited [2014] e-KLR found the Claimant's contract was terminated for a fair and valid reason. She was a Bank Manager exercising a supervisory role over several Branch Managers. The Bank lost money through fraudulent transactions involving the Branch Managers. The Court held that the Claimant failed to exercise her supervisory role properly, which resulted in huge financial loss occasioned to the Employer. The Employer was justified in holding her accountable.

156. In dealing with employment disputes however, Courts must exercise caution in adopting judicial precedents, as not all circumstances in each case, are similar to the other. Employment relationships are unique, and each case must be analyzed on the basis of its own unique characteristics. Facts, in each case of negligence, with all the extenuating circumstances, must be considered to ascertain if the conduct or omission by the Employee is sufficiently serious to merit dismissal.

157. Section 44[4] [c] of the Employment Act 2007 defines forms of negligence by an Employee, which would amount to gross misconduct for which the Employer may summarily dismiss. The elements are:

- Willful neglect by the Employee to perform any work which is his duty to perform.
- Careless and improper performance by the Employee of any work, which from its nature it was his duty, under his contract, to have performed carefully and properly.

158. Other than the evidence given to PWC by the Claimant, the CEO and KPMG on the weaknesses in the Accounting System, there was evidence provided on the subject by International Evaluator David Cumming. This Consultant reported that the Claimant had as early as 2005, advised on the effective separation of functions and accounting procedures. The Finance Department had only 3 Accounts Assistants. Cumming concluded that *''it is clear that early warnings on the question of effective separation of accounting functions were present as early as 2005…the action by the Board and Management should have been taken sooner rather than later…''*

159. Whenever money, of a magnitude as was lost by the Respondent, is lost, it is easy for the Employer or the Court trying facts, to be influenced by the feelings of moral disapproval, and quickly apportion blame to the Chief Officer responsible for the Department, through which the money is lost. The Court must keep feelings of moral disapproval in check, and examine facts objectively.

160. The Claimant cannot have been willfully negligent, or performed his duty carelessly and improperly, while he had advised the Respondent from as early as 2005, on the weaknesses of its Accounting System. The Auditors' Reports, the Cumming Report, the evidence of the CEO and that of the Claimant before the Auditors, all point at an institutional failure rather than an individual failure.

161. There was no way the Claimant could have exercised greater supervisory control to avoid the fraud, in the absence of the implementation of reforms to the Accounting System, which the Claimant had been advocating from 2005. It was not proper to hold him negligent. It is difficult to say the Claimant failed to perform his duty with requisite care, fidelity, skill and diligence expected of his position.

162. The Respondent alleged it did not after all, summarily dismiss the Claimant. It terminated his contract regularly, as there was no evidence to directly involve him with the fraud. At the same time, the letter of termination dated 7th December 2009 specifically mentioned Section 44 [4] [c] and [g] of the Employment Act 2007 which are on employment offences amounting to gross misconduct, which merit summary dismissal.

163. This indecision on the way to disengage the Claimant, reflected doubt in the mind of the Respondent on the correctness of its decision against the Claimant. The Respondent was unsure of the validity of the termination reason, and in the view of the Court had good reason to be unsure, given the history of its Accounting System and the attempts the Claimant had made in restructuring that System, before the fraud took place.

164. There was a suggestion made by the Claimant in passing that the decision against him, was made because the Respondent was bent on getting rid of him, now that a new Chief Finance Office was in place, and a Chief Finance Officer in the name of Kariuki recruited to fill that role. The Claimant was the Finance Manager from 2004. In paragraph 9 of the Statement of Response, the Respondent referred to him as Chief Accountant. In a Notice put out to the Respondent's Members of Staff by the CEO announcing the arrival of the new CFO on 29th April 2009, the CEO stated ''*Muhoro remains the Chief Accountant and is an integral part of the finance team Joseph will be working with……''* In the Certificate of Service dated 9th February 2010, the Respondent gave the position of the Claimant on termination as 'Finance Manager.' Although there was no clear evidence that the Respondent was anxious to see the Claimant off in view of the arrival of Kariuki, the reference by the Respondent of the Claimant's position as that of Chief Accountant, while he was the Finance Manager, indicates a certain level of discomfort in the Respondent in having both CFO and Finance Manager in the Organization. Perhaps the Claimant's role was deemed superfluous, and the arrival of the fraud was an opportunity to restructure the business.

165. The allegations that the Claimant instructed Phillip Ndegwa, a Subordinate Employee to burn papers, did not seem to relate to the accusation against the Claimant. The Auditors did not allege any accounting documents were missing when they undertook the exercise. Burning of wastepaper was not an abnormal occurrence in the Organization. Burning of papers does not seem to have been enquired into during the disciplinary hearing, and adverse findings made against the Claimant on the burning of papers. The Auditors interviewed the Claimant and their records do not seem to incriminate him in destruction of evidence. The nature of evidence destroyed through burning was not revealed to the Court. The incineration of papers would have been relevant, if the papers subject matter of the incineration were shown to be relevant to the probing of the fraud. The Auditors did not complain about missing papers, and the Respondent did not also, suggest there were missing accounting documents, which hampered the audit.

166. The Claimant offered to make good the loss suffered to the Respondent, which in the view of the Court, was not an admission of negligence; it was an offer made by the Claimant on the realization that

after 25 years of faithful service, he was on the verge of exit from Ol Pejeta. He had loans with the Banks and Cooperative Societies. In such a situation, any reasonable Employee could offer to repay monies through salary deductions, even when not directly responsible for loss of those monies, to continue in employment. Any Employee in such as situation could offer desperate reparations to secure continuity of service. Considering the findings of the various agencies engaged by the Respondent in the attempt to understand the anatomy of the fraud, the Claimant's offer to pay to his Employer what was lost, can hardly be given much weight and held against him. Why did not the Respondent accept this proposal" Was it because it would have entailed retaining the Claimant"

167. In sum, the Court finds the Respondent did not prove the reason or reasons for termination under Section 43 of the Employment Act 2007. It did not establish on the part of the Claimant willful negligence, or careless and improper performance of duty under Section 44 [4] of the Act, and did not demonstrate valid or fair reason for termination under Section 45 of the Act. Termination was not based on valid and fair reason.

[ii] Fairness of Procedure

168. The Claimant was sent on compulsory leave on 6th November 2009. He was advised this was necessary, to enable an external Audit Firm carry out an in-depth audit of the books. Compulsory leave would last 30 days, and be offset against the annual leave days due to the Claimant.

169. He was informed on 27th November 2009 that investigations were complete, and he should attend a disciplinary hearing on 2nd December 2009. He was told he could attend the hearing in the company of a workmate, as required by the law.

170. The Respondent testified it fulfilled all the procedural requirements imposed by Section 41 and 45 of the Employment Act 2007. The Claimant asked to be given more time to prepare. The hearing was rescheduled to 7th December 2009. He was heard by a Panel comprising CEO Richard Vigne, CFO Mr. Joseph Kariuki, and Human Resource Manager Apollo Kiarie. The Claimant was accompanied by the Chimpanzee Manager Martin Mulama

171. In between the scheduled disciplinary hearings, the Claimant wrote to the Respondent demanding to be supplied with the UHY Audit Report. It was not supplied up to the date of the hearing, the 7th December 2009. The CEO testified that he gave the Claimant a copy on the material day, which the Claimant angrily threw away.

172. The letter of termination issued on the same day, 7th December 2009. The CEO explained that the Panel, on the advice of the Respondent's Advocates, determined to terminate the Claimant's contract regularly rather than summarily dismiss him, as he was not found to have been directly involved in the fraud.

173. It is not clear when the Lawyers for the Respondent gave this advice, given that termination letter was made the same day of the hearing. Section 41 of the Employment Act requires the Employer to consider any representations made by the Employee and the Person accompanying him to the hearing, before a decision is made. The Respondent appears not to have done this, going into the session with a predetermined sanction, complete with the advice of Lawyers given before the hearing.

174. There was no evidence shown to the Court by the Respondent of charges given to the Claimant, before he attended the hearing. He was merely told there were fraudulent activities in the Finance Department. The specific charges, the Claimant was invited to respond to, were not given to him. There

was no letter asking him to show cause, why disciplinary action should not issue.

175. Worryingly, the Claimant was not supplied with a copy of the Audit Report, even after he made spirited requests to the Respondent, to supply him with the Audit Report, to enable him make an informed response at the hearing. Why would the Respondent refuse to share with him the findings of the exploratory Audit, yet this was the basis of the allegations he was being asked to answer to"

176. The Claimant was doubly impaired in preparing for the hearing, in that he did not have specific charges. The general charges he was appearing before the Panel to defend were from an Audit Report he had not seen, or been involved in its preparation.

177. The principle of fair hearing requires the Employee has sufficient opportunity to prepare. This entails:

- The Right to sufficient time to prepare. The Claimant asked the Respondent for more time to prepare, which the Respondent acceded to. Time however, is not the totality of sufficiency of opportunity.

- The right to fully understand the charges. Even as he was granted more time, the Claimant was not availed of any specific charges which he was required to respond to. General charges such as ‘dishonesty,’ ‘fraud’ and fraudulent activities’ are vague and offer the Employee no opportunity to respond intelligibly, or at all.

- The right to documentation. The Employee must be given the documents the Employer intends to rely on at the hearing, as well as other documents the Employee may request for.

178. In the ***Unreported High Court of South Africa Case of Oliver v. Universiteit van Stellenbosch [cited in Contemporary Labour Law Vol.14 No.9 of April 2005],*** forensic investigations carried out at the University implicated the Employee Oliver, in certain irregularities at the University. He was given a notice of disciplinary hearing and advised of the right to be accompanied to the hearing by a representative of his choice. Six days before the hearing, he requested for documents he needed to use, and requested for clarification of the charges. He also asked for postponement of the hearing to enable him prepare.

179. The University refused him all the requests. He approached the High Court of South Africa, with an application compelling the Employer to grant what he had requested. The High Court allowed his application, holding that Oliver had not been given sufficient time to prepare; the charges were vague; and the requested documents were necessary to enable him respond. The High Court of South Africa was notably criticized for assuming jurisdiction in a Labour and Employment dispute, much like our High Court in certain cases today, is coming up for criticism for exercising Labour and Employment jurisdiction, disregarding clear constitutional demarcation on exercise of judicial mandate.

180. The case is similar to Muhoro’s except that Muhoro was granted postponement while Oliver was not. Oliver was given charges, vague charges, while Muhoro was not given any charges worth the name. Both were denied documentation material to preparation of their responses. In either case, the principle of a fair hearing was absent.

181. The Respondent’s Human Resources Policy Manual in force at the time of the Claimant’s exit adopted these principles of fairness. It states that the Company adheres to the policy that any procedure, involved in bringing to an end an individual’s employment, must be observed, to ensure fairness. It

states unequivocally that an Officer alleged to have committed gross misconduct, shall be allowed an opportunity to defend. Without meeting the principles discussed at paragraph 176 above, the Respondent cannot be said to have respected the Claimant's right, of the opportunity to defend.

182. The Claimant appealed against the termination decision to the Board on 8th December 2009. The Board wrote back on 16th December 2009, through Richard Vigne, stating that it had discussed the Appeal, and found it to have no merit. He was told that the Respondent had clear evidence of loss of money in the Finance Department which took place during the Claimant's stewardship of the Finance Department. This evidence would be made available to the Claimant and the appropriate authorities at the appropriate time.

183. The CEO explained this strange advice to mean that the Claimant would have the evidence used in terminating his contract of employment, when the Respondent preferred criminal charges against him. This was the wrong approach. The Respondent emphasized by this communication that it had in the first place, condemned the Claimant without according him the opportunity to have, and review the documentation against him. It secondly cast the appeal process as a continuation of the primary hearing, where documentation just would not be placed in the hands of the Claimant. There was no criminal process that followed against the Claimant. Richard Vigne testified somehow unbelievably, that police investigations, five years after the fraud, are still going on.

184. To compound these procedural irregularities, the Respondent withheld the Claimant's salary for the month of November 2009 without any justification. The CEO explained in the letter of termination, ''*note that the sum of Kshs. 178,445 which had been recovered from your November salary will be reinstated.''* The Human Resource Manager put roadblocks in the way of payment of the Claimant's November salary alleging it was part of the Claimant's terminal benefits, which would only be paid after the appeal lodged by the Claimant was exhausted. It took the intervention of Richard Vigne for the Claimant to receive his November salary.

185. As pointed out in the recent decision of the ***Industrial Court of Kenya in C***ause Number 1149 of 2011 between Peterson Ndung'u and 5 Others v. The Kenya Power and Lighting Company Limited, Employers should not withhold Employee's salaries as a form of a disciplinary sanction. It adds on to the gravity of the procedural irregularity, when the Employee's salary is used as a weapon against him. How was the Claimant expected to defend himself effectively at the disciplinary hearing, without an income"

186. The other notable irregularity in the procedure, related to the 30 days of compulsory leave, which were offset against the Claimant's annual leave entitlement. The law does not contemplate the conversion of an Employee's annual leave entitlement into anything else, other than cash. Compulsory leave is essentially a suspension of the Employee from Employment, pending investigation of the employment offence, and the outcome of the disciplinary process. Annual leave cannot be converted into suspension by whatever name that suspension may be characterized. What the Respondent did with regard to converting the Claimant's annual leave entitlement into a period of suspension, was similar to the withholding of the Claimant's salary, in that the Respondent was withdrawing or withholding an Employee's benefits, to punish the Employee incrementally for perceived employment offences. The Court has not read the term 'compulsory leave' anywhere in the Respondent's Human Resources Policy Manual, the term in use being 'suspension.'

187. Annual leave is voluntarily taken by the Employee, at such time as may be agreed with the Employer. It is not meant to be involuntary. In an old US case of ***Hart v. United States 284 F.2d 682,687, [Ct. Cl. 1960],*** it was held that annual leave imposed on the Employee for disciplinary reasons, constituted suspension and was improper. If the Claimant did not have any outstanding annual leave

days, what was the Respondent to offset compulsory leave against" Section 28 of the Employment Act 2007, which regulates annual leave entitlement does not allow for conversion of annual leave days, into a period of disciplinary suspension.

188. The procedure leading to termination of the Claimant's contract was loudly irregular, unfair and contrary to the law and the employment contract. The answer to the question whether the termination was based on fair and valid reasons, and carried out fairly, must be no, it was not.

B. *Equal pay, for equal work, or work of equal value: the question of unequal pay based on racial discrimination*

[i] Conceptualization

189. This is a very emotive aspect of this dispute. Parties have at certain points, invited the Press, and publicized the dispute, in amplification of their grievances, sense of injury or correctness.

190. It is important before delving into the facts, to attempt a conceptualization of equal pay for equal work, or for work of equal value. In the ILO publication ***'Equal Pay, An Introductory Guide' by Martin Oelz, Shauna Olney and Manuel Tomei, ILO Labour Standards Department, Conditions of Work and Equality Department- Geneva: ILO 2013****,* the concept is simplified as the fundamental right of every worker, to receive equal pay, for the *same* or *similar* work. This may entail equal pay for doing completely different work, but which is, based on objective criteria, of equal value.

191. The right is recognized as a fundamental human right. This right is now recognized under Article 41 of the Constitution of Kenya. The ILO Declaration of Philadelphia of 1944, which is part of the ILO Constitution, affirms that all human beings, irrespective of race, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, and of economic security and equal opportunity.

192. The 1998 ILO Declaration on Fundamental Principles and Rights at Work, states that all Member States, have an obligation to respect, promote and realize the principles concerning fundamental rights, whether or not they have ratified the relevant Conventions. These fundamental principles include the elimination of discrimination in respect of employment and occupation.

193. The Equal Remuneration Convention No. 100 of 1951 and the Discrimination [Employment and Occupation] Convention No. 111 of 1958, prohibit distinctions, exclusions or preferences made on various grounds, including race.

194. Under Convention 100, pay or remuneration is taken to include the ordinary basic or minimum wage or salary, and any additional emoluments whatsoever payable, directly or indirectly, whether in kind or cash by the Employer, arising out of the Employee's contract of employment. The Employment Act 2007 has a similar description under Section 2, defining remuneration as the total value of all payments in money or kind, made or owing to an Employee, arising from the employment of that Employee.

195. Disparity in pay is permitted when there are objective differences in the value of work to be performed. The concept requires a means of measuring and comparing different jobs, on the basis of objective criteria such as skills, working conditions, responsibilities and effort.

196. The Industrial Court of Kenya in the two decisions cited by the Respondent, Cause No. 4 of 2012

between Fredrick Ouma v. Spectre International Limited [2013] e-KLR and Cause No. 473 of 2011 between Miguna Miguna v. the Attorney General [Wasilwa J]**,** explained salaries of Officers serving in the same capacity change due to seniority in rank or even due to experience. The Court explained that even Judges of the High Court do not earn the same salaries as they have different days of appointment, and therefore levels of experience. Section 5[3] [b] states that it is not discrimination to distinguish, exclude or prefer any person on the basis of an inherent requirement of job.

197. Similarly qualified Employees however, must be paid equally when they perform the same or virtually the same work, in equivalent conditions. Work of equal value, it must be emphasized, is work which is different in content, involving different responsibilities, requiring different skills or qualifications.

198. The ILO Publication cited at paragraph 190 above, recommends that in determining the value or worth of a job, Employers should undertake objective job evaluation, free from bias. Two types of job evaluation methods [JEM] exist. The first is the Global or Ranking Methods, the second is the Analytical job evaluation.

199. Under the Global or Ranking Methods, the jobs are ranked on the basis of the importance of the job requirements. The whole job rather than the individual component is evaluated. This tends to identify the characteristics of the job-holder with the characteristics of the job itself. The ranking methods ascertain the importance of the jobs within the Organization, but do not determine the difference in value between them

200. Analytical Job Evaluation Methods break jobs down into components, or factors, and sub-factors, and attribute points to them. The factors include skills and qualifications acquired through education, training or experience; responsibility for equipment, money and people; effort, which can be physical or mental; and work conditions which encompass physical and psychological aspects. By determining the numerical value of a job, analytical job evaluation methods show whether two different jobs have the same value or not. Different jobs that have the same numerical value are entitled to equal remuneration.

201. The ILO Publication at paragraph 190, underscores the importance of remedies, whenever an Employee is found to have suffered wage or salary disparity, based on reasons which are not objective and permissible such as race. The consequences of the unequal pay must be reversed. The Employee must receive compensation and where possible, Courts must impose sanctions such as fines, to deter continuing or future pay discrimination. Other mechanisms meant to promote and protect the right of equal pay for equal work, or equal pay for work of equal value, include partially or wholly shifting the burden proof to the Employer, through legislation. ILO explains that the Employee may not have access to employment records, to establish a claim for discrimination. Courts are urged to protect Employees against victimization, once such Employees in an ongoing employment relationship, have lodged unequal pay claims. The ILO observes that most unequal pay claims escape judicial correction, because Employees are afraid of retaliation from Employers. This explains why Apollo Kiarie forwarded data to Muhoro on salary disparities secretively, with the caution 'for your eyes only.' Courts should deliver justice to those whose rights have been violated, but also clarify what is, and what is not, unequal pay.

202. The challenges posed in establishing claims for pay disparity are discussed in a second ILO Publication, ***' An Outline of Recent Developments Concerning Equality Issues in Employment for Labour Court Judges and Assessors' by Jane Hodges- Aeberhard, Equality and Human Rights Coordination Branch ILO [1997].*** This Court must laud the ILO for taking Regional Industrial Court Judges through the subject of employment discrimination, at the training session in Arusha in October 2013. The Author observes that even where Courts are in a position to obtain detailed remuneration data needed to reach their equal pay decisions, they are often reluctant to interfere with the

Management role in fixing of salaries and wages. In employment disputes, Courts in Kenya are increasingly exercising judicial restraint. Remedies in the employment regime, such as reinstatement, are fast becoming paper remedies. Even in Countries where the concept of equal pay for equal work is enshrined in specific legislation, it is often the jurisprudence of the Courts, which clarifies its scope, and it is the judicial remedies, that give force to its implementation, Jane Hodges observes.

203. Like Oelz, Olney and Tomei, Hodges advocates the need for effective remedies in redressing the violation of the right of equal pay for equal work. The burden of proof ought to

shift to the Employer once the Employee has shown a *prima facie* case of discrimination. Courts should nullify discriminatory clauses in collective agreements as well as the individual employment agreements. Common interest groups such as the Trade Unions should readily be granted associational standing in Courts, to be able to bring class suits against the Employers.

[ii] Evaluation of the evidence on discrimination

204. According to the Claimant all was well before 29th September 2004. On this date the Employees were informed by then General Manager Richard Vigne that Flora and Fauna International had purchased 100% shares of Ol Pejeta Holdings in Netherlands BV from Lonrho Africa.

205. The terms and conditions of service of the Employees under Fauna and Flora International would remain as they were under Lonrho. This communication was made to the Employees individually and collectively through the Notice Board.

206. The communication was plain in its meaning, and the Court did not find any merit in the Respondent's explanation that the notice was in reference to Unionisable Employees' terms and conditions of service. The individual communication as well as the collective notice conveyed the same message to the Employees across the board: their terms and conditions of service would not be adversely affected by the change in the business ownership.

207. Two White Managers Giles Prettejohn [Livestock] and Anne Olivercronna [Chimpanzee] earned Kshs. 120,000 and 115,500, while the Claimant earned Kshs. 115,000 per month, on the date of the business transfer. Prettejohn's salary was raised to Kshs. 464,000 effective from 1st November 2004, Olivercronna's to Kshs. 370,000, Muhoro's was reviewed to Kshs. 148,000 from the same date. He argues this was the beginning of his denial of the right of equal pay for equal work, or work of equal value.

208. The Respondent's evidence in explaining the disparity was that the two White Managers were engaged as Consultants, and employed on regular terms on transfer of business. Secondly, the two held superior qualifications and skills to Muhoro's. Prettejohn holds a higher national diploma in agriculture; is a qualified pilot; and is the Chairman of Boran Cattle Breeders Society. He is a licensed gun holder.

209. Olivercronna holds a degree in zoology from the University of Nairobi and took specialist care for orphaned captive chimpanzees which are exotic to Kenya. The Claimant in his own evidence, held a CPA 1 certificate, Section 2. The two White Managers in the view of the Respondent were not the right comparators.

210. On this, the Court is persuaded by the evidence on record, and its own past decisions on the definition of the term 'Consultant,' that Prettejohn and Olivercronna were not Consultants.

211. In ***Industrial Court of Kenya case of*** Kenneth Kimani Mburu & Saidi Emmerich v. Kibe Muigai Holdings Limited [2014] e-KLR, the Court found *inter alia* that a Consultant is paid a fee, not a salary; a Consultant is not eligible to receive company benefits; is not normally provided with the tools of work by the person engaging the Consultant; the Consultant would be subject to withholding tax; the Consultancy is normally for a limited duration; and the consultancy is normally given on a subject peripheral to the Employer's core business.

212. Although alleged to receive fees as opposed to salaries prior to September 2004, the two White Managers worked as Departmental Heads in Livestock and Chimpanzee, areas integral to the Respondent's Business; they did not render their alleged consultancies for a limited duration; and received benefits from the Respondent such as school fees for their Children and Christmas bonuses. The Group Managing Director J.F.W. Taylor wrote to Prettejohn on 30th November 2000, acknowledging that Prettejohn was receiving these benefits. PretteJohn had worked for the Respondent, as Livestock Manager, from 1998.

213. Furthermore the Ol Pejeta Tax Optimization Review for June 2007 carried out by the Respondent's Tax Advisors KPMG Kenya Limited, seems to suggest the Respondent had a practice of characterizing certain Employees as Consultants, while evidence pointed to employer-employee relationships. At Page 40 of the KPMG Report, it is observed that, ''*in the PR Manager's case, we note that all her work was directed by Ol Pejeta, and she had set reporting times. She was also entitled to leave. These two conditions, point to an employer-employee relationship.''*

214. KPMG further advised that the arrangement with the Chimpanzee Manager was similar to the PR Manager's. '' *Ol Pejeta should therefore have taxed the Chimpanzee Manager for PAYE as opposed to withholding tax.''*

215. There is ample evidence and judicial opinion to conclude that Prettejohn and Olivercronna were not Consultants, but ordinary Employees, in a regular employment relationship with Ol Pejeta, before and after September 2004. The salary disparity between them and Muhoro could not be objectively justified, on the ground of their being Consultants.

216. Did they have superior skills and qualifications to Muhoro, or perform the same or similar work as the Claimant" The rate of pay among the three Managers as seen above was near at par, before the business transfer in September 2004.

217. There was no clear record of job evaluations at the Respondent, either using global or ranking job evaluation methods, or analytical job evaluation methods. Richard Vigne testified he appraised the Claimant day to day. The pieces of information available suggest the Livestock, Chimpanzee and Finance Departments were taken as being of equal value to the Ol Pejeta Business.

218. Under the Lonrho Job Grading and Remuneration, the Finance Manager was in Grade M6, which was described as being in Top Management. The Organogram indicated the Finance Manager was like his colleagues in Livestock and Chimpanzee, in Top Management, reporting directly to the CEO.

219. Before the year 2006 when the Respondent brought in Apollo Kiarie as the Human Resource Manager, the Claimant combined the Finance function with the Human Resource function, carrying out such roles as the pay roll administration. After Kiarie was recruited, the Human Resource role was hived off from the Claimant's responsibilities. The Claimant was left with the running of the Finance and the Accounting Responsibilities.

220. This altered in 2009 with the arrival of Joseph Kariuki as the CFO. It had been pointed out by the Auditors and the International Evaluator that the Claimant's job was overloaded. In 2009 the Finance and Accounting Functions were split, and as seen elsewhere in this decision, the Respondent was unsure about the title to assign the Claimant- Chief Accountant or Finance Manager"

221. It is clear the job of Finance Manager as of September 2004, had three main components: Finance, Accounting and Human Resources. It would not be honest to hold that this docket, overloaded as it was, and being in Top Management, was any less in weight and importance to the Respondent than Livestock and Chimpanzee. The Claimant stated that his job as Finance Manager extended to other dockets such as Donor Accountant and ICT Officer, which jobs the Respondent later advertised and filled.

222. The responsibilities for people, money, and equipment under the Finance Manager were enormous. The physical, mental and psychological effort made by the Claimant to discharge three combined roles, was enormous. Giles Prettejohn main work was in looking after the Respondent's Boran Cattle and ensuring the Livestock kept healthy and reproductive, Livestock breeding being central to the Respondent's Business. Anne Olivercronna did the same work as Prettejohn, the only difference being that she took care of the Chimpanzees not Cattle. Adopting the analytical job evaluation principles, any trier of facts would be persuaded the Claimant performed work, which based on objective criteria, was of equal value, if not more value than the work performed by Prettejohn and Olivercronna. The Respondent seemed aware, at least at the time of the business transfer, that these were Officers performing jobs with equal numerical value, and were therefore paid salaries almost at par.

223. There was nothing in terms of skills and qualifications, which would explain the disparity after September 2004. The Court was asked by the Claimant at the outset to give an Order for the Respondent to bring all the relevant academic and professional certificates of the Managers at Ol Pejeta. The Court gave the Order, but at the time the evidence was recorded, the Respondent had not complied, protesting that it was under no obligation to produce these employment records. It was argued by the Respondent that production of the documents would prejudice the Response. In his evidence, the CEO Richard Vigne testified he was not sure what certificates the Claimant held, but wished to give the Claimant a chance to continue serving. This was strange coming from the CEO, who should have the credentials of his Managers at his fingertips. How did he evaluate the Claimant on professional and academic qualifications without knowing what certificates the Claimant held" Vigne also testified repeatedly, that Giles Prettejohn held a Degree Certificate. This was incorrect. Prettejohn held a High Diploma in Agriculture. Essentially there was no major difference between Prettejohn and Muhoro in terms of their professional and academic pedigree. Muhoro however started working for the Respondent in 1984, while Prettejohn entered the scene in 1998. Muhoro was 14 years ahead of Prettejohn. Muhoro's and Pretejohn's relatively long hands-on job experiences, would cancel out any theoretical advantage held over them, by the Degree-holders.

224. The proceedings closed on 7th February 2014. The Respondent sneaked in a Supplementary Bundle of Documents comprising the certificates of Prettejohn and Olivercronna, which were filed a month after the proceedings closed on 18th March 2014. The Court ordered the fresh documents struck out on 31st March 2014.

225. The evidence given by the Respondent's witnesses was that Prettejohn held a Higher Diploma in Agriculture, and Olivercronna a Bachelor's Degree in Zoology from the University of Nairobi. The Claimant held CPA -1 and graduated at A-Level. In the Respondent's closing submissions, the additional credentials with respect to Prettejohn were that he holds a gun licence and a pilot licence.

226. These academic and professional qualifications were not superior to those held by Muhoro, relative

to the requirements of the respective roles exercised by the job holders. What was the value added to Prettejohn's credentials by holding a gun license" The added value was not made clear to the Court.

227. Giles Prettejohn had worked for the Respondent as a 'Consultant' from 1998 to 2004. He had worked for six years. Muhoro joined the Respondent in 1984, as an Assistant Accounts Clerk. He rose through the ranks of Accountant, Senior Accountant, and Chief Accountant to Finance Manager. He had twenty years on-the job experience, as at 2004 when the Business was transferred. When the Respondent reviewed the Senior Management salaries in the year 2007, it adopted seniority, experience and responsibility. Seniority and responsibility were lumped together, and Giles Prettejohn apportioned 12% on seniority and responsibility, while Muhoro was apportioned 10%. On experience, Prettejohn was granted 5% and Muhoro 12.5%. Muhoro was the most experienced of all the Top Managers at Ol Pejeta.

228. The disparity could therefore not find justification on the basis of skills, qualifications, and experience. The Claimant had worked for twenty five years by the time he left employment. Skills are built through on-the-job training and experience. To understand why the salaries of Prettejohn and Olivercronna sharply rose after September 2004; why Muhoros' salary was modestly improved; one would have to look into other reasons, other than the reasons given by the Respondent.

229. The Claimant testified there was no other reason why there was disparity, other than the fact that he was a Black Manager. He was discriminated against on the basis of race.

230. In analyzing this aspect of the evidence, the Court has cautioned itself as urged by the Respondent, through the decision ***Raol Investments [pty] limited t/a Thekwini Toyota v. Mandlala [2008] ILJ 267 [SCA],*** which states, '' *discrimination against an employee on the grouping of race or other arbitrary grounds clearly has no place in employment practices, quite apart from being unlawful. But, while a Court must be vigilant to ensure that that does not occur, equally it must be wary of concluding too hastily that an employee has been discriminated against on the ground of race, merely because disparity of treatment coincided with racial disparity.''* This principle is the same message communicated through the Publications of the ILO referred to in the previous paragraphs herein, on the subject of careful analyses and objective evaluation of evidence in discrimination claims.

231. Kenya is among the ILO Members States which have legislated in favour of shifting the burden of persuasion on the Employer, once an Employee has established a *prima facie* case, in a Claim for discrimination.

232. Section 5 of the Employment Act 2007 which contains antidiscrimination law, requires Employers to promote equality of opportunity and strive to eliminate direct and indirect discrimination. It also specifies what is not discrimination. It is not discrimination for instance if the acts or decisions of the Employer are based on the inherent requirements of the job. The role of baby care would for instance, involve inherent maternal qualities, and an Employer would be entitled to recruit a lady rather than a gentlemen to discharge the role. In recruitment for a movie role on the life and times of Nelson Mandela, an Employer could hardly be accused of racial discrimination, by employing a Black Man for the Mandela role, rather than a White Man. It is not discriminatory for the State to limit access to certain categories of Employees, where necessary in the interest of the State.

233. Section 5[5] of the Employment act 2007, provides for equal remuneration for work of equal value, while Section 5[7] provides that, ''*in any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any grounds specified in this section.''*

234. This burden of persuasion was the subject of discussion in the ***Industrial Court of Kenya*** Cause No. 1227 of 2011 between G.M.V. v. Bank of Africa Limited [2013] e-KLR. The Court found that once the Employee has established a *prima facie* case, the burden shifts to the Employer to show articulate, specific, and nondiscriminatory reasons for the disparity. The Court can reasonably infer from the falsity of the explanation by the Employer, that the Employer is dissembling, to cover up for discriminatory purpose. Once the Employer's justification is eliminated, discrimination may well be the alternative explanation, especially because the Employer is in the best position to put forth the actual reason for its decision. The Claimant's *prima facie* case, combined with sufficient evidence to find that the Employer's asserted justification is false, may permit the Court to conclude that the Employer unlawfully discriminated against the Employee.

235. This test has been explained to comprise the following steps:

- The Employee must by preponderance of evidence establish a prima facie case of discrimination.
- The Employer must rebut the presumption, by introducing evidence of legitimate nondiscriminatory reason for its actions.
- The Court must in the end examine if the reasons offered by the Employer are pretextual, and if they are pretextual, discrimination may well be the correct diagnosis.

236. The Claimant in this dispute has done more than merely show a *prima facie* case that he was subjected to unequal pay, based on his race. The Respondent was given the opportunity to articulate specific and nondiscriminatory reasons for the disparity, but did not take up the opportunity in full. The Claimant asked for the employment records of the Respondent's Top Managers including the salary, tax, academic and professional records. The Court gave an order which the Respondent was less than willing to comply with.

237. In the view of the Court the Respondent did not discharge its obligation in showing nondiscriminatory reasons for the disparity between the Claimant's salary after September 2004, and those of Prettejohn and Olivercronna. There were other comparisons made in the salaries of different Officers, which persuades this Court that race was a factor in determining the salary levels at Ol Pejeta Ranching.

238. The Respondent submitted that Martin Mulama who took over from Anne Olivercronna as the Chimpanzee Manager was Black, and earned Kshs. 336,000, which was more than the sum earned by Muhoro in 2007 at Kshs. 188,000. The Court notes that Mulama held a Master's Degree in Biology in Conservation, while Olivercronna held a Bachelor's degree in Zoology. Olivercronna earned Kshs 370,000 as her first salary under Fauna and Flora, in September 2004. Mulama, in spite of having a Master's Degree, earned Kshs. 336,000 as starting salary, three years after 2004. It would have been difficult to place him at par with the Claimant in light of the high salary paid to his White predecessor Olivercronna. What was the justification in starting Olivercronna on a better rate years back, than Mulama was given, in the same docket, years later, considering Mulama held a Master's Degree in a relevant field" Mulama was pursuing PhD and by 30th September 2009, his salary was at Kshs. 375,744, roughly the entry salary for Olivercronna in 2004.

239. The other name mentioned in the Respondent's submissions, in comparing the Claimant's pay was Sandra Anne Haworth, the White Public Relations Manager. It was not shown that the Public Relations Manager performed equal work with Muhoro, or work of equal value. The Court has found the Claimant combined three roles. Sandra held a Master of Arts Degree in Documentary Photography, and

was employed in 2007. By 2009 she earned Kshs. 218,360, more than Muhoro who had worked for 25 years and who oversaw three dockets. The Master's degree in documentary photography would not justifiably propel Sandra in the role of Public Relations, to earn more than the Finance Manager discharging three roles and with over 25 years' experience. Sandra Haworth had only worked for 2 years, having been employed in 2007. Going by the decision of Justice Wasilwa in ***Miguna Miguna***, experience and seniority in the present case would have played to the Claimant's advantage. It did not; and the question must be asked, why not"

240. Another interesting Officer named in the Respondent's submissions is Walter Awinda, a Building Manager. He held a Bachelor's Degree in Civil Engineering, and earned a salary of Kshs. 150,000 per month in 2009. The Claimant earned Kshs. 215,767 at the time. Awinda was shown to have worked for just one year by 30th September 2009 and it would be inappropriate to compare him to Muhoro who had worked for 25 years. Awinda could be compared to Brendan Hill who was a White Building Manager, holding a Bachelor's Degree in Industrial Design and Technology, and who had worked for 4 years by the time Awinda was employed, and earned Kshs. 345,345 compared to Awinda's Kshs. 150,000. Both were Building Managers.

241. The Schedule of Management Staff Salaries attached to Supplementary Statement of Claim, was not challenged by the Respondent. This shows the salaries earned by Black Employees, even when they hold equivalent, or superior academic qualifications, than their White colleagues, to be inexplicably lower. A White Research Consultant, with 1 year of service, was in 2006 paid Kshs. 50,000, while a Black Research Consultant with the same number of years of service, was paid Kshs. 10,000. The Schedule however did not show the qualifications, or the nature of research carried out, and this particular employment data may not conclusively show discrimination based on race.

242. As of 30th September 2009, at least 4 White Managers earned over Kshs. 500,000 monthly, while the top Black Manager was Martin Mulama, PhD candidate, earning Kshs. 375, 744, which was the rate earned by Olivercronna, a first Degree Holder, 5 years back in 2004. The possession of a Degree Certificate, or the long years in service, seniority, experience, qualifications or skills-fit-for-the job, did not translate into higher salaries for the majority of Black Employees as shown in the schedule of staff salaries attached to the Supplementary Statement of Claim. Even assuming the jobs that earned their holders over Kshs. 500,000 were of greater value to the Organization, why would they invariably have to be occupied by White Managers, while the Black Managers take the low paying Management positions" This reveals a pattern or practice of discrimination.

243. The Black Livestock Assistant had worked for 30 years by 30th September 2009, and earned Kshs. 40,750 per month; the Black Assistant Workshop Manager had served for 35 years at the same time, and earned Kshs. 57,989; and the Black Fencing Supervisor, with 31 years of service earned Kshs. 49,140.

244. This pattern and practice of racially based salary determinations, was given added weight in the evidence of the Claimant, that the salary paid to Giles Prettejohn in September 2004, became the entry point for new White Managers employed later. Evidence was led on the salary paid to Brian Haworth who was employed on 1st January 2005, and paid Kshs. 464,000. Batian Craig was employed on 1st April 2005 and paid Kshs. 464,000 as the starting salary. This was the salary paid to Giles Prettejohn after the transfer of business in September 2004. This evidence on future White Managers entering employment, at the rate set for Giles Prettejohn in 2004, was not disputed by the Respondent. The CEO mentioned in his e-mails to Apollo Kiarie that Leringato, Muhoro, Kiarie and Hill were some of the Officers who were underpaid. Hill was the White Construction Superintendent and in 2007 had a basic salary of Kshs. 328,000 per month, which was considered low by the CEO. Hill seems to have become a

Building Manager later on. Perhaps Hill's salary was considered low, comparative to a general entry point of Kshs. 464,000 reserved for the White Managers. Muhoro earned at the time, Kshs. 188,000, Leringato 170,857, Kiarie Kshs. 185,000 and the top earner among the Black Managers was Mulama at Kshs. 336,000, which was just about the same rate received by Brendan Hill, who was listed by the CEO among the Managers who were overworked and underpaid. As seen above, Awinda a Black Building Manager earned Kshs. 150,000 in 2009, while Hill a White Building Manager earned Kshs. 345,345 in 2009.

245. The Respondent's International Evaluator David Cumming alluded to historical disparities in salaries. The e-mail communication between the CEO Richard Vigne and Apollo Kiarie confirmed the existence of the disparities, particularly in the case of Muhoro, who, it was acknowledged, was overworked and underpaid. The only thing which was not acknowledged was that the historical disparities, meant discrimination on the basis of race. The Respondent alleged that historical disparities referred to the existing differential between Management and Junior Staff. Apollo Kiarie, the Human Resources Manager conceded in his evidence that after September 2004, there was a wide disparity between the Claimant's salary, and those of the White Managers, but he could not say why this was so. He on occasion testified the historical disparities related to different Conservancies. The CEO maintained Cumming was referring to the disparity between the Senior and Junior Employees.

246. This explanation was pretextual. There was no evidence shown by the Respondent on the pay gap between Management and Junior Staff salaries. The salaries payable to Junior Staff were negotiated periodically between the Trade Union and the Employer, and disparities would be resolved at the collective bargaining forum. Cumming and the e-mails of Richard Vigne, allude to disparities in Management salaries. Historical disparities could mean precisely the inequality based on race, which the Claimant has asked the Court to correct.

247. The pattern or practice of discrimination was compounded by the employment of Relatives of the Top White Managers. These Relatives earned higher salaries compared to the Black Managers. Brian Haworth employed his Son-in- Law Brendan Hill. His Daughter-in-Law Sandra Haworth was employed as the Public Relations Manager. Batian Craig was the Son to Board Member Ian Craig. The Wife to Batian Melissa Duveen was employed as the first Public Relations Manager. This nepotism compounded racial discrimination, and meant that the managerial power was concentrated in the hands of a coterie of White Relatives, with the collective pay packages taken home by the White Managers and their families, disproportionately high, in comparison to those of the Black Managers.

248. The acts of discrimination against the Claimant, and other quiet Black Managers, were not isolated cases, but rather a practice that had gained foothold at Ol Pejeta. The Claimant raised more than a *prima facie* case of discrimination; the Respondent did not discharge the burden of showing disparity was based on legitimate reasons; and in the end the evidence marshaled by the Claimant rebutted the pretextual reasons given by the Respondent in justifying salary disparity. The evidence of disparity in salaries between the White Managers and the Black Managers was so apparent, as to virtually jump off the pages, and slap the Court in the face.

249. Discrimination against the Claimant occurred in small increments over a period of 5 years. The adjustment of September 2004 may have looked insignificant, but morphed over time into a devastating disadvantage for Muhoro.

250. The Respondent seems to have realized there was actual pay disparity based on race, and adjusted the salaries of the Black Managers, but only after the Claimant was out of Ol Pejeta. In the Claimant's Bundle of Documents filed on 29th January 2013, the adjusted salaries of the Black Managers

as at 31st October 2012 were shown. Martin Mulama the Chimpanzee Manager enjoyed an increment from Kshs. 375,700 earned at the time the Claimant left employment in 2009, to Kshs. 611,000 as at 31st October 2012; for Apollo Kiarie the Black Human Resources Manager, his salary rose from Kshs. 211,900 to 457,000 over the same period; the salary for the Black Community Manager Leringato, was adjusted from Kshs. 211,300 to Kshs. 449,000; and Joseph Kariuki the Black CFO who earned Kshs. 230,000 in 2009, received Kshs. 552,000 in 2012. The CFO Joseph Kariuki confirmed at the time of his testimony in Court that his salary had risen to about Kshs. 600,000 per month. Commendably, the Respondent undertook some positive measures in righting what was described in the Cumming Report as historical disparities, and gave what appear as reasonable salaries to its Top Black Managers in 2012. This was done when this case was going on in Court. Muhoro who bore the brunt of the historical disparities, and who had worked for 25 years for the Respondent, the longest serving Manager Black or White, did not enjoy the remedial action taken by the Respondent in redressing the racial pay gap. He left before reasonable adjustments were made. His pay review history from 2004, shows he earned Kshs. 115,785 as of 30th September 2004; this was controversially raised to Kshs. 148,000 and 160,000 from October/ November 2004; from 160,000 the salary rose to Kshs. 176,000 as of December 2005; Kshs. 185,000 as of December 2006; Kshs. 188,000 as of 30th September 2007; Kshs. 204,920 as of January 2009; Kshs. 211,384 on 31st July 2009; Kshs. 211,067 as of 30thSeptember 2009; and a basic salary of Kshs. 215,767 as of 30th November 2009 when the Claimant left employment.

251. Dave Pager and Bruce Western in ***' Identifying Discrimination at Work: the Use of Field Experiments, Journal of Social Issues, Vol. 68, No. 2, 2012 pp. 221 -23***7' observe that given the subtlety of contemporary forms of discrimination, it is often difficult to identify discrimination when it has taken place. Employees who confront such issues at work during employment have the risk of retaliatory actions from their Employers. They have the challenge of gathering evidence from the Employer and Co-Employees. Luckily, the Claimant in this case appears to have accessed important employment records, even when out of employment, which have made his case for pay inequality very persuasive.

252. In a paper titled ***'The Nature of Contemporary Prejudice; Insights From Aversive Racism' [Social and Personality Psychology Compass 3 [2009] 10.1111/J.1751-9004.2009.00183X,*** Adam Pearson, John Dovido and Samuel Gaertner of the University of Yale and University of Delaware, agree on the subtle nature of contemporary racial discrimination. They acknowledge that while the laws have transformed societies and overt expression of racism given way to the principles of racial equality, subtle biases persist. The dominative racism of the past has paved way to what the Authors term as 'aversive racism.' Dominative racism was direct discrimination based on race, the sort of racial bigotry expressed by the likes of Ku Klux Klan in the USA and the Boers in South Africa. Aversive racism is indirect discrimination, which persists because it remains largely unrecognized and un-confronted. Some Employees at certain employment places, are given the tags of 'Consultant' 'Expatriate' or 'Specialist' to justify stratospheric salaries paid to them, at the expense of other more deserving Employees, frequently based on their racial origins, rather than on merit. The Court must be vigilant not to rush to condemn Businesses for racial discrimination, but must exercise equal vigilance in uncovering and redressing aversive racism. The Employment Act 2007 prohibits both the dominative and aversive forms of discrimination.

253. The answer to the question whether the Claimant was paid unequal pay, for equal work or work of equal value, must therefore be in the affirmative. He convinced the Court pay discrimination based on his race occurred on 29th September 2004 when Ol Pejeta was taken over by Fauna and Flora International, and persisted up to the time he left employment in 2009. The Court has an obligation to remedy the effect of the historical injustice suffered by the Claimant. The ILO Publications discussed above guide the Courts to grant effective remedies, which may comprise back salaries and compensation for the denial of the right of equal pay, for equal work, or work of equal value. The Court must now turn to the

area of remedies.

C. Remedies

[I] Pleadings, Proof, and Limitation of Time

254. Employment dues do not fall in the category of special claims contrary to the holding in the ***Nairobi*** H.C.C.C No. 635 of 2007 between Beautta Anselme Maali v. Ethiopian Airlines Enterprises, cited in the Claimant's Submissions, which must be pleaded, particularized and then proved.

255. The correct approach in the view of this Court, was established in ***the Unreported Industrial Court of Kenya Cause No. 43 [N] of 2009 between Crispol Ngugi Kimani and 24 Others v. Yako Supermarket Limited and Another.*** The Court stated that in remedying employment wrongs, claims for unpaid wages and salaries should not be treated as claims for special damages in Civil Claims. Focus of the Court should be on what is reasonable in each case, particularly as employment records, which are necessary in specific proof, are legally in the custody of the Employer. It would also not be possible to shift the burden of persuasion effectively to the Employer in discrimination Claims, if the Employee was called on to specifically plead and prove details of wage or salary discrimination. The procedure shown under the case of ***G.M.V v. Bank of Africa*** on the shift in the burden of persuasion would be unworkable. The Industrial Court retains wide latitude in addressing employment disputes legally and equitably. Nowhere in the substantive and procedural laws relating to enforcement of employment rights, are Employees required to specifically plead, particularize and prove wage or salary claims. In cases such as those brought to Court by the Low Income Groups, like Domestic Servants and Security Guards, the Court would not be living up to its mandate if for instance, it realizes in the course of the proceedings that such a Employee was paid monthly rates below the known statutory minimum wage, and the Court does not on its own motion, grant an order for underpayments. The Court would be legally obliged to grant the Employee an order for underpayments without the Employee having pleaded, particularized or proved the wage disparity. The Industrial Court needs not be moved, to discharge its role as an enforcer of Labour Standards.

256. The Respondent raised the issue of limitation of time, with regard to some of the back salaries and benefits sought by the Claimant, stretching back to 2004. The submission rests on Section 90 of the Employment Act 2007, which became law on 2nd June 2008. According to the Respondent, claims arising outside the 3- year time limit should be rejected outright. The Respondent relied on two decisions of ***the Industrial Court of Kenya,*** Cause No. 487 of 2013 between Josphat Ingosi Andulu and Another v. Nightingale Rukuba [2014] e-KLR and Cause No. 88 of 2013 between Ndao Mahupa v. Crown Petroleum [K] Limited [2013] e-KLR where the Court upheld the argument that claims going beyond the statutory period of limitation, should be disregarded.

257. The Claimant counters this submission through the ruling of ***the Industrial Court of Kenya in*** Cause No. 849 of 2011 between Justus Atulo Ashioya v. Akshar Team Security Limited ***[UR***], in which the Court held that, ''*The period in employment was a continuous period, with employment benefits vesting in the employee, and obligations on the part of the employer attaching, over time. There are accrued benefits which cannot be isolated and subjected to a different date of accrual. At the date of termination, the Employee should be accorded all benefits arising under the contract of employment. The event that triggered this Claim happened on or about 26th January 2011, and the Claim to enforce the full range of benefits was filled on 11th August 2011, well within the period created under Section 90 [of the Employment Act 2007].*''

258. The Court upholds the decision of Ashioya. The Claimant filed this Claim within the stipulated 3

year period. The underpayment of salaries and benefits, the violation of the right of equal pay for equal work, or work of equal value, happened incrementally. The Respondent acknowledged the presence of historical disparities. These could not be adequately redressed by the application of the law of limitation to any part of the claim, while upholding the temporal validity of other parts. Historical injustices cannot be corrected if the Court interprets the law of limitation rigidly. Employees with long years of service could for instance, be denied creditable years of service at the end of employment, because part of their years of service, fall outside statutory time-limits. There is only one Claim, filed within time. All benefits accruing to the Claimant should be paid in full, on termination. Employment law looks back, and frequently, there are rights and obligations which accrue over time, and must be enforced when the relationship comes to an end. The different claims, making up the Claim, would only suffer limitation of time, if the Claim itself is statutory barred.

259. Rigid application of the law of limitation of time in pay discrimination Claims was the subject of judicial discourse in the U.S. Supreme Court case of Lilly Ledbetter v. Goodyear Tyre & Rubber Co. 550 U.S. 618 2007**.** The Civil Rights Act of 1964 Title VII placed a time-limit of 180 days from the day the discriminatory decision was made, for an Employee to initiate a Claim based on race or gender pay discrimination. The Supreme Court upheld the Employer's objection, which was that the Employee filed her Claim for gender pay discrimination outside the 180 days. The Court argued that each paycheque received did not constitute a discrete discriminatory act, and the Employee could have, or should have sued, when the pay decision was made, instead of waiting beyond the 180 day period.

260. The Respondent in the Muhoro case relies on the Section 90 of the Employment Act 2007, and wishes the Court to find that Muhoro could have, or should have sued, when the pay decision was made, instead of waiting beyond the 3 year period to raise the issue of pay disparity that occurred way back in 2004.

261. The Lilly Ledbetter majority decision caused a furore. There was a strong dissenting Judgment read by Justice Ruth Bader Ginsburg, in which it was argued, it was wrong to apply the 180 day limit to pay discrimination, because discrimination often occurs in small increments over large periods of time. Information of fellow workers is typically confidential and unavailable for comparison. The dissenting Judgment reasoned that the Employer had been knowingly carrying past pay discrimination forward, and should not be allowed to do so, through the application of the limitation of time law.

262. Ultimately the dissenting Judgment became the law. It is important that Judges have the freedom to write dissenting opinions. Through the Lilly Ledbetter Fair Pay Act of 2009, signed on 29th January 2009 by President Barack Obama, the Civil Rights Act of 1964 was amended. The new position is that the 180 day statute of limitations, on filing of lawsuits regarding pay discrimination resets with each new paycheque affected by the discriminatory act.

263. In the case of Muhoro, the first act of discrimination in September 2004 was not a cut-off point; it merely marked the beginning of pay discrimination which morphed over time, to the devastating disadvantage of the Claimant. Every unequal pay received by him, reset the date of the accrual of action. In ***the Industrial Court of Kenya*** Cause No. 1029 of 2011, between Mussawa Zacchaeus Mumali v. Nzoia Sugar Company Limited [UR], the Employee's salary was reviewed to Kshs. 28,881 per month on 16th May 2005. The implementation date was backdated to 1st July 2004, but the Employer did not implement the decision. Instead, the Employer later reviewed the old salary, ignoring the earlier review. The Court granted the Claimant the sum of Kshs. 1,339 per month from the 1st July 2004, being the increment that was not acted on. The Court did not see the passage of 7 years from the date of the initial increment as a hurdle in granting unpaid increments. The Court observed that the Claimant had suffered loss of the cumulative incremental benefit. Mussawa was also granted damages at Kshs. 1,500,000 for

continuous breach, and moved to the job grade he ought to have occupied from the year 2002.

[ii] Specific remedies and orders

264. ***The Court declares termination was unfair and unlawful.***

265. ***The Court declares the Claimant was discriminated against by the Respondent on account of his race, and paid unequal pay for equal work, or work of equal value.***

266. Other declaratory orders sought are unnecessary and declined, the grievances they are meant to address, having been addressed in the text of this Award.

267. ***Having concluded under paragraph 143 [a] that termination was unfair both for want of valid and fair reasons, and want of fair procedure, the Court grants to the Claimant compensation the equivalent of 12 months' gross salary, at the rate applicable as at November 2009 of Kshs. 290,757 x 12 = Kshs. 3,489,084.***

268. The Claimant seeks what he called 'Discriminated salaries' at Kshs. 18,265,947, which he states is the difference between his salary and that of Giles Prettejohn the Livestock Manager, for the period between 2004 and 2009. The Court has concluded that Giles Prettejohn, Olivercronna and Muhoro were at positions of equal value in September 2004. They earned almost similar rates of pay, until after the transfer of business on 29th September 2004. The Court has cautioned itself that employment claims are not claims for special damages, where specific pleading must be made, particularized and proved. The Court must strive to do equity and grant the Claimant a reasonable remedy. In this case the grant of Kshs. 18,265,947 would simply mean that the Claimant ought to have had the same entry point with Prettejohn in September 2004, after the transfer of the Business. The difference between Prettejohn and Muhoro after September 2004 was about Kshs. 300,000 monthly. This remained so up to termination of the Claimant's contract in November 2009. Before September 2004, the Claimant earned Kshs. 115,000 and Prettejohn Kshs. 120,000, the difference being a mere Kshs. 5,000. A differential of Kshs. 300,000 per month, for 5 years would result in Kshs. 18 Million, approximately the amount the Claimant seeks in 'discriminated salaries.' The Court has considered that the other Black Managers enjoyed corrective review of their salaries after the Claimant brought these disparities to the attention of the Court. The Court has considered the functions exercised by the Claimant from 2004, ranging from Finance Manager, Human Resources Manager, Chief/Donor Accountant, and ICT Officer. He carried a heavy workload, and even in the estimation of the Respondent, was overworked and underpaid. ***The Court grants him the prayer for Kshs. 18,265,947 for pecuniary disadvantage and loss suffered, due to the breach of the right of equal pay for equal work, or work of equal value.*** This should be enough reparation as a measure of the actual pecuniary loss, and compensation for discrimination. It could never completely place the Claimant where he should have been, if a proper job evaluation had been carried out, weighing the actual value of the work performed by the Claimant; it could never give the Claimant a full sense of closure given the circumstances of the termination of his contract, and the comparatively high salaries earned by the current Black Managers after the Claimant filed this Claim; it nonetheless attempts to restore to the Claimant some modest measure of equality, and is a fair and reasonable remedy. In particular the Court notes that in his cross-examination, the Human Resource Manager admitted that by giving the Claimant a contract indicating his salary was Kshs. 160,000 while continuing to pay him Kshs. 115,000 and subsequently Kshs. 148,000, the Respondent, did not act fairly or lawfully. This is sufficiently redressed by the grant of the basic pay applicable to Giles Prettejohn, to David Muhoro from 2004 to 2009. The orders in paragraph 267 and 268 are granted under Section 49 of the Employment Act 2007, and Section 12 and 15 of the Labour Institutions Act 2007, in force at the time of termination.

269. Having done this it would not be necessary to look into the other claims based on the Lonrho contracts, the contract of September 2004, or subsequent letters of increment. The Court has pulled the Claimant, as far as possible, to the level of Giles Prettejohn up to 2009. It would not be necessary to bring in other contracts and letters of increments, having in main adopted the basic pay afforded Giles Prettejohn over the 5 years. Some of the allowances from the era of Lonrho seem to have been lost in the maze of the transition, perhaps due to corporate ineptitude, rather than through direct or indirect discrimination against the Claimant. The Claimant alluded to the dysfunctional nature of the Human Administrative functions of the Respondent, and not every fault should be attributed to race discrimination. The Court has taken into account that there were certain allowances taken away from the Claimant on changeover, but is not inclined to attribute these to the focus of this dispute, which is salary inequality based on race. The allowances, which were discontinued after the transfer of business, do not seem to have targeted the Claimant as an individual. This is the case with education, house rent and utility allowances.

270. The prayer for anticipatory salaries and benefits up to the age of 60 years, calculated at Kshs. 51,716,586 is rejected. It would not be a fair or reasonable remedy. As determined in the ***Kenya Court of Appeal*** Civil Appeal No. 25A of 2013 between Elizabeth Wakanyi Kibe v. Telkom Kenya Limited [2014] e-KLR, Employees whose contracts of employment are terminated have no reason to sit and wait to enjoy remuneration which they have not worked for. While Employees must not be denied fair pay, for fair work actually done, they must not crave pay for doing nothing. In granting remedies for unfair termination, some of the considerations the Court takes into account are, under Section 49[4] of the Employment Act2007, the Employee's length of service, and the number of years the Employee reasonably expected to have gone on working. The compensation granted at 12 months' gross monthly salary has taken into account the 25 years served by Muhoro, and the 10 years he expected to continue working. He has been compensated, for the denial of the possible income of 10 years. It would not make sense to compensate him, and still grant him the salaries and benefits he would have earned until retirement. This would amount to an order of payroll reinstatement, in which the Employee earns front salaries, without rendering any labour. Fair remuneration is premised on fair work actually done, such as done by the Claimant for the Respondent, for 25 years. The principle of *a fair-go-all round,* demands that the Court weighs the interests of the Employers and the Employees evenly.

271. The claim for accrued service pay of Kshs. 5,172, 255 is denied. The Claimant was in Management, and a Member and Chairperson of the Pension Scheme, where the Respondent contributed 7.5% of his basic pay to the Scheme. The Human Resource Manual Clause H.4 provided for the establishment of the Scheme. Paul Leringato was paid compensation for the 3 years he had not joined the Scheme, and it was not right for the Claimant to compare himself to Leringato in this aspect. Throughout his 25 years, the Claimant was an active Member of the National Social Security Fund. Section 35[6] of the Employment Act 2007 does not encourage payment to Employees, of multiple social security benefits. The Claimant was adequately secured under the existing Social Security Plans, to demand service pay from the Respondent.

272. The claims made as contractual underpayments at Kshs. 16,353,589, based on the terms carried over from Lonrho contracts and the contract of September 2004, are similarly rejected. Some of the individual claims such as house rent allowance, utilities and education benefits were not without foundation as suggested above, but having adjusted the Claimant's basic salary to reach that which was paid to Giles Prettejohn, there would be no reason for the Court to go into each benefit that was supposed to have been carried forward from Lonrho. It has been stated that the Court is not under obligation to grant remedies based on specifically pleaded, particularized and proved claims; the Court looks at the totality of the circumstances, and the need for fair, reasonable and equitable remedies that serve the ends of industrial justice.

273. The prayer for the balance of unpaid annual leave is allowed. The Respondent had no right to offset the compulsory leave days, against the Claimant's annual leave entitlement. Up to the date of termination, the Claimant had accumulated leave of 89.7 days***.*** The Respondent paid to him 39.7 days, having appropriated the days under suspension. The Court has concluded this was wrong, and the Claimant should have been paid the full 89.7 days. The Claimant wrote to the Respondent numerous e-mails seeking clarification on outstanding annual leave. No clarification was made or annual leave records given by the Respondent, contradicting the computation made by the Claimant. ***The Court grants the Claimant 50 days' salary in annual leave pay at Kshs. 290,757 divide by 26 working days = Kshs. 11,182.90 x 50 days = Kshs. 559,148.***

274. The Court has considered the recommendation of the ILO in imposing penalty, such as a fine on the Respondent, to deter continuing or future pay discrimination based on the Employee's race. The leadership of the Respondent, the Auditors and International Evaluators agree the Respondent has in place strong anti-discriminatory Policy. The problem has been in the implementation of that Policy at the earliest, which resulted in growth of aversive discrimination, and injustice for Black Managers such as David Muhoro. The Respondent has endeavoured to right the imbalances, and Apollo Kiarie, Kariuki and Mulama seem to be enjoying good pay today, as compared to 2009. The Court does not consider imposition of sanctions to be warranted, given these positive measures. The Parties shall meet their own costs. No order on the interest. **IT IS ORDERED-:**

[a] It is declared termination was unfair and unlawful.

[b] It is declared the Claimant was discriminated against by the Respondent, on account of his race, and paid an unequal pay for equal work, or work of equal value.

[c] The Respondent shall within 30 days of the delivery of this Award, pay to the Claimant 12 months' gross salary in compensation for unfair termination at Kshs. 3,489,084; Kshs. 18,256,947 in cumulative pay disparity, and damages for discrimination; Kshs. 559,148 being the balance of annual leave pay- total Kshs. 22,305,179.

[d] For avoidance of doubt this amount shall be paid less PAYE tax.

[d] No order on the costs and Interest.

Dated and delivered at Nairobi this 16th day of September 2014

James Rika

Judge