IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MAKHANDIA & M'INOTI, JJ.A)

CIVIL APPEAL NO. 42 OF 2015

BETWEEN

OL PEJETA RANCHING LIMITED ……..APPELLANT

AND

DAVID WANJAU MUHORO ……...…..……RESPONDENT

*(An appeal from the Award, Order and Decree of the Industrial Court of Kenya at Nairobi (**Rika, J**) made on 16th September 2014*

in

Industrial Cause No. 1813 of 2011)

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JUDGMENT OF THE COURT

By the time of termination of his employment by the appellant on 7th December 2009, the respondent had been in its employ for a period of about 25 years or thereabouts. The respondent was first employed by **Chibuku Products Limited**, a subsidiary owned by the appellant's predecessor, Lonhro East Africa Limited on 1st October 1984 as an accounts clerk. The respondent then rose through the ranks on merit and was prior to termination of his employment, a Finance Manager earning a gross monthly salary of Kshs.290,757/-. The appellant is in the business of wildlife conservation and tourism. Sometime in 2004 Fauna & Flora International acquired 100% shares from Lonrho Africa, in Ol Pejeta Ranching Holdings Netherlands BV, which owned the appellant. The appellant however informed its employees among them the respondent, that they would remain in its service under the same terms and conditions as per their existing contracts, together with all accrued service.

By the time of the acquisition, the respondent was still serving as the finance manager and continued doing so until his termination on 7th December, 2009 when he was first sent on compulsory leave to pave way for an in-depth audit into the financial books. Prior to this, the appellant had employed a Chief Financial Officer, Joseph Kariuki, sometime in May 2009 who in October 2009 allegedly stumbled upon some unexplainable entries in the appellant's financial records. Several days prior to the respondent's termination, the said Chief Financial Officer alleged that an employee who worked under the respondent had confessed to fraudulent deals in writing. The respondent was subsequently informed that as a result, external auditors had been called in to investigate further the said fraud and would begin their audit on 9th

November 2009 and he was requested to co-operate with the auditors.

However, on 5th November 2009 he was suddenly ordered to leave the office premises and was later in the day told to return to the office on 9th November to help with the investigations. However, on 7th November 2009 he was sent on compulsory leave vide a letter dated 6thNovember 2009. Following the audit, the external auditors, UHY Kenya delivered their verdict on 20th November 2009 showing that the appellant had lost funds to the tune of more than Kshs. 10,000,000/- through fraud, which it attributed to weak internal control systems especially weak supervisory control, inadequate segregation of duties within the accounts office and collusion between conservancy staff and customers. These conclusions were reached without any input from the respondent whatsoever. However, the report as can readily be seen exonerated the respondent from any wrongdoing.

By a letter dated 27th November 2009 but which the respondent claimed to have received on 1st December, 2009 the respondent was summoned to a disciplinary hearing slated for 2nd December 2009. The respondent wrote to the appellant on 1st December, 2009 requesting for the audit report to enable him prepare for his defense and for a postponement of the hearing. The latter request was granted. The respondent attended the rescheduled hearing on 7th December 2009 accompanied by a colleague, Martin Mulama, under protest as he had not been furnished with the audit report. Following the "*hearing*", the appellant wrote to the respondent on 7th December 2009 informing him that his services had been terminated due to negligence on his part which led to fraudulent activities in the finance department under his supervision and watch. By the same termination letter, the respondent was informed that his November salary which had been withheld as "*company loss recovery*" and other accrued dues would be released to him after his appeal regarding the decision to terminate his services had been heard and determined.

The respondent appealed against the decision to the board chair. His appeal was however rejected summarily and without a hearing or even him being invited to appear before the appeals Board. He was advised by the appellant that the board had taken note and considered the issues the respondent had raised in the appeal. However, the appellant had clear evidence of loss of money in the department whilst under the respondent's supervision and that such evidence was to be presented to him and the authorities at an appropriate time. The respondent was eventually paid Kshs. 740,016/- on 27th January, 2010 in what was understood by the appellant as terminal dues through the District Labour Officer, Nanyuki. The respondent did not agree that this was the amount due to him, nor the termination and the reasons thereof.

It is against this background that the respondent instituted a claim in the Industrial Court, Nairobi through a memorandum dated 18th October, 2011 followed by other supplementary memoranda of claims.

In disputing the validity of the termination, the reason(s), fairness and the procedure, the respondent claimed that he was denied equal pay for work of equal value while in employment, ostensibly because he was a black person. He therefore claimed a whopping sum of Kshs. 98,680,037/- as terminal benefits.

In a nutshell, the respondent claimed; underpaid or unpaid salaries and benefits; compensation for unfair termination; a declaration that his 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 was unfair, unlawful and against the rules of natural justice; a declaration that the act of the respondent of underpaying/non-payment and withholding his 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 was 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.

The respondent laid the basis for the prayers through his averments that he was unfairly, wrongfully and

or unlawfully terminated. His case was that he was terminated on fraud allegations not attributable or attributed to him and without having been issued with any prior warning or caution. That he was wrongfully dismissed from employment since no misconduct against him was proved; that he was not granted a fair hearing to defend himself; that the termination procedure adopted was unfair; and that his appeal was rejected without a hearing and he was denied crucial documents which were necessary for his defence.The respondent pleaded that the financial audit by two different audit firms; UHY Kenya and Price Waterhouse Coopers, had exonerated him from culpability. None of the two firms implicated him in the alleged fraud in any way yet he was still fired.The respondent alleged that the fraud was actually perpetrated by two of the appellant's employees; Charles Kimani and Peter Thuku who were subsequently reported to Nanyuki police station under occurrence book number OB42/29/2010 and were thereafter fired from their employment by the appellant. He further asserted that his family and himself suffered a lot of stress when he failed to meet his financial obligations following the termination of his employment which included four bank loans and two from co-operative societies. It was also the respondent's averment that due to wrongful termination, he failed to secure or lost another job opportunity since the implication was that he was dishonest, fraudulent, corrupt and thus unemployable.

The respondent was also emphatic that during the course of his employment with the appellant he was subjected to unlawful discrimination on the basis of his colour and or race since the white staff who held similar managerial positions and responsibilities as he did earn much higher wages and better conditions of employment as compared to him and other black managers. The respondent claimed that this was against the Constitution, the Employment Act, International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) and the appellant's own Human Resources Procedure and Policy Manual. The respondent averred that as at 30th November, 2005 for instance, as the finance manager he earned a basic salary of Kshs. 176,000/- while the white logistics manager, earned a basic salary of Kshs. 487,200/-. During the same period the black Human Resources Manager earned a basic pay of Kshs. 185,000/ while the white Livestock Manager earned a basic pay of Kshs. 464,000/-; the black chimpanzee manager earned a basic pay of Kshs. 336,000/- while the white wildlife manager earned a basic pay of Kshs. 464,000/. In a nutshell, during the material time the white managers in the employ of the appellant generally earned a significantly higher pay than their black counterparts.

On its part, the appellant in its defence averred that after its Chief Financial Officer raised queries regarding financial records, an employee under the supervision of the respondent admitted to engaging in some fraudulent activities and was subsequently sent on compulsory leave to allow for investigations. The appellant alleged that on 2nd November 2011, the respondent instructed another employee in the financial department to burn accounting documents and that when questioned about the destruction he became rude and abrasive. The appellant claimed that it suspected collusion by all the staff in the finance department and so it decided to send the entire financial department on compulsory leave to preserve evidence. According to the appellant, an audit followed which unearthed fraud in the finance department during the period the respondent was in charge. The respondent was confronted with the findings of the audit in disciplinary proceedings and he undertook to make good any loss occasioned by his negligence, but a decision was reached that the respondent's employment was no longer tenable and his services were subsequently terminated with full benefits. An in-depth forensic audit was later carried out by Price Waterhouse Coopers which confirmed that Kshs.9,560,000/- had been lost for the period 2008-2009.

The appellant maintained that the respondent was lawfully terminated in accordance with the Employment Act due to negligence of duty in his department that led to the said loss. It also averred that the respondent acted in bad faith by ordering destruction of the accounting documents as he had knowledge that the appellant was due to launch investigations. Further, that the respondent was given an opportunity to be heard where he undertook to reimburse the appellant for any losses occasioned by his negligence. It denied that the provisions of the Constitution 2010, the International Labour Organization conventions were applicable as the former Constitution could not be applied during the material time of the claim while the latter had not been ratified so as to be applicable in Kenya.

According to the appellant, there was no discrimination on racial grounds as no evidence or proof that the alleged white managers' basic pay was the actual basic pay earned. It contended that wage differentials alone could not amount to or prove discrimination since each employee including the respondent, was

paid according to qualifications and responsibility. Further, that the respondent had not tendered evidence of qualifications and job competencies to show that the wages earned by the white managers were not commensurate with their qualifications, responsibilities or job complexities. The appellant also averred that the respondent had never raised the issue of discrimination during his employment, at the disciplinary hearing or the labour office before doing so in his memorandum of claim. According to the appellant therefore the issue of discrimination was an afterthought and had no merit. The appellant denied claims by the respondent of earnings up to retirement age of 60 years as the respondent had been terminated lawfully under the provisions of both the law and the employment contract. The appellant termed as speculative and frivolous the monetary compensation claims made by the respondent as, according to the appellant, they had no legal or contractual basis at all. It also contended that some of the respondent's claims were time barred to the extent that some were claimed or dated as far back as 2004 and therefore violated the three year limitation period.

The claim fell for determination before **Rika, J**, in the now renamed Employment and Labour Relation Court, who, after hearing the respondent and four witnesses presented by the appellant, in a judgment dated 16th September 2014 found in favour of the respondent. The learned Judge declared the respondent's termination unfair and unlawful. The Judge also found the appellant guilty of racial discrimination against the respondent as he was paid unequal pay for equal work or work of equal value. The learned Judge ordered the respondent to pay the appellant 12 months' gross pay in compensation for unfair termination totaling Kshs. 3,489, 084/-; Kshs. 18,256,947/- in cumulative pay disparity on account of discrimination and Kshs. 559,148/- being the balance of annual leave pay. In total the respondent was awarded Kshs. 22,305,179/- as compensation. The award of Kshs. 18,256,947/-was arrived at by the judge by calculating the difference between the respondent's salary and that of Giles Prettejohn, the livestock manager, for the period 2004 to 2009.

Being dissatisfied with those findings, the appellant is now before this Court on appeal based on 8 grounds. The appellant faults the High Court for failing to find or hold that a substantial part of the claim for pay disparity and damages on account of discrimination was barred by limitation of time; for failing to find that there was no factual or legal basis for finding racial discrimination against the respondent; for failing to apply the provisions of **section 5 (4)(b)** of the Employment Act 2007; for failing to find that there was factual or legal basis for the respondent's termination; for failing to consider that the respondent by his conduct, wilfully neglected to perform his duties carefully and properly and was liable for summary dismissal under **section 44 (4)** of the Employment Act, 2007; for failing to find that the respondent was granted sufficient time to respond and defend himself and was accorded the right to be heard; lastly, that the quantum of damages awarded for the alleged discrimination and unfair termination was unjustifiably high.

The respondent answered by filing a cross appeal and raised grounds that were hard to follow and understand but which can be paraphrased as follows; the learned Judge erred in law and fact in failing to award costs and interest on the judgment in favour of the respondent; having determined that the applicable basic salary to the respondent is the same as for Giles PretteJohn failed to tabulate the leave and 12 months compensation award with the correct salary of Kshs. 503,258/-; having found that the respondent was entitled at law and proved that education, house rent, mileage, leave travelling, telephone, medical and utility allowances falling under contractual underpayments at Kshs. 16,353,589/- were due failed to award payment of such pecuniary loss; that the honourable court granted the respondent Kshs. 18,265,947/- for pecuniary disadvantage and loss suffered, due to breach of the right of equal work or work of equal value and inadvertently by error apparent on the face of the record instead used Kshs. 18, 256,947 in addition to the awarded amounts; that the honourable court having determined that the respondent pension is payable at 7.5% of the basic salary failed to order that the pension be paid; and that the learned Judge erred in law and fact by failing to consider that the accrued service of Kshs. 5,172,225/- was due and is payable to the respondent having been acknowledged by the appellant.

Following case management, parties agreed to canvass the appeal and the cross-appeal by way of written submissions.

In its written submissions, the appellant submitted that the respondent's claim was time barred by virtue

of **section 90** of the Employment Act, 2007 "*the Act*" which stipulates that no civil action or proceedings based or arising out of the Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained for in the case of continuing injury or damage within twelve months next after the cessation thereof. It submitted that the High Court failed to acknowledge that the respondent's claim comprised of a claim for damages on account of unlawful termination and a claim for damages on account of discrimination. According to the appellant, though the claim for unlawful termination was within time, the claim of damages for discrimination constituted a continuing injury or damage which time for purposes of limitation started to run on cessation of the continuing injury or damage. The respondent's termination occurred on 7th December, 2009 and taking that as the cessation date, then the claim for damages on account of discrimination ought to have been brought within 12 months after the cessation, that is to say, by 7th December 2010. However, respondent filed his claim on 27th October 2011. The appellant was thus of the view that the same was time barred.

The appellant further submitted that if the respondent based his claim of discrimination on the Constitution, 2010 then the claim was misplaced as the Constitution was not in force then. It contended that even if the Constitution was in force, it would not oust the application of section 90 of the Act to the respondent's claim. The appellant further contended that the respondent did not prove racial discrimination against it as the Judge relied on a schedule contained in the respondent's pleadings of black and white managers salaries yet according to the respondent, the said schedule was unreliable since it did not determine the true value of the different managerial positions by taking into account their job descriptions, the requisite skills, experience and academic qualifications. There was no evaluation of the different managerial positions to determine true and fair comparators for purposes of discrimination.The appellant was also of the view that since Kenya did not have a statutory provision governing general prohibition against employment discrimination in the context of a claim for equal pay for work of equal value save for **section 5** of the Act, guidance should therefore be sought from other jurisdictions where statutes and regulations are in place to regulate claims of such a nature. The appellant accordingly urged us to revert to **South Africa's Employment Equity Act** which provides that a difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin is unfair discrimination. The regulations made under the Act go ahead to provide the factors that would justify differentiation in terms and conditions of employees.

The appellant submitted that although the trial Judge attempted to conduct an evaluation of the respondent's work as a finance manager as compared with those of his white colleagues, there was no comprehensive evaluation to determine whether the work was of equal value.The appellant further faulted the learned Judge's basis of using Mr. Giles Prettejohn and Ms. Anne Olivercronna, the livestock and chimpanzee managers respectively, as the comparators to the respondent. According to the appellant, the only basis for comparison of the three managers was their rate of pay before September 2004. As such and according to the appellant, the Judge was not entitled to make a determination, as he did, that the respondent had established a case of discrimination against him. It relied on the South African Labour Court decision in **Mangena & Ors v Fila SA (Pty) Ltd & Others (2010) 31 ILJ 662 (LC) at 668-9**, where the court held that an applicant claiming equal pay for work of equal value must lay a proper factual foundation that would enable the court to make an assessment, as best as it can, on what value should be attributed to the work in question and the tasks associated with it by considering such other factors as skill, effort and responsibility.The appellant was of the view that the trial Judge failed to make an in-depth analysis of the comparators' jobs which resulted in an error.

The appellant further submitted that the trial Judge took into account irrelevant considerations to reach the conclusion that the respondent's and the comparators' works were of equal value to the appellant. The Judge should have considered the respondent and the comparators respective qualifications, abilities and competence to determine whether there was a justifiable basis for the differentiation in their terms and conditions of employment. The appellant cited the case of **Transport & General Workers Union & Anor v Bayete Security Holding (J2512/98) [1998] ZALC 147** where the South African Labour Court held that the mere fact that an employer pays one employee more than another does not in itself amount to

discrimination. It was further held discrimination takes place when two similarly circumstanced individuals are treated differently since pay differentials are justified by the fact that employees have different levels of responsibility, expertise, experience and skills among others.

The appellant also contended that even if discrimination was proved, which it denies, then the quantum of damages awarded was unreasonably high and without justification. In its view, although it was not necessary to show any intention to discriminate for discrimination to be established, motive or intention of the employer may be relevant to the remedy which the court may award and the judge failed to consider whether there was an intention or motive to discriminate. It relied on the case of **Michael Louw v Golden Arrow Bus Services (PTY) Ltd (C.37/97) [1999] ZAL C166** where **Landman J** held:

> ***"It has been held that it is not necessary to show any intention to discriminate.***
>
> ***….intention or motive of the employer may however be relevant".***

Further, it was submitted, the Judge ought to have awarded damages that society at large would consider fair in the circumstances and to undertake, as far as possible, a comparison of comparable cases to determine the damages awardable. Its view was that although awards should not be minimal so as not to trivialize or diminish respect for public policy, on the other hand just because it is impossible to assess the monetary value of injured feelings, awards should be restrained. To award sums which are generally felt to be excessive does almost as much harm to the policy and the result which it seeks to achieve as do nominal awards. See **Alexander v Home Office (1988) 2 All ER 118.**

According to the appellant, it would have been more appropriate for the trial court to award a composite sum as damages for the discrimination rather than a calculation of the back pay resulting from allegedly discriminated salaries. In support of this proposition, the appellant relied on the persuasive decision of **South African Airways (Pty) Ltd. v G.J.J.V.V & Anor [2014] 35 ICJ 2774 (LAC)** in which Coppin, J stated:

> ***"…making an award in the form of payment of a certain number of month's remuneration, which is clearly a vestige of compensation awards under the LRA holds the danger that high earning individuals may (unwittingly) be awarded more as compensation than those that earn less even though the injury suffered by the latter, as a result of unfair discrimination was greater…."***

The appellant also blamed the trial Judge for not taking into account the fact that comparable awards for discrimination by the Employment and Labour Relations Court and the High Court are far much less than the award of Kshs. 18,265,947/-. For instance, in the case of **VMK v Catholic University of Eastern African, [2013] eKLR**, the claimant was awarded Kshs. 5,000,000/- by the Industrial Court on exemplary damages for discrimination on the basis of her HIV status and gross violation of her human dignity. Similarly, in the case of **Koki Muia v. Samsung Electronics East Africa Limited [2015] eKLR**, the Industrial Court awarded Kshs. 7,152,000/- to the claimant for sexual harassment.

The appellant reiterated that the respondent's termination was procedural, fair and in accordance with **section 44 (c)** and for a valid and fair reason as provided under section **45 (2) (b)** of the Act. The appellant asserted that the respondent failed to set up the necessary structures in his department which were part of his job description which resulted in financial loss to the appellant but the trial Judge sought to absolve him from that failure by stating that he had reported in 2005 on the need for separation of accounting functions. The appellant found this holding strange as no evidence was presented to demonstrate that the position in the year 2005 obtained in the year 2009. The appellant was also of the view that the financial loss to it could be attributed to the respondent on account of his failure to perform his duties to the standard required of a financial manager. Further, that even if there was some basis for finding that there was unlawful termination, the circumstances of the case did not lend themselves to an award of the maximum award of damages on the respondent's 12 month's gross salary. In his determination, the Judge had concluded that the respondent's offer to pay back the misappropriated money was driven by the respondent desire to keep his job. This was faulted by the appellant since

according to it, this was not based on evidence presented or submissions made by the respondent.

As regards the termination procedure, the appellant submitted that the same met the principle of fair hearing since disciplinary proceedings were undertaken and the allegations against the respondent were explained to him and he was given an opportunity to respond which according to the appellant satisfied **section 41** of the Act on notification and hearing before termination. On the allegation that the respondent was not supplied with a copy of the audit report, the appellant submitted that it did not render the disciplinary process unfair more so because the respondent already knew and understood the nature of the allegations he was facing. That the respondent was given ample time to prepare and mount a defense especially since he initially sought and was granted postponement of the disciplinary hearing.

On the respondent's cross appeal, the appellant was of the view that the respondent could not fault the Judge's failure to award costs and interest since awarding costs and interest was an exercise in discretion. That being so, the appellant submitted that there was no basis laid before Court to warrant interference with the exercise of that discretion. The appellant relied on the case of **Devram Nanji Dattani v Haridas Kalidas Dawda [1949] EACA 35** for this proposition. Further, that the decision on costs and interest was guided by the provisions of **section 12 (4)** of the Employment and Labour Relations Court Act and **rule 28** of the Industrial Court (Procedure) Rules.

On the ground that the Judge failed to tabulate leave and 12 months compensation at Kshs. 503,258/- the appellant took the view that compensation as sought by the respondent would change his claim to one of backdated pay or underpayment. The appellant supported the Judge's refusal to award Kshs. 16,353,589/- to the respondent as contractual. In any event, and according to the appellant, any claim against it under the pension head was caught by Limitation of Actions Act as per the provisions of **section 90** of the Act.

In the cross-appeal the respondent sought to correct the errors it deemed were on the face of the record. The appellant however submitted that this Court's jurisdiction extends only to such errors as maybe contained in judgments or orders and did not extend to decisions made by the ELRC as per **rule 35 (1)** of this Court's rules. The appellant argued that rather than correct the award of Kshs.18,256,947/- in cumulative pay disparity and damages for discrimination, the award ought to be set aside. Further, that the claim for accrued service by the respondent was untenable in accordance with **section 35 (6)** of the Act as the respondent was a member of a pension scheme and also a member of NSSF where he remitted his monthly contributions.

On his part, the respondent in his written submissions, from the onset submitted that this appeal raises fundamental issues which would enrich our jurisprudence and that it would be prejudicial to dismiss the entire appeal based on the issue of limitation. The appellant urged that though **section 5** of the Act provided for general principles against discrimination at the work place, no regulations or guidelines exist to guide courts on such issue with the exception of such considerations as inherent requirement of a job, affirmative action and how aspects of job evaluation need to be factored in to dispel allegations of disproportionate pay differences leading to discrimination. The respondent reiterated his averments that during his employment he was subjected to unlawful discrimination based on his colour. He alleged that white managers holding similar responsibilities and doing work of similar value or equal value as the respondent were paid disproportionately higher salaries on no justifiable grounds at all. The difference in salary between him as the finance manager and the livestock manager, Mr. Giles Prettejohn, between 2004 and 2009 was Kshs. 18, 265,947/- which was 'discriminated salaries' as properly found by the trial Judge. The respondent submitted that he successfully countered the appellant's defenses in the High Court and the same were duly considered by the Judge and properly rejected. Further that racial discrimination was prohibited both under the provisions of **section 70** and **82** of the former Constitution, **Article 27** of the current Constitution and **section 5** of the Act.

The respondent also submitted that the appellant could not invoke or rely on **section 5 (4) (b)** of the Act since, according to him, for a party to invoke or rely on that provision, that party must first admit the existence of discrimination on its part and then seek refuge under the exception. The exception to the section provides as follows,

"(4) It is not discrimination to-

(a)

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job."

The respondent also argued that the foregoing exception was neither pleaded nor supported by the appellant's. The respondent also countered the appellant's assertions that the claim for discrimination was time barred by submitting that the limitation period is reset with each new pay check affected by the discriminatory act and so time must be taken to start to run on termination. Further that the law of limitation was not to be interpreted rigidly as the underpayment of salaries and benefit happened incrementally. Finally, the respondent added that appellant never raised the issue of one year limitation period for continuing injury in the trial court. In the same vein, the respondent maintained that the defence by the appellant that the discrimination claim formed part of the continuing injury is a new defence that was never pleaded in the trial court. He denied that discrimination was a continuing injury and that parties were not allowed to switch defenses at the appeal stage on the authority of **Mary Kitsao Ngowa & 36 Others v Krystalline Limited (2015) eKLR.**

The respondent submitted that the issue of pay disparity between the managers had even been acknowledged by the human resource manager who had stated in correspondence that they should be addressed. Further, since he was the one who had introduced the issue of comparators, it was the appellant's duty to dispute by way of evidence in the trial court if the comparators were not proper. He observed that the appellant refused to produce the muster roll and certified copies of salary statements for all the employees in the management cadre for the period 2004-2009 even when served with a court order to that effect. The respondent submitted that the Judge assessed the quantum of damages payable and stated that it was not the duty of the Judge to provide evidence of the scientific evaluation as that burden lay with the appellant in accordance with **section 5 (6)** of the Act. The respondent supported the Judge's finding that there was no factual and legal basis for discrimination especially since pay disparity between the white and black managers was never satisfactorily explained. The pay disparity as explained by the appellant that the white managers were consultants and had superior qualifications was not convincing in view of the fact that there was no demonstration of superior qualifications and skills before court and there was evidence on record that the consultants were in fact employees of the appellant. On the other side, the respondent as a black manager was paid a disproportionately lower salary yet he headed the financial department which carried other critical functions like human resource, accounting, donor accounting and ICT functions. According to the respondent, the responsibilities placed on him, his skills, qualification and experience weighed heavily in his favour that he be paid more or commensurate to the comparators.

According to the respondent, the burden of proof that termination was lawful lay with the appellant and that the same entailed proving first, that the reasons of termination were fair, and second, that the procedure for termination was fair as well and/or lawful. On reason for termination, the respondent reiterated that there was no proof that he was negligent in his duties; on procedure, he was categorical that the same was botched, unfair and unlawful. That failure to find negligence on his part had led the appellant to release his November salary which had initially been withheld by the appellant in a bid to recover some of the losses it had suffered. On the quantum of damages awarded, the respondent denied that the same were unjustifiably high as contended by the appellant.

In support of his cross appeal, the respondent submitted that there was an error on the face of the record. In his judgment, the Judge delivered himself thus;

> ***"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."*** **(**Emphasis added**)**

However, the final amount ordered by the Judge was Kshs.18,256,947/-. The respondent was of the view that this Court had jurisdiction to correct the error under **section 3 (2) (3)** and **3A** of the Appellate

Jurisdiction Act. Further, the respondent submitted that the trial Judge failed to award him pension based on the basic pay of the comparator, Mr. Giles Prettejohn, yet there was evidence that the respondent was entitled to pension at 7.5% of basic pay. The respondent also claimed Kshs. 5, 172, 255/- as service pay calculated at 18 days' salary for 25 years which he had completed in service on the basis that his terms and conditions stipulated so and that the Judge failed to award the same without any proper reasons. On costs and interest, the respondent submitted that the Judge should have considered the volumes of documents filed, perusal of the same, attendances and awarded him costs and interest. After all, costs follow the event.

From the record of appeal, the written and oral submissions, the authorities cited and the law, we are satisfied that this appeal can easily be determined on the following issues:

(i) Whether the claim for discrimination was time barred;

(ii) Whether the Judge erred in his finding that discrimination had been proved;

(iii) If (ii) is in the negative, whether the Judge correctly assessed the quantum of damages payable;

(iv) Whether the respondent's termination was unfair and unlawful and the consequences thereof;

(v) Whether the cross-appeal should be allowed.

This being a first appeal, it behooves this Court to re-evaluate, re-assess and reanalyze the evidence on record and then determine whether the conclusions reached by the learned trial Judge should hold. In the case of **Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2EA 212** this Court espoused that mandate or duty as follows:-

> *"**On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.**"*

The appellant has in this appeal advanced the argument that the respondent's claim for pay disparity and damages on account of discrimination was barred by limitation of time. The respondent has alleged that as a black manager he was paid a lower salary than his white manager counterparts solely on account of his race, hence racial discrimination. The respondent therefore claimed the pay disparity between him and the white managers and also damages for discrimination. The Judge in his determination awarded the respondent Kshs. 18, 265,947/- being the difference in salary between the respondent and the livestock manager, Mr. Giles Prettejohn, who the trial Judge used as the comparator for the years between 2004, when the appellant acquired the business, to 2009 when the respondent was terminated. The basis for the appellant's argument that this claim was time barred is **section 90** of the Act which provides as follows;

> *"**Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained of or in the case of continuing injury or damage within twelve months next after the cessation thereof**." (Emphasis added)*

The appellant's argument was that since the acts of discrimination complained of by the respondent were of a continuing nature, then any claim based on them should have been instituted within 12 months after their cessation pursuant to the aforesaid provision. Therefore and according to the appellant, since the respondent was terminated on 7th December, 2009 then that date was the cessation date and any claim for discrimination ought to have been instituted at least 12 months' thereafter, by December 2010. However, the respondent instituted the claim herein through his memorandum dated 18th October 2011, after a period of 22 months or thereabouts. The appellant relied on the authority of **Thuranira Karauri v Agnes**

Ncheche (1997) eKLR where the Court of Appeal held that the issue of limitation related to jurisdiction and whenever it arose then it had to be decided first.

The respondent on his part denied that the acts of discrimination against him were continuing injuries or damage so as to fall within the purview of **section 90** of the Act. He argued that this appeal raised fundamental issues of discrimination at the work place related to breach of the right of equal pay for equal work, or work of equal value which determination would enrich jurisprudence, which is lacking in this area of law and that it would be prejudicial to open and shut the entire appeal and cross appeal on the issue of limitation. In any event, the limitation pleaded by the appellant in the trial court was with regard to three years as opposed to one year limitation period. The defence of continuing injury was never raised.

So how did the learned trial Judge resolve this issue? The record shows that the Judge based his finding that the claim for discrimination was not time barred on the authority of **Industrial Cause No. 849 of 2011**, **Justus Atulo Ashioya v Akshar Team security Ltd (UR)** where that court held as follows,

> *"**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 filed on 11th August 2011, well within the period created under section 90 [of the Employment act 2007]."***

We have absolutely no quarrel with the above reasoning.

However, the Judge also considered that the discrimination which was based on the violation of the right of equal pay for equal work, or work of equal value happened incrementally and that the appellant had acknowledged the presence of historical disparities. In fact an independent international evaluator, Mr. David Cunming from Zimbabwe was appointed by Fauna and Flora International, to assess the performance of the respondent. His report confirmed historical disparities in the employees' salaries which needed to be addressed by the appellant. However, this never came to pass. Similarly, it would appear that the treatment of the respondent with regard to his pay cheque ran afoul of the appellant's advertised and stated objective "*to maintain a working environment for employees of Olpejeta that does not discriminate against anyone on any grounds including but not limited to continence, culture, language, black, pregnancy or height or weight."* It should also be appreciated further that way back in 2007, Fauna and Flora International's donor, the Arcus Foundation had asked to peruse the respondent's contract. At this point it was agreed between the parties what could be reviewed, to bridge the gap between the white and black managers. That the basis of the judges holding that the discrimination could not adequately be redressed by the application of the law of limitation to any part of the claim while upholding the temporal validity of other parts. That the historical injustices could not be corrected if the court interpreted the law of limitation rigidly since according to the Judge, employment law looks back and there are rights and obligations which accrue over time and must be enforced when the employee-employer relationship came to an end.

The respondent in his submission before us also pointed out that the defence by the appellant that the discrimination claim was a continuing injury that was barred by time limitation was a new defence that was never pleaded or raised in the trial court; and that parties are not allowed to switch defenses at the appeal stage. Indeed, the record shows that the defence that the discriminatory acts complained of were continuing injuries or damages so that any claim based on them should be instituted within 12 months of cessation was never raised in the trial court. There is no such defence raised in the appellant's response to the claim nor was such defence led in evidence or in submissions. Further, rule 14(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 allows a party, through pleadings to raise any point of law. Order 2 rule 4 requires in mandatory terms that any relevant statute of limitation must be specifically pleaded. The learned Judge, small wonder, in his determination never addressed that defence in particular. In the case of **Mary Kitsao Ngowa & 36 Others v Krystalline Limited** (supra), this Court has previously dealt with such as issue and pronounced itself thus;

"…we must also appreciate the fact that, this is not even an issue that was canvassed before the trial court. The issue regarding the interpretation, meaning and application of section 90 of the Employment Act was never placed or canvassed before the trial court for determination. The jurisdiction of the appellate court is to look into issues that were presented before the trial court. A court cannot be said to have erred on an issue that was never argued before it. This is what the appellants have sought to do in respect of this ground of appeal. Accordingly, the learned Judge cannot be faulted for not considering or appreciating the concept of continuing injury."

In that case, the Court went further to hold that it was not right for the appellant to change tact in the Court of Appeal as it was too late in the day. That parties in litigation were bound by their pleadings and were not allowed to switch goal posts of litigation as and when they want. That position obtains in the present appeal in our view. The appellant cannot be allowed to hang on a defence that it never raised and prosecuted in the High Court in this present appeal. Not only does this Court lack the benefit of the reasoning of the High Court but the new defense should be taken as an afterthought on the appellant's part and allowing it would be prejudicial to the respondent. The appellant's defence of limitation of time was only concerned with back salaries and benefits sought by the respondent stretching back to 2004. According to the appellant, claims arising outside the 3 year time limit set by section 90 of the Act should be rejected outright. Nowhere did the appellant raise the concept of continuing injury and hence 1 year limitation period. In any event this part of the claim was anchored on violation of the respondent's human rights and in particular the right not to be discriminated against. Ordinarily, such violations would not attract sanctions by way of limitation of time. It has also been stated by the Court of Appeal in **Peter M. Kariuki v Attorney General [2014] eKLR** that;

"……..the Constitution did not set a time limit within which applications for enforcement of fundamental rights should be brought. Nevertheless the court added that, like all other processes of the court, it is in public interest that such applications be brought promptly or within a reasonable time, otherwise they may be considered an abuse of the process of the court."

In the light of what we have stated above, we are satisfied that the respondent's claim could not have been sacrificed at the altar of the limitation of time.

Moving on, did the learned Judge err in holding that discrimination against the respondent was proved? The respondent has alleged that the appellant violated the concept of '*equal pay for equal work, or work of equal value'* due to racial discrimination. That while serving as a financial manager for the appellant he earned significantly lower salary compared to the white departmental head managers who all earned higher salaries. The respondent considered that the work he did to be of equal value as the work undertaken by other white departmental heads or managers which led him to the conclusion that the only reason for the pay disparity was racial discrimination. Now, although the allegations levelled against the appellant happened before the promulgation of the current Constitution, arbitrary discrimination was still prohibited during the material times by **section 82** of the former Constitution. Moreover, Kenya had also ratified a plethora of international instruments that prohibit racial discrimination among them the United Nations Convention on the Elimination of all forms of Racial Discrimination. Further, section 5 of the **Employment Act, 2007** provides *inter alia:*

"(1) (a) ….

(b) ….

(2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.

(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee –

(a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status or HIV status;

(b) In respect of recruitment, training, promotion, terms and conditions of employment, termination of employment and other matters arising out of employment.

(4) It is not discrimination to –

(a) take affirmative action measurers consistent with the promotion of equality or the elimination of discrimination in the workplace;

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job;

(c) employ a citizen in accordance with the national employment policy; or

(d) restrict access to limited categories of employment where it is necessary in the interest of State security.

(5) An employer shall pay his employees equal remuneration for work for equal value.

(6) An employer who contravenes the provision of the section commits an offence.

(7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.

(8) For the purposes of this section –

(a) "employee" includes an applicant for employment;

(b) "employer" includes an employment agency;

(c) an "employment policy or practice" includes any policy or practice relating to recruitment procedures, advertising and selection criteria, appointments and the appointment process, job classification and grading, remuneration, employment benefits and terms and conditions of employment, job assignments, the working environment and facilities, training and development, performance evaluation systems, promotion, transfer, demotion, termination of employment and disciplinary measures."

Further, fairness requires that people doing similar work should receive equal pay. The principle has however extended to an analogous situation requiring that work of equal value should also receive equal pay as is claimed in the present appeal. The principle of equal pay for equal work, or work of equal value was succinctly explained in by the South African Labour Court in **Louw v Golden Arrow Bus Services (Pty) Ltd[1999] ZALC 166** as follows**;**

'……it is not an unfair labour practice to pay different wages for equal work or for work of equal value. It is however an unfair labour practice to pay different wages for equal work or work of equal value if the reason or motive, being the cause for so doing, is direct or indirect discrimination on arbitrary grounds or the listed grounds e.g. race or ethnic origin.'

In claims of this nature, where the claimant invokes the principle of equal pay for equal work the claimant must establish that the unequal pay is caused by the employer discriminating on unlawful grounds. It was observed in **Louw v Golden Arrow Bus Services (Pty) Ltd** (supra) that discrimination on a particular 'ground' means that the ground is the reason for the unequal treatment complained of by the claimant. As discussed by the writer, **Adolph A. Landman** in his article **The Anatomy of Disputes about Equal Pay for Equal Work**,

*"**The mere existence of disparate treatment of people of, for example, different races is not discrimination on the ground of race, unless the difference in race is the reason for the disparate***

treatment. Put differently, it must be shown that the difference in salaries is because of sex, gender, race, and so on."

Posed differently and according to the above writer, would the respondent have received the same treatment from the appellant but for his or her sex, race, etc? The gist of the respondent's claim was that the pay disparity between him and the white managers was due to arbitrary racial discrimination which was still prohibited during the material times by virtue of **section 82** of the former Constitution. The respondent had to establish that the unequal pay was caused by the employer discriminating on impermissible grounds. In the present case, through evidence from the respondent, it became apparent that prior to the appellant acquiring the business in 2004, the respondent and two white managers, Mr. Giles Prettejohn, the livestock manager and Ms. Anne Olivercronna, the chimpanzee manager (used as the comparators by the respondent), earned almost similar salary or what can be considered as salary in the same bracket. The two white managers earned Kshs. 120,000/- and Kshs. 115,000/- respectively while the respondent earned a monthly salary of Kshs. 115,000/-. There had been assurance from the appellant that the employees already in its employ, including the respondent, would continue serving under the same terms and conditions. However, upon the appellant taking over, the salaries of the respondent and the two white managers were reviewed upwards, but there was a significant difference with the two white managers now earning Kshs. 464,000/- in the case of Mr. Prettejohn and Kshs. 370,000/- for Ms. Olivercronna. The respondent however earned Kshs. 148,000/- effective 1st November 2004. Though there was salary increment in favour of the respondent over time, the general position obtaining at all times was that the white managers earned significant higher salaries than black managers after the appellant took over. For instance, as at 30th September 2005, despite being in different departments, the livestock manager, the wildlife manager, the logistics manager and the security manager who were all white earned a salary of Kshs. 464,000/-. The said salary for the white managers was also taken as the entry level salary for all incoming white managers despite obviously possessing different qualifications and or experiences. During the same period the respondent and the human resource manager who were all black earned salary of Kshs. 176,000/- and Kshs. 185,000/- respectively. It can reasonably be implied that the appellant for some reason took the white managers work as of equal value but took the black managers work as being of lesser value despite them also being in the management cadre. This is especially the case since the respondent and the two white managers were paid more or less the same salary until the appellant took over in 2004 when Mr. Prettejohn salary was enhanced to Kshs. 464,000/- which then became the new salary for incoming white departmental managers.

In his article, **Adolph A Landman** (supra), points out as follows;

"In equal value claims different skills, or at least a different mix of job attributes, are in issue. The employer may therefore legitimately argue that in equal value claims he should be allowed to explain and justify a wage differential by, for example, showing that persons possessing one set of skills or mix of job attributes are commanding higher wage rates in the local market."

In the instant appeal, the appellant indeed did endeavor to explain the pay disparity between the respondent and the two white managers used as comparators by alleging that the two were engaged as consultants before it took over the business and that upon taking over the business it employed them as such. The trial Judge considered and analyzed this explanation at length, probably because it had the potential to dislodge the respondent's claim that the pay disparity between him and the white managers was unjustifiable and racially motivated. Ultimately, the trial Judge rejected that explanation since it ran contrary to the evidence that was tendered in court. The Judge rightly found that for a particular engagement to be classified as a consultancy, it had to carry an element of limited time or duration and not be open ended; that consultants are normally paid a fee which was subject to withholding tax as opposed to a salary and did not receive company benefits.

Further, that consultants are not normally given tools of work or trade when contracted. The white managers' engagement did not meet the above qualifications to fit the nature of consultancies as opposed to that of regular employment.

The appellant pleaded that Mr. Prettejohn had been serving as a consultant for 5 other ranches before

becoming its employee. That upon being employed by the appellant, his earnings were improved to Kshs. 464,000/- '*to cover for the loss of earnings he would incur as a result of not serving the other 5 ranches in Laikipia*.' If that explanation is factual, how then can the appellant justify taking that salary as the incoming salary for all other white departmental managers? It is apparent that Mr. Prettejohn was paid a salary as opposed to a fee and was entitled to paid annual leave. He also received motor vehicle allowance, was provided with furnished accommodation, motor vehicle, bonuses, loans and mileage allowance. That, in our judgment, and as rightly observed by the trial Judge, cannot be said to have been engagement as a consultant. The same benefits were also enjoyed by Ms. Olivercronna. A report by the appellant's own tax advisers, Messrs. **KPMG Kenya**, concluded that those benefits implied an employee-employer relationship as opposed to a contractual relationship. As rightly found by the trial Judge, the salary disparity between the white managers and the respondent could not be objectively justified on the ground that the former were consultants.

The appellant has in the present appeal faulted the trial Judge for failing to acknowledge that the differential in salary was justifiable in view of the white managers' superior qualifications. To prove that averment it would seem obvious or normal that the appellant would have tendered evidence to that effect showing that indeed the white managers held superior academic qualifications and experiences in accordance with **section 107** of the Evidence Act. However, it should be noted that the respondent actually moved the court to compel the appellant to avail such evidence. Despite the trial court's order that the appellant be furnished with the evidence, the appellant failed to comply arguing that it was under no obligation to produce such evidence and that in any event such move would prejudice its case.

In his oral testimony, **Mr. Richard Vigne**, the appellant's Chief Executive Officer, stated that Mr. Prettejohn had a degree in agriculture plus 35 years' experience in livestock breeding while Ms. Olivercronna had a degree in zoology and experience dealing with chimps. That the respondent however did not have qualifications as an accountant and or he did not know what academic and professional certificates the respondent held. On analysis of the evidence however, the Judge found that Mr. Prettejojn only held a higher diploma in agriculture while the respondent had graduated at A-level and held a CPA-1. In essence therefore, Mr. Prettejohn and the respondent almost held similar academic qualifications. On further analysis, it became apparent that the respondent would be considered to have had more practical experience since he had worked for the appellant's predecessor for 20 plus years from 1984 when he was employed as an accounts clerk and had risen through the ranks to become a finance manager. As the Judge rightly stated, all terms of service and benefits accrued by the employees prior to the appellant taking over were adopted by it.

On the other hand, Mr. Prettejohn had worked as a consultant prior to him joining the appellant for only a period of 6 years. The appellant therefore failed to discharge the burden of proof placed on him by the provisions of **section 107** and **108** of the Evidence Act. It cannot be reasonably said that the appellant proved that comparators or the white managers in general held superior qualifications always since it had been shown especially that at some point, Mr. Prettejohn's salary became the entry point salary for white managers regardless of qualifications or experiences.

As part of its defense, the appellant also sought to rely on or invoke the provisions of **section 5 (4) (b)** of the Act to advance the defense or the explanation for the pay disparity as the inherent requirement of a job. The appellant has also through its memorandum of appeal faulted the learned trial Judge for failing to apply the provisions of **section 5 (4) (b)** of the Act which provides that it is not discrimination to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job. However, that defence, shield or justification was never satisfactorily pursued both in the trial court and even before this Court, in our view. To say there is no discrimination may also mean only that there is justifiable differential treatment, which in law is not discrimination. When the appellant said there was no discrimination, could it have meant in that sense? No such evidence was led or submissions made by the appellant to satisfactorily support the contention that the white managers received higher pays due to the innate requirements of their jobs. In fact the appellant's defence was simply, that there was no discrimination at all at their work place.

It is apparent from the facts of this claim that the respondent and the two comparators all held different

jobs as the livestock, chimpanzee and finance managers. The respondent's claim is based on the fact that he held work of equal value and ought to therefore have been paid as the two.

As was stated in **Capper Pass Ltd v Lawton [1977] Q.B. 852**,

> ***"Once it is determined that work is of a broadly similar nature it shall be regarded as like work unless the differences are plainly of a level which the industrial tribunal in its experience would expect to find reflected in the terms and conditions of employment."***

Was this claim or allegation supported by evidence? The trial Judge in his determination expressed himself as follows;

> ***"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."***

We find no reason why this Court should interfere with those findings of fact by the trial judge as they are based on evidence. This Court held in **Ephantus Mwangi v Duncan Mwangi Wambugu [1984] eKLR** as follows;

> ***"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses."***

Further, that,

> ***"It is uncertain whether, their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate court, they should be ever mindful of the advantages enjoyed of trial judge who saw and heard the witnesses and were in an incomparably better position, than the Court of Appeal, to assess the significance of what was said, how it was said, and, equally important, what was not said."***

Moreover, the record shows that the pay disparity between the white managers and black managers, and especially the respondent, was a concern acknowledged by the senior management. An email from the Chief Executive Officer dated 12th April 2007 for instance, stated that the pay disparity between the respondent and the rest of the management team was a concern that needed to be addressed. Another one dated 18th May 2007 by the CEO raised concern that he felt the respondent was 'somewhat' being underpaid despite good performance.

In claims of equal pay for equal work or work of substantially equal value, there is always need on the part of the claimant to establish comparators for purposes of showing unequal pay in comparison to the comparators. The appellant has faulted the respondent for not laying basis for identifying the two comparators in the instant appeal.The appellant was also of the view that the trial Judge failed to make an in-depth analysis of the comparators' jobs which resulted in an error. The respondent identified Mr. Prettejohn and Ms. Olivercronna as his comparators. In the article titled, **The Anatomy of Disputes about Equal Pay for Equal Work** (supra) the author analyses some of the rules or guidelines that would be applicable in settling for a suitable comparator for a claimant which include that;

> (a) the comparator must actually exist - a comparison with a hypothetical employee is not permissible;
>
> (b) normally the comparator would be a person doing the same job or a job of equal value at the same time although the European Court of Justice has permitted a comparison with a former employee;
>
> (c) usually the comparator must be employed by the same employer, although some legal systems take into account a comparator at an associated employer. There is some support for the view that the comparator need only be in the same service. A complainant has also been allowed to use a comparator in another organization that is funded from the same public funds.

The above guidelines appear well-founded, applicable and reasonable. We do not think they can be said to be conclusive or exhaustive. In our view, the comparators chosen were not far-fetched and were sufficient for the purpose. They were all in the managerial cadre as the respondent and in the same organisation. The appellant has not demonstrated that the comparators used were not the proper ones or were remote in the circumstances of this case. It's also not the business of court in any event to fill in the gaps left by the appellant in the prosecution of its defence. The appellant cannot therefore fault the learned trial Judge as having failed to conduct an in-depth analysis of the comparators jobs.

Taken as a whole the evidence adduced in this case leads to a reasonable conclusion that there was discrimination against the respondent based on race. **Article 1** of Convention No. 111 – **Convention Concerning Discrimination in Respect of Employment and Occupation**, 1958 defines discrimination thus;

> *"**For the purpose of this Convention the term discrimination includes;***
>
> ***Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation**;" [Emphasis added]*

The learned trial Judge came to the conclusion that,

> *"**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 TopManagers 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 OlPejeta Ranching."***

The appellant seems to have realized there was actual pay disparity based on race, and adjusted the

salaries of the black managers, but only after the termination of the respondent's employment. In the respondent's bundle of documents filed on 29th January, 2013, the adjusted salaries of the black manager 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 appellant undertook some positive measurers 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. The respondent, 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 appellant in redressing the racial pay gap. He left before reasonable adjustments were made.

Having found that there was evidence of discrimination, did the Judge correctly and properly assess the quantum of damages payable to the respondent as compensation for discrimination? The respondent was awarded as damages for discrimination Kshs. 18, 265,947/-, being the difference between the respondent's salary and that of Mr. Giles Prettejohn, the livestock manager for the period between 2004 and 2009. The appellant claims that the quantum of damages awarded were unreasonably high and without justification. According to the appellant, the Judge was required to award damages that society at large would consider fair in the circumstances. The parameters of which the Judge ought to have considered in awarding the damages can be discerned from decided cases. The appellant relied on the case of **Alexander v Home Office (1988) 2 All ER 118** where the English Court of Appeal held that damages for injury to feelings resulting from unlawful racial discrimination were at large and that the award of such damages were to be on one hand more than minimal but on the other ought to be restrained. That even where exemplary or punitive damages were not sought, nevertheless compensatory damages should include an element of aggravated damages, for example, where the defendant had behaved in a high handed, malicious, insulting or oppressive manner in its discriminatory acts against the claimant. Further, that where the claimant knew of the discrimination and he had been held up to hatred, ridicule and contempt, then the injury to his feelings would be an important element in the damages.

In **South African Airways (PYT) Ltd v G.J.J.V.V & Anor (2014) 35 ILJ 2774** (LAC) the South Africa Labour Appeals Court substituted an award of 24 months' remuneration as compensation for discrimination with a composite sum of damages. In that case, the court took into consideration, amongst the other peculiar circumstances of the case such as inflation, which we feel would be a factor to consider in this appeal as well, and stated that making of an award in the form of payment of a certain number of months remuneration holds the danger that high earning individuals may unwittingly be awarded more as compensation that those that earn less, even though the injury suffered by the latter, as a result of unfair discrimination was greater. We entirely agree with and endorse the aforesaid reasoning of the court.

The appellant has again placed reliance on the case of **VMK v Catholic University of Eastern Africa (2013) eKLR** where the claimant was awarded Kshs. 5,000,000/- by the Industrial Court as exemplary damages for her discrimination on the basis of her HIV status in violation of the right to human dignity. In **Koki Muia v Samsung Electronics East Africa Ltd [2015] eKLR**, the Employment & Labour Relations Court awarded the claimant 12 months' compensation, being Kshs. 7, 152,000/- for sexual and racial discrimination. In South Africa, claims based on equal pay for equal or like work principle are governed by the Equal Employment Act, 1998 " **EEA**" which provides the remedy or reliefs that would be available to a claimant where the principle has been violated. The Labour Court may make any appropriate order. Appropriate orders in the context of a pay claim include an interdict; an order directing the performance of an act which, when done, will remedy a wrong and give effect to the primary objects of the EEA; an award of compensation; an award of damages; and an order for compliance with the EEA. Considering the historical context of that country, it is understandable why the South African legislature passed that particular Act. The preamble of the Act in fact recognizes the effect of apartheid and the existence of other discriminatory laws and practices that led to disparities in employment between

different categories of people within the national labour market.

In our jurisdiction however, the question of assessment of damages will have to be guided by amongst others, common law and decided cases. Assessment of quantum of damages is a matter for the discretion of the trial judge, which must be exercised judicially and with regard to the general conditions prevailing in the country, such as inflation, and also prior relevant decisions. An appellate court should only interfere with such an award where the trial Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or where the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage. (See **Peter M. Kariuki v Attorney General [2014] eKLR)**. In our view, the trial Judge adopted a wrong approach in the assessment of damages and ended up awarding an inordinately high award as pay disparity or damages for racial discrimination. The trial Judge awarded Kshs. 18,256,947/- which was the difference in salary between the respondent and Mr. Giles Prettejohn for the period under consideration. As seen in the South African case, there is a real danger in awarding overly high damages through such calculation. High earning individuals may unwittingly be awarded more compensation than those that earn less, yet the effect of discrimination is the same. These damages, ought therefore to be at large. A composite or global figure of damages is appropriate to award for discrimination as opposed to calculation on the back pay adopted by the learned Judge. Taken to its logical conclusion, the calculation adopted by the Judge easily turned the claim to one of underpayment, which was not the case. The learned Judge also, for no apparent reason, failed to be guided by the local authorities which favoured global approach. We are thus justified in interfering with this award on that account. We are satisfied that a global figure of Kshs. 7,500,000/- will suffice and do justice to the case.

The issue whether the respondent was lawfully and fairly terminated has been raised in this appeal. The appellant has impugned the judgment of the trial court by its submission that there was no factual or legal basis for its finding that the respondent had been unlawfully terminated. The respondent on the other hand has argued that there was no fair or valid reason for his termination in accordance with **section 43** and **45** of the Act.

Section 43(1) of the Act states as follows:

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

Under section 45(2) an unfair termination occurs when an employer fails to prove –

> ***"(a) that the reason for the termination is valid;***
>
> ***(b) that the reason for the termination is fair reason -***
>
> ***(i) related to the employee's conduct, capacity or compatibility; or***
>
> ***(ii) based on the operational requirements of the employer;***
>
> ***and***
>
> ***(c) that the employment was terminated in accordance with fair procedure."***

The reason given by the appellant for the respondent's termination was that it had lost a substantial amount of money, approximately Kshs. 9,560,000/- through employees in the department under his watch as a finance manager. The appellant's letter of termination stated that he had been terminated in accordance with **section 44 (4) (c)** and **(g)** of the Act. By invoking the provisions, the implication was that the respondent had been negligent in the conduct of his duties and or he had committed a crime or there was reasonable suspicion that he had committed a crime against the employer. It was the trial court's duty to evaluate and analyse the evidence in this regard to establish whether it supports the

appellant's position. The respondent's employment was terminated after the appellant's chief financial officer alleged to have found some unexplainable entries in its financial records a matter that fell directly under the respondent's docket. However, it should be appreciated that two employees, Charles Kimathi and Peter Thika admitted to the fraud. As a result, a complaint was lodged against them by the appellant at Nanyuki Police station under occurrence book number OB42/29/2010. They were eventually fired from their employment by the appellant. The respondent was not found culpable at all by the two audit firms called in by the appellant to investigate. It is instructive that all these assertions have not been controverted by the appellant. In any event and as correctly observed by the respondent, once the people who were allegedly involved in the fraudulent activities were dismissed, there was no need to visit the collective guilt to the respondent. Otherwise even the Chief Executive Officer of the appellant, **Richard Vigne,** ought to have suffered the same consequence as he countersigned and approved all the reconciliation statements.

After the respondent's termination, the appellant carried out an audit, through Messrs. **UHY Limited Kenya** which resulted in a report dated 20th November 2009.

The report confirmed that the appellant had indeed lost approximately Kshs. 10,000,000/- for the year 2008-09 in review. That report did not, as already stated, apportion any blame or wrong doing on the respondent in the loss but it did recommend more through audit. The respondent thereafter carried out another audit through Messrs. **Price Water Coopers 'PWC'** which gave its report dated 20th July 2010. Their report also found no substantive evidence to implicate the respondent for having made or entered any suspicious entries in the appellant's financial records. 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. In essence, both reports found the respondent was not fraudulent or part of any fraud/scheme that led to the loss. The reports however pointed to weak internal supervisory controls within the accounts office. It is instructive to note that the respondent had over the years complained regarding weak supervisory controls due to understaffing and could not operate optimally followed by inadequate segregation of duties. He had also pleaded for introduction of modern accounting systems to no avail. All these factors were given due consideration by the learned trial Judge who expressed himself thus;

> ***"160. The Claimant cannot have been wilfully 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."***

Before the making of its report, PWC consulted with Messrs. **KPMG** (who were the appellant's internal auditor's) and they observed that the appellant may have been expecting too much of the respondent as he was expected to be in-charge of *inter alia* it's financial strategy, budgeting, financial reporting whilst simultaneously fulfilling the role of chief accountant. We find no reason to fault the above findings by the learned Judge in the circumstances of this case. This Court as a first appellate court has the obligation to pay homage to the findings of the trial court on matters of facts if they are not inconsistent with the evidence on record as in this case.

Even assuming for once that the appellant had a valid and fair reason for terminating the respondent's services, we must go further and interrogate whether the right procedure was followed to determine whether the termination was fair and in accordance with the Act. The termination can be held to be unfair if it is proved that the termination procedure was unfair. In the case of **Kenfreight (E.A.) Limited v Benson K.Nguti [2016] eKLR,** the Court of Appeal held:

> *"**Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken.***
>
> ***Looking at the pleadings, the correspondence between the parties and the evidence on record, no reason at all was given to the respondent why his services were terminated. He was not informed of his transgressions. Neither was he given an opportunity to explain himself**."*

In the instant appeal, the respondent has claimed that he was not issued with specific charges to enable him to sufficiently answer the same; that he was not granted a fair hearing to defend himself; that his appeal was rejected without a hearing; that he was denied crucial documents which were necessary for his defence and that on whole the termination procedure adopted was unfair.

The respondent was sent on compulsory leave vide a letter dated 7th November 2009. He was informed that the reason for the leave was to pave way for more in-depth or through audit into the appellant's financial department. By another letter dated 27th November 2009 but which the respondent claims to have received on 1st December 2009, the respondent was summoned to a disciplinary hearing slated for 2nd December 2009. The respondent requested for the audit report to enable him prepare for his defence and for a postponement of the hearing. The appellant had in the meantime attached or failed to disburse the respondent's salary for the month of November 2009 on what it termed as '*company loss recovery*'. The respondent attended the hearing on 7th December 2009 accompanied by a colleague under protest as he had not been furnished with a copy of the audit report. Following the hearing, the appellant wrote to the respondent on 7th December 2009 informing him that his services had been terminated due to negligence on his part which led to fraudulent activities in the finance department under his watch. In the same termination letter, the respondent was informed that his November salary and other accrued dues would be released to him after his appeal against termination of his services had been determined. His appeal was however subsequently rejected or dismissed without him have been heard. Can the termination procedure in these circumstances be held to having been fair and in accordance with the principles of fair hearing? It was observed in **Judicial Service Commission v Mbalu Mutava & Another [2015] eKLR** that;

> *"**The right to fair hearing under the common law is a general right, albeit, a universal one. It refers to the three features of natural justice identified by Lord Hodson in Ridge v Baldwin (supra). Although it is applicable to administrative decisions, it is apparently limited in scope in contrast to right to fair administrative action under article 47(1) as the latter encompasses several duties – duty to act expeditiously, duty to act fairly, duty to act lawfully, duty to act reasonably and, in the special case mentioned in article 47(2), duty to give written reasons for the administrative action. The duty to act lawfully and duty to act reasonably refers to the substantive justice of the decision whereas the duty to act expeditiously, efficiently and by fair procedure refers, to procedural justice."***

The respondent before the re-scheduled disciplinary 'hearing' requested the appellant to furnish him with a copy of the audit report so as to sufficiently prepare for his defence as is envisaged by the principles of fair hearing. Fairness in the circumstances would inform that the respondent be supplied with the allegations against him in sufficient detail to adequately prepare for a defence. The appellant's CEO testified that he attempted to furnish the respondent with the same on the hearing date but the respondent rejected it. Obviously then, the audit report would have made no impact as there was no time for the respondent to amply prepare. It was merely tendered to the respondent as a technical formality. There was no reason given as to why the respondent could not have been supplied with a copy much earlier and in good time. As also rightly found by the learned trial Judge, no evidence was placed before court to show that the respondent had been issued with a charge (s) of the specific allegations that he was required to answer during the hearing. Going in for the hearing, it is discernable from the record that the respondent

only knew in general terms, the allegations he was to face and counter. That coupled with the fact that he had no knowledge of the audit findings, he had no fair chance to advance his defence. In the circumstances, therefore it cannot be said that the termination process was fair.

Was the award of Kshs. 3,489,084/- representing the respondent's 12 months gross salary as compensation for unfair termination justifiable? Remedies for wrongful dismissal and unfair termination are provided for in section 49 of the Act. They include and which the learned Judge invoked, payment equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employees at the time of dismissal. In deciding whether to adopt some of the remedies, the court has to take into account a raft of considerations such as the wishes of the employee, circumstances in which the termination took place and the extent of the employee's contribution, practicability of reinstatement, employee's length of service, opportunity available to the employee, severance payable, right to press other claims or unpaid wages, expenses reasonably incurred by the employees as a consequence of termination, conduct of the employee which to any extent caused or contributed to the termination, failure by the employee to reasonably mitigate the losses and any other compensation in respect of termination of employment paid by the employer and received by the employee.

The compensation awarded to the respondent under this head was the maximum awardable, that is to say, 12 months' pay. The trial judge did not at all attempt to justify or explain why the respondent was entitled to the maximum award. Yes, the trial Judge may have been exercising discretion in making the award. However, such exercise should not be capricious or whimsical. It should be exercised on some sound judicial principles. We would have expected the Judge to exercise such discretion based on the aforesaid parameters. In the absence of any reasons justifying the maximum award, we are inclined to believe that the trial Judge in considering the award took into account irrelevant considerations and or failed to take into account relevant considerations, which act then invites our intervention. Given that the respondent has received compensation for racial discrimination in terms of salary at his work station, we think that an award of 6 months gross pay amounting to Kshs. 1,744,542 would be appropriate.

The determination of this appeal would be incomplete without considering the fate of the cross appeal. The respondent's cross appeal sought to partially vary the judgement of the trial court and was therefore not in respect of the whole judgment. The respondent *inter alia* faulted the learned Judge for failing to award him costs and interest. The respondent argued that not only had decided cases held that costs follow the event but that he had incurred expenses in the prosecution of this claim that ought to have been catered for and interest awarded. The appellant reiterated that costs and interest are awarded at the discretion of court and the trial court had exercised that discretion judicially.

It has been held that **section 12(4)** of the Employment & Labour Relations Court Act gives the trial court discretionary powers to award costs as it considers just. In addition, that costs in this kind of claims do not automatically follow the event unlike in other civil claims. (See **Alfred Mutuku Muindi v Rift Valley Railways (Limited) [2015] eKLR**). In his determination, the trial Judge held that there will be no order as to costs and interest. The trial Judge did not give reasons that would enable this Court to pass judgment whether the Judge exercised the discretion judicially or not. In our considered view, there is nothing that has been brought to our attention to suggest that in declining to award the respondent costs and interest, the trial court exercised its discretion injudiciously (See **Omega Enterprises Kenya Ltd v Eldoret Sirikwa Hotel Ltd & Ors, CA NO. 235 of 2001**) and **Peter M. Kariuki v Attorney General** (supra).

In view of the fact that the quantum of damages in compensation of the racial discrimination has now been pegged on a composite figure, we think that the other grounds in the cross appeal with regard to tabulation of the leave days and 12 months compensation based on Giles PretteJohn's current salary and the apparent error on the face of the record with regard to the use of Kshs. 18,560,947/- as opposed to or Kshs. 18,650,947 is clearly untenable.

With regard to pension and accrued service, they are certainly not available to the respondent for the reasons advanced by the learned Judge in the judgment. The respondent was in management and a member of the pension's scheme where the appellant contributed 7.5% of his basic salary.

In conclusion, the appeal partially succeeds. We set aside the award of Kshs. 18,256,947 in cumulative pay disparity and damages for discrimination as well as Kshs.3,489,084/- and substitute it with an award of Kshs. 7,500,000/- and Kshs. 1,744,542/- respectively. The cross appeal is dismissed with costs.

Each party to bear its own costs in this appeal.

Dated and delivered at Nairobi this 22nd day of September, 2017.

P. N. WAKI

…….

JUDGE OF APPEAL

ASIKE-MAKHANDIA

……..…

JUDGE OF APPEAL

K. M'INOTI

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR