



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Mainye & 2 others v Mega Pack (K) Limited (Cause 23 of 2020)  
[2023] KEELRC 1098 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1098 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 23 OF 2020  
DN NDERITU, J  
MAY 4, 2023**

**BETWEEN**

**BERNARD ANJILI NUSI MAINYE ..... 1<sup>ST</sup> CLAIMANT**

**DAVID NGANGA MUCHUMI ..... 2<sup>ND</sup> CLAIMANT**

**EVANS WEKESA NYONGESA ..... 3<sup>RD</sup> CLAIMANT**

**AND**

**MEGA PACK (K) LIMITED ..... RESPONDENT**

**JUDGMENT**

**I. Introduction**

1. In a Statement of claim dated 9<sup>th</sup> July, 2020 and filed in court on 15<sup>th</sup> July, 2020 through Mom & Co Advocates the Claimants pray for: -
  - a. A declaration that the Claimant's termination of employment by the Respondent was unlawful, unprocedural and unfair thus illegal.
  - b. A declaration that the Claimant's arrest, detention and arraignment in court was malicious, actuated by malice and false, motivated by spite, ill will, and lack of reasonable and probable cause.
  - c. The Claimant be granted an award of Kshs.3,150,655.30/= as prayed for in paragraph 15 above as compensation for unconstitutional, unprocedural, unfair termination and/or dismissal from work.
  - d. General/Aggravated/Exemplary Damages for unfair dismissal, defamation of character and injury to reputation, abuse of legal process, malicious prosecution and/or making false police reports.



- e. Costs of the suit and Interest at court rates.
  - f. Any such further or other relief as may to this Honourable Court appear fit and just to grant.
2. Specifically, the 1<sup>st</sup> Claimant (hereinafter the Claimant) pleaded the following particulars of his claim –
1. 3 months’ pay in lieu of notice  
Gross pay x 1 month 62,994.70 x 3.....Kshs.188,984/=
  2. Compensation for unfair termination  
Gross pay x 12 months Kshs.62,994.70/= x 12.....Kshs.755,936/=
  3. Leave pay/due  
21 days x years worked x gross pay divide by 30 21 x 6 x62,994.70/= divide by 26.....Kshs.305,282/=
  4. Severance  
15 days x years worked x gross pay divide by 30 15 x 6 x 62,994.70 divide by 30 .....Kshs.188,984/=
  5. Salary for 1 month of November, 2019.....Kshs..62,994.70/=
  6. Service pay  
Gross salary x years worked 62,994.70 x 6.....Kshs.188,984/=
  7. Total Claim .....Kshs.1,880,148.70
3. Together with the Statement of claim was filed a verifying affidavit, statements by the Claimants, and bundles of documents in support of the claim.
4. On 5<sup>th</sup> August, 2020 the Respondent entered appearance through Wachira Wanjiru & Co Advocates and filed a statement in response to the claim on 17<sup>th</sup> August, 2020 and bundles of documents praying that the Claimants’ cause be dismissed with costs for want of merits.
5. On 16<sup>th</sup> November, 2020 this cause was referred to mediation and subsequently a partial settlement was filed in court on 20<sup>th</sup> January, 2021 wherein the parties only agreed on unconditional issuance of a certificate service to the Claimants by the Respondent. The other parts of the claim were returned to court for trial. The agreement for the partial settlement on mediation was filed and received in court on 20<sup>th</sup> January, 2021.
6. Vide a Notice of withdrawal dated 30<sup>th</sup> October, 2020 but filed in court on 20<sup>th</sup> May, 2021 the 2<sup>nd</sup> and 3<sup>rd</sup> Claimants withdrew their respective claims against the Respondent in entirety. This left the 1<sup>st</sup> Claimant(the Claimant) to proceed with the cause alone in regard to his claim as particularized above.
7. This cause came up in court for hearing of the Claimant’s cause on 29<sup>th</sup> March, 2022 when the Claimant (CW1) testified and on 12<sup>th</sup> July, 2022 when Benard Sambaya (CW2) testified and the Claimant closed his case. The defence was heard on the same day when Tom Welikhe (RW1) testified and the Respondent’s case was closed.
8. Counsel for the parties addressed and summed up their respective client’s case by way of written submissions. Counsel for the Claimant filed his written submissions on 22<sup>nd</sup> September, 2022 while Counsel for the Respondent filed on 30<sup>th</sup> September, 2022.



## II. The Claimant's Case

9. The Claimant's case is expressed in the Statement of claim, the oral and documentary evidence of the Claimant (CW1) and his witness CW2, and the written submissions by his Counsel, Mr. Makori, and the same is summed up as hereunder.
10. In his Statement of claim and his oral and documentary evidence, the Claimant pleaded and testified that he was engaged by the Respondent as head of product development and origination on 18<sup>th</sup> March, 2019 based at Nakuru wherein the Respondent manufactures packaging materials.
11. He states that he was wrongfully, unfairly, and unlawfully dismissed on 25<sup>th</sup> November, 2019 after serving for about eight (8) months. As at the time of his dismissal the Claimant was earning a monthly basic salary of Kshs.53,545.50 plus house allowance of Kshs.9,449.20, making a gross monthly salary of Kshs.62,994.70.
12. Prior to the engagement of 18<sup>th</sup> March, 2019, the Claimant had worked for the Respondent for a period of two years and eight months between 2011 and 2013. This re-engagement shows that the parties herein were in a reasonably good employment relationship.
13. On 28<sup>th</sup> October, 2019 all the Claimants were arrested and detained at Kaptembwa Police Station, Nakuru County, and subsequently arraigned and charged with several counts of criminal conduct in Nakuru CMCC Criminal Case No. 3509 of 2019(the criminal case). The charges were later on dropped following an agreement between the Respondent and a company in the name of Landmark Packaging.
14. It was alleged in the criminal case that goods stolen from the premises of the Respondent were found in the premises of Landmark Packaging but the later agreed to return the goods after an agreement was reached wherein the Respondent was to withdraw the criminal charges against all the Claimants.
15. The Claimant states that he was served with two show-cause letters dated 31<sup>st</sup> October, 2019 and 5<sup>th</sup> November, 2019 respectfully. He responded to the first show-cause letter through his Counsel and then responded to both show-cause letters in person. He admits that he was taken through a disciplinary hearing but laments that the process was unfair for the reason that he was not given adequate time to respond to the charges. He urges that there were no lawful reasons for his dismissal as the criminal charges preferred against him on the instigation of the Respondent were baseless and unfounded and the same were withdrawn by the Respondent.
16. He states that the Respondent defamed him through the criminal charges and diminished his chances of ever getting another job as the Respondent portrayed him as a criminal and untrustworthy to every prospective employer. He argues that his character and standing in the society was adversely affected by the actions of the Respondent who made the report of the alleged theft and connecting him to the same without proper basis or evidence. He alleges that he was shamed and ridiculed by the Respondent.
17. The Claimant alleges that the Respondent was of the mistaken, misguided, and unfounded opinion that he was a director, proprietor, or owner of the Landmark Packaging. He is categorical that he is neither a director nor the proprietor of Landmark Packaging and he availed a certificate of search from the Business Registration Services indicating that Landmark Packaging is owned by Moses Macharia Kamau And Muniale Bernard as joint-proprietors.
18. He insists that although he attended the two disciplinary hearing meetings, he was not given a fair hearing as he was given too short a notice to respond to the allegations and no witnesses were called by the Respondent during the hearing to afford him an opportunity to cross-examine such witnesses and



defend himself. He states that instead of the Respondent availing the evidence in support of the charges in the two show-cause letters, the panel expected him to avail his evidence to prove his innocence.

19. In cross-examination, the Claimant admitted that he did not complain about the short notice when responding to the show-cause letters but he insisted that the period was too short and he could not be able to obtain the documents in his defence as now availed in court, including the search certificate for Landmark Packaging. He stated that he was not involved in the withdrawal of the criminal case and the agreement leading to the withdrawal was between the Respondent and the proprietors of Landmark Packaging, which to him proves that the Respondent all along was aware of his innocence.
20. Contrary to the evidence adduced by CW2, the Claimant admitted that he is still a leader in Egerton Church of God notwithstanding the criminal charges that he faced and the dismissal by the Respondent.
21. It is on the basis of the foregoing that the Claimant prays that judgment be entered in his favour as prayed in the statement of claim. The submissions by his Counsel shall be considered in the succeeding parts of this judgment alongside those by counsel for the Respondent.

### **III. The Respondent's Case**

22. The Respondent's case is contained in the response to the claim, the oral and documentary evidence adduced through RW1, and the written submissions by its Counsel, Miss Wachira, as summarized hereunder.
23. RW1, the human resources manager of the Respondent, adopted his statement on record and testified that the Claimant was employed as stated and analyzed in the foregoing part of this judgment.
24. He stated that after the Claimant was arrested and charged with the offences of stealing by servant and or handling stolen property in the criminal case, the Respondent issued him with a show-cause letter dated 31<sup>st</sup> October, 2019 and a second one dated 5<sup>th</sup> November, 2019 and that the Claimant responded to the latter.
25. Subsequently, there was held disciplinary hearings on 7<sup>th</sup> and 11<sup>th</sup> days of November, 2019 both of which the Claimant attended and signed the minutes thereof. He stated that the Claimant failed and or refused to produce documents as ordered by the Respondent to prove that he was not a director or proprietor of Landmark Packaging. He stated that the Claimant absented himself from work after he was issued with the show-cause letter without permission.
26. He testified that after the disciplinary hearing the Claimant was issued with a letter of dismissal dated 25<sup>th</sup> November, 2019. He further stated that the Claimant did not appeal against the dismissal and that the Claimant was paid all his dues upon dismissal.
27. He stated that the Claimant was not party to the negotiations and or the agreement dated 20<sup>th</sup> January, 2020 that led to the withdrawal of the criminal case.
28. In cross-examination, he admitted that the complaint leading to the criminal case was made by Mr. Akash Shah, a director of the Respondent.
29. He admitted that in the two show-cause letters cited above the Claimant had not been requested, directed, or required to avail and or produce any documents during the disciplinary hearing but the Claimant was given time to go get the documents and that is why there were two sittings for the disciplinary hearing. He admitted that the particulars of the goods allegedly stolen were not provided to the Claimant in the show-cause letters. He admitted that the Claimant is neither the owner, proprietor, nor director of Landmark Packaging. He further admitted that the proprietors of Landmark packaging



were not arrested and or charged with the alleged theft and or handling of the allegedly stolen property. He alleged that the Claimant was unable to demonstrate his innocence during the disciplinary hearing and hence the Respondent decided to dismiss him as per the letter of dismissal.

30. It is on the basis of the foregoing that the Respondent prays that the Claimant's cause be dismissed with costs. The submissions by Counsel for the Respondent shall be considered alongside those by Counsel for the Claimant in the succeeding parts of this judgment.

#### IV. Issues For Determination

31. This court has carefully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and submissions by Counsel for both parties. The following issues commend themselves to this court for determination –
- a. Was the dismissal of the Claimant by the Respondent wrongful, unfair, and unlawful?
  - b. Is the Claimant entitled to the reliefs sought in the claim?
  - c. Who meets the costs in this cause?

#### V. Termination

32. The wrongfulness, unfairness, or unlawfulness of dismissal or termination of employment ordinarily revolves around two thematic issues. It is usually about the substantive and procedural fairness before, during, and even after the decision to dismiss or terminate an employee by whatever method or manner – See *Mary Chemweno V Kenya Pipeline Company Limited* (2017) eKLR, *Loice Otieno V Kenya Commercial Bank Limited* (2013) eKLR, and *Walter Ogal Anuro V Teachers Service Commission* (2012) eKLR.
33. The gist of fairness in dismissal or termination is that firstly, the employer has to have a good lawful reason for termination or dismissal and secondly, the employee has a right to fair hearing in accordance with the rules of natural justice as envisaged under Article 47 of the *Constitution* and the various provisions of the *Fair Administrative Action Act*. The same theme is replicated in various provisions in the *Employment Act* (the Act) – See Sections 35, 40, 41, 43, 44, 45, 46, and 47 of the *Act*.
34. It is through the foregoing lens of the law that the dismissal of the Claimant shall be viewed to test if indeed the dismissal was wrongful, unfair, and unlawful as claimed.
35. The genesis of the troubles between the Claimant and the Respondent can be traced back to theft of property of the Respondent leading to arrest and arraignment in court of the Claimants as stated in an earlier part of this judgment. The stolen goods were later on recovered from the premises of Landmark Packaging, an outfit that the Respondent assumed was owned by the Claimant or that he was a director thereof.
36. Upon arraignment in court on charges of stealing and or handling stolen goods on 28<sup>th</sup> October, 2019 the Respondent issued the Claimant with a show-cause letter dated 31<sup>st</sup> October, 2019. For avoidance of doubts, the said letter stated as follows –

31/10/2019

Benard Anjili Nusi Mainye,

PO BOX 3 – 20115

Egerton



Dear Mr. Anjili,

Re: Show Cause Why You Should Not Be Dismissed From Employment

We have been facing issues on reconciling our finished products and raw materials. We end up having shortages on both with no credible explanations.

On the morning of 25<sup>th</sup> October, 2019, company goods were delivered to your company – Landmark Packaging. The goods were neither bought nor lent to you. Our suspicion that our stocks do not tally owing to the theft were now proven true.

It is for the above reason and guided by the *Employment Act* 2007 Section 44(4) that states;

“an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer’s property.”

That we would like to dismiss you from employment.

Kindly let the undersigned get your written feedback by close of business 1<sup>st</sup> November, 2019 on why we should not proceed with the dismissal.

Kindly acknowledge receipt of this communication by signing on each of the pages of this letter.

Yours for and on behalf of Mega Pack (K) Ltd.

Tom Welikhe

Group Human Resource Manager.

Received: Name: Benard Anjili Mainye

Sign: .....signed.....

Date: 31/10/2019 3.41 p.m.

37. The uncontroverted evidence on record shows that the above letter was served upon the Claimant on 31<sup>st</sup> October, 2019 at 3:41pm. On 1<sup>st</sup> November, 2019 the advocates for the Claimant on record responded to the letter and dismissed the letter as premature in view of the fact that there were criminal charges in court for which the Claimant remained and was presumed innocent until proven guilty. Undeterred by the response from the Claimant’s advocates, the Respondent replied to the Claimant’s advocates in a letter dated 5<sup>th</sup> November, 2019 informing the Claimant that the disciplinary process was internal, separate and distinct from the criminal proceedings that were on-going in court. The Respondent issued the Claimant with a second show-cause letter of even date. The said letter stated as follows –

05/11/19

Benard Anjili Nusi Mainye,

Po Box 3 – 20115

Egerton

Dear Mr. Anjili,

Re: Show Cause



On 31<sup>st</sup> October, you were issued with a show cause letter whose response was to be received by close of business 1<sup>st</sup> November, 2019. We did not receive a response from you in this regard. We however received a letter from the firm of Ombati & Ombati & Co. Advocates who wrote to us on your instructions that you will not take part in the disciplinary hearing the same is premature. We wish to advise you that the disciplinary process is an internal disciplinary process that is not subject to the criminal proceedings before the court.

We hereby wish to notify you that failure to respond to the show-cause letter is tantamount to insubordination on your part which is a gross misconduct.

Secondly, our bio-metric system which records attendance shows that you have been absent since the 26<sup>th</sup> of October, 2019 to date.

It is for the above reasons and guided by the *Employment Act* 2007 Section 44(4) (a) and (e) that states;

“Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work.”

“An employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.”

That we require you to show cause why appropriate disciplinary action should not be taken against you for the allegations in the show cause letter of 31/10/2019 insubordination and absenteeism without lawful cause.

Kindly let the undersigned get your written feedback by close of business 5<sup>th</sup> November, 2019.

Kindly acknowledge receipt of this communication by signing on each of the pages of this letter.

Yours for and on behalf of Mega Pack (K) Ltd.

Signed

Tom Welikhe

Group Human Resource Manager,

38. From the foregoing, the Claimant was facing and was expected to respond to a total of three charges as per the two show-cause letters. He was expected to show-cause why he should not be dismissed for having committed or being suspected on reasonable and sufficient grounds of having committed an offence against the Respondent or its property. This had a clear bearing to the criminal charges that the Claimant was facing in court. Secondly, the Claimant was accused of absconding duty from 26<sup>th</sup> October, 2019 to the date of the letter, 5<sup>th</sup> November, 2019. Last but not least, the Claimant was accused of insubordination for failing and or refusing to respond to the show-cause letter of 31<sup>st</sup> October, 2019.
39. The Claimant responded to the two show-cause letters in his letter of 5<sup>th</sup> November, 2019 in the following terms –

Benard Anjili Nusi Mainye

PO Box 3 – 20115



Egerton, Kenya

DATE: November 5, 2019

To Group Human Resource Manager

Mega Pack (K) Limited

Box 3204-20100

Nakuru-kenya

Dear Sir,

Re: Show Cause

I refer to your letter to me dated 5<sup>th</sup> November, 2019 on the above subject matter. I hereby state:

1. I have not committed any offence against the employer, nor committed any offence or crime against my employer or done anything to the detriment of the property of my employer.
2. My duties do not involve production, planning of corrugated board quantities nor dispatch of finished goods.
3. I have never handled or sanctioned goods from Mega pack to Landmark.
4. I have not been actively involved in the operations of Landmark Limited for approximately the last two years and I had indicated my withdrawal and never visited the premises. This fact was confirmed by the security guard of Landmark Packaging when the police officers who went to search the premises on 25<sup>th</sup> October, 2019 asked him in my presence, in the presence of Mr. Akash and Mr. Anand plus KK Security guards.
5. On October 25<sup>th</sup> I was arrested at my workplace and detained with your instruction and this is why I was not able to report to work from 26<sup>th</sup> October, 2019. I reported to work on 29<sup>th</sup> October, 2019, at 8am and denied access. The same scenario repeated itself on 30<sup>th</sup> October, 2019. Later that day I was instructed by the Group HR to call him the following day to learn of my fate.

I collected the show cause letter on 31<sup>st</sup> October; it was answered on 1<sup>st</sup> November, 2019. I have been waiting for your response.

Yours faithfully

Signed

Ben Anjili Mainye

40. During the disciplinary hearing on 7<sup>th</sup> November, 2019 the Claimant denied any association with, proprietorship, or directorship in Landmark Packaging, in whose premises the stolen goods had been traced. He also explained that after the criminal charges were preferred against him he returned to work on 29<sup>th</sup> October, 2019 upon release on bail/bond on 28<sup>th</sup> October, 2019 but he had been denied access to the premises at the gate. Assuming that, and wrongly so, the Claimant was under obligation to prove his innocence, the disciplinary hearing was adjourned to 11<sup>th</sup> November, 2019 ostensibly to compel



the Claimant to avail documents such as Articles of Association to prove that he was not a director or the proprietor of Landmark Packaging.

41. During the second sitting of the disciplinary hearing on 11<sup>th</sup> November, 2019 the panel made a further demand that the Claimant ought to produce his Mpesa transactions statement to prove that he had not had any financial transactions with Landmark Packing or the proprietors thereof.
42. In a letter of dismissal dated 25<sup>th</sup> November, 2019 the Claimant was found guilty on all the three charges in the show-cause letters and he was accordingly dismissed from employment with immediate effect. The question that this court has to deal with is whether the substance and procedure outlined above meets the criteria of substantive and procedural fairness as set out and outlined in the foregoing paragraphs based on the applicable provisions of the law cited above.
43. On substance, there is no doubt that properties belonging to the Respondent had been removed from its premises without authority and the said properties were subsequently traced in the premises of an entity in the name of Landmark Packaging. On the instigation of the Respondent, who suspected or held that the Claimant was either the owner or director of Landmark Packaging, the Claimant was arrested and charged with stealing and or handling the said property alongside the other two Claimants. Subsequently, the Respondent and the proprietors of Landmark Packaging entered into an agreement for return of the properties and the criminal charges against the Claimant and his co-accused persons were withdrawn. The Claimant was not party to the negotiations and or the agreement that led to the withdrawal of the criminal case.
44. The evidence on record, including the show-cause letters and the minutes of the two sessions of disciplinary hearings, indicate that the Respondent had no evidence whatsoever that the Claimant was either the proprietor and or director of Landmark Packaging. There is no evidence adduced to show and demonstrate that the Claimant was in any way connected to the said outfit and or the theft that had taken place.
45. No matter how strong the suspicion, the Respondent was under obligation to establish that indeed the Claimant was involved in the crime. Even if the Claimant was a director or proprietor of Landmark Packaging, which turns out not to be the case, there is no evidence whatsoever that the Claimant was involved in the theft or handling of the stolen goods. The details and information on companies or businesses are readily available in the respective registries, including the names, details, and particulars of the owners, proprietors, or directors. Statements on Mpesa transactions are also obtainable from the service providers on application.
46. The question that begs for an answer is, and which answer the Respondent failed to provide, why did the Respondent not do the background checks entailed in the foregoing paragraph before making the allegations against the Claimant and reporting the matter to the police and naming the Claimant as a suspect?
47. Section 44(4)(g) of the [Act](#) provides that it is a lawful ground for summary dismissal if “an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer’s property”. Of course, the Claimant was not found guilty of the alleged theft or handling of stolen property. In the circumstances, the Respondent had a duty and burden in this cause to demonstrate that the suspicion by the Respondent that the Claimant had committed the alleged offences was based on “reasonable and sufficient” grounds. It is in the considered view of this court that the Respondent has not demonstrated that it had sufficient and reasonable grounds to lead it to believe or even suspect that the Claimant was involved in the theft or handling of its stolen property. Even in the most liberal use of the term prima facie evidence, the Respondent had no reason or honest belief that the Claimant had been involved



in the alleged crimes and hence the substance of that ground of dismissal must fail as the same was unreasonable and insufficient.

48. The Claimant explained that he was in police custody from 25<sup>th</sup> to 28<sup>th</sup> day of October, 2019 and the Respondent was well aware of this fact having instigated the arrest and arraignment of the Claimant in the criminal case. Yet in the show-cause letters the Respondent pretended not to be aware of this fact. This was hypocritical and dishonest on the part of the Respondent. Further, the Claimant informed the disciplinary panel that when he reported back to work on 29<sup>th</sup> October, 2019, upon release from custody, he was denied access to the Respondent's premises and informed to wait for further communication from the Human resources department. Surely, what else would the Claimant have done if no such communication was made to him from the Human resources department? Yet, he was accused of absenteeism and or absconding duty. This is wrong on the part of the Respondent and that charge had no substance at all and the same is dismissed.
49. The other charge against the Claimant was insubordination for failing to respond to a show-cause letter dated 31<sup>st</sup> October, 2019. The court notes that the Claimant did respond to the said show-cause letter through his lawyer urging that he was already facing criminal charges and as such the show-cause letter was premature. From the disciplinary hearing proceedings, the Respondent appears to have been angered by the fact that the Claimant had the audacity to hire a lawyer to respond to the show-cause letter. This cannot amount to insubordination and the substance of this charge must fail.
50. On the procedural fairness of the disciplinary hearing, the show-case letters did not inform the Claimant of his right to come along with a union official or co-worker of his choice. The said letters did not inform the Claimant of any documents that he was expected to avail during the hearing. During the hearing the Claimant was ambushed with demands to avail documents pertaining to ownership of Landmark Packaging and his Mpesa transactions, yet it is the Respondent who was under obligation to prove, prima facie, that the Claimant was guilty of the charges that he was facing. Even more bizarre is that no evidence was presented against the Claimant during the hearing and no witnesses were called by the Respondent. It is also amazing that the Respondent gave to the Claimant less than 24 hours to respond to each of the two show-cause letters. How can a disciplinary hearing as entailed above be said to be fair? It was truly unfair and it is so declared.
51. The upshot of the foregoing paragraphs of this section is that the Claimant was denied both substantive and procedural fairness rendering the dismissal wrongful, unfair, and unlawful. The Claimant has established that the dismissal was wrongful while the Respondent has failed to justify the grounds of the said dismissal – See Sections 43 and 47(5) of the Act.

## VI. Reliefs

52. Having held that the Claimant was wrongfully, unfairly, and unlawfully dismissed this court shall now consider each one of the reliefs sought as set out at the introductory part of this judgment.
53. Prayer (a) is for a declaration that the dismissal of the Claimant by the Respondent was wrongful, unfair, and unlawful. The court has made a finding on this issue above and a declaration is hereby made as prayed.
54. Prayer (b) is for a declaration that the Claimant's arrest, detention, and arraignment in court was malicious and motivated by spite, ill will, and not based on reasonable or probable cause. The evidence on record is that the Respondent, as at the time of making the complaint to the police, had lost properties which were later on traced in the premises of Landmark Packaging. Although the court has found that there were no reasonable or sufficient grounds for the Respondent to name the Claimant as one of the suspects in the theft and or handling of the stolen property, the fact remains that the said



goods had been stolen and or removed from the premises of the Respondent without its knowledge, consent, or authority.

55. However, once the report was made to the police it was upon the Directorate of Criminal Investigations (DCI), or the National Police Service (NPS) for that matter, to sift through the evidence and determine if the Claimant was party to the theft or handling of the stolen goods. It is the DCI or the NPS who are constitutionally and statutorily mandated to investigate crime and make appropriate recommendations to the Director of Public Prosecutions (DPP) for appropriate action. It is the DPP who enjoys the sole constitutional mandate to institute criminal prosecutions – See Article 157 of the *Constitution*, the *Office of the Director of Public Prosecutions Act*, and the *National Police Service Act*.
56. The DCI, the NPS, DPP, and the Attorney General (the AG) are not parties in this cause. The Respondent only made a report on theft of its property that had actually taken place and named the Claimant and his co-accused persons as the suspects. This was not a private prosecution but one based on the investigations carried out by the DCI or NPS and evidence evaluated by the DPP before the prosecution commenced. The AG is the chief legal advisor to the government and is ordinarily sued for and on behalf of the government.
57. In view of the foregoing, while the Respondent may not have had any reasonable and sufficient grounds in naming the Claimant as a suspect in the theft of its property, it is the offices named above, especially the DCI or the NPS, who investigated the case, and the DPP instituted the charges and the prosecution. In those circumstances, the Respondent cannot be said to have been malicious in arrest, detention, arraignment, and prosecution of the Claimant as it has no constitutional or statutory powers for so doing.
58. In the circumstances, without the agencies named above as parties in this cause, this prayer is denied for the foregoing reasons and the argument advanced by Counsel for the Claimant on this issue is outrightly wrong and rejected. In all the cases cited by Counsel for the Claimant, the AG was named as a party for and on behalf of the Republic of Kenya. All those decisions are clearly distinguishable from this cause as the circumstances are different and in this cause the AG was not joined as a party.
59. Prayer (c) is for various categories of liquidated claims amounting to Kshs.1,880,148.70 made up as stated in the introductory part of this judgment. Each item shall be examined as follows.
60. Item (1) is for three months gross pay in lieu of notice in the sum of Kshs.188,984/= . No evidence was adduced to justify this claim and Counsel for the Claimant has not justified the claim in the written submissions. Clause 15 of the contract between the parties, signed for the Respondent on 18<sup>th</sup> March, 2019 and by the Claimant on 26<sup>th</sup> March, 2019, provides that termination of the contract was to be regulated by the Act or any existing CBA. No existing CBA was produced as an exhibit by either party. Section 35 of the Act provides that where wages are paid from month to month the appropriate notice on termination is one month or payment of one month's gross salary in lieu thereof. This court holds that the Claimant was entitled to one month's notice or one month's gross salary in lieu thereof in accord with Section 35 of the *Act*. This prayer is granted at Kshs.62,994.70.
61. Item (2) is for compensation for wrongful, unfair, and unlawful dismissal. The Claimant is seeking for the maximum award of 12 months gross salary. The Claimant's Counsel has submitted nil on this issue as to justify the award prayed for. On the other hand, and on without prejudice basis, Counsel for the Respondent has submitted that in case this court is inclined to granting any compensation that the court considers the entire circumstances of this cause in making any award.
62. Now, the Claimant worked for only eight months or so before the dismissal. He was denied both substantive and procedural fairness. There is no evidence that the Claimant contributed to his dismissal



- in any way. None of the parties has shown or suggested willingness to re-engage. The Claimant testified that the Respondent has made it difficult and or impossible for him to get another job due to negative reports made to prospective employers.
63. Considering all the factors spelt out in Section 49(4) of the Act and the unique circumstances of this cause, this court is of the considered view that compensation in a sum equivalent to four months gross salary would be fair and reasonable compensation in this cause. The award is calculated as Kshs.62,994.70 \* 4months = Kshs.251,979/=.
  64. Item (3) is for leave pay in the sum of Kshs.305,282/=. There is no indication as to which period the claim relates. As at the time of dismissal the Claimant had worked for the Respondent for only about eight months yet the Claimant is seeking for leave pay for six years. The dismissal subject matter of this cause is specific to the contract that commenced in March and terminated in November, 2019 upon dismissal. There is no room for sneaking in a claim for another contract which has not been litigated upon and the court has not been informed how that former contract was terminated. Although the Claimant did not work for a full year so as to earn annual leave, the evidence on record is that the Claimant was paid a sum of Kshs.27,361.75 in leave pay on 30<sup>th</sup> November, 2019. The Claimant has not denied that he received that amount. The claim for leave pay is denied for the foregoing reasons.
  65. Item (4) is severance pay at Kshs.188,984. Again, the Claimant has based this claim on six years yet no nexus has been established or demonstrated between the subject matter of this cause and any other or prior contracts that the Claimant may have had with the Respondent. For avoidance of doubts severance pay is payable to an employee who has been declared redundant under Section 40 of the Act. The Claimant was not declared redundant but was rather dismissed under Section 44 of the Act. Evidently, severance pay is not applicable in the circumstances and this claim is denied and dismissed.
  66. Item (5) is for a claim for salary for November, 2019. The Claimant was dismissed vide a letter of dismissal dated 25<sup>th</sup> November, 2019 and hence he was in employment of the Respondent for that month, albeit for 25 days. The argument by the Respondent that the Claimant should not be paid for the said month is wrong as the reason for his absence from work as from 26<sup>th</sup> October, 2019 has been discussed at length in another part of this judgment and the court held that it is the Respondent who kept the Claimant away from the place of work. In any event, the Claimant had not been dismissed or terminated in any other form or manner prior to 25<sup>th</sup> November, 2019. For the foregoing reasons, the Claimant is awarded the salary for November, 2019 in the sum of Kshs.62,994.70 as prayed.
  67. Item (6) is for service pay for six years in the sum of Kshs. 188,148.70. Again, there is no reason given or nexus established or demonstrated why this claim is for six years rather than the eight months which the Claimant served under the contract that is the subject matter of this cause. The Claimant was a member of NSSF and the pay-slips availed by the Respondent indicate that monthly statutory deductions were remitted thereto as required by the law. In any event, the Claimant did not serve for even one full year. In the circumstances, this claim is denied and dismissed.
  68. In regard to all the above claims, the evidence on record shows that the Claimant was, prior to the contract that is subject matter of this cause, engaged by the Respondent for about two years and eight months between 2011 and 2013. Any claim based on that prior contract expired and lapsed after three years from the date of termination of that contract of service – See Section 90 of the Act.
  69. Going back to the prayers, prayer (d) is for general/aggravated/ exemplary damages for wrongful and unfair dismissal, defamation of character and injury to reputation, abuse of legal process, malicious prosecution and or making false police reports. This is quite mouthful!



70. It would have done a lot of good for the Claimant to plead each of the above items specifically and prove each of them separately and for his Counsel to submit on each of the items separately. First, the Respondent had a reason for reporting to the police that goods had been stolen from its premises and to authenticate that report the stolen properties were traced to the premises of Landmark Packaging and repatriated. The Respondent though, as found elsewhere in this judgment, had no reasonable or sufficient grounds in naming the Claimant as the suspect, had no powers to arrest and or prosecute the Claimant. It is the agencies named in an earlier part of this judgment who arrested and arraigned the Claimant in court. Those agencies have not been joined in this cause as Respondents.
71. There is no evidence whatsoever that was called and adduced in support of the alleged defamation or abuse of legal process, malicious prosecution, or making of false reports by the Respondent. It is illustrative that all the authorities cited by Counsel for the Claimant in this aspect indicate that the AG was joined as a party as the agencies concerned with arresting, arraignment, and prosecution always undertake that duty for and on behalf of the Republic. This court agrees with Counsel for the Respondent that the Claimant failed to prove all the above allegations under this prayer and this claim is hence denied and dismissed.

## VII. Costs

72. The Claimant has succeeded to some extent in his cause and he is awarded costs of this cause based on the awards made. The said costs may be agreed or taxed.

## VIII. Disposal

73. In final disposal of this cause, this court issues the following orders:-
- a) A declaration be and is hereby issued that the dismissal of the Claimant by the Respondent was wrongful, unfair, and unlawful.
  - b) The Claimant is awarded the following –
    - i. One month’s salary in lieu of notice.....Kshs. 62,994.70
    - ii. Compensation for wrongful, unfair, and unlawful dismissal.....Kshs.251,979.00
    - iii. Salary for November, 2019.....Kshs. 62,994.70

Total..... Kshs.377,968.40

\*All the other claims are denied and dismissed.
  - c) The Claimant is awarded costs of the cause.

**DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 4<sup>TH</sup> DAY OF MAY 2023.**

.....

**DAVID NDERITU**

**JUDGE**

