



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 953 of 2011

PATRICK NJUGUNA KARIUKI.....CLAIMANT

-VERSUS-

DEL MONTE (K) LIMITED.....RESPONDENT

JUDGMENT

The Claimant is Patrick Njuguna Kariuki. The Respondent is Del monte (K) Limited. The Respondent filed a statement of claim on 8th June, 2011 through Macharia-Mwangi and Njeru Advocates. The Respondent filed the defense and response on 5th January, 2012 through Simba and Simba Advocates. The Claimant's reply to defense was filed on 22nd February, 2012 and a supplementary memorandum of claim was filed on 5th June, 2012.

In the statement of claim, the Claimant's claim against the Respondent is for:

- a) 3 month's salary in lieu of notice i.e. Ksh. 871,416.69;
- b) General damages for wrongful dismissal being Ksh.290,473.23X12 making Ksh.3,485,666.76 for loss of employment;
- c) 9 days worked in November 2009 making Ksh. 87,142.30;
- d) Exemplary damages;
- e) Reinstatement to his previous position without losing his seniority;
- f) Terminal benefits for the 22 years worked;
- g) Any other relief that the Honorable court may deem fit to grant; and
- h) Costs of the suit.

The Respondent has prayed that the Claimant's claim be struck out or dismissed with costs to the Respondent.

This case came up for hearing on 26th September, 2012 and on 28th September, 2012 following which the parties closed their respective cases and the court directed the filing and serving of written submissions.

The Claimant's written submissions were filed on 5th October, 2012 and the Respondent's submissions were filed on 18th October, 2012. With the leave of the court, the Claimant filed a response to the Respondent's written submissions on 19th October, 2012.

During the hearing, the Claimant testified as follows in support of his case.

1. That he is a graduate specializing in accounting option currently engaged in subsistence farming at Makuyu.
2. That he was employed by the Respondent on 16th February, 1987 immediately after he graduated from the university. He was employed as a foreman in the Respondent's Marketing and Distribution Services Department which included warehousing and shipping functions.
3. The Respondent is in the business of growing, processing and marketing of pineapples and juices.
4. The Claimant was arrested on 6th November, 2009 and dismissed on 12th November, 2009. In between, he was suspended from duty with effect from 8th November, 2009 as per the memo dated 9th November, 2009 and which the Claimant testified that the stated ground for suspension was to pave way for investigations into the alleged offences of conspiracy to defraud the company and stealing by servant. The suspension memo stated as follows:

"Memo

To: Patrick N Kariuki- W/No. 90

From: Human Resources Manager

cc: Managing Director, Production Director, Finance Manager, Security Manager, Legal Officer.

Date: 09 November 2009

Ref: LOSS OF SUGAR/SUSPENSION FROM DUTY

During the month of August 2009, the company lost a consignment of sugar worth Ksh. 4.6 Million in circumstances that are subject to the police investigations. In the process of this investigation you were arrested by the police and charged in a court of law for the following offences.

a. Conspiracy to defraud the company.

b. Stealing by servant.

The above two charges are criminal in nature and contrary to sec. 44 (4) (g) of the employment Act, 2007. Arising from those charges and the on-going investigation by the state, the management has decided to invoke the necessary disciplinary procedure and suspend you from duty with effect from 9th Nov, 2009.

During the period of the investigation, you will be required to stay away from the company premises until you are informed otherwise.

Signed

Joseph M Ng'ang'a

Human Res. Manager"

5. That on 9th November, 2009 the Claimant was not at work and he was at King'ong'o Prison. He had been arrested on 6th November, on 7th he was taken to Kiganjo police station in Nyeri and on 9th

November he was taken to Nyeri law courts. He took the plea and the matter referred to Thika law courts. As per the suspension memo, he was required to stay away from the company premises.

6. The Respondent was dismissed by the letter dated 12th November, 2009 which stated the reasons for dismissal as gross misconduct. The letter stated as follows:

“12-Nov-09

Patrick N Kariuki-W/N0.90

Production Department

Del Monte Kenya Ltd.

P.O. Box 147, 01000

THIKA

Dear Sir,

REF: DISMISSAL FROM EMPLOYMENT

Reference is made to our letter dated 9th November, 2009.

We now wish to inform you that a decision has been made to dismiss you from employment of this company with effect from 9th November, 2009 for gross misconduct. Upon dismissal, you will be paid salary for days worked upto 8th November 2009, pro-rata leave due and pension computation as per the rules governing the scheme.

The above payments are subject to statutory deductions and any other company liabilities.

Yours Faithfully

Del Monte Kenya Limited

Signed

Joseph M Ng'ang'a

Human Res. Manager

Cc: Finance Manager”

7. The original copy of the dismissal letter was sent by registered post to P.O. Box 22, Thika on 18th November, 2009 as endorsed on the copy at folio 11 of the statement of claim.

8. That before the dismissal the Claimant was not given a notice of the intended termination and he was not accorded any chance to appear before the Respondent to defend himself.

9. That before the dismissal on 12th November 2009, the Claimant held a managerial position designated as the Logistics and Warehouse Manager with a monthly wage of Ksh. 290,472.23 as per the October 2009 pay slip at folio 48 of the statement of claim.

10. That as per the letter of termination, the Claimant was to be paid the days worked up to 8th November 2009, pro-rata leave due and pension. The Claimant testified that he had not been paid for the days and leave. For the pension, he had been paid his own contribution.

11. After the dismissal, the Claimant was not given an opportunity to handover to his successor. His car had been left at the Respondent's premises and when he went to collect the car, the security manager asked him not to speak to anyone. He took the car and his personal belongings from the office in presence of the security guards and he did not speak to any person except the security manager.

12. That in the criminal trial, the Claimant was acquitted of all the charges on 24th February, 2011 and as per the judgment, at folio 63 of the statement of claim. The charge in the criminal case at folio 6 of the statement of claim showed that the Respondent's Finance Manager was the complainant on behalf of the Respondent.

13. As the Respondent's Logistics and Warehouse Manager, the Claimant's duties included receiving head office orders, receiving finished or canned products as processed by the Respondent, labeling them and then shipping them.

14. The alleged stolen or lost goods in the criminal proceedings was sugar. The sugar was a raw material and not a finished product in the Respondent's business. As such it was not under the duties of the Claimant. It was in fact under the responsibility of the Finance Manager one Mr. Stanley Wagendo Waruimbo (the named complainant on behalf of the Respondent in the criminal case). Folio 54 on the statement of claim is the said Stanley's statement in the criminal case in which he acknowledged that he was the Respondent's Finance Manager since 1985 and his duties included the purchasing department and stores. The Claimant therefore testified that the stolen sugar in this matter was under the duties of the said Stanley Waruimbo.

15. That the instant case of stolen sugar as a raw material used by the Respondent was not the first such case of theft of the sugar. That folio one marked DMKL1 to 6 is the special report on the review of the theft of the sugar leading to the criminal charge and subsequent dismissal of the Claimant. The report is dated 23rd April, 2010. The last paragraph under introduction on page 1 states that G4S security services company had already been charged for the loss of the sugar which amounted to Ksh. 4, 625,236 (USD 60,068) and corporate office negotiations for a final settlement were in progress. The Claimant testified that in the circumstance, the Respondent knew that the G4S security services company who provided security services to the Respondent was liable for the theft of the sugar. At the time of the dismissal and the criminal proceedings, the liability for the theft had already been passed on to the security company. Folio 17 (b) on the defense and response is a debit note dated 23rd October, 2009 by which the Respondent charged the security company for the same amount of the stolen sugar. In addition, folio 1 to 6 on the defense and response being the special review report dated 23rd April, 2010 on the theft of the sugar made findings and recommendations for improvement. A major finding related to these proceedings stated thus,

“We reviewed the controls over the movement of containers in which sugar is stored and noted there is no register/delivery note by the engineering stores department to record when they are returning/releasing them to the Warehouse and logistics department. We reviewed a sample of containers that had moved/released by the engineering stores section and we did not see any record authorizing the Warehouse and logistics department to take over the custody of emptied containers so that they can be used for stuffing them for export products.”

The recommendations included introduction of a transfer form or register to enter details of containers holding various raw materials such as sugar and fertilizer to be signed off by the engineering stores section upon being emptied for release to the logistics section. A further recommendation was that the Warehouse and logistics department should ensure that the stock position report included all the containers including those holding imports for the engineering stores department to achieve completeness of the records. Further, the logistics section should tag in its records containers holding imports for better accountability so that they are not available for use by the logistics section until they have been emptied and officially released to them by the engineering stores section. The Claimant testified that the recommendations were new measures and that at the time of the theft, the raw materials were under the Finance Manager Stanley Waruimbo who was one of the action managers mentioned in the special report to implement the recommendations. The Claimant stated that since he was not mentioned in the report as an action manager and none of the staff in his Warehouse and Logistics department had been mentioned, it was clear that the stolen sugar was not under his charge and he was not culpable.

16. The Claimant referred to the email dated 23rd July, 2009 at folio 17(a) from the managing director

Edward C. Littleton to the human resource manager Joseph M. Ng'ang'a. The email had originated from the Claimant to the Finance Manager Stanley Waruimbo relating to an ongoing but incomplete stock taking that needed more time to be completed. In that email, the Managing Director was asking the human resource manager for advice on action to be taken against the Claimant as at 23rd July 2009 in view of the Claimant's alleged poor performance. The Claimant stated that as at that date, no loss of sugar had been reported or occurred but after his arrest he came to learn that the theft was said to have occurred at the end of July 2009. The email had shocked the Claimant as it related to finished goods whereby the audit showed more stock than indicated in the books. The Claimant testified that such was a positive variance meaning that no loss had occurred and adverse action against him was malicious because he had done a good job. According to the Claimant's testimony, the email showed that something was cooking against him.

17. The allegation by the Respondent that the Claimant's performance was wanting was not justified as far as the Claimant was concerned because nowhere was it addressed to him or brought to his attention. The Respondent testified that he reported to different managers at different times of his service with the Respondent and his appraisals at folios 13 to 47 of the statement of claim were clean. In addition, the letter of dismissal did not refer to any poor performance but referred generally to gross misconduct.

18. The Claimant referred to folios 10, 11 and 13 on the defense and response being the Respondent's internal documents by the Respondent for computation of claims for payment. He pointed out that folio 11 stated that he had been dismissed. Further, folio 12 on the defense and response was a clearance document which showed that he had not been paid his terminal dues and that he had refused to receive the money as it was unfair and he could not accept to discharge the Respondent from liability in such unfair circumstances.

19. That since the dismissal, the Claimant had tried to apply for jobs but he had not been able to get one in view of the dismissal by the Respondent.

20. The Respondent had not employed another person to fill the position held by the Claimant.

21. That as per folio 18 to 22 on the reply to defense being the report dated 25th May, 2009 there had been another theft of sugar at the Respondent's premises and the report showed that the Claimant's Warehouse and Logistics department was not responsible but Mr. Waruimbo's finance department was in charge as he was required to take action as per folio 21.

22. That the Claimant had served the Respondent for 22 years and he had no disciplinary issue except the unfair dismissal in the instant case so that he prayed to be reinstated to his office in the Respondent's establishment.

23. That the Respondent had not issued the Claimant a formal letter of appointment to the position of Logistics and Warehouse Manager but the appraisal at folio 20 on the defense and response dated 21st October, 2008 showed that he had been so appointed with effect from April, 2005. That in 2005, the Claimant stated that he had been Logistics and Stores manager but over time, he was appointed and assigned duties of Warehouse and Logistics manager which is the position he held at the time of dismissal. Thus, at the time of the dismissal and theft of the sugar in issue, raw materials such as the stolen sugar were under stores in the finance department.

24. The suspension letter dated 9th November, 2009 was delivered to the Claimant at King'ong'o while the dismissal letter was posted as the Respondent alleged that he was unable to reach the Claimant.

25. That the Claimant was not making any pension claims against the Respondent.

26. That in the criminal case, it was the staff of the G4S security company that were convicted in criminal case number 1134 of 2009 at the Chief Magistrate's Court at Nyeri but the Claimant was acquitted because he was found innocent.

27. That folio 28 on the defense and response is a job description for the Claimant which showed that the Claimant as at 14th September, 2007 performed Warehousing duties which did not include dealing with raw materials such as the sugar that was stolen.

28. Nowhere in the pleadings did the Respondent state that it was willing to pay the Claimant's terminal dues.

29. The Claimant prayed that judgment be entered in his favor against the Respondent as prayed for in the statement of claim.

The Respondent's witness was one Johnson Mutisya, the Respondent's internal audit manager. He testified as follows:

1. That his duties entailed appraisal and review of the Respondent's internal control systems and safeguarding the Respondent's assets. His role was to ensure compliance with the Respondent's policies and procedures.

2. That internal controls were about internal reporting on financial assets of the company. The assets were fixed or inventories such as stocks, finished goods and raw materials.

3. That he knew the Claimant as the former Logistics and Warehouse manager of the Respondent. His responsibilities were about finished goods being the manufactured cans and goods processed by the Respondent ready for shipment. He was responsible for the container depot where finished goods were stored.

4. The container depot was not exclusively used for finished goods. Raw materials such as fertilizer and sugar would be stored there so that it had inventories other than for finished goods. The Claimant was responsible for the depot.

5. At the material time, the Respondent lost two containers of refined sugar which were raw materials.

6. The Claimant's benefits included education aid up to four children, a gross pay of about 290, 472, pension scheme, insurance and medical scheme cover and a company house.

7. That Stanley Waruimbo was the finance manager who retired in May 2012.

8. The dismissal letter addressed to the Claimant did not refer to any theft but it referred to gross misconduct as the ground for dismissal.

9. At the time of the dismissal, the Claimant was not on duty because he had been arrested together with other people.

10. The Claimant was responsible for the finished goods.

11. That pine juice products are finished products as opposed to industrial sugar that was stolen and which was a raw material.

12. The role of internal audit was to make recommendations for enhancement and every manager was responsible for implementing operational standards prescribed for their departments.

13. That the witness has served the Respondent for 26 years but did not know the period of the Claimant's service with the Respondent and the same could be obtained from records held in the Respondent's human resource department.

14. That the witness did not know the Claimant's duties and he was not the maker of the documents shown to him in court about the Claimant's duties and he could not even recall such documents as

referred to him during the court proceedings. It was the human resource department that could precisely tell the reasons for the Claimant's dismissal.

15. The witness had not seen the job description of the Claimant as given in the records of the Respondent's human resource department.

16. The Claimant was in charge of the depot with finished goods. There were other people accessing the depot such as the security personnel and many other people including the stores personnel who were responsible for the sugar that was stolen. The Claimant was not responsible for the raw materials. It was the stores personnel under the finance department that were responsible for the raw materials such as the sugar that was stolen. The finished goods were under the Claimant.

17. The witness was not sure if the Claimant was living in the company house before the dismissal and he stated that if the Claimant did not live in the company house then he would be entitled to be paid house allowance.

The issues for determination in this case are as follows:

1. Whether the termination of the employment of the Claimant was unfair and not procedural.
2. Whether the Claimant is entitled to the remedies as prayed for in the statement of claim.

The Claimant was suspended from work by the memo dated 9.11.2009 which stated that the suspension was with respect to the criminal proceedings in relation to the alleged theft of sugar. The memo stated that investigations by the state were ongoing and the Claimant was therefore suspended to stay away from the Respondent's premises until informed otherwise. While the Claimant was confined in custody of the police following his arrest in connection with the alleged offence of theft of sugar, the Respondent issued and served him with the dismissal letter dated 12.11.2009. The letter referred to the suspension memo of 12.11.09 and conveyed that the Respondent had decided to dismiss the Claimant on account of gross misconduct. The effect of the ground for dismissal in the dismissal letter, in the opinion of the court, is that the Respondent invoked and decided to move against the Claimant in accordance with the provisions of the Employment Act, 2007 on summary dismissal on account of gross misconduct.

Subsection 44(2) of the Act provides that subject to provisions of Section 44 of the Act which provides for summary dismissal, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee was entitled to by any statutory provision or contractual term. Summary dismissal is lawful only where the employer has complied with the provisions of Section 44 of the Act. Under Subsection 44(3), summary dismissal is tenable only where the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service. Such conduct on the part of the employee is called gross misconduct under the provisions of Section 44(4) of the Act. If the ground or reasons for removal of an employee amount to gross misconduct, then the employer is entitled to dismiss the employee without giving a notice and a hearing as envisaged under Section 41 of the Act. However, if the reasons for removal are not proved to amount to gross misconduct, then the wings of Section 41 of the Act will have to spread out and the employee is entitled to the full protection of the Section. Thus, disputes of summary dismissal will always be subjected to the test of Section 41 of the Act whenever employees dispute and claim that the circumstances of the case did not give themselves to reasons of gross misconduct. Accordingly, the court has taken the view that employers must stand advised that the discretion to terminate contracts of service on account of gross misconduct stand on a thin line and it were safer for the employer to follow the wider path of due process of notification and hearing under Section 41 of the Act to avoid the price of unfair termination just in case the reasons for removal did not crystallize into gross misconduct.

Under section 43 of the Act it was the obligation of the Respondent to prove that the reasons for terminating the employment of the Claimant amounted to gross misconduct. If the Respondent failed to discharge that obligation, then the court will make a finding that the termination was unfair. The court has carefully considered the pleadings, the evidence on record and submissions by the respective counsel for

the parties and makes the following findings:

1. The memo of suspension dated 9.11.2009 had the effect of the Respondent electing to have the allegations against the Claimant investigated by the state through the criminal case number 1134 of 2009 in which the Claimant was one of the accused persons. By making the election, the Respondent was thereby precluded from internally concluding the Claimant's disciplinary case and the Claimant had a legitimate expectation that the Respondent would determine his fate taking into account the outcome of the proceedings in the criminal case. The criminal case found that the Claimant was innocent as charged and the judgment was delivered on 24th February, 2011 long after the Respondent had dismissed the Claimant with effect from 12.11.2009 and by the letter dated 12.11.2009. The court finds that on 12.11.2009 the Respondent did not have the benefit of the state's investigation report or findings as was to be determined in the criminal case so that the test for gross misconduct as founded on the pending investigations was not capable of being proved by the Respondent at the time of the termination. The Respondent having failed to prove the reason for dismissal of the Claimant on 12.11.2009, the court finds that the termination was unfair under the provisions of Section 43 of the Act; the reason for termination of the contract of employment at the time of the termination cannot be matters that the Respondent can be said to have genuinely believed to exist to justify the termination of the employment.

2. The report on review of the theft of the sugar showed serious deficiencies in the Respondent's operational procedures. In particular, there were no procedures for tagging the containers that had raw materials and therefore not available for use by the warehouse and logistics department in parking finished goods. In addition the stores section did not maintain a register for making entries of the containers from which the raw materials had been emptied and entries as such emptied containers were released for use by the warehouse and logistics department that handle the finished goods or products. The court finds that it is unfair labour practice for the employer to visit an employee with adverse consequences arising from the injury the employer may have suffered due to deficiencies in the employer's operational procedures, policies and systems. Such unfair labour practices are, in the opinion of the court, unconstitutional because they offend Sub-Article 41(1) of the Constitution that entitles all persons to fair labour practices. The court finds that the theft of the sugar in this matter was substantially attributable to the deficiencies in the Respondent's operational procedures, policies and systems namely poor or lack of control measures for emptying raw materials containers by the stores section and conveying the containers to the warehouse and logistics department for use in parking the finished products for shipment. The court considers that a termination grounded substantially on the Respondent's deficient operational procedures, policies and systems was constitutionally an unfair labour practice and therefore was an unlawful and unfair termination.

3. The court further finds that in the instant case the Respondent did not demonstrate and prove that it had internally given the Claimant a chance for due process before the termination and before the arraignment in court for the criminal charges. The Constitution requires employers and employees in public services, private sector and other services to uphold the values and principles of national governance as provided for in Article 10 of the Constitution. The values and principles include human rights and in the instant case the decision to make a complaint and get the Claimant arrested by the police to answer criminal charges evolving from the employment relationship, namely, theft of the sugar, was an administrative decision for which the Claimant was entitled to fair administrative action within the provisions of Article 47 of the Constitution. Under the Article, the Claimant was entitled to an expeditious, efficient, lawful, reasonable and procedurally fair treatment before the Respondent decided to prefer criminal complaint against him and to shortly thereafter dismiss him. He was entitled to clear written reasons but the Respondent chose to generally allege gross misconduct and make a criminal complaint without elaborate particulars establishing the Claimant's implication and culpability. In the circumstances the reasons for termination were invalid, the procedure unfair and the termination was equally unfair under section 41 of the Employment Act, 2007.

As far as the first issue is concerned, the court therefore finds that the Respondent unfairly terminated the Claimant's contract of employment.

The second issue for determination is whether the Claimant is entitled to the remedies as prayed for in the

statement of claim. The court will proceed to deal with each of the claims as follows:

1. The Claimant has prayed for 3 months' salaries in lieu of notice i.e. Ksh. 871,416.69. The parties did not agree on any notice period in event of termination. Section 35(1) (c) of the Employment Act prescribe a notice of 28 days for monthly salaried employees. As submitted by counsel for the Respondent, a one month notice would apply in this case and the court awards **Ksh.290,473.23** being one month salary in lieu of the lawful termination notice.

2. Section 49 (1) (c) entitles the Claimant to maximum of twelve months gross monthly salaries for unfair termination being Ksh. 290,473.23X12 making **Ksh.3,485,666.76** for unfair termination. The court has found that the termination was unfair and in absence of any mitigating factors on the part of the Respondent and taking into account the gross violations of the law on the part of the Respondent as set out in this judgment, the court awards the maximum compensation as prayed for by the Claimant.

3. The 9 days worked in November 2009 making **Ksh.87,142.30** has not been disputed and the same is awarded.

4. The Claimant has prayed for exemplary damages. The court considers that in cases of termination of the contract of employment, the court will exercise the jurisdiction to award exemplary or punitive damages in exceptional cases and upon the Claimant satisfying stringent conditions for such an award. The court is vested with the jurisdiction to award exemplary damages under section 12 (3) (v) of the Industrial Court Act, 2011 which empowers the court to award damages in any circumstances contemplated under the Act or any written law, and also under Section 12 (3) (viii) of the Act which empowers the court to make any other appropriate relief as the Court may deem fit to grant. The principles that govern the award of exemplary damages in disputes of employment are the general principles that govern such awards generally and they include:

- a) the reprehensibility of the conduct being punished, that is, the conduct must be such that it must be condemned or censured;
- b) the reasonableness between the harm and the award to be made; and
- c) the difference between the award and the civil penalties authorized in comparable cases. (*See Black's Law Dictionary, 9th Edition, page 448 on punitive damages*).

In the instant case the Respondent maintained deficient operational procedures substantially contributing to the theft and when the sugar was stolen the Respondent acted by unfairly terminating the Claimant's loyal and dedicated service of 22 years. The sugar being a raw material, the court finds that it was outside the duties of the Claimant as the warehouse and logistics manager charged with the Respondent's products and not raw materials. The Claimant was found innocent in the criminal case initiated by the Respondent. The Claimant stated that after the unfair dismissal, prospective employers could not employ him in view of the dismissal by his long serving employer. The Claimant was a top manager in the Respondent's establishment and was entitled to fair treatment as provided for in the cited provisions of the Constitution and the Employment Act, 2007. The Respondent deserves censure for such flagrant breach of the law against its trustworthy and long serving officer who had dedicated all his professional life from the youthful age, immediately after university graduation, to the service of the Respondent. The court finds that the compensation as may be awarded under the Employment Act shall not serve to do justice to the injury the Claimant has suffered and purge the malicious and outrageous conduct of the Respondent. The court therefore awards a sum of **Ksh.5,000,000.00** on account of exemplary damages and as prayed for by the Claimant.

5. The Claimant has prayed for reinstatement to his previous position without losing his seniority. In his testimony he expressed willingness to return to his employment with the Respondent. The Claimant stated that he was at the time of the hearing engaged in subsistence farming at a place called Makuyu for his survival. Flowing from his unfair dismissal, he stated that he had not been able to secure alternative employment because he had been shunned by potential employers. The Respondent's witness stated that

the top managers including the Finance Manager, the Human Resource Manager and the Managing Director of the Respondent at the time of the Claimant's dismissal had since retired from the service of the Respondent. The witness also stated that as far as he was aware, a person had not been appointed by the Respondent to fill the position held by the Claimant at the time of dismissal. In the circumstances, it is the court's considered opinion and finding that it would be practicable for the Claimant, a highly experienced staff of the Respondent, to get reengaged in the service of the Respondent. The Respondent is a company without feelings and its managers who had been involved directly or indirectly in the unfair dismissal of the Claimant are no longer in the service of the Respondent. It cannot therefore be said that trust, confidence and loyalty has been lost between the parties. The court finds that it would be in the best interests of both parties if the Claimant and the Respondent are rejoined in the employment relationship. An order for reinstatement will require the Respondent to treat the Claimant in all respects as if he had not been dismissed. The Respondent will also be required to pay the Claimant all the salaries and other due benefits from the date of dismissal and the Claimant to resume and continue in employment unless lawfully removed. The court has considered the relationship and the disheartening circumstances between the Respondent and the Claimant during the dismissal period and thereafter. The court's opinion is that trust and confidence has not been lost between the parties and the court should rejoin them in the union of employment. Counsel for the Respondent submitted that the office held by the Claimant was no longer vacant. The submission was not supported with evidence because the Respondent's witness testified that he was not privy to the human resource records and as far as he was aware, the position the Claimant held at dismissal had not been filled. Taking into account the balance of convenience to both parties in this matter, the court considers that an order for reinstatement and all its consequences as described in this judgment would be unfair but also finds that the Claimant is entitled to be reengaged in his position with effect from a future date convenient to both parties and upon such terms of service attached to the position at the time of the dismissal or better terms as the parties may agree. In the opinion of the court, such convenient future date should be December 1, 2012. Accordingly, the Claimant shall be reengaged by the Respondent in the position of Warehouse and Logistics Manager with effect from December 1, 2012 upon the terms prevailing as at the date of dismissal or such better terms as the parties may agree.

6. The Claimant has prayed for terminal benefits for the 22 years worked. It is not disputed that the Claimant served the Respondent for the 22 years as pleaded. It is not also disputed that the Claimant was at all material times a member of a pension scheme. Accordingly, the claim for service pay shall fail in view of the provisions of section 35 of the Employment Act, 2007 which precludes employees enjoying pension schemes from being entitled to service pay.

In conclusion, judgment is entered for the Claimant against the Respondent for:

- a) a declaration that the termination of the employment of the Claimant by the Respondent was unfair;
- b) the Respondent to pay the Claimant a sum of **Ksh.8,863,282.29** plus interest at court rates from the date of the judgment till full payment;
- c) the Claimant to be reengaged by the Respondent in the position of Warehouse and Logistics Manager with effect from December 1, 2012 upon the terms prevailing as at the date of dismissal or such better terms as the parties may agree; and
- d) the Respondent to pay costs of the cause.

Delivered in court at Nairobi on 26th October, 2012

Byram Ongaya

JUDGE

Appearances

Claimant and Counsel for both parties