

**IN THE COURT OF APPEAL  
AT MOMBASA**

**(CORAM: MURGOR, LAIBUTA & NGENYE,**

**JJ.A.) CIVIL APPEAL NO. E068 OF 2023**

**BETWEEN**

**CMC MOTORS GROUP.....APPELLANT**

**AND**

**YASSER SAID SWALEH.....RESPONDENT**

*(Being an appeal from the Judgement of the Employment and Labour Relations Court at Mombasa (Agnes Nzei, J.) delivered on 24<sup>th</sup> November 2022*

*in*

***ELRC Cause No. E665 of 2020)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

- 1. The appellant, CMC Motors Group Limited,** appeals against the decision of the Employment and Labour Relations Court (**the ELRC**) in **Mombasa ELRC Case No. E665 of 2020** dated and delivered on 24<sup>th</sup> November 2022 by **Nzei, J.**
2. In his Memorandum of Claim dated 3<sup>rd</sup> November 2020, the respondent pleaded that he was employed by the appellant on 6<sup>th</sup> September 2018 as Brand Manager, Ford, earning an agreed basic salary of Kshs.550,000. In January 2020, the respondent was transferred to the appellant's Mombasa Branch as the Regional Manager effective 31<sup>st</sup>

January 2020.

However, on 30<sup>th</sup> January 2020, the appellant was served with a Show Cause letter by which he was asked to explain why disciplinary action should not be taken against him for gross misconduct.

3. On 19<sup>th</sup> February 2019, the respondent was invited to disciplinary proceedings on allegations which he defended himself against. He was later served with a Termination of Service letter dated 6<sup>th</sup> March 2020. He challenged the termination in an appeal before the Disciplinary Committee, which was heard, but rejected on 30<sup>th</sup> March 2020. In effect, the appellant returned a verdict affirming his (the respondent) termination.
4. According to the respondent, he served the appellant with dedication, diligence, and with little or no supervision. For this reason, he maintained that his termination was wrongful, unlawful, without justifiable cause, and that it contravened the **Employment Act, Cap 226 (the Employment Act or the Act)**. Consequently, he sought orders: *for a declaration that the termination was illegal and unlawful; Certificate of Service; 12 months compensation for unfair termination amounting to Kshs.6,000,000; unconditional reinstatement to employment; costs of the suit; and any other relief that the court deemed just to grant.*
5. The appellant opposed the Claim by way of a Response to the Memorandum of Claim dated 7<sup>th</sup> December 2020. The appellant conceded that it transferred the respondent to

its

Mombasa Branch, but that this was in accordance with its transfer policy, and that the same was necessitated by the need to fill in vacancy of a Branch Manager in that branch. It was further conceded that the respondent was served with a Show Cause letter dated 30<sup>th</sup> January 2020 to which he responded, though not comprehensively.

6. It was the appellant's defence that it invited the respondent to a disciplinary proceedings' hearing; that it gave him an opportunity to be heard, and that he defended himself; that after hearing the disciplinary proceedings, the Disciplinary Committee reached a verdict to summarily dismiss him on the ground of negligence, whose particulars were as follows:

- "a) Deliberately misreporting sales resulting to business loss of USD 48,000.*
- b) Fictitiously reporting Eighteen (18) units and benefitting the award of USD 2,160. Further, during the disciplinary hearing, the respondent admitted that he had received the award and he was willing to refund the same.*
- c) Misadvising the business on incentives due from Ford on sale of units thus resulting to overstating of expected income amounting to USD 145,100.*
- d) Reversing Fourteen (14) units to try and cover his tracks from scrutiny."*

7. The appellant confirmed that it issued the respondent with a letter terminating his employment with effect from 6<sup>th</sup> March 2020; that, even in the appeal proceedings conducted on 30<sup>th</sup> March 2020, the respondent was unable

to disprove the claims of negligence attributed to him;  
that the termination

procedure was undertaken in adherence to **Sections 41, 43 and 45** of the **Employment Act** in that: the respondent was notified of the charges against him in a language that he understood as per **Section 41**; pursuant to **Section 45**, the respondent was given prior notice of the disciplinary hearing of his case; the respondent appeared before the Disciplinary Committee together with his union representative or a colleague of his own choice; after the decision to terminate his employment was reached, the respondent was paid his terminal dues and awarded a Certificate of Service; and that the respondent's appeal was heard and determined on merit.

8. At the main hearing, the respondent testified as **CW1**. He stated that he was employed by the appellant on 24<sup>th</sup> April 2018; that he took over from one Ms. Kagwiria as the Ford Branch Manager; that Ms. Kagwiria did not guide him or share information on how the work was to be done; that he held the same position until December 2019; and that he was promoted in January 2020 as the Regional Manager to oversee the Coast Region.
9. According to the respondent, he was subjected to witch hunt which rested with a Show Cause letter dated 30<sup>th</sup> January 2020 over matters which allegedly took place between January and December 2019; that the allegations were that he misreported sale of some units for personal gain, pre-reported sale of some units, and that he misled the Finance Team; that the disciplinary proceedings as well as the appeal as conducted by the appellant were

unfair as the decision to

dismiss him was pre-determined; that, furthermore, he was not furnished with the minutes of the disciplinary meeting; and that he was therefore entitled to the reliefs sought.

10. On behalf of the appellant, **Sarah Kithaka (PW1)**, the appellant's Assistant Human Resource Manager, confirmed that the respondent was employed by the appellant on 7<sup>th</sup> May 2018, earning a gross salary of Kshs. 550,000; that Clause 16 of the Employment Contract provided that the respondent could be summarily dismissed for gross misconduct, which included dishonesty and breach of security within the company while performing his duties; and that the respondent was dismissed for misreporting sales, pre-reporting sales and misadvising the business on sales, thereby resulting in over stating sales.
11. On the allegations that the respondent was not trained on what his work entailed, she testified that, as a Ford Branch Manager, the respondent was in charge of the Ford System known as *Smart Vincent* whereby the dealer and the principal interacted on issues relating to incentives, ordering of units, new product offers, claims and payment, as well as sales reporting; that the respondent was a Ford Franchise holder while the sales system belonged to Ford; that the respondent was taken through training in South Africa; that the system was restricted to selected persons in the cadre of Brand Managers where the respondent's designation fell; that he demonstrated to have understood

the system and to operate it on his own to a point that the appellant used him to train

others even 6 months post-employment; and that the respondent was given log-in credentials through which he accessed the system.

12. It was PW1's further testimony that, sometime in December 2019, the Group's Finance Department picked out huge variances or inconsistencies following an audit check on the Ford System; that the gaps were occasioned by the respondent's "*misreporting on sales as well as undue incentives for both the Company and individuals based on sales;*" that this prompted the appellant to issue a Show Cause letter which culminated in the disciplinary proceedings; and that, ultimately, the respondent was properly terminated as a result of breach of contract of employment.
13. In her Judgment delivered on 24<sup>th</sup> November 2022, Nzei, J. isolated two issues for determination, namely *whether the respondent's termination of employment was unfair; and whether the respondent was entitled to the reliefs sought.*
14. On the first issue, the learned Judge found in the affirmative that the appellant adhered to the laid down procedure under **Section 41** of the **Employment Act** by issuing a notification of intention to conduct disciplinary proceedings, by issuing the respondent with a Show Cause letter dated 30<sup>th</sup> January 2020 which set out the allegations levelled against him; that the respondent was also accorded an opportunity to respond to the allegations levelled against him, and that he was

subsequently invited for a disciplinary hearing in which he appeared with a work colleague; and that he was also given an opportunity to appeal, which appeal was declined.

15. The learned Judge held that, even if the procedure for termination was deemed to be fair, the reasons thereof should also be fair; and that, if an employer fails to prove so as required under **Section 45(2) (a)** of the **Employment Act**, the termination is deemed to be unfair. It was held that the respondent did not rebut the reasons accorded to his termination, which he in fact conceded, but blamed it on lack of knowledge on the use of the Ford Sales System. The Judge held that the allegations that the respondent was not trained by his predecessor, Ms. Kagwiria, was not backed by evidence; and that the appellant did not controvert the evidence that the respondent had sold motor vehicles for which he was qualified to receive incentives from the Ford Group.
16. The learned Judge also held that there was no evidence tendered to prove the timeframe within which the alleged deliberate misreporting, pre-reporting and misadvise to the business team was carried out; that it was not demonstrated when the respondent was trained in South Africa; that the appellant did not deny the allegation that the appellant's predecessor controlled the Ford System for 6 months after the respondent was employed; that the training was pivotal for the respondent to conduct his duties, and that the evidence presented indicated that the

respondent was

seeking help from his colleagues on how to use the system as at 9<sup>th</sup> January 2019; that, further, the alleged loss which the appellant deemed to have been suffered by the Company was not produced in evidence and, hence, the alleged negligence attributed to the respondent was not proved; that, as such, it was difficult to determine when the acts for which the respondent was charged with were committed so as to conclude that he was responsible and therefore dismiss him; and that, therefore, the reasons proffered for the respondent's termination were neither justified nor valid.

17. In the end, the trial court concluded that the respondent's termination was substantively unfair. Judgment was accordingly entered for the respondent as follows:

- "a) Kshs.4,400,000 being the equivalent of eight months' salary for unfair termination of employment.*
- b) The awarded sum shall be subject to statutory deductions pursuant to section 49(2) of the Employment Act.*
- c) The respondent shall, within 30 days of this judgment, issue the claimant with a certificate of service pursuant to section 51(1) of the Employment Act.*
- d) The claimant is awarded costs of the suit and interest at court rates. Interest shall be calculated from the date of this judgment."*

18. Aggrieved, the appellant filed this appeal and, by a Memorandum of Appeal dated 4<sup>th</sup> April 2023, it has raised



grounds of appeal which we have condensed into 8, namely that the learned Judge erred in law and in fact by:

- i. concluding that the procedure for termination was fair, but that the reasons for termination were unjustified;***
- ii. questioning the lack of a witness statement by the personnel who trained the respondent and thereby stretched the burden of proof beyond a balance of probabilities to strict proof by the appellant;***
- iii. concluding that the respondent was not adequately trained and, as such, his misreporting of sales and undue incentives for the company were justified;***
- iv. concluding that the respondent's act of seeking assistance on the basics of the Ford System amounted to lack of proper training thus justifying the respondent's misreporting of sales and misadvising of the appellant for personal gain;***
- v. ignoring the appellant's evidence with respect to the training into the Ford System offered to the respondent by his predecessor;***
- vi. concluding that the respondent's predecessor was solely charged with the duty to train the respondent;***
- vii. arriving at an erroneous finding that the reasons for the respondent's termination were unjustified and ignored the justified reasons for terminating the respondent's employment; and***
- viii. by failing to consider the appellant's witness statement filed on 26<sup>th</sup> November 2021 and the written submissions filed on 14<sup>th</sup> June 2022.***

19. The appellant thus prays that: Judgement in **Mombasa ELRC No. E665 of 2020** delivered on 24<sup>th</sup> November 2022 by Agnes Nzei, J. be set aside; the appeal be allowed; and that costs be provided for.
20. When this appeal came up for hearing on 11<sup>th</sup> June 2025, learned counsel **Ms. M'mbaka** appeared for the appellant while the firm of **M/s. Balala & Abed Advocates** for the respondent did not appear although they were duly served with a hearing notice. Ms. M'mbaka solely relied on the appellant's written submissions dated 30<sup>th</sup> October 2024. We noted that the respondent's counsel had also filed submissions dated 24<sup>th</sup> January 2025.
21. The appellant referred to the statutory provisions of **Sections 43(2), 45(2) and 47(5)** of the **Employment Act**, which provide, among others, for the legal burden of proof placed on the employer to prove the reasons for terminating employment. The appellant cited the decision of the ELRC in **Charles Musungu Odana vs. Kenya Ports Authority (2019) KEELRC 2206 (KLR)** where the court held that it is important to establish a valid reason for termination of employment, a position that was affirmed by this Court in **Reuben Ikatwa & 17 Others vs. Commanding Officer British Army Training Unit Kenya & Another (2017) KECA 274 (KLR)** in holding that, an inquiry should be made as to whether a reasonable employer could have dismissed an employee based on the facts presented. The appellant further submitted that it would be improper for a court to

expect an employer to conduct a near forensic examination on the facts placed before it as would be the case in a criminal trial as was held in **Kenya Revenue Authority vs. Reuwel Waithaka Gitathi & 2 Others (2019) KECA 300 (KLR)**; that the trial court overlooked the fact that the respondent admitted culpability; and that, all that is required is for the employee to be subjected to procedural fairness as required by statute.

22. The appellant contended that the email of 9<sup>th</sup> January 2019 written by the respondent was a testament that the respondent had been set up in the system; that, therefore, the sentiments by the trial Judge that it was not proved when the respondent misadvised the Ford sales for 2019 was improper; that the minutes of the disciplinary hearing indicated that, in December 2019, the Finance team picked out huge variances or inconsistencies in the sales, which issue was communicated in the Show Cause letter dated 30<sup>th</sup> January 2020; and that the respondent admitted to the misreporting for financial personal gains, but that he blamed it on lack of training, which should not be a gateway to misconduct.
23. It was the appellant's case that, for the above reasons, there was sufficient reason for the appellant to dismiss the respondent. We were asked to find that, since the procedure for termination was without reproach, this Court ought to set aside the decision of the learned Judge and accordingly allow the appeal as prayed.

**24.** On behalf of the respondent, it was submitted that the main issue for determination was whether the appellant had justifiable reasons for terminating his (the respondent) employment, and whether the termination was substantively fair; and that, for termination of employment to be fair, the same must not only pass procedural fairness (the 'how') test, but that the substantive justification (the 'why') for termination must also be fair. In this regard, reliance was placed on the decision of the ELRC in **Walter Ogallo Anuro vs. Teachers Service Commission (2013) KEELRC 386 (KLR)**; and the decision of this Court in **Overdrive Consultants (K) Limited vs. Mazhar Sumba (2020) KECA 293 (KLR)** for the proposition that, for a termination to be said to be fair, it must meet both the substantive justification as well as procedural fairness; that, under **Section 45(2)** of the **Employment Act**, a termination of employment is deemed as unfair if the employer fails to prove that the reason for the termination is valid, which scenario obtained in the instant case; and that the appellant did not discharge its burden of proof to justify the grounds for his termination in contravention of **Section 47(5)** of the **Act**.

**25.** The respondent contended that he was dependent on Ms. Kagwiria, the former Ford Brand Manager, to assist him in understanding the Ford System, but that she frustrated his efforts as evidenced in the email dated 19<sup>th</sup> January 2019; that, in view thereof, the respondent turned to other

officers (staff) to assist him to learn how to operate the system; that

this was proof that he had not been adequately trained on the Ford System; that the appellant did not controvert the fact that he was not adequately trained, or better still, produce evidence to show that he had been trained in this respect; and that, furthermore, the appellant did not deny the allegations that his predecessor controlled the system for a further 6 months after his employment, which pointed to the fact there was no proof as to when the acts for which he was charged were committed.

26. We have considered the record of appeal, the respective rival written submissions and the law. This being a first appeal from the court sitting as the court of first instance, it is by way of a retrial. We are obliged, as we already have, to evaluate the evidence on record and arrive at our own conclusions. In ***Paramount Bank Limited vs. First National Bank Limited & 2 others*** (2023) KECA 1424 (KLR), this Court held:

***“A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. A first Appellate Court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. While considering the scope of section 78 of the Civil Procedure Act Cap 22, a first Appellate Court can appreciate the entire evidence and come to a different conclusion.”***

27. Further, this Court in **Ratilal Gova Sumaria & Another vs. Allied Industries Limited (2007) KECA 501 (KLR)** expressed itself as follows:

***“Being a first appeal the court was obliged to consider the evidence, re-evaluate it and make its own conclusion bearing in mind that a court of appeal would not normally interfere with a finding of fact by the trial court unless if it was based on misapprehension of the evidence or that the Judge was shown demonstrably to have acted on a wrong principle in reaching the finding he did.”***

28. As was held in **Alfarus Muli vs. Lucy M Lavuta & Another (1997) 302 KLR**, we would interfere with the findings of the first trial court:

***“only if it is shown that there was absolutely no evidence or that the evidence that was there could not possibly support such a finding...Even if a Judge does not give his reasons for his finding the appellate Court can find the same in the evidence.”***

29. What falls for determination in this appeal is whether *the reasons behind the respondent’s termination of employment were fair and lawful and, if so, whether the learned trial Judge was justified in awarding compensation for unfair termination.*
30. It is settled and, therefore, not contested that, prior to the respondent’s termination, the appellant adhered to the procedure provided for under **Section 41** of the

**Employment Act**, requiring that an employee be informed of the allegations levelled against him and allow him to rebut the said

allegations. For the avoidance of doubt, the Section reads as follows:

**(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**

**(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.**

31. Compliance with Section 41 aside, **Section 45(1)** of the **Act** requires that, even if the procedure leading to the termination was fair, the reasons thereof should not be unfair. **Sub-section (2)** of **Section 45** sets out the parameters for determining whether the termination was fair. If the employer fails to prove the following, the termination is deemed to be unfair:

**(a) that the reason for the termination is valid;**

**(b) that the reason for the termination is a 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.**

32. The evidentiary burden of proof that the termination was lawful lies with the employer as provided for under **Section 47(5)** of the **Employment Act**, which provides as follows:

**(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.**

*(Emphasis ours)*

33. This Court in **Lockwood Girls High School vs. Wasike (2024) KECA 360 (KLR)** expounded on the above provision by holding that:

***“In order to appreciate the meaning of the provision, we turn to the Evidence Act. Sections***

***107 and 108 of the Evidence Act are to the effect that the burden of proof is always placed upon the party whose claim would fail if no evidence was adduced by either***

***side and that he who alleges must prove so that a party desirous of establishing any legal right or liability must prove the facts upon which their***

***assertion rests. This is what is referred to as evidentiary burden of proof. The provisions of section 47(5) of the Act as reproduced above must be read in consonance with sections 107 and 108 of the Evidence Act. In that regard, the burden of proof in a dispute such as the one before us always keeps shifting. It starts on the side of the employee who alleges unfair termination and must prove on a balance of probability, that his termination was unfair. Once this is established, the burden then shifts to the employer to demonstrate that the grounds for termination were justified and the termination was procedural.”***

34. In the appointment letter of 24<sup>th</sup> April 2018, the respondent was offered the position of Ford Brand Manager, which he accepted. The respondent was to report as the Sales and Marketing Director, and his duties were to be specified from time to time as discussed and agreed between himself and his supervisor. By a letter dated 6<sup>th</sup> January 2020, the respondent was transferred to the appellant's Mombasa Branch as a Regional Manager reporting to the Group Chief Executive Officer. The fact of the respondent being an employee of the appellant was therefore proved.
35. In this appeal, both parties agree that the reasons for the respondent's termination was as a result of the respondent's alleged mis-reporting of profits, pre-reporting and misadvise to the business. We have looked at the record and are not persuaded that the respondent can absolve himself from blame by stating that his actions

were precipitated by the fact

that he did not receive prior training for the reasons shown hereunder.

36. The Show Cause letter dated 30<sup>th</sup> January 2020 highlighted the alleged contraventions and the respondent's conduct, *inter alia*, as follows:

**"1. You deliberately misreported sales resulting to the business losing incentives amounting to USD 48,000.00 after being clawed back due to your actions as illustrated herein;**

**a) KYEOP/Ministry of Public Service, Youth & Gender Affairs, you reported 5 Units correctly as fleet while 2 Units were reported as retail.**

**b) Rentco/Unilever Kenya, you reported sales as retail as opposed to fleet resulting in a direct self - benefit through the Ford Sales Mangers Incentive Program.**

**2. Pre - reporting sales as retail for self-gains, we note that 18 units were misreported, and you directly benefitted by being awarded USD 2,160.00 as a result of this fictitious reporting.**

**3. You misadvised the business on incentives due from Ford on sale of units resulting in overstating of expected income/margins amounting to USD 145,100.00 on Ford Sales for 2019, negatively impacting the Company financially.**

**4. After you realised that your actions were**

***being scrutinised by Finance, you reversed 14 units to cover your tracks, an action that has***

***greatly affected our business integrity as a dealer owing to the guiding rules of the programs as offered by Ford in which you are fully aware of.”***

37. In his response by email dated 27<sup>th</sup> January 2020, the respondent admitted the variances as outlined in the Show Cause letter, but primarily blamed his lack of adequate training on the Ford System as the reason behind the misreporting. He lamented that he had to navigate through the system alone and that, when he was completely unable to perform his task, he had to learn through other colleagues, namely Ms. Kagwiria, Tshepo and Callinah. He further lamented that, six months after he was employed, it was not him but Ms. Kagwiria who operated the Ford system.
38. The email of 20<sup>th</sup> February 2020 from Ms. Kagwiria from whom the respondent took over stated that the appellant was registered into the system the same date he was appointed. She further stated that the respondent shadowed her for two months and that, even though the training undertaken on the respondent was informal, he was eventually able to know about BPS invoice, Goals Unit Order, WIQs and Sales Reporting; and that the files containing this information were handed over to him.
39. We note that it would appear that the respondent's registration into the system might not have been effected and that, by an email dated 9<sup>th</sup> January 2019, he requested to be

registered in the system to enable him enter the WIQS Quotes.

40. In our considered view, the request to be registered into the system is not synonymous to asking that he be trained due to lack of understanding of how the Ford system worked. In hindsight, at the time when the respondent wrote the email of 9<sup>th</sup> January 2019 asking to be registered into the system, a period of almost 9 months or thereabouts had lapsed from the date of his appointment.

41. In his evidence in chief, the respondent testified:

***“Initially I was employed by Al - Futtaim Group since April 2008. This was in Dubai. I joined as a sales consultant for Lexus. I was promoted within the year to be a Show Room Manager in the same brand, Lexus. After a year I was promoted to Toyota which is a bigger brand, within the same brand as their Business Manager. After some time, I was promoted to Finance Manager, Honda which is a bigger group brand. In 2007 there was a crisis in CMC Kenya East Africa, which had been brought by Al - Futtaim Group in 2017. I was sent to East Africa and was based in Kenya to train their managers.”***

42. From the above excerpt, the respondent presented himself as a well-qualified, diligent and capable person in the conduct of his duties and responsibilities. There is no doubt that he had the expertise, knowledge and know-how in the operations of entities which were, and still are, the business of buying and selling motor vehicles. It is

unfathomable that

after holding senior positions whilst working in Dubai, and with globally reputable motor vehicle companies and at some point even training Managers in Kenya, he was unable to grasp the workings of the appellant within a period of 9 months or so. That notwithstanding, the respondent was to report to the Sales and Marketing Director, an indication that he was not to make autonomous, unilateral decisions at his own behest but, rather, in consultation with others as and when he was required to do so. Even assuming that he felt inadequate to do his job, there is entirely no evidence that he requested for guidance or additional training, and that the appellant refused to accede to such a request.

43. Furthermore, it is common ground that, by the time a person applies for an employment opportunity, they do not apply blindsided. An employee who deems himself competent enough to apply for an advertised position, very well knows that they are capable and ready to execute the tasks outlined. That is why advertised jobs are accompanied by job descriptions which are a formal account of employees' responsibilities. Therefore, for all intents and purposes, if the respondent felt that he did not suit the job description for the job he was offered by the appellant, he had no business applying for it. He could not take up the job and, only after the mess is discovered, he turns around to say that he was not properly trained to handle the employer's System. We are, in the circumstances, unable to buy the respondent's assertion that he was not trained, and that that was the reason for

the variances in the sales.

44. Our further analysis of the evidence on record discloses that the mis-reporting of profits, pre-reporting and misadvice to the business had nothing to do with training or lack of it thereof. All the respondent was required to do was to honestly report on the number of motor vehicles sold. This, he could have done in consultation with the sales teams or further consult with the Sales and Marketing Director to whom he reported in the event of uncertainty. The failure to have the so-called credentials on the grounds that they were held by the previous manager, Ms. Kagwiria, is a mere excuse which did not call for him to misreport or overstate profits or sales for his own benefit. In effect, his actions undermined, and were prejudicial to the appellant's motor vehicle business.
45. For the foregoing reasons, we arrive at the inescapable conclusion that the learned Judge erred in finding and holding that the reasons for the respondent's termination were unfair. We further find and hold that the respondent was lawfully and procedurally dismissed, and he was paid all his dues upon dismissal.
46. As concerns the award by the learned Judge of Kshs.4,400,000 as compensation for unfair termination equivalent to eight months' salary, having found as we have that the respondent's termination was lawful and procedural, the award was unjustifiable in the circumstances, and for the avoidance of doubt, we hereby set it aside.

47. Consequently, the appeal succeeds and is hereby allowed. The Judgement and Decree of Mombasa ELRC No. E665 of 2020 (**Agnes Nzei, J.**) is hereby set aside. As costs follow the event, the appellant shall have the costs of this appeal.

Orders accordingly.

**Dated and delivered at Mombasa this 13<sup>th</sup> day of March, 2026.**

**A. K. MURGOR**

.....  
**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA CARb, FCIArb.**

.....  
**JUDGE OF APPEAL**

**G. W. NGENYE-MACHARIA**

.....  
**JUDGE OF APPEAL**

*I certify that this is  
the true copy of the  
original*

*signed*  
**DEPUTY REGISTRAR**