

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
CAUSE NO. E258 OF 2021

ANN
NGIGI.....CLAIMANT

VERSUS

YOUTH
LIMITED.....RESPONDENT

WANJIRU

KENYA

JUDGMENT

1. By way of a Memorandum of Claim dated 25th March 2021, the Claimant avers that the Respondent company was incorporated in 2006 as part of the Teenwise Media Group of Companies, which also included Teenwise Media Ltd (incorporated in 2001) and Centrestage Market Ltd (incorporated in 2003).
2. The Claimant states that pursuant to a resolution passed in 2006, she was appointed as the Managing Director of the Respondent company. She further avers that the same resolution allocated Teenwise Media Ltd to **David Ngaruiya** and Centrestage Marketing Ltd to **Adam Nyakundi**, both of whom were her co-directors in the Respondent company.

3. The Claimant asserts that upon assuming the role of Managing Director, she discharged her duties diligently and ensured the profitability of the Respondent company.
4. She contends that under her prudent management, the company grew into a successful enterprise, acquiring assets and paying the directors remuneration of approximately Kshs 1,500,000.00 in the years 2015, 2016, 2017 up to September 2018, while attaining a turnover of Kshs 560,000,000.00. She adds that the other two companies operated at a loss between 2010 and 2017, and that the Respondent company, under her management, bore the burden of meeting their financial obligations.
5. The Claimant avers that in 2018, her previously cordial relationship with her co-directors deteriorated due to disagreements regarding the management of the companies.
6. She contends that the other directors of the Respondent, particularly Adam Nyakundi, created a hostile working environment marked by verbal abuse, hostility, and persistent disputes over increased remuneration. She states that despite making attempts to resolve the disagreements, her efforts were unsuccessful.

7. The Claimant further avers that on 9th March 2019, the Respondent's Chief Financial Officer (CFO) resigned at a time when the company was preparing to undertake its 2018 annual audit, and that the other directors attributed the resignation to her.
8. She further states that during a Board meeting held on 25th March 2019, the other directors raised what she describes as unfounded allegations against her and resolved that she temporarily step down as Managing Director to facilitate a forensic audit of the Respondent.
9. The Claimant avers that at a subsequent meeting held on 25th April 2019, the remaining two directors resolved to revoke her appointment as Managing Director with immediate effect, without providing any reasons.
10. It is the Claimant's case that her removal amounted to unlawful and unfair termination of employment. Consequently, she seeks the sum of **Kshs 33,470,060.00**, comprising salary for March and April 2019, notice pay, compensation for unfair and unlawful termination equivalent to twelve (12) months' salary, and payment for 217 accrued leave days with respect to 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2015, 2017 and 2019.

11. In response to the Claim, the Respondent filed an Amended Memorandum of Response dated 12th November 2024, wherein it avers that, in the allocation of responsibilities among the three directors, the Claimant was tasked with overseeing the payment of salaries and other benefits to the directors. The Respondent states that the Claimant would ordinarily authorize monthly payments, which varied based on her assessment of the company's financial position and performance.
12. The Respondent contends that any success realized by the company was the result of the collective efforts of all its directors.
13. The Respondent further avers that the Claimant began to conduct herself in a manner detrimental to the interests of the company and that the financial management of the Respondent fell below the expected standard.
14. It is the Respondent's position that, owing to the Claimant's conduct and the company's declining financial performance, the other directors resolved to commission an independent audit. The Respondent maintains that this decision is what the Claimant characterizes as harassment and a toxic working environment.
15. The Respondent further avers that an audit report prepared by Libra Consulting in September 2019 revealed shortcomings in the management of the company.

16.The Respondent contends that it was consequently resolved that the Claimant steps down, noting among other reasons, that she had incorporated another company, YDX Agency Limited, in which she held a 99% shareholding.

17.In the Respondent's view, the Claimant acted in a manner that was prejudicial to its interests.

18.The Respondent denies terminating the Claimant's employment and instead contends that she voluntarily left the company and has declined to relinquish her position as a director despite several requests to do so.

19.On the basis of the foregoing, the Respondent prays that the Claimant's claim be dismissed with costs.

20.The matter proceeded for hearing on 10th March 2025, 24th April 2025 and 25th September 2025, during which both parties called oral evidence.

Claimant's Case

21.The Claimant testified in support of her case as CW1, and at the outset, she sought to adopt her initial and further witness statements to constitute her evidence in chief. She further produced all the documents filed on her behalf as exhibits before the Court.

22.The Claimant testified that on 1st July 2019, the Respondent instructed auctioneers to attend her residence and repossess a BMW X5 motor vehicle (Registration No. KCH 411T) pursuant to a repossession order dated 28th June 2019.

23.She further stated that following the meeting of 25th March 2019, during which the other directors allegedly raised unfounded claims that she had overburdened the CFO with duties beyond his mandate, with the intention of frustrating her and forcing her to step down as Managing Director, they withheld her monthly salary while continuing to pay themselves, notwithstanding that it had been discussed, resolved, and minuted that she would continue to receive her salary and directors' dues.

24.The Claimant further averred that the Respondent convened a meeting with the finance team and directed them not to take instructions from her, instructed security personnel to deny her access to the office premises, and subjected her to acts of frustration, intimidation, and embarrassment before employees who regarded her as their leader and employer.

25.It was her testimony that, as the designated contact person, she notified Youth Dynamix Proprietary Limited, an affiliate company in South Africa, of the developments in accordance with the Affiliate Agreement, noting that the other

directors had not been actively involved in the management of the Respondent since 2006.

26. She averred that by a letter dated 16th April 2019, Youth Dynamix Proprietary Limited, as the principal, issued a thirty (30) day notice terminating the Affiliation Agreement with the Respondent. According to her, the notice was to lapse on 16th May 2019, after which the Respondent would no longer be entitled to use the principal's branding or intellectual property under the Agreement.

27. The Claimant further stated that by a letter dated 17th April 2019, she and YDX Agency Limited were appointed as the official and exclusive legal affiliate of Youth Dynamix Proprietary Limited with effect from 17th May 2019, thereby granting them exclusive rights to use the YDX brand name, tools, systems, and products from that date.

28. According to the Claimant, attempts by the other directors to represent that the Respondent continued to act for the principal were expressly rejected by the firm of Tabacks Attorneys through letters dated 6th and 10th May 2019.

29. She further stated that by a letter dated 13th May 2019, the Respondent objected to the termination notice and sought permission to continue using the Youth

Dynamix brand name, which request was subsequently declined by a letter dated 7th July 2019.

30. The Claimant further averred that by an email dated 16th May 2019 to Safaricom Limited, Adam Nyakundi, one of the Respondent's directors, forwarded an agreement executed by all three directors acknowledging that YDX Agency Limited had been granted the affiliation licence and that the Safaricom business was to be transferred to YDX Agency Limited.

31. It was her evidence that, with the Respondent's knowledge, she had in 2013 incorporated a company known as **Abiola Ltd** to operate a limousine service, which never commenced business due to her commitments at the Respondent. She explained that in April 2019, Abiola Ltd was renamed YDX Agency Limited following her appointment as an affiliate of Youth Dynamix Proprietary Limited. She further stated that this fact was disclosed in Civil Case No. E197 of 2019 and was not disputed by the Respondent.

32. The Claimant denied the allegation that she misled the public or customers into believing that the Respondent was rebranding as YDX Agency Limited, asserting that such claims were unfounded and intended to mislead the Court. She maintained that YDX Agency Limited was the duly licensed affiliate of the

principal company in South Africa, and that it was incumbent upon the Respondent to pass the requisite resolution if it intended to change its name.

33. She also denied contributing to the resignation of the CFO, stating that, as reflected in the minutes of the meeting held on 25th March 2019, she persuaded Mr. Francis Kamara, the then CFO, to remain in office until the audit process was concluded.

34. The Claimant further averred that her claim for unfair, unlawful, and wrongful termination of employment as Managing Director is properly before the Court. In this regard, she referred to the minutes of the meeting held on 25th April 2019, in which it was noted that; *she did not have a written employment contract; there were labour matters involved since she was an Executive Director and "full time employee of the Company"; any labour matter relating to the employment of the directors would be dealt with by the Human Resource in accordance with the labour laws; and that she would continue to enjoy her privileges and benefits as both a director and an employee.*

35. The Claimant contended that the cumulative actions of the Respondent created an intolerable working environment, rendering it impossible for her to continue working and thereby resulting in her constructive dismissal.

Respondent's case

36.The Respondent called oral evidence through **Adam Nyakundi** and **Kennedy Gitahi Njoroge**, who testified as RW1 and RW2, respectively. Mr. Nyakundi who was the first to go, identified himself as a director in the Respondent company. Similarly, he adopted his initial and further witness statements to constitute his evidence in chief. He further produced all the lists and bundles of documents filed on behalf of the Respondent, as exhibits before the Court.

37.RW1 testified that the Claimant remains a director of the Respondent company to date. He further stated that she also served as the Managing Director, with responsibility for the day-to-day operations of the company, including the payment of salaries.

38.He averred that the Claimant enjoyed various benefits, including access to a company credit card and a company motor vehicle. He added that she was using Motor Vehicle Registration Number KCT 411T, which had been acquired through a loan facility.

39.RW1 further contended that, for reasons known only to herself, the Claimant established a separate entity known as YDX Agency Limited, which offered services similar to those of the Respondent.

40.According to RW1, the name YDX Agency Limited incorporated the first three letters of the Respondent's name, noting that the Respondent also used "YDX" in its logo and email domain.

41.He further stated that upon establishing the new entity, the Claimant attempted to divert the Respondent's clients to her own company by falsely representing that the Respondent was undergoing rebranding and had changed its name to that of her company.

42.RW1 averred that this came to light through members of the Respondent's staff following a meeting with Safaricom TDR business concerning an existing account, during which the Claimant provided a new company address and alternative communication channels for the project.

43. He added that discussions took place between June and August 2019 regarding the transfer of the Safaricom TDR business account to the Claimant's new company, including a draft agreement outlining the proposed transition.

44. According to RW1, the Claimant's actions led to a significant loss of business for the Respondent, with several contracts between the Respondent and third parties being terminated as a result.

45. He averred that the Claimant persisted in the alleged conduct even after receiving a demand letter from the Respondent's advocates.

46. RW1 further stated that the establishment of a competing business by the Claimant, offering similar services, culminated in the institution of Civil Case No. E192 of 2019 before the High Court.

47. He further averred that the Claimant's mismanagement exposed the Respondent to legal challenges, including a claim of wrongful dismissal.

48. RW1 testified that these concerns prompted the Respondent to commission an audit in September 2019. He further referred to a meeting held on 25th March

2019 at which it was proposed that the Claimant step down to facilitate further investigations into the audit findings.

49. He stated that the Claimant objected to the proposal, which was subsequently deferred for further consideration at a meeting held on 25th April 2019, in order to afford her sufficient time to respond to the issues raised.

50. RW1 averred that during the meeting of 25th April 2019, it was resolved that, having been apprised of the concerns and given time to respond, the Claimant would continue to enjoy her entitlements but would temporarily cease to serve as Managing Director.

51. He further averred that due to a series of mismanagement issues and poor business decisions, the company began to incur substantial losses and encountered financial difficulties.

52. RW1 stated that the audit report identified, among other issues, instances of fraud, including the use of company resources by the Claimant to establish a competing business. He added that the report also highlighted poor resource allocation, weak leadership, and negligence.

53.He further testified that the Claimant was uncooperative during the audit process and declined to assist with the investigations that informed the report's findings. He maintained that these circumstances necessitated the Claimant's stepping aside to allow for further inquiry and corrective action.

54.RW1 also contended that, notwithstanding her allegation of termination, the Claimant continued to utilize company resources, including a credit card linked to a KCB Bank account.

55.He averred that the company's financial challenges persisted, ultimately rendering it unable to meet its operational objectives. According to him, this led to the voluntary dissolution of the company as a measure to address outstanding debts.

56.RW1 maintained that the Claimant was never issued with a formal notice of termination and continues to hold the position of director, asserting that her refusal to exit amicably has adversely affected the Respondent.

57.He further contended that the salary claimed by the Claimant is unfounded, explaining that the directors' remuneration was variable and dependent on the company's performance as well as the Claimant's management decisions.

58.RW1 further stated that by leaving the Respondent and establishing a competing enterprise, the Claimant forfeited any entitlement to benefits from the Respondent.

59.In his view, the Claimant effectively resigned from the company and is therefore not entitled to the monetary reliefs sought in her claim.

60.RW2, **Kennedy Gitahi Njoroge**, identified himself as an accountant by profession practicing under Libra Consulting, where he is both a director and shareholder. It was his testimony that he oversees all the firm's assignments.

61.RW2 testified that he was engaged by the Respondent in May 2019 to conduct investigations within the company, which he commenced in May 2019 and concluded in September 2019.

62.He further averred that his mandate included conducting a comprehensive audit of the company, as well as reviewing specific projects in respect of which allegations of fraud had been raised.

63.RW2 stated that the audit revealed weaknesses in internal controls and issues relating to accountability within the Respondent company.

64.He further testified that key staff associated with the audited projects had stepped down or left the company and were unavailable for interviews during the audit process.

65.According to RW2, the audit report he prepared is conclusive. Consequently, he produced the said report as an exhibit and urged the Court to rely on its findings.

Submissions

66.The Claimant submitted that the evidence on record leads to the conclusion that she was an employee of the Respondent, and that an implied contract of service existed between the parties in respect of her role as Managing Director. In support of this position, the Claimant placed reliance on *RTS Flexible Systems Limited v Molkerei Alois Müller GmbH & Company KG (UK Production)*

(2009) EWCA Civ 26 and *Sherry v Children Transformation Project (2022) KEELRC 1429 (KLR)*.

67. Citing the case of *Joseph Okello Adhiambo & another v Y.J Emli & 2 others (2012) KEELRC 267 (KLR)*, the Claimant urged the Court to apply the minimum statutory terms governing employment relationships as provided under the Employment Act.

68. The Claimant further contended that her termination as Managing Director was unlawful and unfair, being in contravention of Sections 41, 43, 44 and 45 of the Employment Act, and in violation of her constitutional right to fair labour practices under Article 41 of the Constitution.

69. It was the Claimant's submission that she was denied an opportunity to respond to allegations raised against her by the two directors during the meeting held on 25th March 2019, where it was proposed that she temporarily steps aside pending an audit. She further asserted that no show-cause letter was issued, nor was she furnished with the alleged audit report prior to her termination.

70. The Claimant further submitted that she was not accorded a hearing before the Board resolved to revoke her appointment as Managing Director at the meeting held on 25th April 2019.

71. According to the Claimant, the immediate revocation of her appointment through the Board's resolution of 25th April 2019, without disclosure of the allegations against her and without affording her a fair hearing, fell short of the requirements of Section 41 of the Employment Act and the principles of procedural fairness. In support of this argument, reliance was placed on the case of ***Joshua Lihanda v Outdoor Occasions Limited (2014) KEELRC 595 (KLR)***.

72. The Claimant maintained that there were no valid or fair reasons to justify the termination of her employment. It was her contention that the reasons advanced for her departure were inconsistent with those allegedly provided to the audit team. She further posited that the allegation that she made unilateral decisions was not substantiated by evidence.

73. She further submitted that the allegation that she undermined the Respondent's interests was unfounded and, in any event, did not form part of the reasons for her termination.

74. The Claimant submitted that she had discharged her evidentiary burden and established, on a balance of probabilities, that the reasons for her termination were unjustified.

75. Citing the case of *Nixon Mandala Malongo v Clifford Okello Rachuonyo & Another (2014) KEELRC 901 (KLR)*, the Claimant urged the Court to find that her termination was unlawful and unfair, arguing that she has demonstrated that she was neither given reasons nor afforded an opportunity to be heard.

76. On the Respondent's part, it was submitted that although the Claimant was appointed as Managing Director, she never executed a contract of employment confirming her status as an employee. On this score, the Respondent placed reliance on *Chitty on Contracts, 27th Edition, Volume 2 at page 703 paragraph 37-008* as well as the case of *Stanley Mungai Muchai v National Oil Corporation of Kenya [2012] KEELRC 38 (KLR)*.

77. The Respondent further posited that the Claimant was not integrated into its staff structure and that there was no evidence of a contract of service, but rather proof of payment of directors' fees and allowances. It was further submitted that there were no leave records, performance appraisals, or human resource files relating to the Claimant, and that she occupied a governance role distinct from that of an employee.

78. The Respondent further submitted that the remuneration structure was indicative of a corporate office as opposed to wages payable under a contract of service. In this regard, reliance was placed on the case of *Munialo v President of Kenya & 4*

others; Nzoia Sugar Company Limited (Interested Party) (Employment and Labour Relations Cause E008 of 2023) [2023] KEELRC 1969 (KLR).

79. Referencing the cases of *Lindong’a v Capital Markets Authority (Appeal 3 of 2018) [2024] KECMT 776 (KLR)* and *Monicah Wangui Njenga & another v David Kinyanjui Njenga & 3 others [2021] KEHC 12552 (KLR)*, the Respondent submitted that, as a director, the Claimant owed fiduciary duties to the company under the Companies Act.

80. The Respondent stated in further submission that Sections 143 and 146 of the Companies Act impose core fiduciary obligations, including duties of loyalty, fidelity, and the avoidance of conflicts of interest. In the same breath, the Respondent argued that the foregoing statutory provisions prohibited the Claimant from acting in a manner that undermines the company’s goodwill, reputation or commercial interests.

81. The Respondent further submitted that the Claimant incorporated a company bearing a deceptively similar name to that of the Respondent, thereby appropriating its goodwill. It was the Respondent’s contention that such conduct amounted to a conflict of interest and a breach of her fiduciary duties. In support of this position, reliance was placed on the case of *Jaba v Capital Markets Authority (Appeal 4 of 2018) [2024] KECMT 781 (KLR)*.

82. The Respondent maintained that the Claimant's conduct fell squarely within the mischief that fiduciary principles seek to prevent, namely, the misuse of corporate position for personal gain. To fortify this argument, the Respondent placed reliance on the cases of *Eveready East Africa Limited v Energizer Middle East and Africa Limited & another* [2017] KEHC 7227 (KLR), *Ajay Shah v Deposit Protection Fund Board as Liquidator of Trust Bank Limited (In Liquidation)* [2016] KECA 436 (KLR), and *Dawoodia v Wills & 2 others; Vogt & another (Interested Parties); Muthaiga Travel Limited (Plaintiff to the Counterclaim); Dawoodia (Defendant to the Counterclaim) (Civil Suit 386 of 2017)* [2025] KEHC 13415 (KLR).

83. The Respondent further submitted that the resolution to remove the Claimant was not oppressive but was a direct consequence of her own conduct. It was the Respondent's position that, had it not been for the alleged breaches of statutory and fiduciary duties, the question of the Claimant's removal would not have arisen.

84. It was the Respondent's further submission that the Claimant was afforded an opportunity to present her views on the proposed removal, and that her representations were duly considered, thereby satisfying the requirements of a fair hearing.

Analysis and Determination

85. Upon review of the record, the Court has distilled the following issues for determination:

- i. Whether the Claimant was an employee of the Respondent;*
- ii. Depending on (i) whether the Claimant was terminated from employment;*
- iii. Depending on (ii) whether the Claimant's termination from employment was unfair and unlawful; and*
- iv. Depending on (iii) whether the Claimant is entitled to the remedies sought.*

Employment relationship?

86. It is not in dispute that at the material time, the Claimant was one of the directors of the Respondent company. It is equally common ground that she was appointed as the Managing Director, albeit without a formal letter of appointment. The issue that arises for determination is whether the Claimant was an employee of the Respondent company.

87. In support of her case, the Claimant produced minutes of the Respondent's Board of Directors' meeting held on 25th April 2019. The minutes, under item *Min 06/03/19*, indicate that the Managing Director (the Claimant) did not have a

written employment contract and that no formal contracts existed for the directors. It was also noted that labour matters were involved, as the Managing Director served both as an executive director and a full-time employee of the company. The minutes further recorded that the Claimant would continue to enjoy the privileges and benefits attendant to her roles as both director and employee.

88. It is also noteworthy that RW1, in his testimony, acknowledged that the Claimant was the Managing Director of the Respondent and was responsible for the day-to-day operations of the company, among other duties.

89. In further support of her case, the Claimant exhibited a copy of a pay slip for the month of September 2018 in which she is described as an employee. The pay slip reflects a basic salary of Kshs 1,000,000.00 together with a non-cash benefit of Kshs 225,400.00.

90. Section 2 of the Employment Act defines an employee as follows: ***“a person employed for wages or a salary and includes an apprentice and indentured learner.”***

91. Applying the foregoing statutory definition to the present case, the Court is persuaded that the Claimant was engaged by the Respondent to render services in her capacity as Managing Director and that in consideration thereof, she received remuneration in the form of a monthly salary. This is evidenced by her receipt of a basic salary and additional non-cash benefits.

92. The above position is supported by the minutes of the Respondent's Board of Directors' meeting held on 25th April 2019, which expressly acknowledged the Claimant's dual role as both a director and an employee of the company.

93. In the circumstances, the Court finds no difficulty in concluding that the Claimant was, in fact, an employee of the Respondent company.

Whether the Claimant was terminated from employment

94. The parties have taken diametrically opposite positions on this issue. Whereas the Claimant holds that her employment was terminated by the Respondent, the Respondent contends that she walked away and was not terminated. The Respondent further asserts that the Claimant's conduct amounted to a termination of her employment.

95. The record bears that at a meeting of the Respondent's Board of Directors held on 25th April 2019, it was resolved that the appointment of the Managing Director (Claimant) be revoked with immediate effect, and that the decision be communicated to the Human Resources department accordingly.

96. The **Black's Law Dictionary (10th Edition, p. 1515)** defines the term "revoke" as follows: ***"To annul or make void by taking back or recalling; to cancel, rescind, repeal or reverse."***

97. Further, the **Essential Law Dictionary (1st Edition, p. 435)** defines the term "revoke" to mean: ***"To cancel or withdraw a will or other instrument, or some power, authority, or privilege."***

98. Applying the foregoing definitions to the present case, it follows that the resolution by the Respondent's Board of Directors to revoke the Claimant's appointment as Managing Director had the effect of cancelling and reversing her appointment. In the context of an employment relationship, this amounted to a termination of her role as Managing Director.

99. Consequently, notwithstanding the absence of a formal termination notice, the resolution passed by the Respondent's Board of Directors on 25th April 2019

effectively brought the Claimant's employment to an end. Differently expressed, the Claimant's employment was terminated.

100. Having so found, the Court now proceeds to determine whether the termination of the Claimant's employment was unfair and unlawful.

Unfair and unlawful termination of employment?

101. The Employment Act, 2007 prohibits unfair and unlawful termination of employment. In this regard, an employer is required to demonstrate that the termination of an employee was both substantively justified and procedurally fair. The applicable legal framework for assessing fairness and lawfulness in termination is set out under Sections 41, 43, and 45 of the Employment Act.

102. Whereas substantive justification concerns the existence and proof of reasons for the termination, procedural fairness pertains to the process followed by the employer in effecting the termination.

(i) Substantive justification

103. With regard to substantive justification, **Section 43(1) of the Employment Act** requires an employer to prove the reasons for an employee's termination from employment, failing which such termination is deemed unfair within the meaning of Section 45. Under **Section 45(2)(a) and (b) of the Employment Act**,

a termination of employment is deemed unfair where the employer fails to demonstrate that the reason for termination is valid, fair, and related to the employee's conduct, capacity, or compatibility, or is connected to its operational requirements.

104. In the present case, the Respondent contends that the Claimant acted in a manner detrimental to the interests of the company, citing, inter alia, declining financial performance which necessitated the commissioning of an independent audit.

105. The Respondent further asserts that the resolution passed on 25th April 2019, requiring the Claimant to step down as Managing Director, was informed by her incorporation of YDX Agency Limited, in which she held a 99% shareholding. It is alleged by the Respondent that the Claimant approached its clients and misrepresented that the Respondent was rebranding as YDX Agency Limited, and that the similarity in names derived from the Respondent's initials facilitated such misrepresentation.

106. In support of this position, the Respondent produced a CR12 dated 23rd June 2019 for YDX Agency Limited, indicating that the company was registered on 12th November 2013, with **Ann Wanjiru Ngigi** (the Claimant) holding 99 shares.

107. On her part, the Claimant maintained that she had initially incorporated Abiola Ltd in 2013 to operate a limousine service, which never became operational due to her commitments at the Respondent company. She asserted that YDX Agency Limited came to be in April 2019 following a change of name from Abiola Ltd. Despite this assertion, the Claimant did not tender evidence to substantiate her position that YDX Agency Limited resulted from a change of name from Abiola Ltd in April 2019.

108. The record further indicates that the Respondent's affiliate in South Africa, Youth Dynamix Pty Ltd, terminated its affiliation with the Respondent by a letter dated 16th April 2019. Immediately thereafter, on 17th April 2019, the Claimant together with YDX Agency Limited was appointed as the legal affiliate of Youth Dynamix Pty Ltd in East Africa.

109. Consequently, as founder and owner of YDX Agency Limited, the Claimant was granted exclusive rights to use the YDX brand, name, tools, systems, and products within the designated territory with effect from 17th May 2019. Notably,

this appointment preceded the Respondent's Board resolution revoking the Claimant's appointment as Managing Director.

110. From the foregoing, it is evident that YDX Agency Limited, the entity incorporated by the Claimant, operated in the same line of business as the Respondent, thereby rendering it a direct competitor. Needless to say, there was conflict of interest on the Claimant's part through the incorporation of YDX Agency Limited.

111. Indeed, pursuant to an agreement dated 16th May 2019, the Claimant and the other directors of the Respondent, including RW1 and David Ngaruiya, agreed that the Respondent's Safaricom (TDR & Research) business would be transferred to YDX Agency Limited, whose director was the Claimant. Under that agreement, the Respondent relinquished its interest in the said business.

112. It thus emerges from the foregoing that the establishment and operation of YDX Agency Limited by the Claimant was against the interests of the Respondent company and adversely affected its business as it directly competed with the Respondent. Indeed, the Respondent incurred an actual loss of business with Safaricom.

113. In the circumstances, the Court finds that the Claimant's act of establishing a company operating in the same line of business as the Respondent constituted a valid and fair reason for the Respondent to terminate her appointment as Managing Director.

114. In reaching this conclusion, I am mindful that the standard of proof in employment matters is on a balance of probabilities, rather than beyond a reasonable doubt (**see Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR**).

(ii) Procedural fairness?

115. Turning to the question of procedural fairness, **Section 45(2)(c) of the Employment Act** requires an employer to demonstrate that the termination of an employee was carried out in accordance with a fair procedure. Section 41 of the Act outlines the essential elements of such procedure, which include notifying the employee of the allegations against them and affording them an opportunity to respond in the presence of a fellow employee or a union representative of their choice.

116. In the present case, it is evident that prior to the resolution passed at the Board meeting held on 25th April 2019, whereby the Claimant's appointment as

Managing Director was revoked, she was not invited to show cause why her appointment should not be terminated on account of the allegations made against her.

117. Additionally, there is no evidence that the Claimant was accorded an opportunity to respond to the allegations or to present her defence before the decision to revoke her appointment as Managing Director was made.

118. In the circumstances, the Court finds that the termination of the Claimant's appointment as Managing Director was not conducted in accordance with the procedure prescribed under Section 41 of the Employment Act, and was therefore procedurally unfair within the meaning of Section 45(2)(c).

Reliefs?

119. Having found that the Respondent had a valid and fair reason to terminate the Claimant's employment, but that the process was procedurally unfair, the Claimant would ordinarily be entitled to compensation under **Section 49(4) of the Employment Act**. However, in view of the circumstances leading to the termination of her appointment, particularly the resultant loss of business suffered by the Respondent, an award of compensatory damages would be unconscionable. Consequently, the Court declines to award compensatory damages.

120. However, on account of the procedural impropriety, the Court awards the Claimant one (1) month's salary in lieu of notice.

121. The Claimant is further awarded salary for the months of March and April 2019, there being no evidence that these sums were paid. This is in light of the fact that the decision to revoke her appointment was made on 25th April 2019. Further, there is no indication or suggestion that she did not work during this period. She is therefore entitled to full salary for March 2019 and salary for twenty-five (25) days in April 2019, computed on the basis of the pay slip produced in evidence.

122. The Claimant's claim for accrued leave succeeds only in respect of the eighteen (18) months preceding her exit from the Respondent company, pursuant to **Section 28(4) of the Employment Act**. Consequently, the claim for leave accrued from as far back as 2006 is declined.

Orders

123. In the final analysis, the Court enters judgement in favour of the Claimant and she is awarded:

(a) One month's salary in lieu of notice, being Kshs 1,225,400.00.

(b) Salary for March 2019 and for the 25 days worked in April 2019, totaling Kshs 2,246,566.67.

(c) Accrued leave for eighteen (18) months, amounting to Kshs 1,286,670.00.

(d) The total award is Kshs 4,758,636.67.

(e) Interest on the total sum in (d) shall accrue at court rates from the date of judgment until payment in full.

(f) The Respondent shall bear the costs of this suit.

DATED, SIGNED and DELIVERED at NYERI this 24th day of March, 2026.

.....
**STELLA RUTTO
JUDGE**

In the presence of:

Ms. Faheema instructed by Mrs. Ahomo for the Claimant

Mr. Njuguna for the Respondent

Ndati Court Assistant

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that

judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE