



REPUBLIC OF KENYA



KENYA LAW
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**Ngila v Kenya Breweries Ltd (Employment and Labour Relations Cause
E775 of 2022) [2025] KEELRC 455 (KLR) (18 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 455 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E775 OF 2022**

HS WASILWA, J

FEBRUARY 18, 2025

BETWEEN

CAROLINE NTHEYA NGILA CLAIMANT

AND

KENYA BREWERIES LTD RESPONDENT

JUDGMENT

1. The Claimant instituted this suit by a Memorandum of Claim dated 28th October 2022, seeking relief for what she termed as unfair and wrongful dismissal by the Respondent. The Respondent is a Limited Liability Company, registered under the *Companies Act*, Cap 486, Laws of Kenya, operating as Kenya Breweries Ltd. The Claimant was engaged by the Respondent as a Territory Management Representative on 12th August 2014, earning a gross monthly salary of Kshs. 162,109/-. She averred that she served the Respondent diligently and with utmost loyalty until her summary dismissal on 30th October 2019, which was communicated through a letter of termination.
2. The Claimant asserted that she was forced to leave employment on the alleged grounds of gross negligence, incompetence, and poor performance, which were contrary to the company's policies and procedures. She refuted these claims, arguing that no concerns had ever been raised about her work performance. On the contrary, she stated that in 2017, she received an award for her contribution to the company's growth trajectory and was subsequently promoted to the position of Area Business Development Manager. She further stated that on 30th September 2019, she received a notice to show cause letter, followed by a letter dated 4th October 2019, requiring her to attend a disciplinary hearing on 8th October 2019.
3. During the disciplinary hearing, she was accused of ineffective distributor management, poor leadership, and integrity issues, allegations she refuted and provided evidence against. However, the committee allegedly disregarded her defense and proceeded to unfairly dismiss her. She was issued with a summary dismissal letter dated 30th October 2019. Aggrieved by the decision, she filed an appeal with



- the Human Resource Director on 5th November 2019, as per the company's policy, but her appeal was never heard. She maintained that her termination was grossly unfair, and she had suffered loss and damage, necessitating the present claim.
4. The Claimant submitted that the actions of the Respondent amounted to serious labour malpractice, violating Sections 44 and 45 of the *Employment Act* as well as principles of natural justice and fairness. She argued that the Respondent had abrogated the law by illegally and unfairly dismissing her and further violated the law by failing to remit her pay for unpaid 62 leave days, contrary to both her letter of dismissal and the *Employment Act*. She reiterated that the Respondent's actions were irregular, unlawful, and amounted to serious labour malpractice, which had caused her significant financial loss. She demanded payment for her unpaid leave days for 62 days.
 5. The Claimant sought the following orders:
 1. The court to find the Respondent guilty of unfair and wrongful dismissal and order the Respondent:
 - a. To compensate and pay her as follows:
 - i. Compensation for unfair and wrongful dismissal at 12 months:
Kshs. 223,496 x 12 = Kshs. 2,681,952
 - ii. Unpaid leave for 62 days: Kshs. 670,480
Total: Kshs. 3,352,440
 2. Interest on (a) above.
 3. A Certificate of Service to be issued to the Claimant.
 4. Costs of this suit.
 5. Any other relief the Court may deem just and fit to grant.
 6. The Claimant filed an affidavit dated 28th October 2022 and reiterated the contents of the Memorandum of Claim as if the same formed part of the affidavit and prayed for the orders stated therein, along with any further relief the Court deemed fit to grant. She affirmed that there were no previous proceedings between her and the Respondent in any court or tribunal over the same subject matter. She asserted that the Court had jurisdiction to hear and determine the matter and swore the affidavit to verify the correctness of the facts stated in the Memorandum of Claim. She confirmed that the contents of the affidavit were true to the best of her knowledge, information, and belief.
 7. The Claimant filed a witness statement dated 28th October 2022, stating that she was employed by Kenya Breweries Limited as a Territory Management Representative from 2014 to 2017, earning a basic salary of Kshs. 162,109. In November 2017, she was promoted to Area Business Development Manager for East African Breweries Limited and was posted to Western Kenya, overseeing Busia Butler's Distributors in Busia Town and M Big Limited in Bungoma and Kakamega Town. She was also responsible for four representatives managing Bungoma, Busia, Kakamega, and Mumias territories.
 8. She asserted that during her tenure as Area Business Development Manager, she was among the top performers nationally, receiving various awards and recognition for her efforts. Her representatives in Kakamega and Bungoma also received similar accolades. Senior EABL leadership, including the Managing Director, Sales Director, Spirits National Leader, and Keg National Leader, visited her area and gave positive feedback regarding her performance. She further stated that her distributor, M Big Limited, was successfully operating in Kisii, Bungoma, and Kakamega, though the Kisii branch, which



was not under her jurisdiction, was later closed. Her three distribution points consistently performed well, often ranking among the top in the country. One of her key performance indicators was ensuring that the Minimum Product Assortment (MPA) was achieved with the assistance of the distributor's sales team.

9. She explained that in September 2019, she noticed that her distributor frequently ordered MPA products from the Kisumu depot, which often had stockouts. She raised the concern via email to the then Acting Divisional Sales Manager, Bernard Kubasu, and advised the distributor to order from the Nairobi depot instead. However, this caused delays in delivery. By that time, her representatives in the field had already reported the stockouts, a situation beyond her control, which she had duly communicated to her superior.
10. She stated that as part of her responsibilities, she held monthly meetings with distributor management to discuss business strategies and future goals. One of her strategies involved using peer coaching to enhance team performance, which included market storms and mentorship from top performers. She noted that her then Divisional Sales Manager, Kerago Ngugi, attended these meetings, commended her approach, and even recommended one of her top performers, Petronilla Metal, to train peers in South Nyanza. However, during her disciplinary hearing, the same manager accused her of failing to manage her team and distributors properly.
11. She recalled receiving a Notice to Show Cause on 30th September 2019 and, on 4th October 2019, an invitation to a disciplinary hearing scheduled for 8th October 2019. During the hearing, her coaching strategy, which had been previously encouraged by her manager, was criticized by the panel. She raised concerns about this inconsistency, questioning why a method approved by her superior was now being used against her.
12. She further asserted that, since her employment, she had never been placed on a Performance Improvement Plan. After her promotion, her boss only coached her in the field four times over two years. Although he sent monthly planners stating that he would work with her at least twice a month, he rarely showed up. On two occasions, he called late at night to schedule a coaching session the following morning, despite company policies requiring advance notice. Additionally, she never had an end-of-year performance review with him. She recounted that in 2018, when she fell ill on the scheduled review day, she informed her manager, who wished her a quick recovery. However, he later assigned her a performance score without any prior discussion or agreement.
13. She denied an accusation made by her manager that she had asked one of her representatives to lie on her behalf regarding coaching feedback sessions. She explained that coaching feedback was digitized, with all records accessible to managers, representatives, and relevant parties, making it impossible for her to manipulate the data. She reiterated before the panel that she had never instructed anyone to lie on her behalf.
14. Following her dismissal, she believed the decision was unfair and contacted the Director of Compliance, who assigned her case to Jane Chevy. She was advised to meet the Human Resource Director, Letna Otieno, who encouraged her to trust the process and file an appeal. She submitted her appeal in November 2019, but to date, it had never been responded to.
15. Her dismissal letter stated that she would receive her dues after deductions for any amounts owed to the company. She had 62 pending leave days but had not been compensated for them. She found the dismissal punitive and stated that she had suffered losses and damages as a result. She requested fair compensation and a certificate of service from the Court.



Claimant's Written submissions

16. The Claimant filed written submissions dated 7th January 2025, seeking a declaration that she was unfairly and wrongfully dismissed from employment. She prayed for compensation amounting to KES 2,681,952, unpaid leave for 62 days amounting to KES 670,480, interest on the amounts, a certificate of service, and costs of the suit. The Respondents, in their response dated 28th February 2023, admitted that the Claimant was employed as a Territory Management Representative on 11th August 2014, earning a gross salary of KES 223,496.54. The Claimant averred that she served the Respondents diligently until 30th October 2019, when she was summarily dismissed on allegations of gross negligence, incompetence, and poor performance. She contended that her dismissal was unfair and in breach of Sections 44 and 45 of the *Employment Act, 2007*.
17. The Claimant argued that the Respondents failed to prove valid reasons for her dismissal as required under Sections 43, 45, and 47(5) of the *Employment Act, 2007*. The dismissal letter dated 30th October 2019 cited ineffective distributor management, poor leadership, and integrity issues, which the Claimant refuted as unsubstantiated during the disciplinary hearing. She explained that her responsibilities included managing distributor accounts, driving brand growth, optimizing distribution, coaching sales teams, and overseeing profitability.
18. On the allegation of ineffective distributor management, the Respondents claimed that the Claimant failed to address undercapitalization and high overdue balances of a distributor under her supervision. They relied on a letter dated 11th June 2018 from the Finance Director, stating that lower bank interest rates had been negotiated for distributors to access more overdrafts. The Claimant, in response, provided evidence from her response to the Notice to Show Cause, showing that she held several capitalization meetings with the distributor. She demonstrated that M-Big injected KES 37 million in August 2019 and an additional KES 15 million in September 2019, with plans to reach KES 50 million by November 2019. She also facilitated the addition of two beer trucks and two spirit vans, ensuring minimum delivery to outlets thrice a week. The Respondents did not dispute these efforts.
19. The Claimant asserted that M-Big's turnover exceeded KES 160 million in the 2019 financial year, surpassing targets. She argued that this performance contradicted claims of mismanagement and demonstrated that the challenges faced were systemic rather than due to her actions. She submitted that the Respondents failed to acknowledge these improvements, making their accusations baseless.
20. On poor leadership, the Respondents alleged that the Claimant failed to provide proof of coaching and team development. The Claimant countered this claim by demonstrating that she successfully guided her sales representatives in Kakamega and Bungoma, leading to peer-to-peer coaching initiatives and recognition for her team. She presented evidence of awards and positive feedback from EABL leadership. The Respondents did not present any complaints from her team or place her on a performance improvement plan. They also alleged that her Minimum Product Assortment (MPA) score was low at 17%. The Claimant explained that stock shortages beyond her control impacted the score and that she had raised concerns with her acting Divisional Sales Manager, but no support was provided. Despite these challenges, she demonstrated significant growth in beer and spirit sales between 2018 and 2019.
21. On the allegation of integrity issues, the Claimant pointed out that her dismissal letter acknowledged that the disciplinary committee did not find concrete evidence against her. She argued that termination decisions must be based on verifiable evidence, and the lack of substantiation further demonstrated the unfairness of her dismissal.



22. The Claimant submitted that she was entitled to reliefs on grounds of unlawful termination and violation of statutory obligations. She cited *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR, where the court held that an employee only needs to establish a prima facie case of unfair termination, shifting the burden to the employer to justify the dismissal. She also relied on *Josephine M. Ndungu & others v Plan International Inc* [2019] eKLR, which reiterated that an employee must present evidence that termination lacked substantive justification.
23. Further, she relied on *Jane Samba Mukala v Ol Tukai Lodge Limited* (2010) LLR 255 (ICK), where the court emphasized that employers must demonstrate measures taken to assess performance and support employees before terminating them for poor performance. In *Janet Nyandiko v Kenya Commercial Bank Limited* (2017) eKLR, the court held that termination must be based on valid reasons and a fair procedure, including a hearing where the employee is informed of the reasons and allowed to respond. She also cited *Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) v Stanley Kinyanjui and Magnate Ventures Ltd* (Industrial Court Cause No. 273 of 2010), which held that before terminating an employee for poor performance, the employer must allow time for improvement.
24. She relied on *Alois Makau Maluvu v Cititrust Kenya Limited & Another* [2018] eKLR, where the court ruled that employers must prove that employees were aware of performance standards and were supported before dismissal. She submitted that she met this threshold by providing evidence of initiatives to improve distributor performance, coaching her team, and addressing operational inefficiencies.
25. The Claimant demonstrated that she addressed undercapitalization by securing KES 37 million in August 2019 and KES 15 million in September 2019, adding trucks and vans to improve deliveries, and achieving a turnover exceeding KES 160 million in 2019. She argued that the Respondents' failure to implement a performance improvement plan further discredited their claims. She pointed out that she received a sales incentive of KES 85,688.48 in her final paycheck, contradicting allegations of poor performance.
26. She further claimed payment for 62 accrued leave days, arguing that the *Employment Act, 2007* provides 21 paid leave days annually, and the Respondents failed to prove that she was compensated for the accrued leave.
27. The Claimant concluded by asserting that she had demonstrated that her dismissal was both substantively and procedurally unfair. She argued that the Respondent failed to substantiate allegations of poor performance, ineffective distributor management, and poor leadership, while she provided clear evidence of her proactive efforts and successes in addressing these issues. She also contended that the Respondent did not provide the necessary support or opportunities for improvement and failed to follow the required procedural fairness under the *Employment Act, 2007*. The Claimant maintained that her entitlements, including compensation for unfair dismissal, unpaid leave, and a certificate of service, were supported by the evidence presented. In light of the Respondent's failure to provide adequate justification for the termination, she urged the court to grant the reliefs sought, including costs of the suit, as she had clearly demonstrated the unlawful nature of her dismissal.

Respondent's Case

28. The Respondent filed a Memorandum of Response dated 28th February 2023, admitting only the descriptive details in paragraphs 1(i) and (ii) of the Memorandum of Claim. It confirmed that the Claimant was employed as a Territory Management Representative through a contract dated 12th August 2014, effective 11th August 2014, with a gross monthly salary of Kshs. 162,109/=. The



- Claimant was later promoted to the position of Area Business Development Manager through a letter dated 1st November 2017, effective 1st October 2017, with a gross monthly salary of Kshs. 223,496.54/= . Her responsibilities included managing distributor accounts, leading brand and volume growth, motivating distributors, overseeing sales, managing profits and losses, and developing her sales team.
29. The Respondent stated that on 2nd July 2019, the Claimant was issued a show cause letter regarding fraudulent incur expense claims amounting to Kshs. 51,110/=, involving receipts with missing dates and outlet names and four receipts written in the same handwriting. The Claimant responded on 6th July 2019, but her explanation was deemed unsatisfactory, leading to a disciplinary hearing on 18th July 2019. Following the hearing, the Respondent issued a warning letter on 30th July 2019, reminding the Claimant to comply with company policy.
30. On 30th September 2019, the Claimant received another show cause letter for breach of the Respondent's Code of Business Conduct due to ineffective distributor management, poor leadership, and integrity issues. She responded on 2nd October 2019, but her explanation was again found unsatisfactory. A disciplinary hearing was held on 8th October 2019, after which the Respondent concluded that the allegations of gross negligence and poor performance amounting to gross misconduct were substantiated. Consequently, the Claimant was summarily dismissed through a letter dated 30th October 2019.
31. The Respondent justified the termination, stating that the Claimant had mismanaged a distributor under her docket, failed to resolve capitalization issues, and did not properly coach her sales team. The Claimant's Minimum Product Assortment (MPA) score was reportedly low, and her explanations were deemed unacceptable. The Respondent denied the Claimant's assertions that she performed her duties diligently and contended that her performance issues had been previously communicated to her.
32. The Respondent asserted that the termination complied with Sections 41, 44, and 45 of the *Employment Act*, 2007. It further stated that payment for accrued leave days, if any, would only be made upon the completion of an exit interview and submission of a signed clearance form, which the Claimant had not undertaken. The Claimant was also eligible for a Certificate of Service upon formal clearance, which she had abandoned. The Respondent denied receiving a demand or notice of intention to sue and put the Claimant to strict proof. It maintained that the claim was unwarranted and should be dismissed with costs.
33. The Claimant responded to the Respondent's Memorandum of Response through a Reply dated 16th June 2023, reiterating the contents of the Statement of Claim except where expressly admitted. In response to paragraphs 2, 3, and 4, the Claimant maintained that she was employed as an Area Business Development Manager. Regarding paragraph 5, she admitted the contents but explained that during the disciplinary hearing, she clarified that all receipts were stapled together, and when separated, they tore off. She noted that the disciplinary committee found her response satisfactory. She denied the allegations in paragraph 6 and put the Respondent to strict proof thereof. In response to paragraphs 7 and 8, she admitted the contents but pointed out that, being stationed in the Respondent's Western Kenya branch, she did not have adequate time to secure a witness or a representative. She also highlighted that even after her response was found satisfactory during the disciplinary hearing, she was still issued a suspension letter.
34. Regarding paragraph 9(a), she contended that she was not in charge of the Kisii depot, which had already been closed, and that the Kakamega (Bungoma) depot, for which she was responsible, remained fully operational. Therefore, she was unfairly penalized for a matter beyond her jurisdiction. In further response to paragraphs 9(b) and 9(c), concerning allegations of poor leadership and integrity issues, she denied the accusations and put the Respondent to strict proof. She maintained that she had received



- numerous awards from the Respondent for exemplary performance and that two of her representatives had also received awards. In response to paragraphs 11 and 12, she admitted the contents but reiterated that she was not given sufficient time to prepare for the hearing or secure adequate representation. Despite this, she maintained that her responses to the Respondent's allegations were satisfactorily proven.
35. In reply to paragraph 13, she restated that none of the concerns raised against her were ever brought up during business review meetings by her superiors. She denied the allegations in paragraphs 14, 15, 16, and 17, asserting that they contained mere denials and unsubstantiated claims. In further response to paragraph 18, she reiterated the contents of paragraph 2(viii) of the Statement of Claim. Concerning paragraphs 19, 20, and 21, she maintained that she had a valid claim and affirmed that the Respondent had been served with demands and a notice of intention to sue. She reiterated the contents of the Statement of Claim in its entirety and prayed for the striking out of the Memorandum of Response and the entry of judgment as prayed.
36. The Respondent filed a witness statement dated 27th November 2023 through Robert Obat, who was employed as the Credit Risk Manager and previously served as the Divisional Sales Manager for Lake Division at the material time. He stated that the Claimant was first employed as a Territory Management Representative under a contract of employment dated 12th August 2014 and was later promoted to the position of Area Business Development Manager, which she held until her termination. Her responsibilities included managing distributor accounts, leading brand and volume growth, networking with distributors, managing sales teams, coaching and developing employees, overseeing profit and loss, and maintaining key relationships.
37. He stated that in July 2019, the Claimant was required to explain her handling of concur expenses, where she allegedly provided fraudulent receipts amounting to Kshs. 51,110. The discrepancies included receipts with torn date sections, outlet names removed, and four receipts from different outlets written in the same handwriting. This was one of several instances where the Claimant had been questioned regarding erroneous concur reconciliations. She responded via an email dated 6th July 2019, but her response was found unsatisfactory, leading to her invitation to a disciplinary hearing on 18th July 2019. After the hearing, the Respondent concluded that the allegations had been proven, and the Claimant was issued a warning letter dated 30th July 2019, reminding her to comply with company policy.
38. The witness further stated that in 2019, concerns arose regarding the Claimant's ineffective distributor management, poor leadership, and integrity issues. It was alleged that she failed to resolve operational issues affecting one of the Respondent's largest distributors, which, as of March 2019, was running an unsustainable business with nearly 50% overdraft funding. She also failed to address high overdue amounts and requisitions of high overdrafts despite multiple reminders from her Line Manager. The undercapitalization of the distributor allegedly affected overall sales in her area. Her leadership was questioned, as her coaching score stood at 29%, her coverage score at 80%, and her Minimum Product Assortment (MPA) score at 17%. Additionally, she failed the coaching capability accreditation, which was a key assessment of her leadership. It was further alleged that she failed to produce her accompaniment records during accreditation and instead asked a subordinate to lie on her behalf.
39. Following these concerns, the Claimant was issued a show cause letter dated 30th September 2019 for breach of the Respondent's Code of Business Conduct. She submitted her response on 2nd October 2019, but it was deemed unsatisfactory. Consequently, she was invited to another disciplinary hearing on 8th October 2019. After considering the Claimant's representations, the Respondent concluded that allegations of gross negligence and poor performance amounting to gross misconduct had been



satisfactorily proven. The disciplinary hearing minutes dated 8th October 2019 and the Respondent's Disciplinary Policy were cited as references.

40. The Claimant was summarily dismissed through a letter dated 30th October 2019. The reasons for dismissal included ineffective distributor management, where she allegedly failed to address capitalization issues despite concerns raised as early as February 2019, and poor leadership, where she failed to provide proof of coaching and her explanation for a low MPA score was deemed unacceptable. She was informed of her right to appeal, but she did not exercise it. The Respondent maintained that the Claimant's termination was lawful, fair, and transparent and that she was not entitled to any of the prayers sought.
41. The Respondent filed another witness statement dated 25th September 2023 through Michelle Kiriinya, the Talent Engagement Manager. She stated that the Respondent was a limited liability company incorporated in Kenya, engaged in the sale and distribution of alcoholic and non-alcoholic beverages. The Claimant was employed as a Territory Management Representative under a contract dated 12th August 2014, effective 11th August 2014, with a gross salary of Kshs. 162,109. She was later promoted to the position of Area Business Development Manager, effective 1st October 2017, earning a gross monthly salary of Kshs. 223,496.54. Her responsibilities included managing distributor accounts, developing brand and volume growth, networking with distributors, managing sales teams, coaching employees, overseeing profit and loss, and maintaining key relationships.
42. She stated that on 2nd July 2019, the Claimant was asked to show cause why disciplinary action should not be taken against her for unsatisfactory handling of concur expenses, where she allegedly provided fraudulent receipts amounting to Kshs. 51,110. The discrepancies included receipts with torn date sections, outlet names removed, and four receipts from different outlets written in the same handwriting. This was one of several instances where the Claimant had been questioned regarding erroneous concur reconciliations. She responded via an email dated 6th July 2019, but her response was found unsatisfactory. On 15th July 2019, she was invited to a disciplinary hearing on 18th July 2019. After the hearing, the Respondent concluded that the allegations had been proven, and the Claimant was issued a warning letter dated 30th July 2019, reminding her to comply with company policy.
43. She further stated that on 30th September 2019, the Claimant was issued another show cause letter for alleged breach of the Respondent's Code of Business Conduct. The accusations included ineffective distributor management, poor leadership, and integrity issues. The Claimant responded on 2nd October 2019, but her response was deemed unsatisfactory. Consequently, she was invited to another disciplinary hearing on 8th October 2019. After considering her representations, the Respondent concluded that allegations of gross negligence and poor performance amounting to gross misconduct had been satisfactorily proven in accordance with the Respondent's disciplinary policy. The disciplinary hearing minutes dated 8th October 2019 and the Respondent's Disciplinary Policy were referenced.
44. The Claimant was summarily dismissed through a letter dated 30th October 2019. The reasons for dismissal included ineffective distributor management, where she allegedly failed to address capitalization issues despite concerns raised as early as February 2019, and poor leadership, where she failed to provide proof of coaching, and her explanation for a low Minimum Product Assortment (MPA) score was deemed unacceptable. She was informed of her right to appeal, but she did not exercise it. The Respondent maintained that the Claimant's termination was lawful, fair, and transparent and that she was not entitled to any of the prayers sought.
45. The Respondent also filed another witness statement dated 25th November 2023 through Robert Obat, who was employed as the Credit Risk Manager and previously served as the Divisional Sales



Manager for Lake Division. He stated that the Claimant was first employed as a Territory Management Representative under a contract of employment dated 12th August 2014 and was later promoted to the position of Area Business Development Manager, which she held until her termination. Her responsibilities included managing distributor accounts, leading brand and volume growth, networking with distributors, managing sales teams, coaching employees, overseeing profit and loss, and maintaining key relationships.

46. He stated that in July 2019, the Claimant was required to explain her handling of concur expenses, where she allegedly provided fraudulent receipts amounting to Kshs. 51,110. The discrepancies included receipts with torn date sections, outlet names removed, and four receipts from different outlets written in the same handwriting. This was one of several instances where the Claimant had been questioned regarding erroneous concur reconciliations. She responded via an email dated 6th July 2019, but her response was found unsatisfactory, leading to her invitation to a disciplinary hearing on 18th July 2019. After the hearing, the Respondent concluded that the allegations had been proven, and the Claimant was issued a warning letter dated 30th July 2019, reminding her to comply with company policy.
47. He further stated that in 2019, concerns arose regarding the Claimant's ineffective distributor management, poor leadership, and integrity issues. It was alleged that she failed to resolve operational issues affecting one of the Respondent's largest distributors, which, as of March 2019, was running an unsustainable business with nearly 50% overdraft funding. She also failed to address high overdue amounts and requisitions of high overdrafts despite multiple reminders from her Line Manager. The undercapitalization of the distributor allegedly affected overall sales in her area. Her leadership was questioned, as her coaching score stood at 29%, her coverage score at 80%, and her Minimum Product Assortment (MPA) score at 17%. Additionally, she failed the coaching capability accreditation, which was a key assessment of her leadership. It was further alleged that she failed to produce her accompaniment records during accreditation and instead asked a subordinate to lie on her behalf.
48. Following these concerns, the Claimant was issued a show cause letter dated 30th September 2019 for breach of the Respondent's Code of Business Conduct. She submitted her response on 2nd October 2019, but it was deemed unsatisfactory. Consequently, she was invited to another disciplinary hearing on 8th October 2019. After considering the Claimant's representations, the Respondent concluded that allegations of gross negligence and poor performance amounting to gross misconduct had been satisfactorily proven. The disciplinary hearing minutes dated 8th October 2019 and the Respondent's Disciplinary Policy were cited as references.
49. The Claimant was summarily dismissed through a letter dated 30th October 2019. The reasons for dismissal included ineffective distributor management, where she allegedly failed to address capitalization issues despite concerns raised as early as February 2019, and poor leadership, where she failed to provide proof of coaching and her explanation for a low MPA score was deemed unacceptable. She was informed of her right to appeal, but she did not exercise it. The Respondent maintained that the Claimant's termination was lawful, fair, and transparent and that she was not entitled to any of the prayers sought.

Respondent's Written Submissions

50. The Respondent filed written submissions dated 23rd January 2023, stating that the Claimant, a former employee, alleged wrongful and unfair dismissal and sought compensation amounting to Kshs. 3,352,440, which included 12 months' salary compensation for unfair dismissal totalling Kshs. 2,681,952 and unpaid leave for 62 days amounting to Kshs. 670,480. The Respondent maintained that the Claimant was lawfully dismissed due to gross negligence in performing her duties. In support of its



case, the Respondent relied on the Memorandum of Response dated 28th February 2023, filed on 1st March 2023, a List and Bundle of Documents dated 30th November 2023, and Witness Statements by Michelle Kiriinya dated 25th September 2023 and Robert Obat dated 27th November 2023. The case was heard on 24th October 2024 and concluded on 27th November 2024, with the Claimant testifying in support of her case, while the Respondent called two witnesses.

51. The Respondent stated that the Claimant was initially employed under a contract dated 12th August 2014 as a Territory Management Representative and was later promoted to Area Business Development Manager, effective 1st October 2017. In September 2019, the Respondent received complaints regarding her performance, including ineffective distributor management, poor leadership, and integrity issues. This was not the first instance of concerns about her performance, as she had previously received a warning in July 2019 for providing fraudulent receipts amounting to Kshs. 51,110, leading to erroneous reconciliation of incur expenses. The Claimant's management of distributor business was questioned due to frequent high overdue amounts and undercapitalization issues at M'big distributors, which forced reliance on overdrafts. Her leadership failures included a lack of required training sessions for her sales team, leading to a low Minimum Product Assortment (MPA) score. Regarding integrity concerns, she allegedly failed to produce her accompaniment records during accreditation and was accused of instructing a subordinate to lie on her behalf.
52. A show cause letter dated 30th September 2019 was issued, outlining these allegations, and the Claimant responded via a letter dated 2nd October 2019, which the Respondent found unsatisfactory. Consequently, on 4th October 2019, she was invited to a disciplinary hearing scheduled for 8th October 2019, where she was informed of her right to be accompanied by a colleague and call witnesses. During the hearing, the allegations were explained, and she was allowed to respond. The disciplinary committee found clear evidence of mismanagement from email correspondences and the undercapitalization situation of M'big distributors. Despite her Line Manager highlighting the issue as a major concern, she had failed to discuss the imminent capitalization challenges or high overdue accounts during business review meetings. The Claimant took an extended period to address these issues, only taking action in September 2019, despite the problem being flagged as early as February 2019. She also failed to recognize the undercapitalization and high overdue accounts as a business crisis, which impacted customers and led to stock shortages. Although she claimed not to understand the capitalization issue, she made no effort to investigate or escalate the matter with her Line Manager.
53. Regarding leadership, she failed to demonstrate how she developed her sales representatives to recognition level. While she claimed to encourage teamwork and peer coaching, this was insufficient as it did not align with the coaching responsibilities expected of her. Her explanation for the low MPA score was also deemed unsatisfactory, as the assessment was conducted over a rolling two-month period, and such a poor score indicated a systemic issue rather than a temporary stock shortage. The integrity allegations, however, were dismissed due to a lack of evidence. The Claimant was subsequently issued a summary dismissal letter dated 30th October 2019, setting out the reasons for termination and the terminal dues payable upon completion of the exit procedures.
54. The Claimant delayed completing the exit process, finalizing it only in 2023, with her outstanding payment being accrued leave pay. Michelle Kiriinya testified that the Claimant was not paid her terminal dues immediately after termination as she had not completed the clearance process. The issues regarding her negligence arose in 2019, leading to a warning in July 2019 and her eventual termination for mismanagement of distributor business. A performance improvement plan was not issued as the problem was due to gross negligence rather than poor performance. Managing capitalization and profit and loss of the distributor was her direct responsibility as an Area Business Development Manager, and she did not appeal the dismissal as provided under the Respondent's Disciplinary Policy.



55. Robert Obat testified that the Claimant's distributor, M'big, operated with high overdue accounts due to her failure to ensure that daily banking of sales was conducted. This resulted in revenue losses, customer complaints, and reputational risks for the Respondent. The distributor relied on short-term overdraft funding, which created gaps that prevented stock replenishment, leading to out-of-stock issues. The Claimant was responsible for managing the distributor account and ensuring proper capitalization for a sustainable business. Despite capitalization and overdue concerns being flagged in February 2019, she failed to take corrective measures. She also did not utilize the Distributor Management System to log coaching sessions, making it impossible to track the skills developed within her team. The depots in Kakamega and Bungoma, which were under her jurisdiction, soon shut down after her dismissal due to unsustainable business operations. The sales growth in her region was overshadowed by her failure to manage the distributor's capitalization effectively.
56. Obat further testified that lower bank interest rates negotiated for distributors were intended as a last-resort measure rather than a means to encourage reliance on overdrafts. The Kshs. 37 million and Kshs. 15 million mentioned by the Claimant in her response to the show cause letter were not capital injections but were intended for debt repayment. The sales incentive awarded to her in August 2019 was based on achieving sales volume targets, which did not exempt her from ensuring that the distributor operated a sustainable business. Her Line Manager had engaged her on the issues of high overdue accounts, banking gaps, and capitalization problems and provided daily banking reports to facilitate engagement with the distributor. The letter of recognition she referenced was issued on 17th August 2017, before she assumed the role of Area Business Development Manager.
57. The Respondent argued that it had valid reasons for terminating the Claimant's employment under Sections 43 and 45 of the *Employment Act*, 2007. Section 45(2) states that termination is unfair if the employer fails to prove that the reason for termination was valid, fair, and related to the employee's conduct, capacity, or compatibility and that the procedure followed was fair. Section 43(2) defines the reasons for termination as those that the employer genuinely believed to exist at the time of termination. The Respondent submitted that the Claimant was dismissed due to her gross negligence, which exposed the company to business risks and undermined trust in the employment relationship.
58. During cross-examination, the Claimant confirmed that her job description required her to manage distributor accounts, oversee profit and loss, and maintain strong relationships with distributors. The Disciplinary Minutes indicated that she admitted to not fully understanding the capitalization issue, despite her role requiring her to monitor sales and ensure that banking was done daily. Her failure to act resulted in the distributor's debt repayment rather than operational capitalization. Despite numerous requests from her Line Manager to ensure timely banking and overdue clearance, she did not take proactive measures, raising concerns about her management abilities. Her low MPA score of 17% was indicative of broader leadership issues beyond stock shortages. She also failed to personally coach her team, instead relying on peer-to-peer coaching, which was inadequate.
59. The Respondent contended that it had proven, through witness testimony and documentary evidence, that the Claimant was grossly negligent. The failure to ensure distributor sustainability led to revenue losses and depot closures, which affected the company's profitability. The *Employment Act*, 2007, under Section 44(4)(c), allows for summary dismissal if an employee willfully neglects to perform duties or carelessly and improperly executes tasks that are their responsibility. The case of *Agnes Kavata Mbiti v Housing Finance Company Limited* [2017] eKLR upheld that negligence, carelessness, or improper work performance leading to employer losses justifies summary dismissal. Similarly, in *Sospeter Kioko Munguti v Nestle Kenya Limited* [2013] eKLR, the court held that negligence in employment arises where there is a duty to act in a particular way as per contract or policy, and failure to comply results in foreseeable loss. The Respondent argued that the Claimant's failure to



ensure daily banking and capitalization predictably led to high overdue accounts and unsustainable business operations. The company's operations depend on efficient distributor management, and the Claimant's negligence had significant commercial and reputational consequences.

60. The Respondent further stated that the Claimant's termination followed a fair procedure as required under Section 41 of the *Employment Act*, 2007, which mandates that an employee must be notified of the allegations against them and be given an opportunity to respond in a fair hearing. The case of *Hosea Akunga Ombwori v Bidco Oil Refineries Limited* (2017) eKLR was cited, where the Court explained that compliance with Section 41 involves issuing a show cause letter outlining the charges and providing reasonable time for a response. The Claimant was issued a Show Cause Letter dated 30th September 2019, requiring her response by 2nd October 2019, which she submitted. However, the Respondent found reasonable grounds to convene a disciplinary hearing. On 4th October 2019, the Claimant was invited to a hearing scheduled for 8th October 2019 and was informed of her right to be accompanied by a work colleague and to call witnesses, a right she chose not to exercise. The Respondent argued that the Claimant had sufficient time to prepare, and she neither objected to the timeframe nor requested an extension. The case of *Henry Isaiah Onjelo v Maridadi Flowers Limited* (2015) eKLR was cited, where the Court held that sufficiency of time depends on the circumstances of each case, and if an employee requires more time, they should raise the request before the disciplinary panel. The Respondent contended that the Claimant acknowledged attending a disciplinary hearing where she was allowed to respond to the allegations, and the Minutes of the hearing, signed by her on 22nd October 2019, were produced in Court and remained undisputed.
61. Following the disciplinary hearing, the Committee reviewed her responses and the evidence before concluding that the allegations of gross negligence had been sufficiently proved. The integrity allegation was dismissed due to a lack of evidence, demonstrating the objectivity of the process. The Claimant was notified of her summary dismissal via a letter dated 30th October 2019, which outlined the grounds for termination and informed her of the right to appeal within five working days. The Respondent maintained that no appeal was received, and the Claimant failed to produce any evidence proving she had lodged one. The Respondent asserted that it adhered to due process in dismissing the Claimant and emphasized that the burden of proving unfair termination rested with her. The case of *Pius Machafu Isindu v Lavington Security Guards Limited* (Civil Appeal 301 of 2015) [2017] KECA 225 (KLR) (Civ) (3 November 2017) was cited, where the Court held that an employee must first prove that termination was unfair before the employer is required to justify it. The Respondent argued that the Claimant had failed to discharge this burden, as she provided no evidence showing how her termination was unlawful or unfair.
62. Regarding the reliefs sought, the Claimant had prayed for compensation amounting to Kshs. 2,681,952 for unfair and wrongful termination under Section 49(1)(c) of the *Employment Act*. However, the Respondent maintained that she had not demonstrated that her dismissal was unfair or wrongful, and therefore, she was not entitled to compensation. The case of *Jonathan Ciano v Uchumi Supermarkets Limited* [2022] KEELRC 379 (KLR) was cited, where the Court ruled that compensatory damages cannot be awarded without a finding of unlawful termination. The Respondent reiterated that it had valid reasons for termination and complied with Section 41 of the Act. The case of *Kiambaa Dairy Farmers Co-Operative Society Limited v Rhoda Njeri & 3 others* [2018] eKLR was also referenced, where the Court held that the maximum compensation of 12 months' salary is reserved for the most egregious cases, which was not applicable in this instance. The Respondent therefore urged the Court to dismiss the Claimant's request for compensation.
63. The Claimant also sought payment for unpaid leave for 62 days amounting to Kshs. 670,480. The Respondent acknowledged that the Claimant had outstanding leave days but stated that her actual



leave balance was 43.79 days, not 62. The Respondent argued that the burden of proof regarding the number of unused leave days rested with the Claimant. The case of *Monica Wanza Mbavu v Roofspec & Allied Works Co Ltd* [2021] eKLR was cited, where the Court held that the Claimant must provide proof of not taking leave for the claimed period. Similarly, in *Otwere v Bedrock Holding Limited* (Cause 2060 of 2017) [2022], the Court declined a claim for annual leave due to a lack of supporting evidence. The Respondent submitted that the Claimant had not provided any proof of her alleged 62 outstanding leave days and urged the Court to find the claim unsubstantiated. However, the Respondent expressed readiness to settle the unpaid leave balance as directed by the Court.

64. In conclusion, the Respondent maintained that the Claimant's termination was both substantively and procedurally fair, and as such, she was not entitled to the reliefs sought. The Respondent asserted that the claim was without merit and prayed for its dismissal with costs.
65. I have examined all the evidence and submissions of the parties herein. The issue for this court's determination are as follows:
1. Whether there were valid reasons to warrant the claimant's termination.
 2. Whether the claimant was subjected to due process before being terminated.
 3. Whether the claimant is entitled to the remedies sought.

Issue No. 1 Reasons for termination

66. According to the claimant's termination letter dated 30th October 2019, she was terminated for gross negligence in the performance of her duties which had occasioned the company substantial reputational damage and/or risk through mismanagement of company resources and suppliers.
67. Prior to the claimant's dismissal, she was served with a notice to show cause dated 30th September 2019 and another dated 2nd October 2019. The claimant responded to the notice to show cause by denying allegations therein. The 1st notice to show cause faulted the claimant for inefficient distribution management, poor leadership and integrity issues which were laid out in the said letter.
68. In her response to the show cause letter, the claimant explained that contrary to the assertions in the letter for show cause she had performed well and her distributor one Mbig had performed well. The claimant also indicated that she had held meetings with her team and did coaching for them and had even won various recognitions for her team.
69. On issue of integrity, she indicated that all records pertaining to her accompaniment could be viewed online and she never asked anyone to lie on her behalf. She was thereafter asked to attend a disciplinary hearing vide a letter of 4/10/2019. The hearing was scheduled for 8th October 2019 at 11 am. Minutes of the disciplinary hearing have been produced in this court as exhibits. I have looked at the minutes therefore and note that the charges were read to the claimant and she was asked to respond to them.
70. The claimant reiterated her previous responses that she did her work well and held meetings with her distributor and her team and did all that was expected of her. She claimed being a good leader.
71. On integrity issues, she indicated that she had all her records on DWWS portal and resorted to the manual spreadsheets when they had an outage of the system. The minutes were signed by Caroline Ngila Nthenya on 22/10/2019. The claimant had averred that she was unfairly terminated because the panel that handled her disciplinary process disregarded her defence and unfairly dismissed her.



72. She avers that the respondents did not establish the existence of valid reason leading to her dismissal. She indicted that she was able to show that she held various meetings with her distributor and team and that M big injected kshs 37 million in August 2019 and an additional 15 million in September 2019 with plan to have an additional 50 million by November 2019. She averred that Mbig exceeded 160 million in 2019 financial year surpassing targets and that this performance contradicted claim of mismanagement and demonstrated that the challenges faced were systematic rather than due to her actions.
73. She also demonstrated that she was not a poor leader and that she coached her team. No evidence of integrity issues was established against her as per her dismissal letter.
74. In respondent's evidence they averred that the claimant was dismissed due to gross negligence in handling her duties in both handling the distribution and her sales group.
75. The claimant filed her submissions and sought to rely on various case laws.
76. Section 41 of *Employment Act* 2007 states as follows:
- 41.
- (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.
77. It is clear under the law that even in cases of non-performance of duties an employee must be given an opportunity to explain himself. However as held in *Jane Samba Mukala vs Ol Tukai Lodge Ltd* (2010) LLR 25 (ICK) the employer must demonstrate measures taken to assess performance and support employee before terminating them for poor performance.
78. In *Otieno vs penda Health Ltd* (2024) eKLR the Hon. Nzioka wa Makau held that in cases where an employee is dismissed for poor performance the employer is placed at a high level of proof as outlined in section 41(1) supra of the *Employment Act* 2007.
79. The employer must also show that in arriving at the decision of noting the poor performance of an employee they had put in place an employment policy or practice on how to measure good performance as against poor performance. This position was also restated in *Timothy Nchoe Sironka vs he JSC* 2020 (eKLR) where the hon court noted that there were no mutually agreed targets between the magistrates and JSC to show poor performance and failure to deliver on the agreed targets.
80. In the case before court the claimant was terminated for negligence in performance of her duties. What the respondents have failed to prove is that the targets that the claimant was expected to deliver were not delivered. There is also no demonstration of that the claimant was given an opportunity to improve herself and she failed to do so.
81. The respondents were duty bound to show measures put in place to help the claimant improve which she failed to follow leading to the conclusion that she was a poor performer and therefore liable to dismissal.
82. Section 43 of the *employment act* 2007 envisages that the respondent must prove that there were varied reasons leading to the dismissal of the employee with all the parameters above put in place.



83. In view of my reasons above, it is my finding that the respondents have not discharged the burden to prove that they had valid reasons to dismiss the claimant.

Issue no 2 due process

84. From the evidence before court the claimant was invited for a disciplinary hearing and was allowed to answer to the charges placed before her. She was able to present her case but which she contends the respondents ignored. In terms of processes the claimant was actually allowed to give her evidence and present her case.

85. In terms of section 41 of the *Employment Act* 2007 the claimant was given an opportunity to present her case and so the claimant was accorded due process.

Issue No 3 Remedies

86. Having found as above section 45(2) of *Employment Act* 2007 provides as follows:

- (2) A termination of employment by an employer is unfair if the employer fails to prove——
- a. that the reason for the termination is valid;
 - b. that the reason for the termination is a fair reason——
 - i. related to the employees conduct, capacity or compatibility; or
 - ii. (ii) based on the operational requirements of the employer; and
 - c. that the employment was terminated in accordance with fair procedure.

87. In view of the fact that the respondents were unable to establish the existence of valid reason leading to the claimants dismissal, it is my finding that the claimant's dismissal was unfair and unjustified. I declare it so.

88. The claimant sought to be paid compensation for the unfair termination. I do find that indeed the claimant is entitled to compensation which in view of the fact that she was given due process I find that she is entitled to 6 month's compensation for the unfair dismissal = $6 \times 223,496 = \text{kshs } 1,340,976/-$.

89. The claimant also sought to be paid for the unpaid leave of 62 days which the respondents did not object to.

The prayer remained unchallenged and I find for claimant and I award her the 62 days leave prayed = $62/30 \times 223,496 = \text{Kshs } 461,892/-$.

Total awarded = 1,802,868/- less statutory deductions.

90. The respondents will pay costs of this suit plus interest at court rates w.e.f the date of this judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2025.

HELLEN WASILWA

JUDGE

