



**Imbuga v Nairobi Bottlers Limited (Cause 267 of 2020)
[2022] KEELRC 4131 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4131 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 267 OF 2020**

**M MBARŪ, J
JUNE 30, 2022**

BETWEEN

ADRIAN IMBUGA CLAIMANT

AND

NAIROBI BOTTLERS LIMITED RESPONDENT

JUDGMENT

1. The claimant is male adult. The respondent is a limited liability company.
2. On June 1, 1999 the respondent offered the claimant employment when it was operating as a subsidiary of Coca-Cola Beverages Africa (K) and he rose through the ranks to the position of Operations Director on November 20, 2018 with a salary of Ksh 977, 500 and a car allowance of Ksh 293, 250 as at December, 2019.
3. The claim is that On April 30, 2020 the respondent terminated the claimant's employment without justification or lawful cause contrary to section 41, 43, 45 and 46 of the *Employment Act*, 2007 (the Act). the termination of employment was with malice, irregular and without due regard to employment rights for the reasons that there was no notice, a hearing, humiliation, and the same was based on findings of a report of *The Kenya Visit Report (Logistics Report NBL & KQ 29 November – 5 December 2019)* that was not linked to any notice to show cause of charges. The claimant was not allowed the appeal process and the disciplinary process instigated was incomplete.
4. The claim is also that the respondent discriminated against the claimant by termination his employment unfairly while offering separation packages to other employees. such discrimination against the claimant arose out of the fact that the claimant was isolated for unlawful termination of employment without basis, replacing the clamant with a new manager without considering the existence of the claimant's contract, singling the claimant from other employees, failing to offer the claimant any other employment in the organisation, and denying the claimant his 2019 incentives.



5. The claimant suffered loss and damage and seeking the following;
 - a. 3 months' notice pay Ksh 2,932,500;
 - b. 18 days accrued leave Ksh 808,966;
 - c. Group contribution incentive Ksh 600,000;
 - d. Service pay for constructive redundancy Ksh 32,114,990;
 - e. Car allowance for 4 months January to April, 2020 Ksh 1,173,000;
 - f. Phone payment for 4 months Ksh 40,000;
 - g. Club membership Ksh 150,000;
 - h. Gym for 4 months Ksh 200,000;
6. The claimant is seeking judgement for;
 - a. a declaration that his employment terminated unfairly and unlawfully,
 - b. an order of reinstatement to his employment without loss of benefits,
 - c. salary and allowances for the period out of employment,
 - d. damages for wrongful termination of employment/redundancy,
 - e. damages for frustrations and mental torture,
 - f. damages for discrimination, and
 - g. Costs of the suit.

the claimant testified in support of his case that in the year 1999 he was employed by the respondent as a mechanic by Flamingo Bottlers a subsidiary of Coca-Cola under Coca-Cola SABCO and in the year 2002 he was seconded to the Nairobi Bottlers Limited as part of the consolidation team in the position of County Fleet manager heading the fleet maintenance, fleet procurement and maintenance department.

7. The claimant was promoted over the years for good performance including holding the role of backward interaction projects and his performance as rated very highly. The last appraisal being for 2019, he was rated at 3 for meeting expectation.
8. The claimant testified that in his career with the respondent he was anchored in supply chain with mapping into the County Management Team for supply chain in Kenya which exposed him to leadership and in the year 2018 while undertaking exposure in the manufacturing department as manufacturing Unit Manager for Unit 3, the role of Logistics Operations Director became vacant. He applied and was successful and was appointed in the position of logistics operations director on November 20, 2018 with duties which included; overseeing the logistics section in Coca-Cola Beverages Africa in Kenya covering 3 plants being Nairobi Bottlers Ltd, Embakasi Depot, Metro-Industrial Area, Nakuru, Molo, Mombasa, and Kisumu. Under his position, there were 7 managers and he was reporting to the managing director Mr Daryl Wilson.
9. In April, 2019 the respondent announced that Mr Daryl was transferring to Coca-Cola East African Bottling Share Co. in Ethiopia and that the Ethiopia MD Mr Xavier Selga would take up his position in Kenya. The transfer was effected on May 6, 2019.



10. In October/November, 2019 Mr Selga suggested to the claimant that he should consider taking up the General Manager role at Mbeya plant in Tanzania. The proposal was presented as an opportunity in career advancement towards a county management role and the claimant in response suggested that he was still new in his role as logistics director and had started on new plans which had not taken shape and wanted to see them through.
11. In November, 2019 the claimant learnt of Mr David Earnes who was around for *a look and see* a process which takes place before a prospective employee to a new country visits for inspection of housing, schools, transport and other facilities.
12. In November, 2019 the claimant learnt that he had been excluded from the 2020 General Management Annual Meeting to be held in Ethiopia which event occurs in March each year and attended by prospective county management teams and he was part of management. No communication was made to him while David Earnes was included in his place. The claimant raised his exclusion with the human resource manager who responded and noted that he was not aware of the issue.
13. In November, 2019 while in a discussion with Mr Selga the claimant learnt that he intended to bring in somebody else in logistics to do his role and that Almasi had been acquired by Coca-Cola Beverages Africa and would be known as part of CCBA – Kenya and hence he wanted someone with experience in business integration and the claimant’s role was not known yet. David Earnes was to take up his role with effect from January 6, 2020.
14. In November, 2019 the MD asked for a warehouse process and procedures review to be done by Mr Eben Arends and Danny Morsner who are supply chain development specialists and consultants for the group office. The claimant learnt of this visit on November 26, 2019 and the visit was on November 28, 2019. The team held the meeting from 29th November, to December 5, 2019 and the report shared with the claimant in December 9, 2019. The report highlighted that there was an opportunity to improve on the process in KQ-Embakasi site, need to change the way the operations were being handled in the system, a one-step stock transfer to a two-step stock transfer which meant the conversion of the KQ-Embakasi site to a deport. This was not new and the same measure was being implemented from September, 2019 based on protocols and procedures change in the SAP system and the KQ-Embakasi Deport went alive on December 18, 2019 and all issues raised in the audit were closed.
15. The MD, Finance Director and Human Resources Manager then held a brief meeting to obtain feedback from the claimant, Evans Momanyi who was then the Logistics manager.
16. In November, 2019 there was a board meeting and the main issue which arose was Fix Kisumu EBL as the business was still low. In the period the claimant had taken over Kisumu there was a turnaround with reduction of costs and then Mr Selga as the MD proposed to the claimant to take over as GM, EBL Kisumu as the business required a leader to hasten strategic decision making. This proposal was to be addressed in the next board meeting.
17. On December 17, 2019 after the claimant resumed duty from annual leave he discussed with Mr Selga regarding the next steps but there was no formal communication. He had changed his position on the role of GM EBL Kisumu and the offer retracted and the claimant no longer had any role. The claimant enquired whether his position was redundant but was advised to wait for new opportunities.
18. Early 1st January the respondent undertakes stocks counts which the claimant did with his manager. There was an audit by independent auditors, PWC and no issues were raised, David Earnes joined the respondent on January 6, 2020 and was introduced as the Logistics Director. The claimant handed over his duties and had no clear role. There was an additional employee, Immaculate Makgae from South Africa for the position of projects in the warehouse.



19. The claimant enquired from the human resource officer for clarification on his role and whether there was a redundancy but he was told to wait for communication.
20. Within this period the claimant learnt that the logistics manager Evans Momanyi had a meeting with the MD and had a Separation Agreement package in lieu of going through a performance disciplinary hearing. The package included a resignation and exit by March 31, 2020. The claimant as then offered this role with expanded duties and the MD noted that this was not a demotion but based on what was available and upon weighing his options the claimant accepted but declined to sign the letter due to the manner of its structure as the letter indicated the claimant had requested for this role and following discussions with the MD. There was no package to the offer.
21. Every year, there is a Performance Development Review (PDR) and the claimant would develop his tool. His supervisor Mr Selga scored 3 meaning met expectations and when asked why he had not signed the offer letter and upon negotiations, the claimant accepted the lower position and deployment with effect from April 1, 2020.
22. David Earnes asked the claimant to consider taking up the position of National Fleet Manager so as to allow Immaculate to take up the position of Logistics manager. The logistics manager then Mr Momanyi left the business.
23. On April 6, 2020 3 days later after the claimant took up the role, he was issued with a notice to show cause. It was on allegations that in December, 2019 out of stocks holding units which are over 150 for KQ-Embakasi site the team was unable to reconcile 3. They attributed this to a systems issue and the logistics team. This was noted in the end year stock count and signed off by the team manager and noted that the issue would be resolved by consultants.
24. This matter had persisted on and had been signed off by the previous logistics manager, Evans Momanyi. The noted batch had been received from Nyeri Bottlers Ltd and was the 350ml Coke, 350ml Fanta and 350ml Sprite. This is planned and agreed upon by the sales and planning teams.
25. When the consultants were engaged, an investigation was conducted to establish the source of system overage leading to double-counting and it was noted that stocks would be requested through the system and when the Lorries made deliveries, another count added leading to double-counting. Following the investigations, stocks manager, team leaders and systems clerks were to be taken through the disciplinary process. The claimant asked to sit in as the direct line manager. The staffs was found guilty for instructing systems clerks not to follow the processes and not escalating and completing the issues with the stock controller.
26. In the show cause notice, the claimant was introduced to the *Kenya Visit Report* which he had no prior notice of. He was accused of neglecting duty and activities for employees at 5 levels below him being the stock controller, stocks team, stocks manager and logistics manager who had different role profiles. The Director's perspective was covered by 7 managers and 7 sites on for the Stock Team Leader and Stock manager had to ensure that the process was adhered to and the statements given by these officers demonstrated they had exactly done this.
27. Following the disciplinary hearing, the third charge was dropped based on lack of evidence and the fact that the matter had not been escalated to the claimant and there was no way he would have been aware of such matter. The same should have been done with the first and second charges and the matters had not been brought to his attention with regard to the stock process.
28. The claimant was invited to a disciplinary hearing and was found culpable for alleged negligent of his duties and his employment terminated on April 30, 2020. He was replaced by Immaculate Makgae;



- the bonus pay-out that was to be paid in 2019 for group incentive of 15% was not paid while other county managers were paid. Despite asking of the reasons leading to termination of employment, the claimant did not receive any response.
29. The claimant also testified that in the year 2019 he was not involved in stocks audits. When he got the audit report he noted two areas of his concern and he gave his feedback and noted the areas of assistance and training needs on December 8, 2019. His role was not to challenge any findings but act on findings. One of the concerns noted was that basic procedures in stocks were not in place. The sending and receiving plants could not verify movement of stocks. Stocks movement from one depot to the next meant that there was no discrepancy since there were records kept and what was noted in the system ought to have been verified with the physical stocks upon exit and arrival at a given depot. Hard copies and system information should be synchronised. At the end there was no loss.
30. This meant a one-step transfer in the warehouses and the movement of goods. Once goods were received on the other end, have both a system and physical count done. Both check-in and check-out processes were in place but the system had no real-time update. The audit report had to be looked at as a whole and not the challenges only. To do so would mean other parts were not considered as a whole and the context given the nature of the respondent's business due to the daily movement of stocks. It was then proposed that a printer be placed at the warehouse and clerks to ensure all the records were correct as per the system records.
31. The claimant testified that the allegation that he was negligent and stocks got lost was without evidence. Fred and Polycarp were the team leader and stock managers respectively and reporting to Evans Momanyi. From December, 2019 to April, 2020 the claimant was told that the two managers had a problem in stocks but there was no loss. The claimant was not involved in the audits and was only called to give feedback which he shared with the logistics manager and any stock loss, if at all, the employees responsible were disciplined and the claimant had no case of negligence as alleged. There was no valid reason leading to termination of employment and he should be reinstated back to his employment and paid damages.

Response

32. The response comprises mere denials and that the claimant was appointed as Operations director in the year 2018 when he negligently performed his duties and exposed the business to loss of stock. A disciplinary hearing was held and determined the claimant was negligent leading to termination of employment. The allegations and particulars of discrimination are denied, the claimant was taken through the due process and the claims made should be dismissed with costs.
33. The respondent filed various work records during the hearing taking parties back and forth.
34. In evidence, the respondent called John Mwenda the human resource manager who testified that on November 20, 2018 the claimant was appointed as operations director at a basic salary of Ksh 850m000 and a car allowance of Ksh 255, 000per month.
35. The claimant was deployed on an interim basis from operations director to Logistics Project Manager from January 6, 2020 to March 31, 2020 and thereafter took over as Logistics Manager. The claimant retained his terms and conditions of employment.
36. Mr Mwenda also testified that the operations director role included overseeing the execution of warehouse, distribution, fleet and customer collaboration to ensure effective storing and distribution of products. From 29th November to December 5, 2019 a site visit was conducted on KQ resulting in a logistics report for the period which report was shared with the claimant as the operations director.



37. The logistics report noted that warehouse and stock procedures had not been followed and had been overridden by the use of shortcuts and which report informed the management that both NBI and KQ sites had been put at risk which may lead to high stock losses and the methods used were not in line with the blueprint, no verification of movement and checking in/out stocks both at warehouse and off-site locations were not un place. The report found that the respondent had been exposed to too many risks due to incorrect postings. The claimant failed to take any step to protect the business.
38. On December 17, 2019 the claimant respondent to the report casually and without addressing the issues.
39. In March, 2020 the respondent came to the realisation that the claimant had negligently perfumed his duties in December, 2019 and January, 2020 and exposed the business to loss of stocks of 7,155 cases valued at Ksh 2, 820,105. Such loss arose from the negligence and lack of due diligence of the claimant and which enabled the non-adherence with stock management routines, contravention of key systems policies and failure to follow Standard Operating procedures in the period on question.
40. The loss was confirmed through recounts and by an interim investigations report done by the Lead Investigator, Bernard Otieno which loss was attributed to system related problems experienced immediately K054 went live on December 18, 2019.
41. Mr Mwenda also testified that the claimant as the operations director was expected to know what was happening on the ground from stock control and management and to note any variances and escalate the same to the managing director to secure the business from any loss but in January and March, 2020 the stock loss remained hidden from scrutiny due to the claimant's failures to address the loopholes.
42. The claimant was issued with a notice too show cause dated April 6, 2020 and he gave his response on April 7, 2020. On April 9, 2020 the claimant was invited to a disciplinary hearing on April 16, 2020 on 3 charges over alleged failure to enforce stock routines, failure to enforce the standard operating procedures and failure to escalate risk losses. The claimant was found culpable of the first two charges leading to termination of his employment. The claimant has since cleared with the respondent and his terminal dues paid in full. The claim herein should be dismissed with costs.
43. At the close of the hearing, both parties filed written submissions.
44. The claimant submitted that his services were terminated on grounds of alleged negligence of duty without any evidence to support the said allegation save from canvassing vague, general and unsubstantial allegations of non-performance. That section 45(1)(2) of the *Employment Act*, 2007 prohibit employers from terminating the employment of an employee unfairly and assert that termination of employment is unfair if the employer fails to prove that the reason for the termination is a fair reason related to the employee's conduct, capacity or compatibility or based on the operational requirements of the employer and that the employment was terminated in accordance with fair procedure.
45. He submitted that he was not accorded sufficient reason nor explanation and was neither issued with any notice before the Respondent terminated his employment services as stipulated in the provisions of section 41 of the *Employment Act*. Furthermore, contrary to the provisions of article 47 of the *Constitution of Kenya* on fair administrative action, the Respondent did not grant him a fair hearing or at all before his termination. The claimant submitted that the disciplinary process was therefore flawed and termination of his employment was targeted and procedurally unfair, ultimately for want of substantive and procedural fairness.



46. In the case of *Pravin Bowry v Ethics & Anti-corruption Commission*, ELRC Cause No 1168 of 2012, the Court found that the respondent had unfairly terminated the five-year contract of the claimant and thus awarded the claimant the equivalent of unspent shortfall of the contract amongst other damages. The award was based on the principle of lawful expectation as the claimant had taken up the job knowing that he would serve a five-year contract which was cut short.
47. The Court of Appeal in the case of *National Bank of Kenya v Anthony Njue John*, CA 117 of 2017, affirmed the order of reinstatement of the employee to previous position in the Bank after establishing that the employee had suffered wrongful termination at the hands of the employer.
48. The claimant further submitted that pursuant to the foregoing authorities, this honourable court should find and hold that he suffered an unfair termination and to further find merit in his case as prayed.
49. The respondent submitted that it issued the claimant with a notice to show cause letter asserting the negligence in his work, it invited him to a hearing and informed of his right to bring any evidence or witness, and was heard before a disciplinary panel. It subsequently issued the claimant with a termination letter which restated the charges that had been made against him, indicated the findings of the disciplinary panel, included the date when the termination would take effect and the dues he would be entitled to upon clearing with the respondent, and also communicated to him his right of appeal. It went on to consider his appeal through a differently constituted panel and thereafter communicated to him the confirmation of the termination. The respondent submitted that the events leading up to the termination of the claimant were thus procedurally fair.
50. In the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR, the court held that for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. In the case of *Standard Group Limited v Jenny Luesby* [2018] eKLR, the Court of Appeal stated that the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer.
51. On procedural fairness, the Court of Appeal in the case of *CMC Aviation Limited v Mohammed Noor* [2015] eKLR cited with approval the case of *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited* [2013] eKLR where the court said:
- ...whatever reason or reasons that arise to cause an employer to terminate the services of an employee, that employee must be taken through the mandatory process as outlined under section 41 of the *Employment Act*.... there must be a hearing to give such an employee an opportunity to defend self.
52. As regards substantive justification, the respondent submitted that the grounds for terminating the claimant's employment were certainly valid. The claimant neglected to follow the correct and current process flow for checking out trucks and resulted in truckloads of products being lost and that he admitted at the disciplinary hearing that the processes were not being followed. The respondent submitted it had a valid reason to terminate the claimant's employment and that it is trite law that the grounds for termination must be proved, must be valid and must be fair before employment termination of an employee. In the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR, the Court of Appeal held that the employer must prove the reasons for termination/dismissal (section 43); prove that the reasons are valid and fair (section 45); and prove that the grounds are justified (section 47(5)), amongst other provisions.



53. In Civil Appeal 366 of 2017 *Mukoma v Cannon Assurance Limited* [2022] KECA 86 (KLR) (CIV), the Court of Appeal opined that the appellant did not act with due diligence as would be expected of a person in his position and held that this ground alone was a valid and justifiable reason to initiate disciplinary proceedings against him.
54. The respondent submitted that the claimant has not satisfied this court that the respondent was in fact discriminatory to him and his allegations are thus null and void. its case is that it did not offer any other employees a mutual separation package to the exclusion of the claimant and it also did not single him out so as to terminate his services. That pursuant to section 5(2) of the *Employment Act*, it has at all times endeavored to promote equal employment opportunities for all its employees and further does not condone discrimination at the work place. The respondent relies on the case of *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* (2020) eKLR where the Supreme Court of Kenya stated that it is a timeless rule of the common law tradition that the party making an averment in validation of a claim is always the one to establish the plain veracity of the claim. This position is also asserted in section 108 of the *Evidence Act* that he who alleges must prove. The respondent submitted that it did not discriminate the claimant.
55. It submitted that having demonstrated that the termination of the claimant was on valid grounds, was procedural and adhered to the laws of the land as well as the respondent's guidelines, the claimant is not entitled to a declaratory order that he was unfairly terminated or to damages. That the claimant has also not specifically pleaded or proved the damages for frustration and mental tenure and neither has he proved the damages for discrimination. In the case of *Swalleh C. Kariuki & Another v Viloet Owiso Okuyu* [2021] eKLR, the court held that the court will not act in a vacuum or whimsically where there is no evidence regarding special damages.
56. The respondent further submitted that the remedy of reinstatement arises only when the termination of the claimant is unlawful and this court cannot thus uphold this prayer. In the case of *Kenya Airways v Allied Workers Union Kenya & 3 others* [2014] eKLR, the Court of Appeal held that an order for reinstatement is discretionary and each case has to be considered on its own merits. The respondent concludes that in view of the foregoing, this honourable court ought to find that the claim lacks merit and dismiss the suit with costs to the respondent.

Determination

57. On April 30, 2020 the respondent terminated the claimant's employment on the allegations that that the claimant had;
1. failure to enforce stock routines
 2. failure to enforce Standard Operating Procedures (SOPs)
 3. Failure to escalate risk losses.
58. Upon the claimant going through the disciplinary hearing on April 16, 2020 he was found culpable of;
- ... During the period of December 18, 2019 and 5th of January 2020, you performed your duties in a negligent manner by failing to enforce the stock routines and Standard operating Procedures (SOPs) within KQ depot. ...
59. The allegations/charges framed against the claimant by the respondent oscillate between alleged failures, alleged negligence or lapses in the performance of his duties. The pedantic labelling of the charges merely obfuscated the conduct in that the only difference between negligence and poor work



performance was whether the conduct was intentional and what the respondent as the employer did to address such conduct.

60. It is also not clear whether the parties understood the substance of the charge. The evidence of Mr Mwenda in court and who was not part of the disciplinary hearing on April 16, 2020 is just but a chronology of events. Even though it was not necessary for Mr Mwenda to import that exactness required in criminal cases with regard to the burden of proof, the issue at hand was whether it was understood that the charge related to negligence or poor work performance or both.

61. in the case of *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation and Arbitration & others* (2006) 27 ILJ 1644 (LC) the court in contradistinguishing the parameters when an employee is charged with poor performance and he is found guilty of misconduct in the form of negligence held that this is a species of poor work performance in that it relates to negligence in the performance of an employee's duties. The court held that;

... that it is not fair or appropriate to elevate a charge during a disciplinary proceeding from poor performance to misconduct and then to rely on the lack of prospects of restoring the employment relationship to justify dismissal as a sanction. The employee was charged with incapacity and presented mitigation in respect of this and was found guilty on only one charge. The charge for which he was dismissed was not put to him at the disciplinary enquiry nor was he given an opportunity to respond thereto. Furthermore it is trite that in the context of the Act there is a vast difference between misconduct and incapacity both conceptually and practically. In this context the sacrosanct principles of natural justice were violated and the arbitrator's decision was justifiable and eminently reasonable.

62. In this regard, The charge of negligence for which the claimant had been accused of had to be evaluated on the basis of whether a reasonable person in his position would have foreseen the harm resulting from his action and would have taken steps to prevent it and accordingly, it was the lack of diligence rather than the harm caused which was being evaluated. This unlike poor performance which is a matter well addressed by the court in several cases that the where there is alleged poor performance, the employer must inform the employee of such matter and allow the employee reasonable time to improve on his performance. see the cases of *Naumy Jemutai Kirui v Unilever Tea Kenya Limited* [2020] eKLR; *Professional Clean Care Limited v Danson Mwendwa Muthoka* [2021]eKLR; and in the case of *Magbanga Newton Raphael v Panal Freighters Limited* [2021] eKLR where the reiterated the required procedure for terminating employment on account of poor performance and held that;

The procedure for terminating employment on the ground of poor performance is now clear and it is this; that the employee is first made aware of their shortcomings and allowed a reasonable time to improve. Further, any performance appraisal upon which the decision to terminate is made must have the input of the employee (see *Jane Wairimu Machira v Mugo Waweru and Associates* [2012] eKLR and *Joshua Kabaka v Tandu Alarms Systems Limited* [2019 eKLR]).

63. To therefore warrant termination or dismissal from employment on account of negligence such conduct had to be gross, which meant the claimant as the employee either had to be persistently negligent or the omission must have been particularly serious.



64. In the case of *Babari Parents Academy v LBZ (Minor suing through his father and next friend) BNZ* [2020] eKLR the court has defined negligence of duty to mean;

Negligence is a conduct, not state of mind – conduct which involves an unreasonable great risk of causing damage; negligence is the omission to do something much a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something, which a prudent and reasonable man would not do.

...

In strict legal analysis, negligence means more than heedless or careless conduct whether in omission or commission, it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing. With regard to employment and labour relations, negligence then connotes on a balance of probabilities that there is evidence that the claimant as an employee failed to enforce stock routines and that he failed to enforce standard operating procedures which facts he was well aware of. Further that he was well of the standards and levels of his required performance but deliberately failed to take proper care in performing the same to the required standard/degree/level.

65. In this case therefore, the subject period under reference becomes relevant. The claimant is alleged to have negligently performed his duties from December 18, 2019 to January 5, 2020.
66. As analysed above, The elements of persistent is lacking.
67. Lack of proper care that was persistent is lacking.
68. Careless conduct of omission or commission leading to breach and damage is not particularised. As noted above, the response by the respondent comprises mere denials without any particulars.
69. In the minutes and proceedings and disciplinary hearing of the claimant on April 16, 2020 great prominence is given to the period of December 18, 2019 and January 5, 2020. Equally the *Kenya Visit Report* and the report thereof was a notable major subject at the disciplinary hearing and the claimant asked to be supplied with the same at the hearing.
70. What comes out clearly is that the respondent is a well-structured business with various levels of manager and while the claimant was the operations director, under him were managers and team leaders responsible for various dockets.
71. The logistics director has below 5 levels of managers through to the stock controller whose duty is to conduct stock takes and through to the stocks manager and logistics managers.
72. It would therefore defeat the purpose of such a structure to require a logistic director to undertake the direct duties of a stock controller. Such is not strategic or reasonable.
73. From the disciplinary proceedings it is clear to the court that the alleged failure to enforce stock routines and failure to enforce standard operating procedures were matters which were addressed by the respondent and the subject individual employees who had led to such failures taken through the disciplinary process and action taken against them.

There was the case of polycarp whose employment was terminated;

The case of Fred Ongila whose employment was terminated; and



The case of Evans Momanyi who was allowed a separation agreement.

74. Prior to the disciplinary hearing, on April 6, 2020 the claimant had been issued with a notice to show cause over allegations of being negligent in the performance of his duties and that between December 2019 and January, 2020 the respondent lost 7,155 cases valued at Ksh 2, 820,105 and a further 4,095 cases valued at Ksh 2, 139,069 could not be accounted for as at March, 2020.
75. During the disciplinary hearing, the issue of losses incurred were addressed comprehensively without any audit as to what exact loss/losses the respondent incurred. None could be allocated to the claimant.
76. In response, the respondent called Mr Mwenda that Human Resource Manager and the person responsible for the human capital management within the respondent business. His evidence is therefore crucial as with it he gave relevant details that;the claimant was appointed as operations director on November 20, 2018;the claimant was then deployed on an interim basis from the position of Operations Director to the position of Director Logistics effective 6th January to March 31, 2020; andthereafter the claimant took the role of Logistics Manager, Nairobi.
77. The period of employment prior to November 20, 2018 is addressed under various written notices to the claimant by the respondent.
78. Of importance, is the claimant work performance rating through letter dated April 16, 2019. He had done exceptionally well and was awarded a salary increase.
79. The witness, Mwenda authored letter dated January 14, 2020 on the Deployment of the claimant and he noted that;

Following your meeting with the Managing Director on January 13, 2020 regarding a suitable role in logistics department, a decision on your deployment has been agreed on.

This is to confirm that you have been deployed on an interim basis from the position of Director Logistics to the position of Logistics Project Manager effective January 6, 2020 (effective date) to March 31, 2020. Thereafter you will take on the role of Logistics Manager, Nairobi.

80. These details are relevant noting the allegations/charges made against the claimant following Logistics Report NBL & KQ 29th November – December 5, 2019.
81. Of the report, no objective is given save for remarks that;

... warehouse & stock procedures haven't been followed and have been overridden by using short cuts. The management tea of NBL & KQ should know that they put both sites at risk and that may lead to high stock losses. Trucks exit the NBL & KQ with short product that don't match with the checkout documentation (Manifest & invoices).

Housekeeping standards at both sites need to be addressed. Current security service providers poses a stock loss risk due to checkout processes not followed as well as their availability on both sites. A review of the Security Service Provider's contract/SLA should be reviewed to make sure they provide the correct service.

The report ends with Interim Findings.

82. Whereas the report and its makers appreciate the warehouse and stock procedures were not followed, they also noted that such lapse may lead to high stock losses. No stocks were lost.



83. To guard on any stock losses, several areas of improvement were noted such as housekeeping standards at both sites of NBL & KQ and a review of the security service provider's contract to provide correct service. it was also recommended that the methods of processing transactions be addressed, basic processes be put in place so as to avoid the risks of fraud, cycle count differences due to incorrect postings and systems real-time be updated.
84. The procedures and systems issues/matters noted were general and not directly relating to the claimant's work performance. the only direct link to possible losses related to the security service provider and recommendations that they provide correct service.
85. Where any matter of the Logistics Report related to the claimant's work performance, which is not the case here, such ought to have been directly and formally addressed with him. the implication that his responses to the report were causal in nature and that he failed to address the concerns noted, to apply such matter to urge a disciplinary case against him is to avoid the obvious, the due process contemplated under section 41 of the Act.
86. The motions of the law under section 41(1) of the Act are that;
- (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.
87. The employee alleged to be of poor work performance must be issued with notice with particulars of the allegations made to enable him address and defend himself.
88. Even in a case where the employee is alleged to have neglected his duty and subject to summary dismissal, section 41(2) of the Act demands that such an employee be issued with notice however short to allow him defend himself;
- (2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.
89. The report and the basis given leading to the claimant's disciplinary hearing is without particulars as to any lapse in work performance or the matter relating to the nature and particulars of negligence attributable to the claimant.
90. The court finds no justification for the sanction taken of termination of employment. The reasons given lack validity are not reasonable and amount t unfair termination of employment contrary to section 41, 43 and 45 of the Act.
91. The other matter the claimant raised was that he was discriminated against by the respondent. He gave particulars of instances of discrimination particular that other employees faced with similar allegation like him were allowed to continue in the service of the respondent yet his employment was terminated.
92. The claimant in his response to the notice to show cause gave various instances in Sales and Marketing where there were forgeries leading to loss of business but the team leader was allowed to continue working; in the same department vendor payments were delayed and not honoured but the director was not taken through any disciplinary process; in manufacturing where water treatment routines were



- not followed leading to product quality and loss of money, the manager and director were not taken through the disciplinary process. In human resource there were payments to ghost workers but the team leader and director were not disciplined.
93. Part of the de process parameters under section 45 of the Act is to ensure every employee faced with a disciplinary matter is treated equally and similarly to other employee placed under similar circumstances. It is therefore discriminatory to have one employee disciplined while another is let free while faced with similar allegations.
94. Section 45(2) and (5) (d) of the Act which mandates the employer to;
- (2) A termination of employment by an employer is unfair if the employer fails to prove—
...
- (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the court shall consider—
(d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and
95. Well aware of circumstance at the shop floor, as analysed above, there being no matter of negligence of noted poor performance, to treat the claimant differently and separately from other employees was an act of discrimination as defined under section 5 of the Act.
96. Again, as noted above, the response made does not address the claim as pertains to particulars of negligence save for the respondent to make mere denials. The respondent hence lost the opportunity to give any response on these serious allegations as required under section 5(7) of the Act which places the burden of proof on any claim that there was discrimination against the employee upon the employer. Such burden was not discharged in this case. The respondent failed to make any effort however remote to address the claim.
- (7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.
97. Above findings put into account, the claimant also raised the issue of the respondent having expatriate employees to take over his employment and which led him to consult with his employer and managing director as to his role and position and whether he had been rendered redundant.
98. In November, 2019 the claimant learnt of Mr David Earnes who was around for *a look and see*. Soon thereafter such officer and an expatriate were hired for the same position. the protections available to the claimant under section 5(2), (3) and (4) of the Act were not secured. Discrimination against an employee under Kenyan law is that direct and indirect act by the employer which places the employee at a disadvantage and particularly when the national policy on employment and protection of citizens in concerned.
99. In this regard, discrimination against an employee by the employee is now defined by the Court of Appeal in the case of Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others [2018] eKLR where the court held as that;
- ... discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions... whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject



or are accorded privileges or advantages which are not accorded to persons of another such description.... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age; sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.

discrimination on its own is not an actionable cause. It becomes an actionable cause once the element of unfairness is present. The grounds are enablers of this element of unfairness. Whereby persons of a particular description are accorded different treatment. There is unfair treatment or denial of a normal privilege or there is no reasonable distinction. See *Kenya Aviation Workers Union v Kenya Airports Authority* Petition No E088 of 2021 that ordinarily, discrimination based on any of the listed grounds is presumably unfair unless it can be shown to be fair. However, if it is based on unlisted grounds – arbitrary grounds – unfairness needs to be proved.

100. The complaint by the claimant is that he was taken through targeted discriminatory treatment by the respondent from October, 2019 to January, 2020 when he held meetings with his managing director and a matter arose about any poor work performance or negligence of duty, he was being interested to take other work roles outside of Nairobi to accommodate foreign employees such as David Earnes and Immaculate Makgae and when this failed, other means were employed to demote him and create allegations leading to termination of employment for no reasonable cause.
101. Such complaints founded on discriminatory treatment are not gone into by the respondent.
102. The court finds the claimant was discriminated against by the respondent a matter specifically outlawed under article 27 of the *Constitution* read together with section 5 of the Act.
103. On the reliefs sought, the claimant is seeking for an order of reinstatement as his primary remedy.
104. The Supreme Court in *Kenfreight (EA) Limited v Benson K Nguti* [2019] eKLR addressed the section 49(1) (a) of the Act remedies and the remedies available under section 49(1) (b) of the Act and held that;

Guided by the above analysis, we find that once a court has reached a finding that an employer has unlawfully terminated an employee's employment, the appropriate remedy is the one provided under section 49 of the *Employment Act*. We also need to clarify that a payment of an award in section 49(1) (a) is different from an award under section 49 (1) (b) and (c).section 49 allows an award to include any or all of the listed remedies provided that a Court in making the award exercises its discretion judiciously and is guided by section 49(4) (m).

under subsection (a) such relates to;

- (1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—

- (a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

And subsections (b) and (c) relate that;

- (b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or



- (c) the equivalent of a number of month's wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.
105. The court is allowed to award an employee who has been unfairly terminated from his employment may recommend the employer to pay to the employee any or all of the following being notice pay, full term of the contract or the term that is unexpired under a term contract and or a compensation of up to 12 months gross salary.
106. In this case, the remedy of reinstatement is primary and specifically pleaded by the claimant. He testified in-depth in this regard. To allow a reinstatement would redress the procedural and substantive unfairness of his case.
107. In the case of *Alex Wainaina Mbugua v Kenya Airways Limited* [2017] eKLR the court held that an order of reinstatement is the primary remedy under section 49(3) of the *Employment Act*, 2007 and involves placing an employee back in employment as if the dismissal had never occurred. If the exceptions to the remedy of reinstatement do not apply as set out under section 49(4), the court only has discretion with regard to the extent to which reinstatement should be made retrospective.
108. The court, cited above, relied on the cases of *Mediterranean Textile Mills (Pty) Ltd versus SACTWU and others* [2012] 2 BLLR 142 (LAC) and in *Mary Chemweno Kiptui versus Kenya Pipeline Company Limited* [2014] eKLR the court held that;
- ... The court is cognisant of the claimant long service with the respondent, has been diligent and faithful and that this is one exceptional case to order specific performance. this follows an enquiry as to the precedent conditions applicable in a case where reinstatement is sought, section 49(4) of the *Employment Act*. The claimant has a legitimate expectation of a reinstatement. Termination was on June 29, 2013 a time within the three (3) years rule when reinstatement can be considered. ...
109. On the findings above, an order of reinstatement is hereby found justified and appropriate to redress the unfair termination of employment.
110. The substantive role held by the claimant was that of operations director.
111. On January 14, 2020 the claimant was then appointed on an interim basis as the Director Logistics for the period of 6th January, to March 31, 2020 and advised that after such period he would revert to the position of Logistics Manager. Such roles were interim since the substantive role remained that of operations manager.
112. While the claimant was undertaking the interim roles, David Earnes was brought in as the Logistics Director and became the line manager to the claimant. This is the same position the claimant had been appointed to through letter dated January 14, 2020 on an interim basis.
113. As noted above, the respondent is well structured and the position held by the claimant could not just fall off. Such position of operations director after completion of the interim roles remains intact together with the attendant benefits.
114. The claimant is allowed reinstatement back to his employment with the respondent without loss of benefit and shall be paid all back salaries from April 1, 2020. The claimant shall resume duty with the respondent on July 4, 2022 and report to the managing director for allocation of work as appropriate.
115. The claimant pleaded for alternative reliefs which, with reinstatement addressed, shall not be gone into save on the claim for damages for discriminatory treatment, he urged the court to award damages.



116. In the case of *Ol Pejeta Ranching Limited v David Wanjau Muboro* [2017] eKLR the court is assessing damages in a case where the employee had been discriminated against made an award of Ksh 1,744,542 which amount was equivalent to 6 months' salary.
117. In *Lucy Chepkemoi v Sotik Tea Company Limited* [2022] eKLR the court awarded an employee found to have been discriminated against by the employee the sum of Ksh 2, 000,000.
118. Similarly, the Supreme Court in *Simon Gitau Gichuru Package Insurance Brokers Ltd* [2021] e KLR made an award of Ksh 2,000,000 on similar grounds of discrimination against the employee.
119. Guided by the above authorities, the award of 6 months gross salary in damages is hereby found appropriate. The claimant was last earning a gross salary of Ksh 977, 500 and for 6 months total due is Ksh 5, 865,000 in damages.
120. Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;
- a. a declaration is hereby entered that employment terminated unfairly and unlawfully;
 - b. a declaration that the claimant was discriminated against by the respondent;
 - c. an order of reinstatement of the claimant by the respondent is hereby issued without loss of rank position, benefits and back salaries from May 1, 2020 to date;
 - d. the claimant shall report to the managing director of the respondent at his last place of work on July 4, 2022 at 8.30hours for allocation of duties;
 - e. dues (c) above shall be paid within 30 days after which date the same shall accrue with interests until paid in full;
 - f. the claimant is hereby awarded damages for discriminatory treatment at Ksh 5,865,000; and
 - g. Costs of the suit.

DELIVERED IN COURT AT NAIROBI THIS 30TH DAY OF JUNE, 2022.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and

