



**Merwe v Technomed Limited (Employment and Labour Relations Cause E1029 of 2023) [2025] KEELRC 1910 (KLR) (27 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1910 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E1029 OF 2023**

**SC RUTTO, J**

**JUNE 27, 2025**

**TOGETHER WITH ELRC CAUSE NO. E1028 OF 2023; TECHNOMED  
LIMITED VS ANDRE VAN DER MERWE**

**BETWEEN**

**ANDRE VAN DER MERWE ..... CLAIMANT**

**AND**

**TECHNOMED LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant herein, Andre Van Der Merwe, is the Respondent in ELRC Cause No. E1028 of 2023, while the Respondent herein, Technomed Limited, is the Claimant in ELRC Cause No. E1028 of 2023. As the facts leading to the dispute in the two claims arose from the same set of circumstances, the matters were heard together.
2. Therefore, to ensure clarity in this judgment, Andre Van Der Merwe shall be referred to as the Claimant, while Technomed Limited shall be referred to as the Respondent.
3. The Claimant herein has stated that he is a former Managing Director in the Respondent company and in addition to that, holds 10% of the shares, while Faizel Ismail holds 80% of the shares and Lorraine Van Der Merwe, who is also a director, holds 10% of the shares.
4. The Claimant avers that until 2018, he was a resident of South Africa. It is his assertion that at the time, he was approached by the agents of the Respondent who requested him to relocate to Kenya and take over the management of the company, streamline operations, market it and do all that was necessary to ensure it was operational and profitable.
5. That as a consideration for relocation and for the work done for the company, he was offered shares in the company, appointment as a director and employment as the company's Managing Director.



- Together with his wife, they relocated to Kenya in 2018 and he started working for the Respondent company.
6. It is the Claimant's case that on 16<sup>th</sup> August 2023, he received an email from Mr. Uthara purporting to accept his resignation as a director/shareholder of the company and requiring him to issue one month's notice for the company to effect his resignation and handover his duties and responsibilities to Mr. Uresh.
  7. The Claimant maintains that he did not write any resignation letter.
  8. The Claimant further avers that on 30<sup>th</sup> August 2023, the Respondent called a meeting of its employees and informed them that he [Claimant] had been removed from the position of Managing Director and a new director had been appointed.
  9. From the record, the series of events that followed culminated in the Claimant's termination from employment vide a letter dated 26<sup>th</sup> October 2023. The Claimant contends that the reasons for his termination from employment are unjustified and do not warrant such drastic action.
  10. It is against this background that the Claimant prays for the following reliefs against the Respondent:
    - a. An order declaring that the Claimant was unlawfully terminated from employment.
    - b. General damages for the loss of employment assessed as follows;
      - i. 1 months' salary in lieu of notice- Ksh 1,605,198.00.
      - ii. 12 months' basic salary as damages for unprocedural termination;  $1,605,198.00 \times 12 =$  Kes19,262,376.00.
      - iii. Service pay at the rate of 15 days for every year worked;  $1,605,198.00 \times 15 \times 5 \text{ years} / 30 =$  Ksh 4,012,995.00.
      - iv. Leave days earned but not taken  $1,605,198.00 \times 17 / 30 =$  Ksh 909,612.20.  
TOTAL: Ksh 25,790,181.20
      - v. A certificate of service.
      - vi. Transfer of motor vehicle Registration number KBV 599 M to the sole name of the Claimant deemed as compensation for his unfair termination and their ruthless dealing with the matter at hand.
    - c. Costs of these legal proceedings incurred by the Claimant.
    - d. Any other relief that this honorable Court deems fit and just in the circumstances.
  11. In response to the Claim, the Respondent has admitted that the Claimant was employed by the company in 2018 in the capacity of Managing Director and that he held the said position until his summary dismissal on 26<sup>th</sup> October 2023.
  12. The Respondent avers that the Claimant was terminated from employment upon being found guilty of gross misconduct.
  13. The Respondent further contends that given the nature of his duties as Managing Director, the Claimant had at his disposal company assets and office equipment, which he has refused, declined and/or ignored to return even after his termination. That for this reason, the Claimant is not entitled to the prayers sought in the Statement of Claim.



14. On account of the foregoing, the Respondent has asked the Court to dismiss the Claimant's claim with costs.
15. In its Statement of Claim in ELRC Cause No. E1028 of 2023, the Respondent avers that during his employment, the Claimant was provided with a company motor vehicle registration number KBV 599M to aid in the fulfillment of his duties. That besides the motor vehicle and given the nature of the Claimant's duties, he had at his disposal other company assets and office equipment. According to the Respondent, these assets are worth Kshs. 28,187,633/=.
16. In light of the foregoing, the Respondent claims the following reliefs against the Claimant herein;
  - a. A declaration that the Respondent is liable for conversion of the Claimant's property;
  - b. An order compelling the Respondent to return forthwith all and any company assets and office equipment in his possession due to be returned to the Claimant;
  - c. In the alternative to [b] above, the Respondent be compelled to pay to the Claimant herein a total of Kenya Shillings Twenty Eight Million One Hundred and Eighty seven Thousand Six Hundred and Thirty Three [Kshs. 28,187,633/-] being the total value of the assets in possession of the Respondent and due to be returned to the Claimant herein;
  - d. Special Damages of Kenya Shillings Fifteen Thousand [Kshs. 15,000/-] being hiring charges of Motor Vehicle KBV 599M per day from 26<sup>th</sup> October 2023;
  - e. General Damages to the Claimant herein;
  - f. Costs of the suit and interests at Court rates from the date of filing this suit until payment in full; and
  - g. Any other orders as the Court may deem fit and just to grant.
17. Opposing the Claim in ELRC Cause No. E1028 of 2023, the Claimant avers that the issuance of the motor vehicle registration number KBV 599M, as well as other assets, was on the basis of his appointment as a Director/Shareholder of the Respondent and not the Managing Director.
18. According to the Claimant, the Respondent's Statement of Claim in ELRC Cause No. E1028 of 2023 smacks of malice, ill motive aimed at satisfying the Respondent's ego and selfish interests and consequently, he prays that it be dismissed with costs for want of merit.
19. The matter proceeded for hearing on 6<sup>th</sup> March 2025, during which both parties called oral evidence.

#### **Claimant's case**

20. The Claimant testified in support of his case as CW1. At the outset, the Claimant sought to adopt his Statement of Defence in ELRC Cause No.1028 of 2023, his Statement of Claim herein and his witness statement herein to constitute his evidence in chief. He further produced the list and bundle of documents filed on his behalf as his exhibits before court.
21. It was the Claimant's evidence that on 25<sup>th</sup> September 2023, the Respondent sent a show cause letter requiring him to show cause why disciplinary action should not be taken against him.
22. That through his advocates, he sent a response to the show cause letter dated 5<sup>th</sup> October, 2023, giving an elaborate explanation to the allegations contained in the show cause letter.



23. That on 25<sup>th</sup> October 2023, the Respondent arranged for an online disciplinary hearing to which all relevant parties were present. The allegations were pronounced and he answered all questions brought forth.
24. That on 26<sup>th</sup> October, 2023 the Respondent sent him a letter of immediate termination of employment.
25. The Claimant averred that throughout his tenure, he consistently demonstrated dedication and competence in his role as the Managing Director, often getting international suppliers to engage with the Company.
26. According to the Claimant, he was unexpectedly terminated from employment even after offering valid explanations for the alleged misconduct. It is his position that the reasons for termination are unjustified and do not warrant such drastic action.
27. The Claimant further averred that there were significant flaws in the disciplinary process, including but not limited to lack of proper notice; absence of fair hearing; being sent home for compulsory leave without salary to give the Respondent an opportunity to conduct its investigations, however no report came from this experience; withholding his salary; and terminating his medical coverage prematurely ending in March 2024.
28. It was the Claimant's further testimony that the Respondent resorted to despicable harassment tactics, such as deploying law enforcement officers to his residence on two occasions under the pretext of property retrieval.
29. It was the Claimant's further contention that the absurdity of the Respondent's misguided criminal charges against him on handling stolen property, whereas he is still a shareholder and director in the company, is an embarrassment.
30. The Claimant further stated that the Respondent's callous decision to terminate his medical cover and that of his spouse, prematurely ending in March 2024, demonstrates a complete lack of empathy.

### **Respondent's case**

31. The Respondent called oral evidence through Mr. Eric Aswani who testified as RW1. Mr. Aswani identified himself as the Respondent's Acting Managing Director and similarly, he sought to adopt the Respondent's Memorandum of Response in the case herein as well as the list and bundle of documents filed together with the said Response. In addition, RW1 adopted the Statement of Claim filed in ELRC Cause No. 1028 of 2023, his witness statement and the list and bundle of documents filed in the said suit to constitute his evidence in chief.
32. It was the evidence of RW1 that the Respondent company deals in medical equipment supplies, laboratory testing supplies, farming, and agricultural supplies business activities.
33. It was RW1's testimony that during the Claimant's employment with the Respondent, it was discovered that he drew excessive salaries for himself to the detriment of the Respondent Company; sold or oversaw the selling of the Company's products at losses; caused his wife one Mrs. Lorraine Frances Van Der Merwe, to assume a Management role in the Company without the Board of Management's approval; employed his daughter as an employee of the company absent of due process and without the requisite documents; and closed a business account belonging to the Respondent without proper authorization from the Board of Directors and made payments to suppliers without valid contracts.



34. That following such discovery, the Claimant was invited by the Respondent to a disciplinary hearing on 25<sup>th</sup> October 2023 to answer to the issues raised against him.
35. The Respondent considered the Claimant's responses to the claims raised and made a finding that he was in breach of his fiduciary duties to the company and that he had acted in a manner that had violated the *Employment Act* and thus the totality of his actions and inaction amounted to gross misconduct.
36. RW1 further averred that on or about 26<sup>th</sup> October 2023, the Claimant was terminated on account of gross misconduct, breach of his fiduciary duties to the Respondent company, and violation of the *Employment Act*.
37. RW1 added that during his employment in the Respondent Company, the Claimant was provided with a company Motor Vehicle, Toyota Prado Registration Number KBV 599M, to aid him in the fulfillment of his duties.
38. That besides the said Motor Vehicle, and given the nature of the Claimant's duties as a Managing Director of the Respondent Company, the Claimant had at his disposal other company assets and office equipment. However, and much to the disappointment of the Respondent, the Claimant refused, declined and ignored to return the company assets even after his termination and his terminal dues having been settled.
39. RW1 averred that despite demands and reminders to return the said company assets, the Claimant herein has refused, declined and ignored to return the same to the Respondent and as such, has resorted to converting the Respondent's property to his personal use.
40. In RW1's view, the Claimant's refusal to return company assets in his possession has seriously hampered the operations of the Respondent Company and has occasioned serious loss.

### **Submissions**

41. In support of his case, the Claimant submitted that the Respondent failed to issue him with all the evidence they relied on during the hearing, hence amounting to unfair conduct. In support of this argument, reliance was placed on the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR.
42. Referencing the case of *Postal Corporation of Kenya v Andrew K. Tanui* [2019] KECA 489 [KLR], the Claimant submitted that the Respondent did not fulfil any of the obligations provided by statute before proceeding to terminate his employment. According to the Claimant, the staged disciplinary hearing was a sham as he had already been relieved of his duties in August.
43. In the Claimant's opinion, he had proved that his termination was indeed unfair and the Respondent when called upon to prove the reasons for termination, failed to do so.
44. With respect to the Respondent's claim, the Claimant posited that at all times, he has been willing to facilitate the return of any company property, and attempts were made to collect the same. In the same vein, the Claimant posited that the Respondent deliberately created a hostile environment, even involving the police to frustrate these efforts.
45. It was the Claimant's position, the Respondent has not proved conversion of company property on his part and further, his actions have not been one of willful and wrongful interference, since on several occasions, he has tried to get the Respondent to retrieve the company assets.
46. The Respondent did not file written submissions as the same were missing on the Court's physical record and were not traceable on the online portal.



## Analysis and Determination

47. Having considered the pleadings by both parties in the two claims before me, the evidentiary material on record as well as the Claimant's submissions, the issues falling for the Court's determination can be condensed as follows:
- i. Whether the Respondent has proved that there was a justifiable reason to terminate the employment of the Claimant;
  - ii. Was the Claimant accorded procedural fairness prior to being terminated from the Respondent's employment?
  - iii. Is the Claimant entitled to the reliefs sought in ELRC Cause No. E1029 of 2023?
  - iv. Whether the Respondent's claim against the Claimant in ELRC Cause No. E1028 of 2023 has merit hence entitling the Respondent to the reliefs sought?

### Justifiable reason for termination of employment?

48. As can be discerned from the letter of termination dated 26<sup>th</sup> October 2023, the Claimant herein was terminated from employment on the basis that the Respondent found him guilty of breach of fiduciary duties, misconduct and violation of the *Employment Act*, 2007.
49. In the said letter of termination, the Claimant was alleged to have drawn excessive salaries while the company was incurring substantial losses, selling products at a loss and failing to retain major customers. The Claimant was further accused of employing his daughter, Ms. Loandre Wanda Van Merwe on a contractual basis without obtaining a work permit and allowing his wife, Mrs. Loraine Frances Van Der Merwe, to assume a management role within the company without the Board's approval.
50. It was further alleged that the Claimant had closed a business account without proper authorization from the Board of Directors and had effected payments to suppliers without a valid contract in place.
51. Under Sections 43[1] and 45 [2] [a] and [b] of the *Employment Act*, an employer bears the burden of proving the reasons for an employee's termination from employment and failure to do so, such termination is deemed to be unfair. In this regard, such reasons ought to be fair, valid and related to the employee's conduct, capacity or compatibility, or based on the operational requirements of the employer.
52. Drawing from the aforementioned statutory provisions, it follows that the Respondent herein was required to prove on a balance of probabilities the allegations leveled against the Claimant in that he engaged in acts of misconduct and breached his fiduciary duty as alleged.
53. Fundamentally, it was crucial for the Respondent to substantiate the allegations of misconduct and breach of fiduciary duty by the Claimant in order to prove that it had fair and valid grounds for termination of the Claimant's employment based on his conduct, hence discount the Claimant's claim for unfair termination.
54. From the record, the Respondent did not adduce evidence in whatever form or manner to prove the allegations raised against the Claimant. For instance, the Claimant was accused of drawing excessive salaries. Be that as it may, the Respondent did not exhibit the Claimant's contract of employment against his pay slips or bank transfers to his personal bank account, thereby proving that he drew salaries for his own benefit beyond what was contractually agreed upon.



55. The Claimant was further accused of employing his daughter at the Respondent company and allowing his wife to assume a management role at the company without the authority of the Board of Directors. However, there was no evidence adduced by the Respondent to support this assertion. To prove this accusation, the Respondent would have produced evidence to confirm that the Claimant's daughter and wife were paid salaries from the Respondent's coffers.
56. Equally, the Respondent did not lead any evidence to prove its allegations that the Claimant had sold the Respondent's products at a loss and had failed to retain major customers. In addition, it is worth noting that the Respondent did not disclose the identity of the major customers the Claimant was accused of not retaining.
57. Further to the foregoing, there was no evidence from the Respondent's end to support the allegation that the Claimant had closed a business account without proper authorization from the Board of Directors and had effected payments to suppliers without valid contracts in place. Indeed, closure of a bank account and payment of suppliers are matters that can be evidenced. As such, I cannot help but question why the Respondent did not adduce any kind of evidence in court to prove these allegations against the Claimant.
58. In a nutshell, aside from the narration of the allegations against the Claimant in the letter of termination, there was no evidence presented before this Court by the Respondent in whatever form or manner to back up the allegations of the Claimant's breach of fiduciary duties, misconduct and violation of the *Employment Act*.
59. Needless to say, there is no evidentiary material on record to substantiate the allegations against the Claimant.
60. In sum, the Court finds that the Respondent has failed to discharge its evidential burden under Sections 43[1] read together with Section 45[2] [a] and [b] of the *Employment Act* by proving that it had a fair and valid ground to terminate the employment of the Claimant based on his conduct. There was therefore no justifiable cause to warrant termination of the Claimant's employment.

#### **Procedural fairness?**

61. In line with Section 45 [2] [c] of the *Employment Act*, an employer is required to prove that an employee's termination from employment was in accordance with fair procedure. Section 41 [1] of the Act makes specific requirements with regards to the process to be complied with by an employer. It entails notifying the employee of the allegations levelled against him or her and thereafter granting him or her the opportunity to make representations in response to the said allegations in the presence of a fellow employee or a shop floor union representative of own choice.
62. In the Statement of Claim, the Claimant has pleaded that he was issued with a Notice to Show Cause, which he responded to through his advocates. In this regard, the Claimant exhibited a letter dated 5<sup>th</sup> October 2023 from his advocates to the Respondent through which his advocates tendered a comprehensive response to the allegations raised in the Notice to Show Cause.
63. The Claimant has further pleaded that he appeared for an online disciplinary hearing where all parties were present and he responded to the allegations against him.
64. Based on the material on record, the Court is unable to fault the Respondent with respect to the process applied in terminating the Claimant's employment.
65. This is on the basis that the Claimant was made aware of the reasons for which the Respondent was contemplating terminating his employment through the Notice to Show Cause and was afforded



an opportunity to appear for a disciplinary hearing to render his oral explanation in answer to the allegations leveled against him.

66. It is also worth noting that the Claimant's reference to an email communication from the Respondent's Mr. Uthara on 16<sup>th</sup> August 2023, purporting to accept his resignation, was not supported by evidence as the said email was not exhibited before the Court. Devoid of such evidence, the Court is unable to confirm the Claimant's assertions that his disciplinary hearing was a sham, as he had been terminated from employment in August.
67. Overall, on this issue, the Court finds no reason to fault the process applied by the Respondent in terminating the Claimant's employment.

#### **Reliefs under ELRC Cause No. E1029 of 2023?\***

68. As the Court has found that the Respondent has not proved that there was a justifiable reason to terminate the Claimant's employment, he is entitled to one [1] month's salary in lieu of notice, together with compensatory damages under Section 49 [1] [c] of the *Employment Act*. Bearing in mind the length of the employment relationship between the parties as well as the circumstances attendant to the Claimant's termination from employment and the Claimant's assertion that he is a shareholder in the Respondent company, the compensatory damages awarded shall be equivalent to four [4] months of his salary.
69. The Claimant is further awarded service pay as there is no evidence he falls within the exclusions under Section 35[6] of the *Employment Act*.
70. The Claimant is further awarded leave pay equivalent to 17 days as the Respondent failed to produce the Claimant's leave records to disprove his claim that he had pending leave days. This is noting that the Respondent, as the employer in this case, bears the responsibility of maintaining leave records under Section 74[1] [f] of the *Employment Act*. As such, the Claimant's claim with respect to leave was not controverted.

#### **Merit in the Respondent's claim in ELRC Cause No. E1028 of 2023?**

71. In its Statement of Claim in ELRC Cause No. E1028 of 2023, the Respondent has averred that the Claimant was provided with motor vehicle registration number KBV 599M to aid him in the fulfillment of his duties. It is also the Respondent's assertion that the Claimant had at his disposal other company assets and office equipment.
72. In support of its claim, the Respondent exhibited a copy of the log book of motor vehicle registration number KBV 599M, which indicates that the registered owner is Technomed Limited, the Respondent herein.
73. The Claimant has not declined the Respondent's assertions that the motor vehicle is still in his possession. He admitted as much during cross-examination. As there is no evidence that the Claimant was entitled to retain possession of the motor vehicle in question post termination of employment, it follows that the Respondent is entitled to the said motor vehicle.
74. The Claimant further admitted during cross-examination that he was yet to return other assets belonging to the Respondent company and which were in his possession by virtue of his employment. From the Claimant's standpoint, he has at all times been willing to return any of the company's property and attempts have been made to collect the same. He contends that the Respondent has deliberately created a hostile environment, including involving the police, to frustrate these efforts.



75. There being no contest that the Claimant is still in possession of the Respondent's motor vehicle and other assets, the Court finds merit in the Respondent's claim under ELRC Cause No. E1028 of 2023. As such, the Claimant is required to return the Respondent's motor vehicle and other assets in his possession.

### **Final Orders**

76. With respect to ELRC Cause No. E1029 of 2023, the Court enters judgment in favour of the Claimant against the Respondent as follows:

- a. A declaration that the termination of the Claimant from employment was substantively unfair.
- b. The Claimant is awarded one [1] month's salary in lieu of notice being the sum of Kshs 1,605,198.00.
- c. The Claimant is awarded compensatory damages in the sum of Kshs 6,420,792.00 being equivalent to four [4] months of his salary.
- d. The Claimant is awarded service pay at the rate of 15 days salary for each year of service, being Kshs 4,012,995.00.
- e. The Claimant is awarded the sum of Kshs 909,612.20 being payment for 17 accrued leave days.
- f. The total award is Kshs 12,948,597.20.
- g. Interest on the amount in [f] shall apply at court rates from the date of Judgment until payment in full.
- h. The Claimant is also entitled to a Certificate of Service, which is to be issued by the Respondent within 30 days from the date of this judgment.

77. As to ELRC Cause No. E1028 of 2023, the Court enters judgment in favour of the Respondent against the Claimant in that; The Claimant shall within 14 days from the date of this judgment, hand over possession of motor vehicle registration number KBV 599M to the Respondent, together with other assets that are in his possession belonging to the Respondent as better particularized in the inventory annexed to the Respondent's statement of Claim and exhibited before Court.

78. In view of the fact that both matters have succeeded, the Court will be inclined to order that each party bears their own costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 27<sup>th</sup> day of June 2025.**

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**STELLA RUTTO**

**JUDGE**

In the presence of:

For the Claimant Ms. Wahito

For the Respondent Mr. Alphonse

Court Assistant Millicent

**ORDER**



In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159[2][d] of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B** of the *Civil Procedure Act* [**Chapter 21 of the Laws of Kenya**] which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**

