



**Musembi v Intraspeed Arcpro Kenya Ltd (Cause 33 of 2020)  
[2024] KEELRC 1213 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1213 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 33 OF 2020  
DKN MARETE, J  
APRIL 24, 2024**

**BETWEEN**

**STEPHEN NTHENGE MUSEMBI ..... CLAIMANT**

**AND**

**INTRASPEED ARCPRO KENYA LTD ..... RESPONDENT**

**JUDGMENT**

1. This matter was originated by way of a Memorandum of claim dated 15th January 2020. The issues in dispute are therein cited as;
  - I. Unlawful, unfair and wrongful summary dismissal of Stephen Nthenge Musembi, (hereinafter the “Claimant”), by the Respondent;
  - II. Violation and breach of Claimant’s fundamental rights such as right to fair labour practices and fair administrative action; and
  - III. Miscalculation and/or non-payment of claimant’s dues.
2. The Respondent in Response to Memorandum of claim dated 11th March, 2020 denies the claim and prays that it be dismissed with costs.
3. The claimant’s case is that at all material times prior to this action he was an employee of the Respondent. He worked as Operations Manager. This is stipulated in an employment contract dated 15th September, 2020.
4. The particulars of employment come out as follows;
  - a. You have been selected for the post of operations manager with effect from 18<sup>th</sup> October, 2010;
  - b. Your consolidated salary will be Kshs 80,000 per month.



- c. You will be entitled to in-patient medical cover of Kshs 500,000 per year
  - d. Official working hours are 8:00 am to 5:00 pm, Monday to Friday. However, you may be required to work late or extra hours should exigencies of work demand;
  - e. You will be entitled to 21 days paid leave for each completed year of service;
  - f. Either party may terminate this contract by serving one month's notice in writing or by paying one month's pay in lieu of notice;
  - g. You will be bound by the rules and regulations of the office administration manual as amended from time to time.
5. This was confirmed vide a confirmation letter dated 1st August, 2011.
6. The claimant's further case is that the Respondent issued him with a job description seven years down the line. He later executed an employment contract dated 17th October, 2017, particulars of which are as follows;
- a. The date of engagement with the employee is 18<sup>th</sup> October, 2010;
  - b. The employer employs the employee as a HOD Declaration;
  - c. The employer shall pay the employee a consolidated salary of Kshs 165,000 per month;
  - d. Employer will provide inpatient medical insurance coverage of Kshs 500,000;
  - e. The employee shall execute his duties from Monday to Friday within 8:00 am to 5:00 pm;
  - f. Employee entitled to 21 working days leave with full pay;
  - g. This agreement shall be exclusively governed and construed in accordance with the Laws of Kenya.
7. The Claimant's other case is the he performed dedicatedly without any warning letter or reprimand and was promoted to the post of customs Affairs Manager. His salary became Kshs 174,900.00 vide a letter dated 26th February, 2019. This included a commendation for his good work and professionalism.
8. The claimant avers that on 28th October 2019 he was summoned to the company's boardroom by the company Human Resource Manager and Chief Commercial and Operations Officer and his immediate boss. (Michael Sila) wherein he was ambushed with baseless and unfounded allegations levelled against him, after which he was directed to hand over his resignation letter or face some unexplained consequences.
9. He therefore opted to do an email entitled "Coercion to Resign" dated 28th October, 2019 addressed to the Managing Director wherein he reported his misgivings on the said meeting and indicated his reservation to the harsh treatment he was been subjected to as follows;
- a. I was called to boardroom today for a meeting with Joan (HR) and Michael Sila my immediate boss;
  - b. Some unsubstantiated allegations which you were mentioned as having knowledge about were levelled against me;
  - c. I was then directed to hand over a resignation letter within today failure to which i should expect some unexplained consequences;



- d. The tone of the talk was quite abnormal and bordering on intimidation;
  - e. I have given this company my nine (9) years and feel I deserve some little respect if not for anything else, for the time I have tirelessly worked for its growth;
  - f. I have not tendered my resignation since I feel I'm being unfairly pushed out.
10. He was ultimately summarily dismissed from the employment on 29th October, 2019 ostensibly on grounds of his letter of protest. This was unlawful, unfair and wrongful on the following basis;
- a. The Respondent did not issue the Claimant with a show cause indicating the reasons why it wanted to dismiss him;
  - b. The Respondent did not offer any reasons as to why they summarily dismissed the Claimant from Employment other than that the Claimant had not resigned as had been directed in the meeting of 28<sup>th</sup> October, 2019;
  - c. The Claimant was not afforded an opportunity to issue a response to the allegations levelled against him;
  - d. The Claimant was not afforded a hearing as stipulated under the relevant labour laws;
  - e. The claimant was not issued with a written notice of his summary dismissal but was verbally informed to vacate the company's premises and that he was no longer an employee of the Respondent.
11. The Claimant other case is that after his summary dismissal, he was taken through a sham disciplinary process. This was initiated through the issue of a Show Cause letter dated 29th October, 2019 whose particulars came out thus;
- a. We refer to the briefings you had with the Managing Director, chief Commercial and Operations Officer and HR Manager on the 23<sup>rd</sup> October 2019 and 28<sup>th</sup> October 2019 respectively;
  - b. It came to our attention that: You failed to follow proper procedure on Radiation Board payments; You were involved in receiving Radiation Board payments and used to funds for unofficial purposes; You have knowingly accepted falsified receipts from your team members.
  - c. As such you are required to respond back to us in writing explaining why disciplinary action should not be taken against you;
  - d. The response should reach the undersigned before close of business Friday, 1<sup>st</sup> November, 2019.
12. The Claimant in return responded to the show cause letter by denying and explaining the various allegations made against him and called for evidence in support of the same. He also pointed out the anomaly of issuing the show cause letter after the event of termination of employment.
13. It is the Claimant's penultimate case that he was invited to a disciplinary hearing on 14th November 2019 wherein he demanded evidence on his misgivings so as to enable a response. This was done on 15th November and not the 14<sup>th</sup> as indicated in the letter of invitation. Here, the Claimant;
- a. The Claimant made it clear he has never authorized any payments as the same do not form part of his job description;
  - b. Authorizations are only done by the Managing Director and the CCOO;



- c. The claimant has never received any funds and was therefore unable to utilize what he does not receive for unofficial purposes as claimed in the show cause;
  - d. The Claimant clearly indicated that he had never received any falsified receipts;
  - e. The Claimant fully relied on his response to the show cause letter;
  - f. The Claimant was informed that the Respondent was restructuring and that the same would affect his position in the Company;
  - g. He was asked his thoughts on the Respondent approaching him with an exit package and asked to consider the same;
  - h. The CCOO indicated that following investigations, Kshs 4.500.000 has been paid out as radiation board payments and that the Claimant spear headed this fraud;
  - i. The findings of such investigation was not presented to the Claimant to enable him respond to the same;
  - j. The Claimant was ambushed with a new allegation of involvement in fraud, of which had not been brought to his attention before to enable him respond to the same;
  - k. The Respondent blatantly declined and/or wantonly refused to offer the Claimant any form of evidence, report and/or findings from their investigations backing he allegations in the show cause;
  - l. The managing Director threatened the Claimant that he will proceed to report the alleged fraud to the police and the Claimant informed him to do so.
14. He was thereafter issued with a letter of summary dismissal with effect from 2nd December, 2019 on grounds of gross misconduct as follows;
- a. Following the disciplinary hearing held on 15<sup>th</sup> November 2019, a decision has been made to terminate your employment by reason of gross misconduct;
  - b. Your conduct in discharging your duties as the Operations Manager was found to be unsatisfactory in the following respects: Failure to establish the veracity for the radiation board payment resolutions; Failure to follow proper laid out procedure on correct radiation board payments; Involvement in receiving the radiation board payments and utilization of the funds for unofficial purposes; Knowingly accepting falsified receipts from your team member.
  - c. The above actions not only constitute a criminal offence punishable in law but are also detrimental to your employer. Your acts amount to gross misconduct whose consequence is summary dismissal;
  - d. The company finds this issue particularly serious and harmful as it has led to loss of huge sums of money in unverified, illegal and unnecessary payments.
  - e. Your termination date shall be the date of this letter.
15. It is his case that dismissal from employment amounted to unfair labour practice and was wrongful, unfair and unlawful.
16. He claims thus;



29. 12 month's pay for unlawful and unfair termination of employment: Kshs 174,900/= x 12months =Kshs 2,098,800/-
  30. One month's pay for insufficient notice Kshs 174,900/
  31. Accumulated leave days not taken for the 9 years worked (9@Kshs 174,900)=Kshs 1,574,100/-)
  32. Overtime worked for the years in service = Kshs 1,900,000/=.
17. He prays as follows;
- a. Determination that the Respondent's actions infringed on Claimant's constitutional right to fair labour practices;
  - b. Determination that the Claimant was unlawfully, unfairly and wrongfully summarily dismissed;
  - c. Order for payment to the Claimant of the actual pecuniary loss suffered as result of wrongful dismissal from date of such dismissal to date of such determination and as detailed through paragraphs 29 to 32;
  - d. Order for payment of interest in (c) above at court rates to the Claimant by the Respondent;
  - e. Order for payment of legal costs;
  - f. Order for the payment of other costs and any other relief this Honourable court may deem fair and fit to grant.
18. The Respondent's case is a denial of the claim.
19. She however admits the claimant's averments on the claimant's employment contract dated 20th September, 2010, the confirmation letter dated 1st February, 2017. This besides the descriptive appendages to the claim.
20. It is the Respondent's further case that subsequent investigation leading to the present circumstances carried out by herself seriously dent the Claimant diligence as claimed. She also admit summoning the Claimant on 28th May, 2019 to an informal meeting where the Respondent's Human Resource Manager, the Chief Commercial and Operations Officer and his immediate Supervisor were in attendance and informed him of the charges against him and informed him of his need to respond to the charges.
21. The Respondent's other case comes out as follows; That the meeting of 28th October, 2019 was follow-up of the earlier one held on 23'd October, 2019 where the Managing Director to Respondent was in attendance. She admits receipt of an email titled "Coercion to Resign" but did not understand it as the Claimant was only required to respond to the charges against him. She denies wrongful, unfair and unlawful termination of claimant's employment. The claimant was lawfully dismissed on 2nd December, 2019 after due process was instituted. Disciplinary process was kick started by the show cause letter issued on 29th October, 2019 and ended with a dismissal letter of 2nd December instant. She received a response to the show cause dated 1st November, 2019 in answer to the show cause letter which is an indication that the claimant was aware of charges levelled against him and answered accordingly. The claimant was invited to a disciplinary hearing held on 14th November, 2019. No dismissal had been made prior to the disciplinary hearing, or at all. The Claimant always knew the sworn testimonies of Joseph Mburu, Kennedy Muema and Isaac Musyoka which went to show the claimant's failure to follow proper procedure on authorizing payments, use of funds of



the Respondent for unofficial purposes and accepting falsified receipts from his team members. The claimant had through two telephone calls been notified of the re-scheduling of the disciplinary meeting from the 14th November, 2019 to 15th instant.

22. The Respondent in the penultimate submits a case of lawful and fair dismissal of the claimant's employment in that all due process and disciplinary procedure was applied in such termination. He was notified of his dismissal by a letter dated 2nd December, 2019 and ultimately paid all his final dues of employment. He was also issued with a certificate of service in accordance with [Employment Act](#), 2007.
23. She therefore prays this matter be dismissed with cost to herself.
24. The issues for determination;
  1. Whether the termination of employment of the Claimant by the Respondent, was wrongful, unfair and unlawful.
  2. Whether the Claimant is entitled to the relief sought.
  3. Who bears the cost of this cause.
25. The 1st issue for determination is whether the termination of employment of the Claimant by the Respondent was wrongful, unfair and unlawful. The Claimant in his written submissions dated 22nd December, 2023 reiterates his case and submits wrongful, unfair and illegal summary dismissal on the part of the Respondent. On this he seeks to rely on provision of section 44(4)(g) of the [Employment Act](#), 2007 which provides for the tenets of gross misconduct so as to justify summary dismissal as follows;

“ Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal...”
26. She seeks to rely on the authority of [Anthony Kelly Muema v Airtel Networks Kenya Limited](#) (2017) eKLR where this court was moved by the authority of [Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture & Technology](#) (2014) eKLR where it was held thus;

“ I agree that counsel for the respondent that internal disciplinary proceedings are not judicial in nature (sic.) However, in order for an employee to respond to the allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in possession of employer which would assist them in preparing their defence. The employee is also further entitled to call the witnesses to buttress the defence(sic.)
27. The Respondent in her responds submission dated 24<sup>th</sup> February, 2024 also reiterates her case of lawful termination of employment and employs section 45 of [Employment Act](#), 2007 to assert that valid reasons and due process was followed in the claimant's summary dismissal in compliance with section 41 of the Act.



28. She further seeks to buttress her case by relying on the authority of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR where the Court of Appeal express itself as follows;

“There can be no doubt that the Act, which was enacted in 2007, placed heavy obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47(5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”

Again, section 47(5);

“So that, the appellant in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43(1): “to prove the reasons or reasons for the termination, and where the employer fulfils to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”

29. The Respondent thereon goes out of her way to restate the sequent of event leading to the summary dismissal of the claimant.

30. A look at the respective cases of the parties tilt this matter in favour of the Respondent. She has in toto brought out an overwhelming case of fair termination of employment of the Claimant as opposed to the contrary case by the said Claimant. This is especially displayed in the Respondent’s trial bundle which incorporates a detailed itemisation of the document in support of her case. This is besides the elaborate Respondent’s witness statement made by Joan Wachira, the Customs Affairs Manager of the Respondent dated 24th June, 2022.

31. The Claimant’s case and submissions remain hollow and unsubstantiated in the circumstance. I therefore find a case of lawful termination of employment and hold as such.

32. The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost on a case of unlawful termination of employment, he becomes disentitled to the relief sought.

33. I am therefore inclined to dismiss the claim with orders that each party bears their costs of the same.

**DELIVERED, DATED AND SIGNED THIS 24TH DAY OF APRIL 2024.**

**D. K. NJAGI MARETE**

**JUDGE**

Appearances

Mr. Ondego instructed by Timothy Got Ondego for the Claimant

Miss Muriranja instructed by Mckay & Company Advocates for the Respondent.

