



**Itebete v Econet Media Kenya Limited t/a Kwese (Cause 838 of 2019)  
[2023] KEELRC 3020 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3020 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 838 OF 2019  
SC RUTTO, J  
NOVEMBER 24, 2023**

**BETWEEN**

**ANTHONY KHAKALI ITEBETE ..... CLAIMANT**

**AND**

**ECONET MEDIA KENYA LIMITED T/A KWESSE ..... RESPONDENT**

**JUDGMENT**

1. The Claimant instituted the suit herein *vide* a Statement of Claim dated 12<sup>th</sup> November 2019, in which he avers that he was employed by the Respondent on 1<sup>st</sup> January 2019, as a Finance Manager. The Claimant further avers that he worked diligently until 28<sup>th</sup> June 2019, when the Respondent served him with a notice of intended redundancy. While serving the notice, he was informed of unsubstantiated claims alleging impropriety on his part without any form of proof. Following a disciplinary process which the Claimant regarded as a sham, he was served with a notice of dismissal dated 20<sup>th</sup> August 2019.
2. The Claimant has termed his dismissal as grossly, unfair, irregular, and unlawful hence has sought the following reliefs against the Respondent;
  - a. A declaration that the summary dismissal of the Claimant's services was unconstitutional, unlawful, unfair and irregular.
  - b. General damages for unfair dismissal;
  - c. Payment of terminal dues as tabulated below;
    - i. Notice of intention to declare redundancy @ 1 month Kshs 332,420.00
    - ii. Notice as per contract of three months Kshs 997,260.00.
    - iii. Days worked upto 21<sup>st</sup> August 2019 Kshs 229,506.00
    - iv. Outstanding leave days 34 Kshs 376,743.00.



- v. Severance @ 15 days per year Kshs 491,799.00
  - d. Compensation or unfair dismissal @ Kshs 332,420.00 for 12 months totaling to Kshs 3,989,040.00.
  - e. Certificate of Service;
  - f. Costs of the Claim;
  - g. Any other relief that this Court may deem just and expedient to grant.
3. The Respondent did not enter appearance nor file a defence or such other document in response to the Statement of Claim. As proof of service, the Claimant filed an Affidavit of Service sworn by Vincent Anyona on 15<sup>th</sup> November 2020, in which he deposes that he effected service of the Statement of Claim and Notice of Summons upon the Respondent. As such, the Claim was undefended hence the matter proceeded for formal proof hearing on 22<sup>nd</sup> June 2023.

### **Claimant's Case**

4. The Claimant testified in support of his case and to start with, he adopted his witness statement to constitute his evidence in chief. He proceeded to produce the bundle of documents filed together with the Statement of Claim as exhibits before Court.
5. It was the Claimant's evidence that upon being served with the notice alleging impropriety on his part, he proceeded to offer a comprehensive response to the claims that had been levelled against him.
6. That on 23<sup>rd</sup> July 2019, the Respondent conducted sham proceedings in the name of a disciplinary process for the purpose of validating the premeditated decision to dismiss him.
7. The Claimant further testified that despite following up to know the outcome of the proceedings, the Respondent failed to update him within a reasonable time of the outcome of the sham process.
8. That on 19<sup>th</sup> August 2019, he submitted a request for voluntary retrenchment to the Respondent who refused and or failed to honour the same.
9. It was his testimony that on 22<sup>nd</sup> August 2019, the Respondent served him with a notice of dismissal dated 20<sup>th</sup> August 2019 which does not set out the specific facts that justify the action.
10. According to the Claimant, the actions by the Respondent in first serving him with a Notice of Intended Redundancy and then subjecting him to a sham disciplinary process and then subsequently summarily dismissing him point to a premeditated intention to deny him his rights under the law.
11. In the Claimant's view, the Respondent was required by law to provide him with clear valid reasons for any disciplinary process and not merely general statements that are not supported by facts.
12. That by the Respondent mixing two different issues of redundancy and discipline, he was subjected to unnecessary mental anguish and stress.
13. The Claimant further contended that by virtue of the Respondent's actions against him, he has suffered loss of his livelihood as he was solely dependent on the earnings from this job for the sustenance of his family and himself.
14. He further averred that it is clear that the Respondent was determined to deny him his lawful dues by not paying the statutory amount due from a lawful redundancy process.
15. Concluding his testimony in chief, the Claimant asked the Court to allow his Claim as prayed.



## Submissions

16. Upon close of the hearing, the Claimant was given 14 days within which to file written submissions. However, the Claimant did not comply despite being granted a further extension of 7 days from 25<sup>th</sup> September 2023.

## Analysis And Determination

17. Having considered the pleadings and the evidence on record, it is apparent that the Court is being called to determine the following issues:
- a. Whether the Respondent has proved that there was a justifiable cause to terminate the Claimant's employment;
  - b. Whether the Claimant's termination was in line with fair procedure?
  - c. Is the Claimant entitled to the reliefs sought?

## Justifiable Cause?

18. In order to establish fair termination under the *Employment Act* (Act), an employer is required to prove the reasons leading to an employee's termination. It does not end there. In terms of Section 45(2) (a) and (b), such reasons ought to be fair, valid and related to an employee's conduct, capacity or compatibility; or based on the employer's operational requirements. This is also known as substantive justification. It is noteworthy that the burden of proof in this instance, lies with the employer.
19. In the instant case, the reasons for the Claimant's termination from employment as can be discerned from his letter of termination were failure to adhere to set financial control systems and abuse of position of trust. The Respondent based the Claimant's dismissal on Section 44(4) (c) of the Act which relates to negligence and improper performance of duty.
20. What is notable is that the reasons behind the Claimant's termination from employment are quite vague, general and lacking in particulars. I say so because first, the Claimant was accused of failure to adhere to the set financial control systems. Be that as it may, the particulars of breach were not provided.
21. Second, the accusation that the Claimant abused a position of trust, was not accompanied by any particulars.
22. In view of the foregoing, I cannot help but question what aspect of the Respondent's financial control system did the Claimant fail to adhere to and further, in what manner did the Claimant abuse his position of trust?
23. The Court of Appeal in the case of *Ol Pejeta Ranching Limited v David Wanjau Muboro* [2017] eKLR, found that the allegations against the employee in that case were too general hence termed his termination as unfair. The learned Judges rendered themselves thus:

“As also rightly found by the learned trial Judge, no evidence was placed before court to show that the Respondent had been issued with a charge (s) of the specific allegations that he was required to answer during the hearing. Going in for the hearing, it is discernable from the record that the Respondent only knew in general terms, the allegations he was to face and counter. That coupled with the fact that he had no knowledge of the audit findings, he had



no fair chance to advance his defence. In the circumstances, therefore it cannot be said that the termination process was fair.” Emphasis mine

24. I fully align myself with the above determination. Nothing would have been easier than for the Respondent to avail more particulars as regards the allegations against the Claimant and more specifically, the specific breaches he committed in relation to the Respondent’s financial control systems and the particulars of abuse of position of trust.
25. It is also worth pointing out that besides stating the reasons for an employee’s termination, it is crucial for an employer to substantiate the allegations in question.
26. In this case, the Respondent was required to prove by way of evidence, the substance of the allegations levelled against the Claimant.
27. As stated herein, the Respondent did not file a defence hence it failed to tender evidence to prove its accusations against the Claimant. Put another way, the allegations against the Claimant were not corroborated through evidence presented in whatever form or manner.
28. In terms of Sections 43 and 45(2) (a) and (b) of the Act, the burden was on the Respondent to prove the reasons for the Claimant’s termination from employment. Therefore, by failing to tender evidence, the Respondent failed to discharge its evidential burden.
29. In light of the foregoing, it is this Court’s finding that the Respondent has failed to satisfy the requirements of Section 43(1) as read together with Section 45(2) (a) (b) of the Act and as such, it has not proved that there was a justifiable cause to warrant termination of the Claimant’s employment.

#### **Procedural Fairness?**

30. Section 45(2) (c) of the Act provides that for termination to be fair, it ought to be in line with fair procedure. What constitutes fair procedure is spelt out under Section 41 of the Act. This procedure entails notifying the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to make representations in response to the said allegations. The employee is also entitled to be accompanied by a fellow employee or a shop floor union representative of his or her own choice in making such a representation.
31. In the instant case, the Claimant stated that he was issued with a notice detailing the allegations against him and he responded to the same. He stated that he was thereafter taken through a sham disciplinary hearing which was aimed at achieving a predetermined end.
32. In terms of Section 45(2) (c) of the Act, it was upon the Respondent to prove that it subjected the Claimant to a fair process prior to terminating his employment. This, it failed to do hence the Claimant’s assertion that the process he was subjected to was a sham, was not controverted.
33. The fairness of a disciplinary process cannot be over emphasized. This is noting that such a process has the likelihood of depriving an employee the source of his livelihood and therefore, must by all means be seen to be fair.
34. By failing to tender any evidence to counter the Claimant’s assertions that the hearing was not fair, I am inclined to find that the Respondent failed to act in consonance with the statutory requirements of procedural fairness.
35. Against this background, I arrive at the inevitable conclusion that the dismissal of the Claimant was procedurally unfair hence unlawful.



36. In total sum, I find that the Respondent has failed to prove that there was substantive justification to warrant the Claimant's termination from employment and that it accorded him procedural fairness prior to his termination. Therefore, the Claimant's termination fell short of the requirements stipulated under Section 45 of the Act hence was unfair in all respects.

### **Reliefs**

37. The Claimant is awarded three (3) months' salary in lieu of notice in accordance with his contract of employment.
38. Having found that the Claimant's termination was unfair and unlawful, the Court awards him compensatory damages equivalent to five (5) months of his gross salary. This award has taken into consideration the length of the employment relationship and the fact that the Respondent failed to prove substantive justification and that it applied a fair process in effecting the Claimant's termination.
39. The claim with regards to salary for days worked also succeeds there being no evidence that the Claimant was paid accordingly.
40. Similarly, the Claimant is entitled to payment in lieu of leave as the Respondent failed to avail his leave records in line with its obligations under Section 74(1) (f) of the Act. Be that as it may, pursuant to Section 28(4) of the Act, the said leave days shall be limited to 18 months preceding the Claimant's exit from employment.
41. The claim for severance is declined as redundancy was not the main reason for the Claimant's exit from the Respondent's employment.

### **Orders**

42. It is against this background that I enter Judgment in favour of the Claimant against the Respondent as follows:
- a. A declaration that the Claimant's summary dismissal by the Respondent was unfair and unlawful.
  - b. The Claimant is awarded Kshs 921,000.00 being three (3) months' salary in lieu of notice.
  - c. The Claimant is awarded the sum of Kshs 1,535,000.00 being compensatory damages equivalent to five (5) months of his gross salary.
  - d. The Claimant is awarded the sum of Kshs 204,666.60 being salary for 20 days worked in the month of August 2019.
  - e. The Claimant is awarded the sum of Kshs 322,350.00 being payment in lieu of leave days not taken.
  - f. The total award is Kshs 2,983,016.60.
  - g. Interest on the amount in (f) at court rates from the date of Judgment until payment in full.
43. The Respondent shall also issue the Claimant with a Certificate of Service in accordance with Section 51(1) of the Act.
44. The Claimant shall have the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2023.**



**STELLA RUTTO**

**JUDGE**

*Appearance:*

*For the Claimant Ms. Nzioki*

*For the Respondent No appearance*

*Court Assistant Abdimalik Hussein*

*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.*

