

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS AT
KAKAMEGA
CAUSE NO. E016 OF 2023

HOWARD LIDALO1ST CLAIMANT

MERCY KHAOYA 2ND CLAIMANT

VERSUS

**COUNTY GOVERNMENT
OF KAKAMEGA.....1ST RESPONDENT**

**COUNTY PUBLIC SERVICE BOARD
OF KAKAMEGA 2ND RESPONDENT**

PUBLIC SERVICE COMMISSION 3RD RESPONDENT

(BEFORE HON. JUSTICE DAVID NDERITU)

JUDGMENT

I. INTRODUCTION

1. The claimants commenced this cause by way of a memorandum of claim dated 13th September 2023 received in court on 18th September 2023 through Otieno, Yogo, Ojuro & Company Advocates. The memorandum of claim is accompanied with a verifying affidavit sworn by the 1st claimant, a list of witnesses, two witness statements each by either of the claimants, and a list of documents and a bundle of copies of the listed documents. A further list and a bundle of the listed documents dated 8th April 2024 was filed alongside further witness statements by the two claimants.

2. The claimants filed an amended memorandum of claim dated 8th April 2024 wherein they are seeking for the following reliefs

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- a) The decision of the 3rd respondent of the 3rd respondent dated 24th April, 2023 be set aside and the same be substituted by an order reinstating the claimants to their positions in the 1st respondent's employment.***
- b) A declaration that the 3rd respondent's decisions are unlawful, unconstitutional and contrary to employment laws of Kenya.***
- c) A declaration that the decision of the 3rd respondent was premeditated, actuated by malice, ill will and bad faith and contrary to public policy and law.***
- d) Payment of all withheld salaries, terminal dues and all other dues as per employment laws from the time of suspension and or dismissal.***
- e) Damages for unlawful, wrongful and unfair dismissal.***
- f) Costs of the claim herein.***
- g) Interests on (f) above at court rates.***
- h) Any other remedy the court deems fit to grant.***

3. The 1st and 2nd respondents entered appearance and filed defence through Tindi Munyasi & Company Advocates. In a response to the claim dated 30th October 2023 the two respondents deny the claim in its entirety and pray that the same be dismissed with costs for want of merits. An amended

response to the claim was filed dated 2nd May 2024 praying for the dismissal of the claim.

4. The 1st and 2nd respondents filed a joint witness statement by Catherine Gathoni Otenyo dated 23rd January 2024 and a list and bundle of the listed documents dated 5th February 2024. An amended statement by the same witness dated 2nd May 2024 was later on filed alongside the amended response alluded to above. A further list and bundle of copies of the listed documents dated 12th June 2024 was filed as well.
5. The 3rd respondent entered appearance through Selina Iseme Advocate but filed no response to the claim, or documents, or witness statements.
6. The claimants' case came up for hearing on 3rd December 2024 and 5th February 2025 when the two claimants (CW1 & CW2) testified and closed their case. The defence was heard on the latter date when Catherine Gathoni Otenyo (RW1) testified for the 1st and 2nd respondents. The 3rd respondent neither called any witnesses nor adduce any evidence.
7. Counsel for the parties addressed the court by way of written submissions. Mr. Odhiambo for the claimants filed submissions dated 6th March 2025. Miss Tindi for the 1st and 2nd respondents filed submissions dated 27th March 2025 alongside a list of authorities of even date and copies of the listed authorities. Miss Iseme for the 3rd respondent filed submissions dated 18th March 2025 alongside copies of the authorities cited.

II. THE CLAIMANTS' CASE

8. The claimants' case is expressed in the amended memorandum of claim, the oral and documentary evidence adduced by the claimants (CW1 & CW2) and in the written submissions by their counsel.
9. In the amended memorandum of claim, the claimants aver that at all material times they were employees of the 1st respondent and that on 15th April 2020 they received show-cause letters and were put on suspension on allegations of various charges. Subsequently, the claimants variously wrote to the respondents seeking for further and better particulars of the allegations and more so supporting documents to enable them respond thereto but to no avail. Meanwhile, the claimants remained on suspension and were forced to respond to their respective show-cause letters without the benefit of the particulars sought.
10. The claimants were invited for disciplinary hearing by the 2nd respondent vide letters dated 30th September 2020. The disciplinary hearing proceeded and the claimants were ultimately dismissed vide respective letters dated 15th December 2020.
11. The claimants thereafter appealed to the 3rd respondent but the dismissals were upheld in respective letters dated 13th October 2021. Subsequently, the claimants applied for review of the decision by the 3rd respondent through their trade union, Kenya County Government Workers Union, vide a letter dated 22nd December 2021 and the request for review was allowed by the 3rd

respondent in a letter dated 15th March 2022. The 3rd respondent directed that the appeals by the claimants be heard afresh and the 1st and 2nd respondents were ordered to specifically respond to each of the grounds of appeal raised by the claimants in their appeals alluded to above.

12. It is pleaded that the 2nd respondent, in total disregard to the 14 days allowed by the 3rd respondent to respond to the appeal, replied to the appeal late in a letter dated 27th September 2022.

13. Ultimately, the appeal by the claimants to the 3rd respondent was dismissed and it is the claimants' case that the 3rd respondent was biased and unfair in dismissing their respective appeals for the reasons stated in the memorandum of claim.

14. It is the claimants' position that the entire process up to and leading to their dismissal was unfair and unlawful and hence they are seeking for the reliefs set out in the introductory part of this judgment.

15. In his testimony in court the 1st claimant (CW1) stated that he did not secure another job after the dismissal. He adopted his amended witness statement dated 8th April 2024 and produced copies of the documents in the list dated 13th September 2023 and the further list of documents dated 8th April 2024 as exhibits 1 to 15. He reiterated that while he was served with a show-cause letter dated 15th April 2020 the respondents failed to supply him with documents in support of the allegations and charges against him. He restated his averments as pleaded in the amended

memorandum of claim as alluded to in the foregoing part of this judgment concluding that his dismissal was unfair and unlawful.

16. In cross-examination by counsel for the 1st and 2nd respondents, CW1 admitted service of the show-cause letter, his responding thereto, and service of a hearing notice and his attendance and participation in the hearing. Further, he admitted that he banked a sum of Kshs325,000/= after the disciplinary hearing. He stated that he had retained the money from 27th March to 9th September, 2020 for purchases. He admitted that he was not supposed to hold such monies as he was obligated to surrender imprest within 48 hours. He denied misappropriating funds belonging to the 1st respondent.
17. He stated that he was dismissed vide a letter dated 15th December with effect from 1st December, 2020.
18. In cross-examination by counsel for the 3rd respondent, CW1 stated that he is a certified public accountant since 2018 but had worked as an accountant in public service since 2007 and as such he understands public finance management procedures and regulations. He admitted that the reasons for his dismissal were stated in the letter of dismissal.
19. Further, he admitted that he had no evidence that a conference ever took place as was intended when he was allocated monies for the same. In fact, he admitted that no such conference ever took place but the money was allegedly paid out in advance to officers who were to attend. He thus admitted that he failed to account for

the monies that he received for the intended purpose. He stated that he un-procedurally kept a sum of Kshs325,000/= received for the said conference from March to September, 2020 when he allegedly banked the same after the disciplinary hearing.

20. In re-examination by his counsel, CW1 insisted that the procedure adopted by the respondents leading to his dismissal was wrong. He claimed that the direction by the 3rd respondent that his appeal be heard afresh was not complied with.
21. In her testimony in court, CW2 stated that she did not locate another job after the dismissal. She adopted her statement dated 8th April 2024 and produced the documents in the further list of even date as claimants' exhibits 16 to 19.
22. She admitted service of the show-cause letter dated 15th April 2020 on charges of making false claims. She stated that despite asking for details and particulars in her letter of 24th April, 2020 the 1st and 2nd respondents failed, refused, and or neglected to supply her with the same. She stated that she was not informed of her right to attend the hearing with a witness and or a union representative.
23. She reiterated the journey of her appeal and review of the dismissal to the 3rd respondent, as pleaded in the memorandum of claim and as was stated by CW1 above, and that her dismissal was upheld as per a letter dated 27th September 2022. She stated that she was not invited for the hearing of her appeal by the 2nd

respondent as ordered by the 3rd respondent and as such her dismissal was un-procedural.

24. She stated that she was not charged with any criminal charges related to the allegations made against her in the show-cause letter and that no evidence was availed against her during the disciplinary hearing. She maintained that the dismissal was unfair and unlawful as the directions for re-hearing issued by the 3rd respondent was not adhered to and she was not supplied with the evidence against her even after asking for the same.
25. In cross-examination by counsel for the 1st and 2nd respondents, CW2 stated that she responded to the show-cause letter and she was invited for disciplinary hearing vide a letter dated 30th September 2020. She admitted that she attended the hearing and presented her defence to the charges. She admitted receiving the monies stated in the charges being Kshs352,800/= and a further Kshs480,200/=. However, she admitted that the monies were not accounted for as per the public finance management rules and regulations.
26. In cross-examination by counsel for the 3rd respondent, she admitted that the 3rd respondent had not directed her to file a fresh appeal but the 2nd respondent had been directed to reply to each ground of the appeal afresh. She stated that she was not invited for the re-hearing of the appeal.
27. She stated that she surrendered the imprest on the monies she received and insisted that a training took place attended by

accountants including herself. However, she admitted that she did not supply the documents in support of her alleged surrender to the respondents either during the disciplinary hearing or the hearing of the appeal or review.

28. In re-examination by her counsel, CW2 insisted that she was not informed of her rights during the disciplinary hearing, the show-cause did not come with supporting documents, and the appeal was not heard afresh as directed by the 3rd respondent. She therefore opined that the dismissal was unfair and unlawful.

29. It is on the basis on the foregoing evidence and circumstances that the claimants are seeking that judgment be entered in their favour as prayed in the amended memorandum of claim. The submissions by their counsel shall be considered in a succeeding part of this judgment.

III. THE RESPONDENTS' CASE

30. The 1st and 2nd respondents' case is contained in the amended response to the claim, the oral and documentary evidence adduced through RW1, and the written submissions by their joint counsel. As noted in the introductory part above, the 3rd respondent did not file a response to the claim and did not call any witness. However, its counsel filed written submissions that shall be considered in a succeeding part of this judgment.

31. In the response to the amended memorandum of claim, the 1st and 2nd respondents admit that while the claimants were their employees, they were however fairly and lawfully dismissed for

gross misconduct. It is pleaded that the claimants were accorded fair hearing and facilitated to mount their defence in accordance with the law. They vehemently denied that they were biased against the claimants emphasising that they had valid reasons for dismissing the claimants and the procedure applied in arriving at that decision was fair and just.

32. In her testimony in court, RW1, the chief executive officer of the 2nd respondent, adopted her filed amended statement dated 2nd May 2024 as her evidence in-chief. She produced the documents in the list dated 5th February 2024 and further list dated 12th June 2024 as exhibits 1 to 12.
33. RW1 stated that the disciplinary hearing against the claimants was delayed due to Covid 19 pandemic. She stated that the 2nd respondent manages the human resources for the 1st respondent but it can delegate that function to a select or Ad hoc committee as it did in this case. She stated that the misconduct by the claimants was investigated and a report made by the committee. She stated that the claimants were given a hearing, alongside other employees investigated of misconduct, and the claimants were found guilty as per the report produced in court.
34. RW1 further stated that the claimants were found culpable of misappropriation and or failure to account for funds in the sum of Kshs557,400/= and Kshs325,800/= respectively. She stated that contrary to allegations made by the claimants, they were supplied with all details and documents in support of the charges against

them and, in any event, they had retained copies of the same documents that they were seeking. She stated that upon fair and just hearing the claimants were dismissed and their vacancies have since been filled. She stated that the claimants abused their fiduciary positions and the respondents can no longer trust the claimants with public funds.

35. In cross-examination by counsel for the claimants, RW1 stated that no criminal charges were preferred against the claimants. She stated that the investigation report is the primary document that was used in the disciplinary proceedings against the claimants for their misconduct. She stated that the claimants failed to account for the monies/imprest they took and hence the dismissal for gross misconduct. She insisted that the claimants were afforded fair and just hearing all the way to the appeal before dismissal.

36. The 3rd respondent neither filed a response to the claim nor called any evidence or witness. However, its counsel filed submissions that shall be considered hereunder alongside those by counsel for the other parties.

37. It is on the basis on the foregoing evidence and circumstances that the respondents pray that the claimants' cause be dismissed with costs. The submissions by the respondents' counsel shall be considered below alongside those by counsel for the claimants.

IV. SUBMISSIONS

38. On the one hand, the claimants' counsel submitted that after the claimants were served with show-cause letters dated 15th April

2020 and put on suspension, they sought to be supplied with further and better particulars of the charges by way of documentary support of the charges but the respondents failed, refused, and or neglected that request. It is submitted that the claimants proceeded with the disciplinary hearing without the benefit of the requested documents and, ultimately, they were dismissed vide letters of dismissal dated 15th December 2020.

39. Counsel submitted that thereafter the claimants appealed the dismissal to the 3rd respondent but the dismissal was upheld. However, the claimants through their workers' union, Kenya County Governments Workers Union, applied for review of the dismissal of the appeal and the review was allowed on 15th June 2022. The 3rd respondent directed that the appeal be heard afresh. The respondents were directed to respond to each ground of appeal within 14 days of that date.
40. However, it is submitted that the respondents did not respond as directed until 27th September 2022, without giving any explanation for the delay and without providing the documents in support as requested by the claimants earlier. It is submitted that despite protestations from the claimants the 3rd respondent upheld the dismissal.
41. Counsel for the claimants identified the following issues for determination –
 - a. *Whether the claimant's termination was unlawful and unfair.*

- b. *Whether 1st and 2nd defendant had jurisdiction to handle disciplinary claims against the claimants.*
 - c. *Whether the 1st and 2nd respondents proved the allegations against the claimants.*
 - d. *Whether the 1st and 2nd respondent's actions were actuated by malice, ill will and bad faith contrary to public and the law.*
 - e. *Whether actual loss was established by the 1st and 2nd respondent.*
 - f. *Whether the claimants were accorded a fresh hearing as directed by the 3rd respondent.*
 - g. *Whether the claimants are entitled to the reliefs sought.*
42. On the first issue, it is submitted that the fact of employment of the claimants as pleaded is not contested. It is submitted that their dismissal was unfair both in substance and procedure in that the respondents allegedly failed to meet the provisions of **Sections 43, 45, & 47 of the Employment Act (the Act)**. In support of this position counsel cited **Walter Anuro Ogal V Teachers Service Commission (2013) eKLR** and **Alphonse Machanga Mwachanya V Operation 680 Limited (2013) eKLR**.
43. Further, it is submitted that the respondents failed to afford the claimants fair hearing as envisaged under **Article 50 of the Constitution** and various provisions in the **Fair Administrative Actions Act** by failing to supply the claimants with documents

in support of the charges even after the claimants requested for the same.

44. It is further submitted that the respondents did not avail any evidence in support of the allegations and charges during the disciplinary hearing and even during the hearing of the cause in court. It is submitted that the dismissal was wrong, unfair, and unlawful.
45. On the second issue, it is submitted that the 1st and 2nd respondents had no disciplinary jurisdiction over the claimants based on the applicable Discipline Manual. In any event, it is submitted that no loss was proved during the hearing as required under the ***Public Finance Management Regulations, 2015***.
46. Further, it is submitted that the 1st and 2nd respondents did not comply with the directions of the 3rd respondent that the appeal be heard afresh. It is submitted that the claimants were neither informed nor invited for the fresh hearing of the appeal.
47. On reliefs, it is submitted that the dismissal was unfair and unlawful and the respondents subjected the claimants to unfair labour practices under ***Article 41 of the Constitution***. The court is urged to apply ***Section 49 of the Act*** and ***Section 12 of the Employment and Labour Relations Court Act*** and grant to the claimants the remedies and reliefs sought as per the amended memorandum of claim. It is submitted that the claimants are not satisfied with the ruling of the 3rd respondent dated 24th April

2023 wherein the respondents were ordered to pay to them an equivalent of 12 months' salary for unlawful dismissal.

48. The court is urged to award any other reliefs available in law besides and beyond the 12 months' salary awarded to them by the 3rd respondent. It is submitted that **Section 49 of the Act** provides for a variety of factors to be considered by a court in arriving at the right and equitable reliefs/remedies. The court is urged to be persuaded by **Obonyo & Another V Municipal Council of Kisumu** (citation not provided) and award exemplary damages to the claimants.
49. On the other hand, counsel for the 1st and 2nd respondents identified several issues for determination summarized as follows.
50. The first issue is the alleged lack of propriety in the procedure adopted and executed by the respondents culminating in the dismissal of the claimants. It is submitted that the procedure as applied by the respondents was fair, just, and lawful. It is further submitted that the show-cause letters served upon the claimants were clear and specific on the allegations and charges against the claimants with no room for ambiguity. It is submitted that the claimants were allocated adequate time to respond to the charges; they were invited for disciplinary hearing and were heard; they were informed of their right to appeal to the 3rd respondent which right they indeed exercised; they applied for a review of the

dismissal of the appeal in the first instance; and they were reheard on the appeal.

51. It is further submitted that the claimants were not only the accountants who were subjected to the disciplinary process as indeed other two of their colleagues were reinstated after the disciplinary process. It is submitted that the claimants fully participated in the disciplinary hearing and no bias or discrimination was visited upon them by the respondents. The court is urged to look into the report that the respondents relied on and which was availed in court.
52. On substantive fairness, it is submitted that the respondents had valid and genuine reasons for dismissing the claimants. It is submitted that the claimants faced specific and particularized allegations and charges as per the show-cause letters served upon them. It is submitted that during the hearing the 1st claimant admitted receiving Kshs557,400/= on 10th February 2020 yet the intended training did not take place and the money was not returned and or accounted for. Further, on 27th March 2020 he requisitioned for and obtained a further Kshs325,100/= purportedly to be paid to Government Printer for purchase of printed materials in breach of applicable procurement laws and regulations.
53. In regard to the 2nd claimant, it is submitted that on 18th January 2020 she generated a requisition for Kshs350,800/= and again she generated another for Kshs480,200/= on 31st March 2020 and yet

failed to account for the said sums of monies. Further, it is submitted that the activities that were supposed to be facilitated with the first amount above did not take place. On the second amount of money she claimed that the same was intended to clear pending bills but she failed to avail evidence on the appropriation of the monies.

54. It is submitted that it is on the basis of the foregoing that the 1st and 2nd respondents endorsed the dismissal recommended by the Ad hoc committee that investigated their misconduct based on the investigation report.
55. It is further submitted that the claimants were both accountants and always retained copies of the documents submitted upon requisition, expenditure, or imprest and as such the issue of lack of documentation on their part did not arise.
56. It is further submitted that both the claimants failed to account for the monies received as stated above and in the circumstances the respondents had lawful grounds and reasons for taking the disciplinary action and process culminating in the ultimate dismissal of the claimants.
57. On reliefs/remedies it submitted that the claimants should not be reinstated as they were dismissed on valid grounds/reasons and the procedure applied was fair and lawful. It is submitted that the claimants were found culpable for misappropriation and or failing to account for monies received by them. It is submitted that the claimants were dismissed more than four years ago and as such

reinstatement is not tenable under **Section 12(3)(vii) of the Employment and Labour Relations Court Act**. It is further submitted that the positions formerly occupied by the claimants have since been advertised and filled.

58. Further, it is submitted that since the dismissals were fair and lawful the issue of compensation to the claimants in any form does not arise. It is further submitted that the remedy for general damages as sought by the claimants is not provided for in the law. The court is urged to be persuaded by the decisions in **Central Bank of Kenya V Julius Nkonge (2002) eKLR** and **George Onyango Akuti V G4S Security Services Limited (2013) eKLR** amongst others in that regard.
59. It is further submitted that the 3rd respondent did not direct that the disciplinary action against the claimants be heard afresh but rather directed that the appeal be reconsidered and in the circumstances the respondents were not obligated to invite the claimants to hear them afresh. It is further submitted that it was the 3rd respondent that was to reconsider the appeal as the request for a review was founded on an appeal filed before it by the claimants as per **Sections 86 & 88 of the Public Service Commission Act** as read with **Article 234 of the Constitution**.
60. It is further submitted that the issue of whether the dismissal was fair and lawful was heard and determined with finality by the 3rd respondent and as such the court has no jurisdiction to reopen the issue. In any event, it is submitted that the claimants have not

demonstrated any lawful reason why the court should interfere with the decision arrived at by the 3rd respondent in the appeal.

61. For the 3rd respondent, counsel submitted that the Commission did not order for rehearing of the claimants' case by the respondents. Rather, it is the 3rd respondent that was to rehear the appeal after the claimants applied for review hence the order to the 1st and 2nd respondents to respond to each ground of appeal to enable the Commission to consider the appeal on merits. It is submitted that at no point in time was the appeal referred back to the respondents for hearing. The Commission then reconsidered the appeal based on submissions and materials placed before it by both sides and arrived at the conclusion that the claimants were fairly and lawfully dismissed.
62. It is submitted that both claimants failed to account for the monies applied for and received by themselves as alluded to severally in the foregoing parts of this judgment. It is submitted that in failing to surrender and account for the imprest the claimants violated ***Regulation 93(5) of Public Finance Regulations (2015)***.
63. Counsel for the 3rd respondent identified three issues for determination by the court as follows –
- a) *Whether the respondents had valid reasons to dismiss the appellants.*
 - b) *Whether the process was followed.*
 - c) *What reliefs, if any, are the claimants entitled to?*

64. It is submitted that the respondents had valid and lawful reasons for the dismissal of the claimants as they obviously failed to account for the monies requisitioned and received by them. It is submitted that in the appeal and review to the 3rd respondent the claimants did not allege lack of substantive justification of their respective dismissal but rather only complained of procedural unfairness. It is submitted that the claimants did not deny requisitioning for and receiving the monies stated and the 1st claimant actually banked part of the monies (Kshs325,100/=) after a long time in clear admission of his lack of transparency and accountability. Likewise, the 2nd claimant admitted to circumventing public finance management regulations by receiving and paying out monies to officers who were not eligible for such payments and who were not to attend a purported training that did not take place.
65. It is submitted that the claimants held fiduciary positions and their misconduct fell far below expectations under **Article 232(1) of the Constitution**. It is submitted that the complaint against the claimants was not purely loss of funds but rather lack of accountability and transparency on their part for the funds applied for and received as alluded to above.
66. It is submitted that having failed to meet the ethical, moral, and financial probity expected of them, the 3rd respondent was fair and within the law to confirm their dismissal as recommended by the other respondents.

67. It is further submitted that the procedure adopted and applied by all the respondents was fair and lawful. It is reiterated that the claimants were issued with show-cause letters; they were invited for a hearing and attended thereto; they appealed, applied for review and the appeal re-heard; and a fair, just, and lawful decision upholding the dismissal was arrived at.
68. It is submitted that the 1st and 2nd respondents had to form an Ad hoc committee to hear the charges against the claimants and others facing various charges as some of the members of the committee that would otherwise have heard the cases were themselves involved in some of the charges and allegations. It is submitted that there was no procedural unfairness detected by the 3rd respondent as there was none.
69. On reliefs, it is submitted that the claimants have neither demonstrated nor proved that they deserve any of the remedies sought.
70. It is therefore submitted for all the respondents that this cause lacks merits and the court is urged to dismiss the cause with costs.

V. ISSUES FOR DETERMINATION

71. The court has carefully and dutifully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and the written submissions by counsel for all the parties.
72. The basic relevant facts in this cause are largely uncontested. The claimants were employees of the 1st respondent, as recruited and hired through the 2nd respondent, as accountants, until 15th

April 2020 when they were suspended on allegations and charges as per the show-cause letters served upon them on even date. They responded to their respective show-cause letters and they were invited for disciplinary hearing wherein they attended and were heard. Ultimately, the claimants were found culpable and summarily dismissed. Subsequently, the claimants appealed their respective dismissal to the 3rd respondent and the dismissals were upheld. They then, through their trade union, applied for review of the decision of the 3rd respondent and the review was allowed and the 3rd respondent considered their appeal for the second time but still upheld the dismissals.

73. As far as the court understands the protestations by the claimants about their respective dismissal, they accuse the respondents of not giving them a fair hearing. More so, the claimants allege that they were denied procedural fairness after the respondents failed to supply them with documents in support of the allegations and charges against them.

74. As reproduced in the introductory part of this judgment the claimants are chiefly seeking that the decision by the 3rd respondent, upholding their respective dismissal, be set aside.

75. In the court's considered view the following issues commend themselves to the court for determination-

a) Whether the dismissal of the claimants by the 1st and 2nd respondents as upheld by the 3rd respondent was unfair and unlawful.

- b) Whether the claimants are entitled to the reliefs sought.*
- c) Who should bear the costs of the cause?*

VI. DISMISSAL

76. The jurisprudence on what constitutes fair and lawful dismissal is by now fairly settled. It entails two cumulative aspects – substantive and procedural fairness. Substantive fairness has to do with the reason(s) for the dismissal while procedural fairness has to do with the manner and style of the hearing and disposal of the disciplinary process. A multitude of decisions have come from this court (ELRC) on these two issues – see *Walter Ogal Anuro V Teachers Service Commission (2013) eKLR* and *Mary Chemweno Kiptui V Kenya Pipeline Company Limited (2014) eKLR* as good precedents on what entails substantive and procedural fairness under *Sections 41 and 47(5) of the Employment Act (the Act)*.
77. The above two aspects are capsulated in *Sections 41, 43, 44, 45, 46, & 47 of the Act*.
78. In their filed pleadings and the oral and documentary evidence on record the claimants are mainly challenging the procedure adopted by the respondents culminating in their respective dismissal. Their common argument is that they were not supplied with the documentary support of the allegations and charges against them notwithstanding their request for the same. Further, they argue that the 1st and 2nd respondents failed and or refused to rehear their case after being directed to do so by the 3rd

respondent. The claimants also argue that the panel that heard their case was not properly constituted.

79. First things first. The claimants did not deny requisitioning and receiving the monies as charged and as alluded to in their respective show-cause letters. In fact, the requisition and receipt of the monies is admitted and the evidence as recorded in court and in the disciplinary hearing in that regard is uncontested.
80. Further, it is the claimants as accountants who had custody of the documents or copies thereof in support of their alleged return of the imprest on the monies received upon incurring expenditure. The claimants again admitted and owned up to the fact that no such returns were filed on the imprest received. Of course, this they did against well established rules and regulations in public finance management as alluded to elsewhere in this judgment.
81. Further, the claimants admitted and owned up to the fact that the activities for which the monies were intended did not take place and in any event they ought to have retained copies or the receipts for any expenditures that were incurred and or any payments made. What documents then did the claimants expect to be supplied with by the respondents yet they were supposedly the authors of the same?
82. In the court's considered view, the claimants knew they did not make and or avail the necessary documents in support of the alleged expenditure of the monies received and yet, dishonestly, wanted and expected the respondents to avail such records. While

Sections 10 and 74 of the Act place a duty on employers to keep records of employment, it cannot be a proper interpretation of that law to impose that duty on an employer if and where it is the employee who failed to make the necessary records and or avail the same. The claimants could not eat their cake and have it and they knew, or ought to have known, that the documents they were asking for did not exist as they had filed none.

83. Needless to say, the argument that the claimants were not supplied with the alleged documents is defeated by the fact that the claimants admitted in having requisitioned and received the monies stated in the show-cause letters and yet failed to avail and support expenditure of the same. In fact, the 1st claimed admitted to refunding and banking some of the monies, Kshs325,100/=, after a period of six months in a daring abuse of the public finance management regulations. Both claimants failed to avail evidence of expenditure of the monies and in support of their position that the intended activities actually took place.
84. In the circumstances, in regard to substantive fairness, the 1st and 2nd respondents had valid grounds and reasons for taking disciplinary action against the claimants in line with **Section 43 of the Act**.
85. In regard to the procedure adopted, the court appreciates the argument by the 1st and 2nd respondents that some of the persons involved in the misconduct were members of the human resources advisory committee that was supposed to handle disciplinary

matters and as such an Ad hoc committee had to be formed to handle the charges against the claimants and others listed in the documents on record. The claimants were duly served with show-cause letters and were suspended from duty; they were invited for disciplinary hearing and they attended; they were informed of the outcome of the hearing; and they exercised their right of appeal to the 3rd respondent. Their appeals were heard and the dismissals upheld. They then, through their union, applied for review of the decision by the 3rd respondent and the review was allowed and appeal heard afresh.

86. It is erroneous and misleading for the claimants to allege and claim that the 3rd respondent directed the other respondents to rehear the matter. That is not the evidence on record. What the 3rd respondent directed after the review is that the respondents were to file their responses to the appeal for reconsideration by the 3rd respondent. At no point did the 3rd respondent direct the other respondents to rehear the matter and in any event such a direction would have been un-procedural and unlawful as the appeal had already been heard and what was before it was a review – see ***Sections 86 & 88 of the Public Service Commission Act.***

87. It is important at this point for the court to point out that disciplinary hearings are not court trials where strict rules of evidence and procedure apply. As long as the general rules of natural justice are adhered to, as envisaged under the ***Constitution***

and the *Administrative Actions Act*, courts should not interfere with that process.

88. From the pleadings filed and the oral and documentary evidence tendered, the alleged and pleaded particulars of bias and unfairness were not proved by the claimants. No discrimination was established and proved and no violation of the rules of natural justice was demonstrated and proved.
89. The court arrives at the inevitable conclusion that the dismissal of the claimants was fair and lawful both in substance and form/procedure. The court shall thus not interfere with the decision arrived at by the 3rd respondent and the outcome thereof.

VIII.RELIEFS

90. Flowing from the finding and the holding in the foregoing part of this judgment the court finds and holds that the cause by the claimants lacks merits. The court finds no basis or grounds upon which to set aside the decision of the 3rd respondent made on 24th April 2023.
91. Consequently, the cause is hereby dismissed.

IX.COSTS

92. Each party shall meet own costs.

X.ORDERS

93. For all the foregoing reasons the claimants' cause is hereby dismissed in its entirety. Each party shall meet own costs.

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT
KAKAMEGA THIS 29TH DAY OF SEPTEMBER, 2025.**

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**DAVID NDERITU
JUDGE**