



Metobo v Public Sector Accounting Standards Board (Cause E380 of 2022) [2023] KEELRC 1949 (KLR) (11 August 2023) (Judgment)

Neutral citation: [2023] KEELRC 1949 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E380 OF 2022
SC RUTTO, J
AUGUST 11, 2023**

BETWEEN

WILFRED ONSERIO METOBO CLAIMANT

AND

PUBLIC SECTOR ACCOUNTING STANDARDS BOARD RESPONDENT

JUDGMENT

1. The Claimant herein, Mr Wilfred Onserio Metobo, commenced the instant suit through a Memorandum of Claim filed on June 7, 2022. Mr Metobo avers that he was employed by the Respondent as a Manager, Human Resource & Administration, with effect from July 1, 2019. According to Mr Metobo, he had an illustrious career working with the Respondent and never encountered any challenges until April, 2021 when he started experiencing some frustrations which resulted in his summary dismissal from employment on March 10, 2022. Accusing the Respondent's Chief Executive Officer (CEO) of witch-hunt, Mr Metobo has termed his dismissal from employment as unlawful, wrongful and unfair, hence prays for the following reliefs against the Respondent:
 - a. A declaration that his termination was unlawful, wrongful and unfair and a breach of his fundamental rights under the Constitution of Kenya;
 - b. Reinstatement into service without loss of any benefit;
 - c. Compensation for unfair, wrongful and unlawful termination;
 - d. Compensation for loss of employment alternative to prayer 2 above;
 - e. Payment of any unpaid salaries, allowances and benefits;
 - f. General damages for defamation and breach of Contract;
 - g. Costs of the Claim;



- h. Interest on the sum awarded at court rates; and
 - i. Any other relief which is just and fair to award the Claimant.
2. The Claim did not go unopposed. Through its Defense to the Memorandum of Claim dated July 20, 2022, the Respondent avers that Mr Metobo was dismissed after a lawful, efficient, expeditious and fair disciplinary process as provided by the law and its Human Resource Policies and Procedures Manual, 2020.
 3. The matter proceeded for hearing on diverse dates, during which both sides called oral evidence.

Claimant's Case

4. Mr Metobo testified in support of his case. To start with, he sought to adopt his witness statement to constitute his evidence in chief. He proceeded to produce the documents filed together with his Claim as exhibits before Court.
5. It was his testimony that on September 8, 2021, he received a Short Text Message (SMS) from his supervisor, CPA Georgina Muchai, inviting him for a meeting the next day to discuss matters relating to Human Resource and the Organization. As he was out of Nairobi for his annual leave, they agreed to have a virtual meeting on September 9, 2021. When he logged into the meeting, he noticed that there was one visitor who was thereafter introduced to him by the Respondent's CEO as being Benjamin Mokuia and another one introduced in absentia as Dr. Benard Okemwa. The CEO informed him that the two visitors had raised complaints against him on matters touching on his conduct as the Manager, Human Resource and Administration. Mr Metobo stated that he requested the CEO to allow him respond to any formal complaints once he resumed office after the annual leave.
6. It was his further evidence that on September 10, 2021, he received an SMS from the Principal Officer, Internal Audit, Ms. Rose Sambi, requesting him for an online exit meeting for the Human Resource Audit. He raised concerns on the Audit Report since the same did not cover all the sections outlined in the Scope of Work. That the Audit Report had omitted all sections touching on policy violations by the CEO and the Directors such as recruitment, acting appointments, staff trainings and development succession planning and salary advances. It was at this particular juncture that he realized that the Audit was being used as a smoke screen in the witch-hunt against him and in a bid to pacify the offensive and irregular actions of the CEO and the Directors.
7. He further averred that the frustrations and witch hunt took a turn for the worst after he raised the queries on the Audit Report. That he received a Notice to Show Cause on September 14, 2021 via e-mail raising three allegations against him.
8. He responded to the Notice to Show Cause on September 21, 2021 albeit without being furnished with the complaint letters from the alleged complainants and any evidence in support of the complaints. The CEO furnished him with a complaint allegedly from Dr. Bernard Okemwa on September 22, 2021 after he had tendered his Response to the Notice to Show Cause. Mr Metobo contends that this goes to demonstrate the mischief on the part of the CEO.
9. It was Mr Metobo's further evidence that on October 6, 2021, he received a second Notice to Show Cause with a fourth allegation being "Solicitation of a bribe to offer a position of Principal Officer, Finance and Accounts at PSASB to one Ms. Florence Ndinda Sila." He responded to the said Notice to Show Cause and on October 16, 2021, the CEO wrote an email to the members of the Respondent's Human Resource Management Advisory Committee (HRMAC) asking them to review his case and advise him on the next cause of action. In Mr Metobo's view, the CEO was determined to manipulate



the processing of his case and was keen to poison the minds of the members of HRMAC, by expressly indicating that he had persisted in showing disrespect to him.

10. On November 5, 2021, he received a letter from the then Chairperson of the HRMAC, inviting him for a Preliminary Interview on November 22, 2021. On the same date, he received another letter from the said Chairperson alleging failure on his part to record HRMAC Meeting Minutes. He termed these allegations as lacking in basis since at no point did he decline to record any Minutes of the HRMAC. He was also surprised that the allegation was not coming from a person who was required to impartially process his disciplinary proceedings. He responded to the new allegation by the HRMAC Chair vide a letter dated November 19, 2021.
11. He further stated that on November 9, 2021, his Supervisor, Georgina Muchai, wrote a Memo asking him to avail some missing files whereas she knew very well that the files had been with her from October 6, 2021, pointing to a concerted effort to frustrate him.
12. Mr Metobo further stated that he attended a Preliminary Interview on November 22, 2021, by the HRMAC and was subjected to an opaque process without being granted an opportunity to effectively defend himself and whenever he raised concerns, the HRMAC members became agitated and hostile to him which pointed to a conflict of interest on their part. He contends that they declined to give him a copy of the Minutes of the Preliminary Interview for his record and reference which pointed to a sinister motive on their part. The HRMAC submitted its Report on December 10, 2021, recommending to the CEO to form an Ad Hoc Investigative Committee in partnership with other investigative agencies such as EACC and DCI. This recommendation has never been implemented to date.
13. He was interdicted on November 23, 2021. The letter of interdiction pointed to only one of the previous allegations and introduced a new allegation being “failure to disclose crucial information (alleged summary dismissal by the County Government of Kisii) to the recruitment panel knowing very well it would have had material effect on the eventual decision of the panel.”
14. According to Mr Metobo, the County Government of Kisii set the record straight on his alleged summary dismissal but the Respondent failed to drop the charges and proceeded to terminate his employment on the basis of the false allegation pointing to partiality and malice in the processing of his case. He later learnt that the CEO had proceeded to lodge a frivolous complaint against him at Muthaiga Police Station in that he had declined to hand over certain assets after his interdiction whereas knowing very well that he had done the handing over as required of him under the Respondent’s internal regulations.
15. That on February 17, 2022, he received an Invitation for a Disciplinary Hearing indicating that the investigations had been concluded and he was to appear for a hearing on February 24, 2022. The letter of invitation raised three allegations being:
 - i. Failure to disclose crucial information to the recruiting panel regarding an alleged summary dismissal by the County Government of Kisii for unethical behaviour involving soliciting of bribes from four Kenyans in the pretext that he would secure them jobs at the County;
 - ii. Soliciting and obtaining a bribe of KES. 221,000 from Ms. Florence Ndinda Sila between July 10, 2020 and July 12, 2021 in order to offer her the position of a Principal Officer Finance and Accounts at the Public Sector Accounting Standards Board; and
 - iii. Reformatting of a Laptop to cause destruction of data and information.



16. Mr Metobo contends that the third allegation on reformatting of the laptop was not processed through the HRMAC and he was never invited to Show Cause on the said allegation before the invitation for the hearing.
17. He attended the disciplinary hearing on February 24, 2022 which he termed as a sham and choreographed to achieve a predetermined conclusion. He contends that neither his accusers nor any other witness appeared during the disciplinary hearing to enable him cross-examine them.
18. On March 9, 2022, the CEO called him to his office at 4.30 p.m. and asked him to voluntarily resign but he declined since there was no justifiable cause for his resignation.
19. Mr Metobo further averred that he was summarily dismissed from service for the three allegations raised in the letter of invitation for the disciplinary hearing on March 10, 2022. That up and until this point, he has never been furnished with any evidence to prove the allegations levelled against him.
20. According to Mr Metobo, the genesis of the witch-hunt against him by the Respondent's CEO and some Directors arose due to Complaints he raised against their irregular actions with respect to the operations of the Respondent including but not limited to the skewed Audit Report, recruitments, acting appointments and staff training and development.
21. He further contends that the HRMAC members were conflicted in the issues raised against him and hence they could not be impartial in handling his case.
22. Mr Metobo further denied committing the offences alleged against him and stated that the disciplinary proceedings were extensively interfered with and manipulated by the Respondent's CEO and had the process been allowed to run its logical course, he would have been exonerated of all the charges levelled against him.

Respondent's case

23. The Respondent called oral evidence through five witnesses being Mr Eustus Mutugi, Ms. Florence Ndinda Sila, Ms. Georgina Muchai, Ms. Rose Sambu and Mr Fredrick Riaga who testified as RW1, RW2, RW3, RW4 and RW5 respectively.
24. Mr Eustus Mutugi was the first to go. He identified himself as the Lead Engineer, Data Recovery and Cyber Forensics Expert at East Africa Recovery Experts. He started by adopting his witness statement to constitute his evidence in chief.
25. It was RW1's testimony that they received HP ProBook 440 G6 S/N #5CD93922H7 for evidence acquisition. He stated that computer forensics services commenced thereafter to investigate data modifications within the aforementioned laptop from a neutral standpoint independent of any interference/influence of either party. That they found the original file was deleted and replaced with a new outlook file. It was his evidence that the original is residing in the recycle bin folder which shows the files were deleted and moved to the recycle bin.
26. RW1 further stated that they found the original file was deleted and replaced with a new outlook file. The original size of the outlook file was 2,101,682,176 bytes/2.1 GB and replaced with a new file of about just 16,818,176/16 mb. He gave the path to these files as being ~/User/AppData/Local/Microsoft/Outlook/Wilfred.metobo@psab.go.ke.ost. He stated that the deletion and creation happened at seemingly the same time 9.22.2021 11:39:45 am.



27. RW1 went on to state that there is extensive document deletion from 2 major partitions and some more deleted data which is about 15 GB which they suspect is a google drive partition that was logged in on the laptop.
28. It was his evidence that the HP Probook 440 G6, S/N #CD93922H7 had 8 USB connected devices. Of the eight USB connected device, as shown on exhibit number 005. That Trust Product USB hub was connected which can hold other USB connections. He further stated that the device had 2 partitions with the first partition being C and the second partition being D. However, the device shown connected a drive F, means there was a connected storage drive E and storage drive F.
29. It was his further evidence that there is a shell bag, a set of registry keys that store details about a viewed folder, such as its size position and icon of anti-forensics performed on a key document. The documents are my ComputerD:principal Officer Accounting Standard and My computerD:principal Officer Finance And Account.
30. RW1 further stated that there were deleted interview questions of a third copy of the same file of the Principal Finance and Accounts Officer. That there was occurrence of downloaded and deleted Principal Officer and Accounts documents.
31. Ms. Florence Ndinda Sila testified as RW2. It was her evidence that a job advert for the position of Principal Finance and Accounts Officer was placed by Eagle HR Consultants recruiting for their client, the Respondent. She applied and was invited for an interview on August 29, 2019 with Eagle HR Consultant.
32. She later received a call from Mr Metobo, who introduced himself as the Respondent's Human Resource Manager, inviting her for an interview for the position of Principal Finance and Accounts Officer with the Respondent, having succeeded in the first interview with Eagle HR Consultants. She attended the interview at the Respondent's offices but did not receive any feedback on the outcome.
33. It was RW2's evidence that around June, 2020, she received a call from Mr Metobo, who informed her that the Respondent had re-advertised for the position of Principal Finance and Accounts Officer on their website and that he wanted her to apply without fail. She believes Mr Metobo obtained her contacts from her previous interview interaction. She applied for the position as advertised and dropped the same in person on the final day of the application.
34. Mr Metobo called her on July 2, 2020 and invited her for an interview to be held on July 9, 2020 with the Respondent, following a successful shortlisting. She attended the interview as earlier communicated. There were three panellists being, the Respondent's CEO, Mr Metobo and one of the Directors.
35. Mr Metobo called her on July 10, 2020, a day after the interview and informed her that he wanted to see her. They met at Stima club, adjacent to the Respondent's office at around 1:00 PM. Mr Metobo informed her that the interview was very competitive and that she was successful as being the only lady, gave her an upper hand.
36. That Mr Metobo said his team, the interview panelists had sent him to tell her that she needed to "kurudisha mkono" because they had fought for her to get the job. He told her that the gross salary for the position was Kshs. 221,000/= and that is what she was required to give. She requested to meet the CEO but Mr Metobo told her that it was not possible since he was the one delegated to handle the matter. He then asked for any amount as commitment as she sought out the rest. He insisted that time was of essence. She gave him Kshs.21,000/= in cash as commitment fee as he had requested.



37. RW2 further stated that Mr Metobo called her on July 12, 2020 and assured her that things were as planned and they needed to meet that afternoon for briefing. He told her that she should come along with the balance of Kshs.200,000/= so as to conclude on the remaining process. They met at Stima Club on July 12, 2020 at around 3PM and she gave him Kshs.200,000/= in cash. Mr Metobo promised to call her the following week on Tuesday to inform her when to collect her appointment letter but not later than Friday same week.
38. The following week, she met Mr Metobo at Stima Club and he showed her a screenshot of her letter of appointment on his phone. He assured her that things were as planned and that her appointment letter was at the CEO's desk awaiting signature. He also showed her approval letters from National Treasury authorizing the Respondent to recruit. Mr Metobo told her he had gone with the documents to make her believe that he was not a conman and he was telling her the truth.
39. She stated that Mr Metobo with his false promises, never allowed her at any given time to meet with the CEO despite requesting him to do so in order to confirm his promise to her.
40. That Mr Metobo failed to honour his promise, kept on bringing up stories after stories and it got to a point where he could not receive her calls nor reply to her text messages. She informed him through WhatsApp message that she was going to take further action against him and it's at this point that Mr Metobo called her and informed her that things did not go as expected and he promised to refund the money by June 24, 2021. That Mr Metobo also spoke to her husband and told him that he is alive to the fact that the issue had taken longer than anticipated and that he was going to refund the money on June 24, 2021 without fail. That after this date, he stopped picking her calls completely and she visited Mr Metobo's office on July 1, 2021. She called him but he did not pick. She texted him that she was at his office following up on the issue of refund but he didn't respond.
41. It was RW2's evidence that she lodged a formal complaint with the Respondent's CEO, requesting him to help her recover her money from Mr Metobo. It's after lodging the complaint that Mr Metobo called her on October 18, 2021 with a different phone number, threatening to write to her employer if she pursued the case.
42. Ms. Rose Sambu who introduced herself as the Respondent's Principal Officer Internal Audit Officer, testified as RW3. Similarly, she started by adopting her witness statement to constitute her evidence in chief.
43. It was her evidence that the internal audit function activities are guided by an approved internal audit work plan as prescribed by the International Practices Framework. That the team undertook its work as per the approved work plan for Financial Year 2021/2022 and communicated the dates of the audit to Mr Metobo through email and an engagement letter dated July 16, 2021.
44. She stated that the Respondent's internal audit team discharges their duties independently and in accordance with its Internal Audit Annual plan contrary to Mr Metobo's assertions. That the internal audit function in undertaking its duties employs a systematic and disciplined approach as prescribed in the International Standards for the professional practice of internal auditing.
45. It was her evidence that prior to performing the engagement, the internal audit team communicated the scope and objectives of the audit to the audit client/ Mr Metobo on July 16, 2021 and held the entry meeting on July 19, 2021. That the Respondent's internal audit requested for information from Mr Metobo to facilitate the audit process on July 16, 2021. The Information requested for audit was however provided in piecemeal by Mr Metobo.



46. The Respondent's internal audit documented sufficient, reliable, relevant, and useful information to support the audit engagement results and conclusions. The potential findings were discussed with Mr Metobo, his immediate supervisor and the Senior Human Resource Officer in an exit meeting conducted virtually on September 10, 2021.
47. RW3 denied that the audit team rendered an apology to Mr Metobo for skewed reporting or a flawed process. All material observations reported were justified and supported adequately as expected of an objective internal auditor.
48. It was RW3's evidence that the draft audit report sent to Mr Metobo through an email on September 15, 2021 was accurate, objective, clear, concise, constructive, complete and timely. That the objective of communicating the findings through a draft audit report is to provide the management an opportunity to respond to the findings and provide action plan with assigned responsible individuals for the recommendations agreed upon.
49. Ms. Georgina Muchai, testified as RW4. She identified herself as the Respondent's Director Accounting Standards and the Acting Director, Training and Corporate Services. RW4 also started by adopting her witness statement to constitute her evidence in chief.
50. It was her testimony that she invited Mr Metobo for a meeting through SMS on his official mobile number since he was on leave. Owing to the nature of complaints raised and the reputational risk to the Board, management decided to have a meeting with Mr Metobo before the expiry of his leave of 15 days.
51. The meeting was arranged after receipt of complaints from one Mr Bernard Okemwa and Mr Benjamin Mokuia. That Mr Okemwa wrote to the Board on September 7, 2021 with regards to an outstanding amount of Kshs.691,000/= owed to him by Mr Metobo. The complaint from Mr Mokuia was verbal and related to recruitment irregularities with respect to the position of Manager, Finance and Accounts which the Board had successfully filled on July 1, 2021. Mr Mokuia raised complaints that Mr Metobo demanded Kshs.400,000/= to offer him the said position, but Mr Mokuia managed to raise Kshs.20,000/= which he paid to Mr Metobo on three different occasions and in cash.
52. It was her evidence that the meeting was held virtually on September 9, 2021 and in attendance, was herself, the Respondent's CEO, Mr Benjamin Mokuia (the complainant) and Mr Metobo. Mr Bernard Okemwa was not available at the time and therefore did not attend.
53. The meeting held on 9th September culminated in the issuance of a show cause letter to Mr Metobo on September 14, 2021.
54. RW4 further averred that while preparing the payroll for the month of October, 2021, the Ag. Senior Human Resource and Administration Officer noted that the physical file (Salaries file volume 2 or B) could not be traced. It is at this point that she instructed the Ag. Senior Human Resource and Administration Officer to conduct an audit of the Human Resources Cabinet with a view to ensure that all human resources files could be accounted for. The audit also included a review of the Human Resource files movement register, Mr Metobo's office and other cabinets with Mr Metobo's office.
55. The audit revealed that the salaries file volume 2B, a recruitment file and the salary advances files could not be traced. It was also noted that the files had been used in the internal audit process and returned to Mr Metobo on September 24, 2021 who acknowledged receipt through signing on the movement register. It is at this point that she wrote a memo dated November 9, 2021 to Mr Metobo requiring him to produce the missing files by November 15, 2021. Mr Metobo did not acknowledge receipt. On



- November 15, 2021, she wrote another email to requesting Mr Metobo to hand over the three missing files to the Respondent's CEO since she was travelling for official duties.
56. RW4 further testified that on November 16, 2021, Mr Metobo replied via email acknowledging the memo of November 9, 2021 on the missing files and stating that he was consulting with his team members and would continue to trace them.
 57. It was her evidence that the Respondent reported the missing files to Muthaiga Police Station vide a statement dated November 26, 2021.
 58. That the files were not returned up until Mr Metobo's interdiction on November 23, 2021 and his eventual dismissal on March 11, 2022. It was RW4's view that Mr Metobo intentionally refused to return the files since they contained information that was subject to his disciplinary process.
 59. She further stated that on October 14, 2021, she received an email from Mr Metobo referring to section 7.1, 7.2 and 7.3 of the Respondent's Human Resources Policies and Procedures Manual, 2020 (HR Manual). That Mr Metobo complained against the Respondent's CEO and by extension, against herself in her capacity as his supervisor.
 60. Since she was away on official duties, she replied to his email the same day and advised that they would discuss the matter the following day at the office. They met in her office on October 15, 2021 and followed through the discussions with an email stating that she was not able to adjudicate on the issue since she was conflicted. She also advised Mr Metobo to seek an alternative route to have his complaint addressed which included seeking audience with the Board of Management as provided for in the HR Manual.
 61. To her knowledge Mr Metobo did not raise the issue again with any organ of the Board including the Board of Management in writing up to the time of his dismissal on March 11, 2022.
 62. Mr Fredrick Riaga who testified as RW5, introduced himself as the Respondent's CEO. Similarly, he adopted his witness statement to constitute his evidence in chief.
 63. It was the evidence of RW5 that the Respondent's Internal Audit is an independent department which conducts its work professionally and with no other contributions from any other staff. That Mr Metobo was not part of the internal audit to give his contributions as alleged in his Memorandum of claim.
 64. It was his testimony that Benjamin Mokuia and Benard Okemwa are some of the complainants who raised complaints against Mr Metobo. In addressing the complaints, the Respondent's management invited Mr Metobo for a virtual meeting. This meeting was held on September 9, 2021 and attended by one of the complainants. A show cause letter regarding this matter was issued to Mr Metobo on September 14, 2022.
 65. It was his testimony that Mr Metobo had on several occasions brought up the issue of witch-hunt by the Respondent but has failed to demonstrate the events confirming witch-hunt as alleged. On the contrary he (RW5) received several allegations regarding Mr Metobo's conduct. The issues were a subject of disciplinary process which culminated in Mr Metobo being served with a warning letter and further dismissal from service following a concluded disciplinary process.
 66. RW5 further stated that the Respondent received complaints from Ms. Florence Ndinda Sila on allegations of soliciting for Kshs.221,000/= for Mr Metobo to offer her a position of Principal Officer, Finance and Accounts. The case was forwarded to the HRMAC for processing and further advisory and Mr Metobo was issued with a second show cause letter dated October 6, 2021. That following recommendations from the HRMAC, the matter was forwarded to the Board and on November 23,



- 2021 Mr Metobo was interdicted following the full Board Meeting Resolution held on November 12, 2021.
67. RW5 further averred that through the Adhoc Board Committee, Mr Metobo was invited to a disciplinary hearing meeting and was subjected to a disciplinary hearing process on February 24, 2022. That the charges were clearly spelt out in the invitation as required by the clause 4 (d) of the Disciplinary Manual for Public Service of 2016. It was his evidence that in the invitation Mr Metobo was at liberty to be accompanied at the meeting by a work colleague not acting in a legal capacity.
 68. The Adhoc Committee after completing its disciplinary hearings tabled its findings to the full Board on March 8, 2022 wherein the Board was satisfied with the recommendations and recommended dismissal of Mr Metobo due to his consistent and continuous unethical conduct.
 69. RW5 further denied having a meeting with Mr Metobo and forcing him to voluntarily resign as alleged.
 70. He further contended that the recruitment for the position of the Principal Officer, Finance and Accounts which was conducted in the year 2020, was competitive and fair and followed the required and correct procedures as laid down by the Respondent's HR Manual.
 71. RW5 further averred that through the dismissal letter, Mr Metobo was given an opportunity to appeal against the decision dismissing him from service.

Submissions

72. It was the Claimant's submission that it would be a travesty of justice to rely on evidence that is evidently compromised or doctored to condemn a person. That it is extremely unsafe to rely on an Expert Report that does not stand for itself. To this end, the Court was urged to find that the allegation of the destruction of data and emails has not been proved to the requisite standard to justify the Claimant's dismissal.
73. The Claimant further termed the allegation with regards to failure to disclose his resignation from the County Government of Kisii as an afterthought. It was the Claimant's submission that the Respondent did not provide the minutes of the recruitment panel to confirm what transpired during the recruitment process. He further argued that the burden to bring forth this information rests with the Respondent being the owner of the recruitment process. On this issue, he urged the Court to return a finding that the Respondent failed to prove that he failed to disclose the fact of his resignation from the County Government of Kisii.
74. As regards the allegations of bribery and solicitation, the Claimant urged the Court to return a finding that the Respondent has failed to prove the said allegation. He argued that no evidence has been led to demonstrate the solicitation and payment of the bribe as alleged.
75. Placing reliance on the cases of *Muthaiga Country Club v Kudheiba Workers* (2017) eKLR and *Peter Kisang v Judicial Service Commission* (Nairobi ELRC Cause No E521 of 2020), the Claimant further submitted that the Respondent has not proved a valid reason to dismiss him.
76. The Claimant stated in further submission that the disciplinary process in the instant case did not meet the requirements of due process. That the process was jumbled up so much that the end does not reflect the beginning. He contended that the charges kept oscillating creating an environment of uncertainty. The Claimant further submitted that the introduction of new evidence by the Respondent mid-way through the disciplinary process amounts to a breach of the rules of Natural Justice and leads to trial by ambush.



77. To this end, the Court was urged to return a finding that the Respondent failed to follow due process in the disciplinary proceedings against the Claimant.
78. On the Respondent's part, it was submitted that it had justifiable grounds to terminate the Claimant. It was the Respondent's submission that from the Expert Report and the evidence of RW1, it is clear that the Claimant reformatted the laptop and deleted crucial information contrary to its ICT Policy.
79. The Respondent further submitted that on a balance of probabilities, it is certain that the Claimant did in fact solicit for a bribe from four persons against a false promise to offer them employment when he was an employee of Kisii County Government.
80. The Respondent further invited the Court to take note that it cannot be a mere coincidence that two different employers, in different counties, two different suits before two different honourable Courts with similar allegations of bribes, involving one Claimant, can be premised on a claim of witch-hunt.
81. The Respondent further submitted that the multiplicity of complaints against the Claimant on similar facts were alarming and led to a reasonable conclusion that indeed, they were genuine.
82. In support of its arguments, the Respondent placed reliance on the case of *George Onyango Akuti v G4S Security Services Kenya Limited* (2013) eKLR.
83. The Respondent further submitted that all rules of a fair hearing were adhered to in accordance with Articles 41 and 50 of the *Constitution*, the *Employment Act* and relevant Human Resource Policies and Procedures Manual. It was further submitted that throughout the process, the Claimant was afforded adequate time to respond to the allegations against him, including informal opportunities to address the concerns before they were escalated to a formal disciplinary mechanism, such as the plenary meeting held on September 9, 2021.
84. The Respondent further submitted that arising from the concerns raised by the Claimant on the independence of the process on account of the alleged conflicted positions of members of HRMAC, its CEO referred the matter to the Board. It was further submitted that the Respondent acted reasonably to accord the Claimant a fair hearing and ensured that he had an avenue for appeal.
85. In further support of the Respondent's submission, the Court was invited to consider the case of *Paul Wanyagah v Market Development Trust t/a Kenya Markets Trusts* (2017) eKLR.

Analysis and determination

86. I have considered the pleadings on record, the documentary evidence, oral testimonies rendered before Court, together with the rival submissions and the following issues stand out for determination: -
 - i. Whether the Respondent had a fair and valid reason to terminate the employment of the Claimant;
 - ii. Was the Claimant accorded procedural fairness prior to being terminated from employment?
 - iii. Is the Claimant entitled to the reliefs sought?

Valid and fair reason?

87. Section 43 as read together with Section 45 (2) (a) and (b) of the *Employment Act* (Act) are the key statutory provisions in determining this issue. In this regard, Section 43 requires an employer to prove the reasons for termination while Section 45(2) (a) and (b) provides that a termination of employment is unfair if the employer fails to prove: -



- a. that the reason for the termination is valid;
 - b. that the reason for the termination is a fair reason-
 - i. related to the employees conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; ...
88. Turning to the case herein, it is discernible from the Claimant’s letter of summary dismissal that his exit from the Respondent’s employment was on account of three grounds which I will reproduce hereunder verbatim:
- i. Failure to disclose crucial information to the recruiting panel regarding your summary dismissal by the County Government of Kisii for unethical behavior involving soliciting bribes from four Kenyans in the pretext that you would secure them jobs at the County.
 - ii. Allegations made by Ms. Florence Ndinda Sila between July 10, 2020 and July 12, 2021, you solicited and obtained Kes. 221,000 bribe to offer her the position of Principal Officer Finance and Accounts at the Public Sector Accounting Standards Board.
 - iii. Allegations on reformatting of a laptop assigned to you in the course of your work as Manager Human Resources and Administration. You maliciously took away the said laptop without authority from the premises of the Board and upon return, it was verified that you had reformatted the laptop to cause destruction of data and information contained therein, which was in contravention of Section 5.12.1(7) of the PSAB Human Resources Policies and Procedures Manual.
89. On the first allegation, the Respondent avers that it received the information regarding the Claimant’s exit from employment at Kisii County Government, following further investigations. In support of its case, the Respondent exhibited a letter from Kisii County Government dated March 2, 2022, couched as follows:
- “RE: Information Regarding Mr Wilfred Onserio Metobo
- Reference is made to your letter Ref No....dated February 28, 2022 on the above subject matter.
- Mr Metobo joined the County Government of Kisii in the capacity of Ward Administrator w.e.f September 29, 2014 and left on resignation w.e.f August 1, 2016.
- During his service, disciplinary charges were leveled against him after he solicited for money from four members of the public in exchange for employment opportunities. Consequently, he took the County to Court a case which he lost and thereafter he resigned from the service before he could be formally dismissed on account of gross misconduct.”
90. From the aforementioned letter, it is evident that the Claimant was not summarily dismissed from the County Government of Kisii, rather he resigned. It is also notable that the Respondent did not indicate whether there was an express requirement for disclosure of the said information at the point the Claimant was being recruited into its employment, and if there was, whether the Claimant misrepresented such information to the Respondent or failed to disclose altogether. From the record, this is not evident.
91. Therefore, in as much as the Claimant may have resigned from Kisii County Government in order to avoid disciplinary action, it was not factual for the Respondent to state that the Claimant failed



- to disclose crucial information to the Recruiting Panel regarding his summary dismissal by the said County Government.
92. In the circumstances, the said reason cannot be termed as valid and fair as to warrant the Claimant's dismissal from the Respondent's employment.
 93. With regards to the second allegation of soliciting for a bribe of Kshs 221,000/= from Ms. Florence Ndinda Sila in exchange of offering her a position of Principal Officer Finance, the Respondent in support of its case, adduced oral evidence through Ms. Ndinda herself.
 94. It is worth noting that besides, Ms. Ndinda's oral evidence, there was no other evidence to corroborate the allegation of bribery and solicitation on the Claimant's part.
 95. The record bears that during the preliminary hearing by the HRMAC on November 22, 2021, it is apparent that the Respondent had in its possession evidence in the form of an audio recording between Ms. Ndinda and the Claimant in which they allegedly discussed the issue. From the minutes of the said meeting, the audio recording was played and the Committee members confirmed that the information emanating from the conversation in the audio recording corroborated the extracts of the Respondent's visitor's book in that Ms. Ndinda had visited its offices on July 9, 2020 for the interview and on December 17, 2020 to visit the Claimant. That specifically, the audio recording mentions December 17, 2020.
 96. The minutes of the said meeting of November 22, 2021, further reveal that the Chairman of the Committee, Mr Mangoka read out messages from Ms. Ndinda in which she was requesting the Claimant for a refund of Kshs 200,000/= allegedly paid to him as a bribe. That in the messages, the Claimant promised to refund the money to her. The minutes further state that the Claimant confirmed that the line in question was registered in his name.
 97. In light of the foregoing, it would be reasonably expected that the Respondent would exhibit during the trial, the said audio recording, the extracts from the visitor's register book and the messages exchanged between the Claimant and Ms. Ndinda in order to corroborate the oral evidence of Ms. Ndinda. I say so because it is apparent that this was evidence in the Respondent's possession hence accessing the same was not an uphill task. In addition, the *Evidence Act* recognizes electronic evidence and provides for means of adducing the same. Hence, one wonders why the Respondent did not deem it fit to adduce the said evidence during the trial.
 98. Granted, in cases of bribery and solicitation, there may be no paper trail for instance, receipts and invoices. Be that as it may, in this case there was evidence which the HRMAC and the Disciplinary Committee relied upon to interdict the Claimant and dismiss him from service. It was therefore crucial to avail such evidence and in default therefore, I cannot help but find that that the Respondent did not prove to the requisite standard, that it had a valid and fair reason to terminate the Claimant's employment based on the said allegation of solicitation and bribery.
 99. The third allegation levelled against the Claimant was with regards to reformatting of the Respondent's laptop in his possession, hence causing destruction of data and information. In support of its case, the Respondent exhibited an Expert Report from East Africa Recovery Experts. In the said Report, it was concluded that secure deletions were done on the laptop to ensure data stored on the device is beyond normal recovery techniques.
 100. The Claimant has challenged the probative value of the said report on several fronts, with the first being that RW1 who exhibited the report did not present his qualifications. The second issue raised by the Claimant is that there is a discrepancy with regards to the model of the laptop in question in that RW5 makes reference to HP Probook 446 S/N 5CD93922H7 Tag 176 while the expert report



- makes reference to HP Probook 440 G6 S/N #5CD93922H7. The Claimant further contends that the laptop was never produced in Court and that there is no certainty as to the correct date the laptop was received for analysis.
101. The Respondent on the other hand, placed reliance on the Claimant's admission during the disciplinary hearing of February 24, 2022 that he deleted the data at Kipevu Restaurant. The Respondent further placed reliance on the logins contained in the Expert Report and contended that the same cannot be undone. With regards to the discrepancy in the identification of the laptop, the Respondent termed the same as inadvertent and maintained that the same was inconsequential as the serial number which is the unique identifier, is similar.
 102. Looking at the Expert Report, it is apparent that the extracts of the data bear part of the Claimant's name as the user of the said laptop wherefrom the data was extracted. Further, I find it a bit farfetched that different laptops albeit being different in terms of models, would bear serial numbers that are eerily similar. I am therefore inclined to agree with the Respondent on this issue and find that the discrepancy notwithstanding, it is highly probable that the laptop in question was the one in the Claimant's possession.
 103. Turning to the argument regarding the qualifications of the Expert witness, in my view the same is insignificant. I say so because expert evidence is not binding on the Court and is essentially opinion evidence (see the case of *Stephen Kinini Wang'ondou v The Ark Limited* [2016] eKLR). Therefore, expert evidence ought to be weighed against other evidence adduced before Court and cannot trump all other evidence. Such evidence cannot be considered in a vacuum.
 104. In this case, it is notable from the record that in the minutes of the disciplinary hearing of February 24, 2022, the Claimant confirmed during the hearing that he proceeded to Kipevu Restaurant and secured the information he needed after which he proceeded to delete the emails that in his view were sensitive and that could be used against him in future. That he thereafter handed over the laptop to the Respondent's Principal ICT Officer.
 105. This admission by the Claimant corroborates the information contained in the Internal Memo of the Respondent's Principal Officer, ICT, dated November 23, 2021, in which she states that the Claimant had reformatted and deleted all official data including email access contrary to the Respondent's approved ICT policy.
 106. It is instructive to note that the Claimant did not challenge the accuracy of the said minutes hence I have no reason to doubt the same.
 107. In further support of its case, the Respondent exhibited a copy of an extract of its ICT policy which provides at clause 10.4.9 that the messages sent over the computer and communications system is the property of the Respondent. Clause 10.4.12 of the Policy further provides that the said information must be returned immediately at the time of separation.
 108. In light of the Claimant's own admission that he deleted the emails which in his view were sensitive and could be used against him in future and considering the Respondent's ICT Policy requirements, I am led to conclude that the Claimant by his own action gave the Respondent a valid and fair reason to take disciplinary action against him.



109. In arriving at this determination, I am mindful of the standard of proof in employment cases which is on a balance of probabilities. As was held by the Court of Appeal in the case of *Kenya Revenue Authority v Rewel Waitbaka Gitahi & 2 others* [2019] eKLR:

“The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist,” causing it to terminate the employee’s services.”

110. On this score, applying the standard of proof to the case herein, I am satisfied that the Respondent has proved that it had a valid and fair reason to commence the process of terminating the Claimant’s employment on grounds that he reformatted the laptop in his possession, causing destruction of data and information therein.

111. In light of the foregoing, I find and hold that the third allegation constituting one of the reasons for the Claimant’s dismissal was fair, valid and related to his conduct, within the meaning of Section 43 as read together with Section 45(2) (a) and (b) of the *Act*.

Procedural fairness?

112. The requirement for fair procedure is generally provided for under Section 45 (2) (c) of the *Act*. In addition, Section 41 (1) of the *Act* makes specific requirements in 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 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.

113. From the record, the Claimant was issued with the first notice to show cause on September 14, 2021. He responded to the same and seemingly, the matter rested there as the allegations contained therein did not part of the reasons for which he was interdicted and eventually dismissed from employment.

114. The record bears that the Claimant was notified of the three allegations levelled against him on diverse dates. In this regard, he was notified of the allegation with regards to soliciting for a bribe from Ms. Ndinda through a letter dated October 6, 2021 and with regards to the reformatting of the laptop through the letter dated December 7, 2021. As to the allegation relating to the manner in which he exited employment from the County Government of Kisii, it is evident that the Claimant was notified of the same through the letter of interdiction dated November 23, 2021.

115. From the record, the Claimant was invited for the hearing of his disciplinary case through a letter dated February 17, 2022. Through the said letter, he was informed of the right to be accompanied by a colleague. It is apparent that the Claimant appeared for the disciplinary hearing on February 24, 2022 and ventilated his case as his responses to the allegations levelled against him, are captured in the attendant minutes.

116. In view of the foregoing, I cannot help but note that the Claimant was accorded procedural fairness as he was notified of the allegations levelled against him beforehand and given an opportunity to be heard on his explanation to the said allegations.

117. I must add that what is central from the provisions of Section 41 of the Act, is that an employee ought to be notified of the allegations against him or her in a language he understands and given opportunity to be heard on any explanation he may have. In my view, this was fulfilled in this case as the Claimant was able to defend himself against every allegation that found its way into his letter of summary dismissal.



118. In the circumstances, I am satisfied that the Respondent complied with the spirit of Section 41 of the Act hence the disciplinary process leading upto the Claimant's dismissal from employment was procedurally fair.
119. With regards to the issue of bias raised by the Claimant against some members of the HRMAC, it is notable that the recommendation to dismiss him from employment was made by an Adhoc Disciplinary Committee constituting different persons. They were different from those who sat as HRMAC to consider the Claimant's case during the initial stages. Further, the decision to dismiss the Claimant from employment was made by the Respondent's full Board on March 8, 2022.
120. Therefore, it is evident that the persons who made the final decision to dismiss the Claimant from the Respondent's employment were not any of the persons constituting the HRMAC, who he had complained against.
121. In total sum, I find that the Claimant's dismissal from the Respondent's employment was neither unfair nor unlawful.

Orders

122. In the final analysis, I find that the Claimant is not entitled to the prayers sought hence I dismiss the Claim in its entirety with an order that each party bears its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF AUGUST, 2023.

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STELLA RUTTO

JUDGE

Appearance:

M/r. Kenei for the Claimant

Mr Oure for the Respondent

Abdimalik Hussein Court Assistant

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 15th March 2020 and subsequent directions of 21st 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

