



REPUBLIC OF KENYA



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**Amuhaya v Kati & another (Claim E012 of 2023)
[2023] KEELRC 2196 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2196 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
CLAIM E012 OF 2023
JW KELI, J
SEPTEMBER 22, 2023**

BETWEEN

COLLINS MUSAVI AMUHAYA CLAIMANT

AND

ROBERT KATI 1ST RESPONDENT

AMATSI WATER SERVICES COMPANY LIMITED 2ND RESPONDENT

JUDGMENT

1. The Claimant on 27th July 2022 filed Memorandum of Claim together with a Notice of Motion application dated 26th July 2022. The court directed that the motion be heard together with the main claim the contract of the claimant having been terminated. The application and suit had been triggered by termination of the Claimant's services as the Managing director of the Second Respondent.
2. Vide the Memorandum of Claim, the Claimant has prayed for the following reliefs:-
 - a. A declaration that the leave, suspension, interdiction, show cause and termination of the Claimant's employment and the process leading to the same was unlawful.
 - b. The termination of the claimant's employment contract be set aside forthwith and he be reinstated unconditionally and with all privileges.
 - c. The Claimant be paid has full salary and allowances from the remaining period of the three years contract of Employment.
 - d. That without prejudice to above in the alternative the Claimant be paid salary and all related allowances for the remaining period of the three years contract of Employment.
 - e. That further without prejudice to the above the Respondent do compensate the claimant for unlawful termination of his employment together with withheld salary/allowances.



- f. The Honourable court do issue such other fit and just order to meet ends of justice.
 - g. Interest.
 - h. The Respondent to pay costs of this proceedings.
3. The Notice of motion application sought the orders that:-
- a. This application be certified urgent , be heard on priority basis and in the first instance interim orders be granted.
 - b. That pending the hearing and determination of this application an interim order/temporary injunction be issued against the Respondents , their agents or any other body or person from commencing the process of replacing the Claimant or recruiting a managing director of the 2nd Respondent Company.
 - c. That Pending in the hearing and determination of this application a conservatory order restraining and or prohibiting the respondents , their against , members, officers from appointing , recruiting permanently or in an acting capacity any person to the position and office of the Managing Director of the 2nd Respondent Company.
 - d. That pending the determination of this claim /suit the purported termination of employment as expressed in the letter of 14.7.22 or any be and is hereby suspended forthwith.
 - e. That pending the hearing and determination of this claim /suit, a conservatory order restraining and or prohibiting the Respondents, their agents, members, agents, officers or any other person from advertising, or declaring the position of the Managing director vacant or appointing, recruiting whether permanent or in any acting capacity any person in the position. And office of the Managing Director of the 2nd Respondent and further from in any way obstructing, interfering and or preventing the Claimant from carrying out any of the official duties of her Managing Director.
 - f. Any further and or relied that this court may deem just.
 - g. That costs be provided for.
4. Also filed in this suit are the Claimant’s list of documents dated 26/7/2022 (comprising of 10 documents that were eventually adopted by the court as Claimant’s Exhibits 1- 10 and the Claimant’s witness statement dated 26th July 2022.
5. The application and claim were heard together. The Respondent filed a Replying affidavit sworn by Dr. Robert Kati on 18th August 2022 and the Statement of answer to the Claim dated 18/8/2022. The Respondents’ also filed a List of Documents (comprising of 18 documents that were eventually adopted by the court as Respondents’ Exhibits 1- 18), a List of Witnesses and a Statement of Dr. Robert Kati dated 18th August 2022, all filed on 22nd August 2022. (All documents filed on 22nd August 2022 were later refiled on 15th November 2022 as the respondents’ bundle)
6. By an order of 21st September 2022, by consent of the parties, the Notice of motion was consolidated into the Statement of claim.
7. The Claimant on 24th October 2022 filed a further affidavit dated 19th October 2022 in response to the respondent’s’ Replying affidavit of 18th August 2022 and filed his further witness statement dated 18th February 2023 and a further list of witnesses of even date and filed in court on 20th February



- 2023, accompanied by further documents that were eventually adopted by the court as the Claimant's Exhibits 11- 12.
8. On 22nd February 2023, the Respondents filed the witness statement of Hebert Mutiva Agola dated 26th January 2023.
 9. By an order dated 20th April 2023, this matter previously filed at Bungoma as E020 of 2022 was transferred to Kakamega for hearing and determination.

Hearing And Evidence

10. The Claimant's case was first heard orally on the 2nd November 2022 when the Claimant testified as the witness of fact in his case, produced his evidence as the claim filed, the claimant's list of documents filed on 22nd August 2022 (comprising of 10 documents that were eventually adopted by the court as the Claimant's Exhibits 1- 10 and the Claimant's witness statement filed on 26th July 2022.
11. The Claimant was cross-examined by the counsel for the respondents, Mr. Musiega. The hearing resumed on 23rd March 2023, when Inspector Gilbert Kipngeno Tonui(CW2) testified on oath as the Claimant's expert witness and produced the Forensic examiners report and the Exhibit Memo as the Claimant's Exhibit 11.
12. He was cross-examined by counsel for the respondents, Mr. Musiega . On even date, Corporal Gilbert Cheruiyot(CW3) testified on oath as the Claimant's second expert witness and produced the Exhibit Memo adopted as the Claimant's Exhibit 11 and was likewise cross-examined by counsel for the respondents, Mr. Musiega and the matter was marked as Part-heard. The hearing continued on 23rd May 2023 when the Claimant still under oath from 2nd November 2022 adopted her witness statement dated 18th February 2023 and adopted the Forensic Report and Exhibit memo adopted as the Claimant's Exhibit 11 as her further evidence. The claimant was cross-examined by counsel for the respondents, Mr. Musiega and the Claimant's case closed.
13. The Respondents' case was heard on the 23rd May 2023 where its witness Robert Kati(DW1) testified on oath as the Respondents' witness of fact and adopted his written witness statement dated 18th August 2022 and the Replying affidavit dated 18th August 2022 as defence evidence in chief, and produced defence documents as exhibits R-1-18 as per list of documents dated 18th August 2022 . DW1 was cross-examined by counsel for the Claimant, Masakhwe. Herbert Mutiva Agola(DW2) testified on oath as the Respondents' second Witness of fact on even date and was cross-examined by counsel for the Claimant, Masakhwe.

Claimant's case in summary

14. The Claimant was a former Managing Director of the 2nd Respondent(a Public Entity) from 5th June 2018 on a three-years' Contract which contract was renewed vide a letter dated 21st July 2021 for a further three years. Through a letter dated 16th August 2021 the 1st respondent as chair of the Board of the 2nd respondent requested the Claimant to supply various documents used in the extension of the Claimant's Contract the same having been requested by the County Secretary as they were a prerequisite before an extension of term of contract.
15. The Claimant sent the requested documents to the County Minister in charge of water. Through a letter dated 15th November 2021, the Claimant was informed that his extension of contract term had been irregularly conducted and some irregularities from records and documents in the company called for a reconsideration of the said extension.



16. That on the 1st Respondent's instigation, the Claimant was allegedly sent on administrative leave on 14th April 2022. This was followed by a show cause letter dated 2nd June 2022 which the claimant states interdicted him and directed him to show cause and to which the Claimant responded to through his letter dated 14th June 2022. He was invited through the letter dated 29th June 2022 to a disciplinary hearing on 13th July 2022.
17. He was thereafter terminated from employment on 14th July 2022 and the Claimant avers that his purported administrative leave, suspension, interdiction , notice to show cause and termination did not follow the set terms in his employment contract, were undertaken without any appropriate investigations and new issues not raised in his show cause letter were introduced during his disciplinary hearing that he was not made aware of in advance. He terms his termination to have been based on personal vendetta, ill will, bad faith, maliciousness, was irregular and unlawful.

The Respondents' case

18. The Respondents' case was that the Claimant was employed as a Managing director of the 2nd Respondent for a term of three years from 2018 and when his term expired, the claimant unprocedurally secured an extension of his contract by taking advantage of the new Board of the 2nd Respondent to ensure he got an extension.
19. That the Board in order to regularize the improper extension of the Claimant's term informed the Claimant on 15th November 2021 of the irregular nature of his extension and sought for various documents from the claimant being periodic appraisals of his 3 year performance, proof of the satisfaction of the set revenue collection of six million and satisfaction of chapter six(IV) of *the constitution* which the respondent avers the claimant did not possess at the time of his contract renewal, conditions that were required precedent to his renewal of contract term.
20. That the claimant during his first term mismanaged the funds of the 2nd Respondent as was shown by the WASREB audit which established financial malpractices under the Claimant's leadership had occurred due to payments made out to contractors who had either not performed their work or the work was not completed or poorly undertaken under the Condition Liquidity Support Project(CLSP) that had been sponsored through the National government.
21. That the Claimant had additionally unprocedurally, authored a letter increasing his salary against company policy and on 14th April 2022 the Claimant was sent on administrative leave to undertake investigations raised in the WASREB Audit Report and which culminated in the issuance of the Show cause letter of 2nd June 2022 that set out the instances of financial malpractices that had been ongoing under the Claimant's watch.
22. The Claimant was called to a Disciplinary hearing on 13th July 2022 and the Board of the 2nd respondent terminated his employment for the reasons of the loss of funds from the said project on 14th July 2022. The Respondents affirm that the Claimant was taken through he proper disciplinary proceedings and his termination was lawful based on the reasons arising from the loss of funds from the said CLSP project.

Written submissions

23. The court gave directions for filing of written submissions after the hearing. The parties complied. The Claimant's written submissions were drawn by Fwaya Masakhwe Were & Advocates and filed on 19th June 2023. The Respondents' written submissions were drawn by the County Attorney, Aggrey B L Musiega and dated 20th June 2023.



Determination

Issues for determination.

24. The Claimant in their written submissions identified the following issues for determination: -
 - a. Whether the process of leave, suspension, interdiction, show cause and termination was fair or the same was instigated by personal vendetta , ill will, bad faith , malice and hence was illegal.
 - b. Whether good/valid reasons were available to warrant the Claimant's termination of employment.
 - c. Whether the claimant is entitled to the reliefs sought.
25. The Respondents in their written submissions identified the following issues for determination:-
 - a. Whether the Claimant's administrative leave, suspension, interdiction, show cause and termination were all unlawful?
 - b. Whether the Claimant's termination was out of the 1st Respondent's malicious mechanization?
 - c. Whether the claimant is entitled to the reliefs sought.
26. The Court having considered the issues addressed by the parties in their submissions and pleadings were of the considered opinion that the question of whether the claimant was a former employee of the respondent was not in dispute and thus the issues to be addressed in the determination of the dispute were as follows:-
 - a. Whether the Claimant's contract extension was regular?
 - b. Whether the termination of employment of the claimant by the respondents was lawful and fair.
 - c. Whether the claimant was entitled to the reliefs sought.

Issue a. Whether the Claimant's contract extension was regular?

27. The Respondents argued that the Claimant had irregularly obtained his extension of contract which was to expire on 1st August 2021, but was extended on 21st July 2021, by influencing the 2nd Respondent's new Board. The respondents argued that the extension was to be undertaken after an appraisal which was never undertaken. The Claimant opined that it was the board that had reached the aforesaid decision to extend his contract. The Human Resource Policy and Manual (R-Exh- -7) clause 1.11 stated that: "The board's communication with the Managing Director will be in the form of minute resolutions.." The Letter dated 21st July 2021 renewing the Claimant's contract was a communication of the board's resolution.
28. The Board of Directors is an independent organ of an institution and it undertakes its mandate independently. The communication from the board's chairperson to the Claimant that his contract had been renewed was basis for the Claimant to rely on the same and accept that his contract had been extended.
29. The Respondents in their letter of 15th November 2021(C-Exhibit 3) purporting to regularize the irregular appointment of the Claimant pointed to the requirements required before renewal of a contract of the Claimant's contract being:- Appraisal of the Claimant's performance, meeting set



target , the renewal be tabled as an agenda before the board, and compliance with Chapter six of [the Constitution](#) of Kenya among others. As per the Claimant’s employment Contract (C-exhibit 1)the Claimant was to work under the Directions of the Board and the Board was responsible to review the Claimant’s performance.

30. Clause C(1) (a) of the Employment agreement provide that: “You will be served with performance targets that will be observed by the board of Directors and yearly appraisal be done.”From this excerpt, it was the 2nd Respondent’s Board that was mandated to ensure that the claimant’s performance was evaluated and this failure manifests a clear case of board dynamics and a corporate governance issue in the 2nd Respondent Board for having failed to undertake their mandate of reviewing the claimant’s performance. The same board issued the renewal letter and the claimant not sitting in the Board of the 2nd Respondent could not have been in a position to know if the board had discussed the issue of his renewal or not. The 2nd Respondent’s Board being the custodians of the minute of the meeting of 29th June 2021, did not provide the same to disprove that they had not indeed discussed the issue. To require the Claimant to provide the minutes of the Board was far-fetched as the board itself could have provided its minutes of the said date to disprove the contract renewal of the claimant was not an agenda in the meeting.
31. The respondents argued that Claimant’s contract was extended before the expiry of his first term. The provisions of the employment contract clause C(1)(f) stated that: “Your Employment may be extended upon the expiry date stated in (d) above provided:-You have met the performance target agreed with the board of Directors to the satisfaction of the Company.The company considers that you are in every respect suitable to continue in the position of managing Director and you wish to continue to serve the company.
32. In absence of the Respondents contrary proof that the agenda of the Claimant’s renewal was approved, the court holds that the Claimant’s contract renewal was confirmed by conduct when the Respondent allowed the Claimant to continue working for the 2nd respondent as a managing director until 14th April 2022 when he was sent on administrative leave. By Conduct the Board of the 2nd respondent allowed the claimant to hold the managing director position while drawing a salary thereof signaling confirmation into the renewed contract. By clause C(10(d) of the Employment contract(C-Exhibit -1) stated that: “You will be employed for a period of three years and subject to the provision of paragraph (f),(22) and 7. The contract will be effective on the date you receive the letter”(Emphasis mine). During hearing the claimant during cross-examination on 2nd November 2022 was asked:-Mr. Musiega: When did you accept the employment letter?

Claimant:2nd July 2018.

33. Reading the above clause as read with the claimant’s response during hearing, it therefore means that the Claimant’s contract term was to run from 2nd July 2018 and not on 1st August 2018 when he began working. The employment contract clearly stated that the employment was effective from the date when the claimant received the letter of employment. The Black’s Law Dictionary, Bryam A. Garner, Tenth Edition Effective date means: “the date on which a statute, contract , insurance policy, or other such instrument becomes enforceable or otherwise takes effect. This date sometimes differs from the date on which the instrument was enacted or signed.- Also termed commencement date.” It therefore means that the Claimant’s contract expired on 2nd July 2021 and was renewed by the 2nd Respondent’s board after its expiry on 21st July 2021.

Issue b. Whether the termination of employment of the claimant by the respondents was lawful and fair.



34. The court in determination of the issue was guided by the provisions of section 45 of the [Employment Act](#) which states:- ‘Unfair termination 45(1) No employer shall terminate the employment of an employee unfairly. (2) A termination of employment by an employer 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 employee’s conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer; and (c) that the employment was terminated in accordance with fair procedure.’”

Substantive fairness- validity of the reason

Claimant’s case

35. On the validity of the reasons for the termination of the employment, the Claimant submits that the entire process from his administrative leave, interdiction, show cause and termination were maliciously instigated by the 1st Respondent. The Claimant submits that his termination was a ploy instigated by the 1st Respondent who had vowed to have him terminated from his position when he served him with the letter of 16th August 2021(C-Exh-5) requesting for documents that were used in renewing the claimant’s contract on 21st July 2021.
36. The Claimant submits that under the 1st Respondent’s directions the chairperson of the board of the 2nd Respondent issued the letter of 15th November 2021(C-Exh-3) which purported to withdraw the claimant’s Renewal. The Claimant states that he was sent on administrative leave on 14th April 2022(PEXH6), yet no minutes were availed that approved his going on administrative leave.
37. The claimant alleges that his termination was unfair as allegations levelled against him that he wilfully neglected to perform his official duties, which led to the loss of company funds amounting to Kshs. 7,000,000/- were not the reasons that the Respondent issued him a show cause letter dated 2nd June 2022. The Claimant argues that, the Respondents failed to supply him with the documents that had allegations against him to enable him respond and in fact the Technical Committee Report produced by the Respondents(R-Exhibit-12)was endorsed on 20th June 2022 way later after the claimant had been served with the show cause letter on 2nd June 2023 and responded to the same on 14th June 2022.
38. The Claimant argued that the Respondents’ lacked any valid reasons to terminate his employment and relied on the allegation that the claimant had increased his salary, which the claimant submits was misconceived as the WASREB Report submitted by the Respondents (page 274 of the respondent’s documents) acknowledged that the 2nd Respondent had increased the salaries of all employees of the company, the claimant’s salary among them.
39. The Claimant submits that the Respondents allegations relating to gross misconduct arising from misappropriation of funds, is false as DW1 Robert Kati confirmed during the hearing that no contractor had complained having not been paid and DW2, Hebert Mutiva confirmed that there was an inspection Committee that was charged by the Project Manager with monitoring projects and approving payments to contractors. The claimant submits that the Respondents did not have any evidence of misappropriated funds and if they did they could have forwarded a formal complaint to investigative authorities so that the lost funds could be recovered.
40. The Claimant further submits that the Respondents relied on the findings of the WASREB Audit and Technical Committee Reports whose findings were not conclusive and which did not show any proof of monies lost. The Claimant insists that the respondents solely blamed him for issues arising in the compnay relating to payments to contractors, when the inspection Committee led by the Project Manager investigated projects and approved payments to be made to them.



41. The Claimant argues that the Respondents found all reasons possible to terminate his employment having had not concrete reason to do so. The Claimant submits that he performed his duties diligently and the Respondents being unhappy with his renewed contract began a witch hunt to have his employment terminated.
42. The Claimant submits that the salary Increment letter for the year 2020 had been forged together with the payment vouchers and purchase orders but the Respondents did not bring an expert to rebut the expert witness brought by the claimant relating to the forged documents. The Claimant submits that the respondents were wrong in sending him on administrative leave which was not provided in his contract.

Respondent's case

43. DW1 confirmed that the reasons for the termination of the employment of the claimant was due to his mismanagement of funds from the Condition Liquidity Support Project (CLSP) and produced the WASREB Audit reports (Exhibit 8), the Project Implementation Status (R-Exhibit-11) and the audit report on expenditure of CLSP funds (R-Exhibit 12).
44. The respondents submit that the Claimant was afforded a chance to be heard and challenge all evidence against him as he was well aware of the contents of the Audit reports that were either supplied to him or in his custody.
45. The Respondents further submit that the Claimant unprocedurally authored a letter increasing his salary and was at pains during hearing to explain how his salary was increased from Kshs. 130,000 to 165,000/-. The Respondents submit that the Respondent was responsible for the running of the 2nd respondent and the WASREB Report confirms that there was mismanagement and misappropriation of the company funds from when the Claimant was employed. The Respondents confirm that the Claimant was sent legally on Administrative leave which is a prerogative of the employer and relied on the decision of John Njuru V AIC Kijabe Station Management(2020)eKLR.
46. The Respondents submit that it was lawful to issue the claimant with a show cause letter and he was invited for disciplinary hearing on 13th July 2022 and the Disciplinary committee having being dissatisfied with the claimant's responds, terminated his employment through the letter dated 14th July 2022. They relied on the case of John Njuru (supra) to assert this position where the court held that:-

“The dictates of section 41 and 43 of the Act requires that Upon investigations, the employee may be issued with a show cause notice or where found not culpable be returned to work.....” See the case of Elizabeth Cheronu Kurgat versus Kenya Literature Bureau [2014] eKLR and Ezra Chiloba versus Wafula Wanyonyi Chebukati & 7 others [2018] eKLR. In this case, the claimant was not recalled back to work to address the purpose of the administrative leave following letter dated 13th February, 2019. Even where the contract of employment allowed for termination of employment upon issuance of 4 months' notice or payment in lieu thereof, section 43 of the Act requires the employer to give reason(s) for which employment is terminated. Where there were audit investigations and which forced the respondent to cause the claimant to go on compulsory leave, the due process of section 41 read together with section 43 of the Act required the respondent as the employer to ensure the due process of the law. these provisions as stated in mandatory terms and requires both substantive and procedural justice.

On the one part, section 41 of the Act required the claimant be notified of his misconduct and be allowed a hearing in the presence of another employee of his choice. This was not



done. On the other part, section 43 required the respondent as the employer to give reason(s) leading to termination of employment even where there was an intention to pay for the notice period.”

47. The Respondents submitted that the under the Human Resource Policy and Manual (R-Exhibit -7 at page 74 and 75), the Claimant could be interdicted on ground any misconduct and thereafter after disciplinary proceedings, his employment could be terminated if the staff Advisory committee found the Claimant guilty of misconduct.
48. The Respondent urged that the Claimant could not be reinstated as a managing Director in the fact of the allegations of mismanagement of Public funds. The Respondents argues that the Claimant was terminated from employment not on account of irregularity in his contract renewal but on the mismanagement of company funds. The respondents relied on the decisions in *Protus Wanjala Mutike V Anglo African Properties t/s Jambo Mutara Lodge Laikipia (2021)eKLR* and *Kenfreight (E.A) Limited V Benson K. NGUti (2019) eKLR*.

Decision on substantive fairness

49. The burden of proof of the validity of reasons for termination lies with the employer under section 43 of the *Employment Act* which reads:- ‘43. Proof of reason for termination (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45. (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.’”
50. In the instant case the dismissal of the Claimant was pegged on mismanagement and misappropriation of funds from the Condition Liquidity Support Project (CLSP), which allegations the respondents submits emanated from the WASREB Audit Report (R exhibit 4), Audit Report dated 30th May 2022 (R Exhibit 12) and Technical Committee Reports dated 20th June 2022 (R Exhibit 11). Additionally, the Respondents accused the Claimant of having increased his salary unilaterally against procedure.
51. 50. What the court needs to determine is whether the reasons for the termination were valid and whether the dismissal decision met the reasonable test where Lord Denning in *British Leyland UK Limited v Swift (1981) I.R.L.R 91* held that:-

“The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view...”
52. The court has looked at the disciplinary procedure contained in the The Human Resource Policy and Manual (R-Exh- 7) clause 11.1 and found that the disciplinary procedure laid thereunder did not relate to the discipline of the Managing Director but to the other staff of the company. Clause 11.1 states disciplinary control is Under the Board and the MD. The Respondents in dismissing the Claimant referred to the ground on gross misconduct under Clause 11.1, nevertheless, clause 1.1. of the policy acknowledged that “where certain aspects are not fully covered in these regulations or difficulties in interpretation are experienced reference shall be made to the management advisory committee who shall seek guidance from the BOD, the government circulars and regulations and the laws of Kenya.”



Therefore the provisions of the *Employment Act*, 2007 with respect to the discipline of the Managing Director would then apply.

53. Indeed, the Claimant was dismissed in terms of Section 44(4)(c) which provides for the summary dismissal of an employee if;

“An employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;”
54. The Claimant denied the allegations made against him in his response to the show cause letter and argued that he had performed his duties diligently, and that the Claims for misappropriation of funds were not true as no money had been reported to any investigate agent to have been lost and neither had any contractor said that they had not been paid their dues. The claimant argued that the authority to pay had been based on the recommendation of the investigate committee of the project which investigated project’s performance and recommended their completion.
55. The claimant argued that the purchase orders and payments receipts produced as the Claimant’s Exhibit 11 bore his forged signature. The Claimant argued that no complains had been brought against him and the audit Reports i.e. the WASREB Report, Technical committee Report and the County Audit Report did not implicate him personally.
56. The Respondents on the other had argued that the Claimant was in-charge of all the personnel in the company and he had the last say in all decisions in the company. The Respondents argues that the Audit Reports pointed to a mismanagement company under the Claimant’s leadership and the claimant could not continue to run the company as the Managing Director with the loss of Public funds having been witnessed.
57. The Claimant was issued with a show cause letter dated 2nd June 2022 and his written response submitted on 14th June 2022. The claimant submitted that he did not have the copies of the Audit Report dated 30th May 2022(R Exhibit 12) and Technical Committee Reports dated 20th June 2022 (R Exhibit 11)at the time of responding to the show cause letter and was thus disadvantaged as he could not defend himself properly.
58. Under the show cause letter, the issues raised by the claimant majorly related to payments made to contractors in the Condition Liquidity Support Project(CLSP). The show cause letter accused the Claimant of having made payments to contractors yet the projects paid had not been completed or others were never done at all.
59. The claimant in his response stated that the he had only paid for projects which had been approved by the inspection committee and documents evidencing that the projects had been undertaken were allegedly given to the Inspection committee that had approved payments to be made by the claimant.
60. What came out of the evidence was that the claimant in making payments to contractors solely relied on the reports of the Project inspection Committees and this position was confirmed by DW2.
61. While the Audit Report dated 30th May 2022(R Exhibit 12) and Technical Committee Reports dated 20th June 2022 (R Exhibit 11)were supplied to the Claimant at trial, the issues relating to the misappropriation of funds from CLSP was not a new issue as the same had been brought to the attention of the claimant in the show cause letter and the Claimant replied to the issues regarding finances as he replied in his further affidavit dated 19th October 2022 stating that the Inspection committee had been responsible for the monitoring of contractors and approval of payments that were



- to be paid, and the Claimant had only paid out for the projects that had been approved. Dw2 confirmed that before the claimant made payment there was approval by inspection and acceptance committee chaired by the Project manager. The minutes of the committee were used in making payment. DW2 confirmed he was not aware of any issues concerning payment by the claimant.
62. The Respondents pointed out that the Claimant had proceeded to pay contractors without personally confirming the status of projects and based his judgement the word of the employees. At the hearing the claimant blamed the employees for payments without supporting documents.
 63. The Claimant additionally at the close of the disciplinary hearing acknowledged that he had learned from the proceedings and he would strive to improve his leadership if he was reinstated.
 64. The court on analysis of the reasons presented to the court under the termination letter being willful neglect to perform official duties or carelessly and improperly performing duties as a result of which the company had lost sum estimated at Kshs. 7m7illion in which projects whose value cannot be felt. The court opines that as the Managing Director of the 2nd respondent the claimant was the accounting officer bearing the responsibility of ensuring prudent use of public funds. I have perused the minutes of the proceedings of the disciplinary process leading to the dismissal. Some the transgressions admitted by the claimant at the hearing include:- payment of Kshs. 1, 500,000 /- for Hamisi sub-County project yet no work had been done without physical verification and failing to disclose the payment to the Directors when they were proceeding to inspect the project. This was a demonstration of lack of diligence. Making payment for Luanda Pipeline project worth Kshs. 1,377,883/- and Esirabe Pipeline project worth 1,500,000/- without technical reports and completion certificates to support the payments and Failure to ensure there was a 10% contract sum retention clause to address project defects while signing the project contracts thus exposing the company for defective projects having paid the full contract sum(see pages 361-362 of the respondent's documents). I do not agree with the proposition by the claimant that for lack of complain by contractors or investigation by authorities cleared him of these transgressions. The contractors/suppliers have no reason to complain as they were not even held to account by 10% retention clause. Their mouths are full and are eating in silence. The employer has investigated and found the claimant culpable. The claimant was heard before termination and appeared to shift the blame to inspection team made of his staff yet he signed the contracts and the cheques. I am satisfied there were valid reasons for the termination consistent with the managing director role as the accounting officer of the company. The court holds that termination met the reasonable test as stated by Lord Denning in Lord Denning in British Leyland UK Limited v Swift(1981)I.R.L.R 91.

Issue of fraud

65. The claimant alleged that his signature had been forged in the purchase orders and adduced expert evidence(C-Exhibit 11) to support his assertions. Justice Mativo (as he then was) in Christopher Ndaru Kagina v Esther Mbandi Kagina & another [2016] eKLR set out the grounds for relying on expert evidence and stated:- “It is a trite principle of evidence that the opinion of an expert, whatever the field of expertise, is worthless unless founded upon a sub-stratum of facts which are proved, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof. The importance of proving the facts underlying an opinion is that the absence of such evidence deprives the court “of an important opportunity of testing the validity of process by which the opinion was formed, and substantially reduces the value and cogency of the opinion evidence.” An expert report is therefore only as good as the assumptions on which it is based.

An expert gives an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions



as to fact on which the opinion is based.[20] In my opinion, the factors which the court may take into account in determining the reliability of expert opinion, include:-

- a. the extent and quality of the data on which the expert's opinion is based, and the validity of the methods by which they were obtained;
- b. if the expert's opinion relies on an inference from any findings, whether the opinion properly explains how safe or unsafe the inference is (whether by reference to statistical significance or in other appropriate terms);
- c. if the expert's opinion relies on the results of the use of any method (for instance, a test, measurement or survey), whether the opinion takes proper account of matters, such as the degree of precision or margin of uncertainty, affecting the accuracy or reliability of those results;
- d. the extent to which any material upon which the expert's opinion is based has been reviewed by others with relevant expertise (for instance, in peer-reviewed publications), and the views of those others on that material;
- e. the extent to which the expert's opinion is based on material falling outside the expert's own field of expertise;
- f. the completeness of the information which was available to the expert, and whether the expert took account of all relevant information in arriving at the opinion (including information as to the context of any facts to which the opinion relates);
- g. if there is a range of expert opinion on the matter in question, where in the range the expert's own opinion lies and whether the expert's preference has been properly explained; and
- h. whether the expert's methods followed established practice in the field and, if they did not, whether the reason for the divergence has been properly explained.

In addition, in considering reliability, and especially the reliability of expert evidence, the court should be astute to identify potential flaws in such opinion which detract from its reliability, such as:-

- a. being based on a hypothesis which has not been subjected to sufficient scrutiny (including, where appropriate, experimental or other testing), or which has failed to stand up to scrutiny;
- b. being based on an unjustifiable assumption;
- c. being based on flawed data;
- d. relying on an examination, technique, method or process which was not properly carried out or applied, or was not appropriate for use in the particular case; or
- e. relying on an inference or conclusion which has not been properly reached.”

66. Having considered the evidence out of the Forensic Document Examiners' Report(C-Exhibit 11) produced by CW2, the report failed to identify the dissimilarities between the Known signature



specimens(C1-CC9 & E-1 TO E-2) provided and the Signatures on the questioned documents (payment vouchers(A1 to A8); purchase orders(B1-B-8). The report gave a general report that “In my opinion the signatures were made by different authors”. The Report did not identify how each signature did not correspondent to the claimant’s known signatures to aid the court to establish a probable case. The Expert’s opinion was incomplete and could not establish that the claimant’s signature had been forged.

67. In any event, the purchase orders and purchase orders that the claimant alleged had his forged signature were documents relating to the contractors from the Condition Liquidity Support Project and whom the claimant confirmed during cross -examination that had been paid money from the 2nd Respondent. The same was also confirmed at the disciplinary hearing.
68. As to the issue of the letter increasing the claimant’s salary even though the expert evidence was not conclusive to verify whether the claimant had unilaterally increased his salary, the WASREB Report at page 81 confirmed that the company had increased salaries for all employees including the Claimant’s, a position DW1 confirmed during cross-examination. Additionally, the Claimant’s contract (c-exhibit 1 at Clause 2.0(b))alluded to the yearly review of the Claimant’s salary. The respondent although had records of the pay records of the Claimant did not show that the claimant’s salary had not been increased and in fact continued to pay the claimant his salary at the rate of 165,000/- instead of the salary of Kshs. 130,000/- they alleged was the salary payable to the Claimant. The issue that the Claimant had increased his salary cannot therefore stand. The court further finds the salary increase was not a ground for the termination.

Procedural fairness

69. Procedural fairness is mandatory even in the event where the employer contemplates summary dismissal for gross misconduct under section 44 of the *Employment Act*. The procedural fairness for gross misconduct is as defined under section 41(2) of the *Employment Act* to wit:- ‘41(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.’
70. A literal interpretation of this provision makes it mandatory for an employer before summarily dismissing an employee on stated grounds as happened to the Claimant to:-
 - (a) grant the employee a hearing.
 - (b) consider any representations which the employee and/or his chosen representative at the hearing may make before arriving at a decision to terminate the employment or summarily dismiss the employee.
71. It was not disputed there were disciplinary proceedings before the termination of employment of the claimant on 13th July 2021. The respondents produced the invitation to the disciplinary hearing (R-Exhibit-17) before dated 29 June 2022. The Claimant attended the said proceedings and was taken through the Condition Liquidity Support Project payments as per the minutes of the disciplinary proceedings approved on 26th September 2022.
72. The Respondents submit that they complied with the legal process under section 41 of the *Employment Act* as the Claimant went for disciplinary proceedings and was asked to give his submissions and was allowed to be accompanied by an expert of his choice. The decision to terminate the claimant was made after the disciplinary hearing.



Decision on procedural fairness

73. The court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR observed on procedural fairness :-‘13. There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed ...’(emphasis mine)
74. Section 41 of the *employment Act* provides for the procedure for fair termination as follows:- ‘41. (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.’
75. The Claimant was served with the show cause letter dated 2nd June 2022 which sought in detail explanation from the claimant relating to funds paid out to contractors. The claimant responded to the Show cause Letter on 14th June 2022, responding to each issue raised. The claimant alleged that the show cause letter was not accompanied with the Audit Report that could have helped him answer the questions adequately, but from the answers from the response to the show cause, it was clear that the Claimant was aware of the issues raised therefrom and even alluded to having seen the report. The claimant did not raise any issue with the audit report or ask for adjournment.
76. The claimant in closing remarks stated that the Board had been fair to him during the disciplinary hearing.
77. During cross -examination, the claimant was asked whether he had been taken through due process before his dismissal and he answered in the affirmative. Justice Nzioka in *Freddy Kipkorir Lang’at v Co-operative University of Kenya* [2021] eKLR stated that:--

“9. The decision of *Walter Ogal Anuro v Teachers Service Commission* (supra) held in paragraph 23 thereof as follows:-‘23. It is not in contest that the Claimant was taken through some form of a disciplinary process. However, upon analysis of both the investigation and the disciplinary processes, the Court formed the opinion that the Respondent failed the test of procedural fairness in that it did not take its investigations full circle. In the light of the seriousness of the allegations against the Claimant and the resultant consequences, the Respondent should have done more, but it took the easy option and placed the Claimant and the impostor on the same chopping block. For this reason, I find the termination of the Claimant’s employment by way of summary dismissal unfair for want of due procedure. In this case, the Respondent similarly did not go the whole way by disallowing the Claimant an opportunity to defend himself. The tenets of procedural fairness encompass advance and reasonable notice of not only the steps to be taken in the disciplinary process but also documentation to prepare a defence where such documentation is in the custody of the Respondent as in this case. Put another way, if one is accused of misleading the employer and the evidence for such is the correspondence with a third party, it is incumbent upon the employer to lay the whole case against the employee by availing the full accusation and await the response or defence of the employee. In the



final analysis the termination herein is found to have been ipso facto unfair for want of procedure.....”.

78. The Claimant alleged that he was not given the Audit report relating to the payments from Condition Liquidity Support Project. The Claimant did not require the Audit report for he was aware of the information that was contained in the Audit report and his response to the issues raised in the Show cause letter related to payments that had been done by the claimant of his own knowledge. The information relating to payments made out to contractors was known to the Claimant having been the last person who signed for the payments.

I do uphold the decision in *Walter Ogal Anuro v Teachers Service Commission* and hold that the claimant was aware of the case facing him as the same issues in the show cause he responded to were repeated at the hearing and the matters in question were within his personal knowledge. From the foregoing there was procedural fairness in the termination process of the claimant’s employment contract.

Issue b-Whether the claimant is entitled to reliefs sought.

79. Having found that there was justifiable reasons for the termination of the claimant’s employment and that having established that there was procedural fairness in the termination process, the claimant’s claim for unlawful termination fails and the Claimant was not entitled to a salary for the remaining period of three years or reinstatement.
80. Having lost on a case of unlawful termination of employment the claimant becomes disentitled to the reliefs sought.

Conclusion and disposition

81. In the upshot the court holds that the claim for unlawful termination was without merit and is dismissed in its entirety. The court notes that the employer indicated it will pay the retained half salary during period of interdiction and other benefits due to the claimant after clearance (page 367 of the respondents’ documents). It is up to the claimant to comply and finalise the separation process. The notice of motion application is as a consequence also dismissed.
82. Each party shall bear its costs in this claim.

DATED, SIGNED & DELIVERED IN OPEN COURT AT KAKAMEGA THIS 22ND SEPTEMBER 2023.

**JEMIMAH KELI,
JUDGE.**

In The Presence Of:-

Court Assistant :

For Appellant :

For Respondent:-

