



**Kimani v National Gender and Equality Commission (Cause  
1948 of 2014) [2023] KEELRC 2569 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2569 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1948 OF 2014  
MA ONYANGO, J  
OCTOBER 5, 2023**

**BETWEEN**

**EMILY WAMBUI KIMANI ..... CLAIMANT**

**AND**

**NATIONAL GENDER AND EQUALITY COMMISSION ..... RESPONDENT**

**JUDGMENT**

1. The Claimant was until 6<sup>th</sup> October, 2014 an employee of the Respondent, an independent Commission established under *the Constitution* of Kenya 2010 and the National Gender and Equality Act. No. 15 of the 2011, having been employed on 1<sup>st</sup> November, 2012 on a five-year renewable contract as a legal officer/Investigation officer.
2. By letter dated 6<sup>th</sup> October, 2014 and delivered to her on 7<sup>th</sup> October, 2014, the Claimant's employment was terminated. According to the Claimant, the termination was wrongful, illegal and unfair.
3. In her memorandum of claim dated 31<sup>st</sup> October, 2014 the Claimant seeks the following remedies against the Respondent:
  - a. Salary for 6 worked but not paid (1<sup>st</sup> to 6<sup>th</sup> October 2014)  $6/20 \times \text{Ksh. 201,000}$  Ksh. 40,200.00
  - b. 1month salary in lieu of notice Ksh. 201,000.00
  - c. House allowance Ksh. 30,000.00
  - d. Leave allowance Ksh. 30,000.00
  - e. Unpaid leave days, 20 days  $(20/30 \times 201,000)$   
Ksh. 134,000.00



- f. Gratuity at the rate of 31% of annual basic salary for each year worked  $31/100 \times 12 \times 110,000 \times 2$  Ksh. 818,400.00
- g. Damages for wrongful dismissal and unfair termination pursuant to section 49 (1) (c) of the [Employment Act](#), 2007.
  - 2. damages for loss of employment i.e.
    - a) Last 25 days of the 2<sup>nd</sup> year (7<sup>th</sup> October 2014-31 October 2014)  $25/30 \times 201,000.00$  = Ksh. 167,500.00
    - b) Third year (1<sup>st</sup> November 2014 to 31<sup>st</sup> October 2015)  $201,100 \times 12$  = Ksh. 2,412,000.00
    - c) Fourth year (1<sup>st</sup> November 2015 to 31<sup>st</sup> October 2016)  $201,100 \times 12$  = Ksh. 2,412,000.00
    - d) Fifth year (1<sup>st</sup> November 2016 to 31<sup>st</sup> October 2017)  $201,100 \times 12$  = Ksh. 2,412,000.00
  - 3. That in the alternative to prayer 2 above, the Respondent reinstates the Claimant as a legal/Investigation Officer with full pay and benefits and all perks of office with effect from 6<sup>th</sup> October, 2014.
  - 4. General damages for breach of contract and injured feelings considering the fact that the claimant was aspiring for career growth.
  - 5. Exemplary and punitive damages to act as punitive measures to curb the Respondent from unilaterally and unfairly terminating employees without due regard of the Employment/Labour laws.
  - 6. Certificate of Service.
  - 7. Costs and interest of the cause.
- 4. The Responded filed a Memorandum of Response dated 7<sup>th</sup> October 2018 in which it denies that the termination of the Claimant's employment contract was wrongful, illegal and unfair and states that the Claimant was terminated following a fair hearing that adhered to due process by which she was found guilty of gross misconduct.
- 5. At the hearing of the case the Claimant testified on her behalf while the Respondent called two witnesses, its chairperson Dr. Joyce Mwikali Mutinda who testified as RW1 and Mr. Paul Kirugu Kuria, the Respondent's Director for Programs and Research, RW2. All the witnesses adopted their witness statements which had been filed in court together with documents filed in support of their respective cases.
- 6. The circumstances leading to the termination of the Claimants contract are not contested. By an Internal Memo dated 20<sup>th</sup> May, 2014 the Claimant was proposed for appointment as Chairperson, Tender Opening Committee for the processing of tender for procurement of medical, Work Injury Benefits (WIBA) and Group Life insurance for the staff of the Respondent. By the same Internal Memo she was also appointed as Chairperson of the Tender Processing Committee. The tender opening was scheduled for 23<sup>rd</sup> May, 2014 while the evaluation was scheduled for 26<sup>th</sup> to 28<sup>th</sup> May, 2014.
- 7. Although the Claimant originally declined the appointment, she was prevailed upon to take up the appointments by the Respondent's Chief Executive Officer.
- 8. A total of 29 bids were received. After several stages of evaluation, the only firms whose bids met the requirement as advertised were Britam Insurance, AAR Insurance and Resolution Health Insurance.



9. The Tender Committee whose membership was Catherine Njeru as Chairperson with Brown Tsuma, Dona Mokeira, Ann Marie Okutoyi, Stephanie Mutindi, Linet Amolo and Emily Moraa as members met on 23<sup>rd</sup> June, 2014 and awarded Britam Insurance the Group Medical cover at Ksh. 11,304,293.03 and WIBA cover at Ksh. 831,360 while Group Life cover was awarded to Resolution Health Insurance at Ksh. 1,601,656. The Committee further recommended that the Commission negotiates with Britam Insurance for inpatient and cover limit for pre-existing conditions.
10. After the award of the tender by the Tender Committee, the Claimant together Juliana Mutisya, the Respondents Deputy Secretary Finance and Administration, the Finance Manager and the Procurement Manager altered both the Evaluation Committee Technical Report and the Tender Committee Report to reflect that Resolution Health Insurance was the one recommended by the Tender Evaluation Committee for award of all the three insurance covers.
11. On 30<sup>th</sup> June, 2014 the Claimant as Chairperson of the Tender Evaluation Committee signed the altered Evaluation Committee Report to reflect that Resolutions Health Insurance was the lowest bidder.
12. On 15<sup>th</sup> July, 2014 the Respondent's Chairperson appointed a committee of two Commissioners of the Respondent to review the process for the procurement. In their report dated 21<sup>st</sup> July, 2014, the committee concluded that the recommendations of the Tender Evaluation Committee were altered irregularly and the Claimant signed the altered minutes without convening another meeting of the committee to reconsider the evaluation.
13. It is the Claimant's position that on 15<sup>th</sup> July, 2014 she received a phone call from the Administrative Assistant in the Chairpersons office requesting her to see the Chairperson at the Commission's main Boardroom. Upon arrival in the Boardroom she found the Chairperson with all Commission members present.
14. The Chairperson informed her that the Commission had no medical cover and asked her to explain how the tender evaluation process was carried out which she did. She was thereafter asked to reduce into writing what she had told the Commissioners which she did.
15. On 25<sup>th</sup> July, 2014 the Claimant received a notice to show cause why she should not be disciplined. The letter is reproduced below:

NGEC/OC/CONF/STAFF/VOL.I/ (31) 25<sup>th</sup> July, 201 4

Emily Wambui Kimani

Legal Officer

National Gender and Equality Commission

NAIROBI

Dear

RE: Notice To Show Cause Why You Should Not Be Disciplined

The Commission in its decision of Tuesday the 22<sup>nd</sup> of July 2014 after preliminary investigations on the matter of Tender No. NGEC/01/2013/14 has mandated me to address you on the subject above as herein below.

1. That you were lawfully appointed to chair the Evaluation Committee for adjudication of the stated tender and your role entailed evaluating both technical and financial evaluation of the tenders.



2. That as per s. 16 of the Public Procurement and Disposal Regulations 2006 your role entailed undertaking the evaluation with due diligence. Each member was expected to evaluate independently from the other members prior to sharing their analysis and ratings. You were expected to prepare a report on the analysis of the tenders received, and final ratings assigned to each tender and submit the report to the tender committee with your recommendation.
3. You confirmed that you presented a signed report with the recommendations that BRITAM was the lowest evaluated tender to the procurement officer Mr. Brown Mukanda on a day you could not remember.
4. That on the 30<sup>th</sup> June, 2014, you were approached by the said procurement officer who informed you that he had reworked the Evaluation committee report and minutes because there had been a technical error in evaluation.
5. That you signed the new Evaluation report purporting now to award the Medical Cover to Resolution Health and not BRITAM.
6. That you did the alterations without reference to the members of the Evaluation Committee.
7. Your action contravenes your role as the chairperson of the Evaluation Committee. It amounts to dishonesty and is fraud and or willful breach of trust on your part that is punishable by NCEC and may lead to summary dismissal.
8. You are invited within a period of 14 days to state in writing the grounds if any on which you will rely to exculpate yourself from this claim.

Yours

Signed

Comm. Winfred Lichuma, EBS

Chairperson

16. The Claimant responded on 8<sup>th</sup> August 2014 with a 10-page letter in which she took issue with the wording of the notice to show cause and raised several legal issues about the same.
17. The Claimant was by letter dated 25<sup>th</sup> September, 2014 invited to attend a disciplinary hearing on 2<sup>nd</sup> October, 2014 at 11.00am.
18. According to the minutes of the disciplinary hearing, the Claimant:
  - a. Claimed that she had just passed by Juliana's office when she found her with Emily Oganga and Brown looking through the tender documents;
  - b. Agreed that even when she was alerted that there had been critical mistakes in the evaluation process, she never recalled the evaluation committee to reconsider their earlier evaluation decision;
  - c. Signed the altered report in their office and all the other members signed individually when the Secretary to the Committee (Brown) took to their offices;
  - d. Agreed to back-date the signing of the evaluation report to 6<sup>th</sup> June, 2014 to comply with the requirements of the law since the Tender Committee had awarded on 23<sup>rd</sup> June 2014;
  - e. Agreed that the actual evaluation had ended on 17<sup>th</sup> June 2014 and not 6<sup>th</sup> June, 2014;



- f. Confirmed that the evaluation committee she chaired had awarded Britam as the lowest bidder;
  - g. Concurred with the Commission that the evaluation committee should have probed the changes proposed. She admitted they trusted Brown 'too much';
  - h. Concurred with the Commission that the process of Tender is either confidential and not open to third parties.;
  - i. Agreed that changing minutes of the evaluation or tender committee is contrary to the law.
19. The Claimant's employment was thereafter terminated by letter dated 6<sup>th</sup> October, 2014.
  20. The minutes of the disciplinary hearing indicate that the contracts of the Secretary/CEO, Prof. Rose Odhiambo, Ms. Juliana Mitisya, Ms. Emily O. Oganga, Ms. Catherine Njeru and Mr. Brown T. Mukanda were also terminated together with the Claimant.
  21. In her written submissions the Claimant posits that there was no valid reason to terminate her employment contract as she did not sign two reports as alleged by the Respondent with one report recommending award of the tender to Britam and another recommending award to Resolution Health. That the report recommending the tender to Britam was a draft and was unsigned as confirmed by RW1.
  22. The Claimant contends that she did not award the tender to Resolution Health as her role was limited to making a recommendation to the Tender Committee. The Claimant relied on section 80(4) of the Public Procurement and Asset Disposal Act 2015 which provides that the Evaluation Committee shall prepare an evaluation report containing a summary of evaluation and comparison of tenders and to submit the report to the person in charge of procurement for his or her review and recommendation.
  23. The Claimant further relied on section 80(5) which provides that the evaluation report shall be signed by all members of the Evaluation Committee. She submits that the Report recommending award of the tender to Resolution Health which was produced in court is evidence of compliance with the Act. That there was no proof that she was dishonest or negligent as alleged in the letter of termination.
  24. It is the Claimant's submission that she was discriminated as she is the only substantive member of the Tender Evaluation Committee who was disciplined. That this is a contravention of section 5 of the Employment Act which prohibits discrimination in employment.
  25. The Claimant submits that the statement of Beatrice Njenga who was a member of the Tender Evaluation Committee has not been produced by the Respondent meaning that either the same was not taken or that if it was taken it was not among those given to the Claimant for her oral defence.
  26. The Claimant further submits that Edna Koitie who sat in the Tender Evaluation Committee is the one who approved the processing of her gratuity in 2015 meaning that she was not disciplined. That this was confirmed by RW2 who testified that the said Edna Koitie was still in the Employment of the Respondent.
  27. It is the Claimants submission that the Respondent has not placed any evidence before the court to explain why she was found guilty while the other members of the Evaluation Committee were exonerated.
  28. To fortify her submission, the Claimant relied on the decision in *Mathaiga Country Club v KUDHEIHA Workers* [2017] eKLR where the Court of Appeal refused to overturn the decision of the Employment and Labour Relations Court which held that the employer had not proved reasons that justified the termination of the services of the Grievants.



29. It is further the submission of the Claimant that the termination process was flawed as she was ambushed to make a statement on 14th July, 2014 without being informed that she was under investigation. The Claimant further submits that the statements used by the Commissioners of the Respondent to complete their report that indicted her were never issued to her to prepare for her oral defence.
30. The Claimant further submits that she was never given a chance to be heard before she was issued with the notice to show cause.
31. The Claimant further submits that when she attended the oral hearing she was only asked to read her written statement then asked questions on the CEOs involvement in the tendering process. That the oral hearing was therefore a mere formality as she was never given a fair hearing or a chance to defend herself.
32. The Claimant further submitted that the Respondent did not comply with its own disciplinary procedure as stipulated in its Human Resource Manual which provided for counselling, show cause letter, verbal warning, written warning, interdiction, suspension, dismissal and appeal.
33. The Claimant further submits that her appeal, which was supposed to be heard by a differently constituted team as per Human Resource Manual was declined without merit by the same person who had reached the decision to terminate her employment. That she was thus not accorded a fair appeal hearing.
34. It is further the Claimants submission that the Respondent did not have the legal mandate to investigate her role in the tender evaluation committee as the issue ought to have been investigated by the Public Procurement Oversight Authority (PPOA), DCI and Ethics and Anti-Corruption Commission. She relied on section 9(1) of the Public Procurement and Assets Disposal Act which gives the Public Procurement Regulatory Authority the powers to investigate and act on complaints received in procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public. That section 9(2) further provides that should the Authority be of the opinion that civil or criminal proceedings ought to be preferred against any entity, state officer or public officer the authority shall refer the matter to the relevant authority.
35. The Claimant submits that the investigation by 2 members of the Commission was contrary to section 8 of the National Gender and Equality Commission (NGEC) Act which sets out the functions and powers of the Commission that do not include investigation of procurement matters.
36. Relying on the decision of the Court of Appeal in *Power Group Technologies Ltd V Kibugi* (Civil Appeal No. 169 of 2017) [2021] to effect that administrative action by public bodies ought to comply with section 41 of the *Employment Act*, and the Court of Appeal decision in *Bamburi Cement limited v William Kilonzi* [2016] eKLR the Claimant submitted that the Respondent failed to comply with section 41 and 45 of the *Employment Act* as well as its own Human Resource Manual on both the disciplinary hearing and the appeal.
37. The Claimant urged the court to grant the remedies sought in her claim relying on the Court of Appeal decision in *Bamburi Cement Limited v William Kilonzi* (supra), the Supreme Court decision in *Kenfreight (E.A) Limited v Benson K. Nguti* [2019] eKLR and the decision in *Abdulhamud Ebrahim Ahmed v Municipal Council of Mombasa* [2004] eKLR.
38. For the Respondent it was submitted that contrary to the Claimant's averments that the Tender Committee is not bound by recommendations of the Technical Evaluation Committee, Regulation 11 of the Procurement Regulations (2006) provides that the Tender Committee can approve, reject with



reasons or approve the recommendations subject to minor clarifications by the Evaluation Committee. That Regulation 11(2) provides that the Tender Committee cannot modify the Evaluation Committee Report.

39. It submits that in this case the Tender Committee was presented with an Evaluation Report, met on 23<sup>rd</sup> June, 2014 and awarded Britam Insurance the WIBA and Medical Insurance covers. That on 30<sup>th</sup> June, 2014 it made an about – turn and awarded Resolution Health the two policies yet the report of 23<sup>rd</sup> June 2014 had been adopted and they had not rejected the recommendations of the Evaluation Committee as provided in Regulation 11.
40. It is the submission of the Respondent that the Claimant admitted at paragraph 8 and 9 of the claim, that after she returned from her trip to Samburu she was informed by the secretary to the Technical Evaluation Committee that the Committee had overlooked a technical aspect that warranted rectification of the draft evaluation report. Without holding a meeting to deliberate on the same as provided in the Regulations the Claimant and the Secretary altered the report that had already been prepared and circulated to the other committee members to sign.
41. The Respondent submits that on 15<sup>th</sup> July, 2014 the Claimant was called to enlighten the Commissioners on what happened during the tendering process and to explain the change in the award of tenders to Resolution Health yet Britam was the lowest bidder. It submits that time was not an ambush as averred by the Claimant. It submits that the recording of the Claimant’s explanation does not amount to a breach of Article 50 of *the Constitution* as the Claimant owed an explanation to the Respondent in her capacity as the chair of the committee. That the evidence was not obtained illegally as alleged by the Claimant. The Respondent relied on the decision in *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others* [2020 eKLR on the test of admission of illegally obtained evidence.
42. On the Claimant’s allegation that there was no fairness in the disciplinary process because the Respondent was conflicted, being the investigator, prosecutor and arbiter in her case, the Respondent submitted that Section 41 of the *Employment Act* provides for the employer to hear the employee before termination of employment.
43. On the claim on discrimination, the Respondent submits that the Claimant cannot demand the termination of employment of other members of the evaluation committee merely because her employment was terminated. That indeed a total of 6 employees had their contracts terminated as a consequence of the tendering process. The Respondent denies that it failed to comply with section 41 of Act *Employment Act* noting that it was the Claimant who failed to call a fellow employee of her choice to accompany her to the disciplinary hearing.

### **Analysis and Determination**

44. Having considered the pleadings, the evidence on record and the submissions by the parties, the issues arising for consideration by the Court are the following:
  - i. Whether there was valid reason for the termination of the Claimant’s contract of employment,
  - ii. Whether the Respondent complied with fair procedure, and,
  - iii. Whether the Claimant is entitled to the remedies sought in her claim.

### **Valid Reason**

45. The *Employment Act* provides at Section 43 as follows:-  
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.
46. The reasons given for the termination of the Claimant's employment in the letter of termination are that her explanation as given in the response to the show cause notice and at the disciplinary hearing were wanting, unacceptable and at variance with information and evidence availed to her by letter dated 25<sup>th</sup> September, 2014. That consequently she was found to be dishonest and negligent.
47. The Claimant does not deny that the report of the Tender Evaluation Committee which recommended Britam Insurance Company to be awarded the tender for medical insurance and WIBA policy was altered and Resolution Health who was recommended for only the Group Personal Accident insurance cover was awarded all 3 covers.
48. The Claimant's explanation is that the report recommending Britam as the lowest bidder was a draft, that she signed only one report and that she agreed to the alteration of the original decision of the Tender Evaluation Committee after she was informed by the Secretary to the Committee that the Committee had overlooked a technical aspect in the scoring of the tenders.
49. The Claimant did not explain what the error was that resulted in Resolution Health being recommended for award of all the 3 insurance covers.
50. As the Chairperson of the Committee, the Claimant had the responsibility to ensure compliance with the Public Procurement and Disposal Regulations. Regulation 16 thereof provides as follows.
- (1) For each procurement within the threshold of the tender committee, the procuring entity shall establish an evaluation committee for the purposes of carrying out the technical and financial evaluation of the tenders or proposals.
  - (2) An evaluation committee established under paragraph (1) may comprise-
    - (a) a separate financial evaluation committee and a separate technical evaluation committee; or
    - (b) a combined financial and technical evaluation committee.
  - (3) An evaluation committee shall consist of a chairman and at least two other members all appointed by the accounting officer or the head of the procuring entity upon recommendation by the procurement unit.
  - (4) No person shall be appointed under paragraph (3) if such person is a member of the tender committee of the procuring entity.
  - (5) A technical evaluation committee established in accordance with paragraph (2)(a) shall be responsible for-
    - (a) the technical evaluation of the tenders or proposals received in strict adherence to the compliance and evaluation criteria set out in the tender documents;
    - (b) performing the evaluation with all due diligence and within a period of thirty days after the opening of the tenders.



- (6) Each member of the technical evaluation committee shall evaluate independently from the other members prior to sharing his or her analysis, questions and evaluation including his or her rating with the other members of the technical evaluation committee.
  - (7) A financial evaluation committee established in accordance with paragraph (2) shall be responsible for-
    - (a) the financial evaluation of the tenders or proposals received in strict adherence to the compliance and evaluation criteria set out in the tender documents or request for proposals;
    - (b) performing the evaluation with all due diligence and within a period of five days from the time of completion of the technical evaluation.
  - (8) Under no circumstances may any member of an evaluation committee enter into direct communication with any of the tenderers participating in a tender or proposal that such evaluation committee is considering.
  - (9) An evaluation committee shall prepare a report on the analysis of the tenders received, and final ratings assigned to each tender and submit the report to the tender committee.
  - (10) The report prepared under paragraph (9) shall include-
    - (a) minutes of the opening of the tenders or proposals;
    - (b) the results of the preliminary evaluation, with reasons why any tenders or proposals were rejected;
    - (c) the scores awarded by each evaluator for each tender or proposal;
    - (d) a summary of the relative strengths and weaknesses of each tender or proposal;
    - (e) the total score for each tender or proposal; and
    - (f) a recommendation to award the tender to the lowest evaluated tenderer or to the person who submitted the proposal with the highest total score.
51. Regulation 16(6) is clear that after individual rating, the members share their ratings with the other members while Regulation 16(10) provides that the report shall include among others a recommendation to award the tender to the lowest evaluated tender or the tender with the highest total score.
52. The Claimant as chairperson of the committee cannot escape responsibility by shifting the blame to the secretary or other members of the committee. The fact that she altered the minutes without calling another meeting to reconsider the undisclosed technical aspect that was allegedly overlooked is proof of both negligence and dishonesty on the part of the Claimant.
53. I thereof find that there was valid reason for termination of the Claimant's employment on grounds of negligence and dishonesty.

### **Fair procedure**

54. Fair procedure is provided for in sections 41, 45(2)(c) and 45(5)(a) of the *Employment Act* as reproduced below:
41. Notification and hearing before termination on grounds of misconduct



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.
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.
  - (1) ...
  2. A termination of employment by an employer is unfair if the employer fails to prove—
    - a. ...
    - (b) ...
    - (c) that the employment was terminated in accordance with fair procedure.
  - (3) ...
  - (4) ...
  - (5) (a). The procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
55. The Claimant avers that the evidence on the basis of which she was issued with notice to show cause was obtained illegally and is not admissible. That she was not given a chance to be heard before she was issued with the notice to show cause and that the Respondent did not comply with its own disciplinary procedure as stipulated in its human resource manual.
56. The evidence on record is that the Claimant was on 15<sup>th</sup> July, 2014 summoned to a meeting of Commissioners of the Respondent. She was asked to explain how the evaluation process for the medical cover was carried out. She was later asked to record her responses which she submitted in writing to the Respondent. She was thereafter issued with a notice to show cause dated 25<sup>th</sup> July, 2014 which she responded to by her letter of 8<sup>th</sup> August 2014.
57. The Claimant was invited for a disciplining hearing which she attended on 2<sup>nd</sup> October, 2014. She thereafter received a letter of termination of employment dated 6<sup>th</sup> October, 2014. She appealed against the termination by her letter dated 9<sup>th</sup> October 2014 and by letter dated 24<sup>th</sup> October, 2014 she was informed that her appeal was dismissed.
58. From the foregoing the Respondent substantially complied with the provisions of Section 41 of the *Employment Act*. The Respondent however did not notify the Claimant about her right to be accompanied to the disciplinary hearing by a colleague of her choice.
59. The claim that she was not given a hearing before the notice to show cause was issued to her has no basis in law as there is no provision for such in the *Employment Act*.
60. The Claimant's averment that the evidence used as a basis for issuance of the notice to show cause was obtained illegally is also not grounded on the law as the information was obtained from the claimant



during preliminary inquiries. At that stage an employer is entitled to question any employee whom it believes has information that can shed light on the issue under investigation.

61. The Claimant's averment that the Respondent failed to comply with its disciplinary procedure was not proved as no copy of the same was availed to the court to enable it determine if any of the provisions thereof was not complied with.
62. The averment that the Claimant was discriminated by the Respondent for being singled out as the only member of the Evaluation Committee whose employment was terminated has also not been proved. As is evident from the record, the chairperson of the committee and the secretary to the committee were both subjected to disciplinary process and terminated. The Claimant has not proved that any other member of the Committee was culpable to the same extent as the Claimant and the secretary to the committee to warrant being subjected to disciplinary process.
63. The Claimant submitted that the Respondent had no mandate to investigate the tender evaluation process as this is the responsibility of the PPOA, DCI and the Ethics and Anti-Corruption Commission. This argument has no basis as none of the legal provisions that set up the said investigative bodies oust the power of an employer to discipline its employee who flouts the procurement legislative provisions. The Claimant did not state if the Respondent's disciplinary regulations prohibited it from disciplining employees who flouted the statutory provisions for tender evaluation process. Section 44(4) of the *Employment Act* provides that an employee who wilfully 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; or commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property is guilty of gross misconduct and liable for summary dismissal. Violation of procurement regulations is a criminal offence.
64. For the foregoing reasons it is my finding that the Claimant has not proved that the termination of her employment was unfair, or that she was discriminated by the Respondent.

#### **Is the Claimant entitled to any of the remedies sought?**

65. The Claimant testified that she was paid her terminal benefits after she failed the suit herein. The prayers for salary for days worked, pay in lieu of notice, house allowance, leave allowance and gratuity are therefore spent.
66. The Claimant further prayed for damages for wrongful dismissal which she is not entitled to, the court having found that she did not prove that the termination of her employment was unfair.
67. The prayer for damages for loss of employment is a duplication of the prayer for damages for wrongful dismissal.
68. The prayer for general damages for breach of contract and exemplary damages was not proved by the Claimant. The Claimant did not prove that the Respondent acted in a manner to warrant being punished by award of exemplary damages.
69. The Claimant is entitled to a certificate of service if the same has not already been issued to her.
70. The alternative prayer for reinstatement is unavailable to the Claimant as the termination of her employment was not found to be unfair.
71. With the exception of the prayer for certificate of serve, the claim herein is dismissed. Each party shall bear its costs.



DATED, SIGNED AND DELIVERED VIRTUALLY IN ELDORET THIS 5<sup>TH</sup> DAY OF OCTOBER, 2023.

M. ONYANGO

JUDGE

