



Kirui v Ekaterra Tea Kenya PLC (Employment and Labour Relations Cause E013 of 2023) [2024] KEELRC 1747 (KLR) (9 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1747 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
EMPLOYMENT AND LABOUR RELATIONS CAUSE E013 OF 2023**

HS WASILWA, J

JULY 9, 2024

BETWEEN

GEOFFREY KIRUI CLAIMANT

AND

EKATERRA TEA KENYA PLC RESPONDENT

JUDGMENT

1. The claimant commenced this suit by a Memorandum of claim dated 9th August, 2023, through the firm of Gordon Ogola and Kipkoech Company Advocates, on the basis, that the claimant was illegally terminated by the Respondent and seeking for compensation for the alleged unfair termination. The claimant sought for the following reliefs; -
 - i. A declaration that the summary dismissal of the claimant from employment by Respondent was wrongful, unlawful, procedurally unfair and unconstitutional hence null and void ab initio.
 - ii. An order of permanent injunction restraining the Respondent from terminating the employment of the claimant either by itself, its employees, its servants and or agents.
 - iii. An Order of reinstatement or re-engagement of the claimant to employment with back pay and with no loss of seniority, privileges, salaries, allowances and benefits.
 - iv. In the Alternative to prayer (ii) ad (iii) above, back pay from the date of the termination upto the date of Judgement.
 - v. An order for full remuneration up to his retirement at 60 years.
 - vi. An order for compensation for unlawful and unfair termination equivalent to his 12 months gross salary.



- vii. In addition to (v) above, an order that the claimant be paid three month's salary in lieu of notice.
- viii. An order directing the Respondent to remit all the statutory deductions on the claimant's salaries to their respective account for the duration he was unfairly dismissed.
- ix. An Order for compensation by way of exemplary damages to the claimant for unfair and unlawful termination.
- x. Costs of the claim.
- xi. Interests at Court rates on all the payments above if awarded, from the date of filling of this claim until payment in full.
- xii. Any other of further relief that the Court may deem fit to grant in the interest of justice.

Claimant's case

2. The claimant states that at all material times, he was employed by the Respondent as a Divisional manager for the past 26 years.
3. That he served the Respondent diligently without any complaint until 29th April, 2023, when he was served with a Show cause letter dated 28th April, 2023 on allegations that he had breached the company's code on Respect, Dignity and Fair treatment, which the claimant denied and made his response by the letter of 2nd May, 2023.
4. It is averred that the claimant was not served with witness statement on time but that the same were read to him during the disciplinary hearing. After hearing he was summary dismissed by the letter of 8th May, 2023 on the basis of breaching the company's code policy on avoiding Conflict of interest. Subsequently, he was order to vacate the company's house by 12th May, 2023.
5. Dissatisfied with the dismissal, the claimant appealed the decision by its letter dated 14th May, 2023, which was not considered but that the Respondent upheld its disciplinary decision and communicated the same by the letter of 23rd May, 2023.
6. He stated that the dismissal on basis of sexually harassing his female colleagues was not proved by any evidence and the same is thus in breach of his right under *the Constitution*, the *Employment Act*, Fair Administrative Actions Act and principles of natural justice.
7. The claimant gave the particulars of the unlawfulness of the Respondent actions by stating that; there was no complaint raise against the claimant, that the Respondent concocted evidence based on media story, criminalized freedom of association amongst adult of sound mind, the claimant was not subjected to impartial disciplinary process, that the claimant is a victim of witch-hunt and politicized issue.
8. It is also stated that the claimant was not granted fair labour practices, Fair administrative action, neither was he afforded a right to fair hearing as guaranteed under Articles 41, 47 and 50 of *the Constitution*, in the manner in which the disciplinary hearing was conducted.
9. The claimant maintained that his termination was not justified in both reason and procedure as such this Court should allow the claim as prayed.
10. The Respondent entered appearance through the firm of Kaplan and Stratton Advocates and filed a response to claim on 5th February, 2024 denying the entire claim and stating that the claimant



was summary dismissed on 8th May, 2023 for sexually harassing female employees contrary to the Respondent's code Policy on Respect, Dignity and Fair treatment. Also that the claimant was subject to due disciplinary procedure before termination.

11. It is averred that the claimant herein was employed on 24th February, 1997 as a field assistant and rose through the ranks to become the Divisional manager –Koiwa Estate.
12. He avers that in January, 2023, BCC televised a documentary duped “Sex for Work’ in the region. Pursuant to this ex pose, the Respondent carried out independent investigations and while at it, received several complaints of sexual exploitation at its farm . this culminated to further inquiry to establish the veracity of these allegations.
13. Upon conclusion of investigation, the Respondent established genuine reason to believe the claimant was culpable of the charges raised against him and issued him with a show cause letter dated 28th April, 2023, seating out the particulars of the alleged sexual harassment. That the claimant was granted ample time to respond to the allegations, which he did by the letter of 2nd May, 2023.
14. On 3rd May, 2023, the Respondent summoned the claimant for disciplinary hearing scheduled for the next day on 4th May, 2023. That in the letter of invitation, the claimant was informed of his right to have a witness accompany him for the disciplinary hearing. He then attended the hearing, which allegations were discussed at length and the claimant allowed time to defend himself.
15. During hearing, the Respondent established that the claimant was well aware of the Respondent's Sexual Harassment policy, admitted to have made sexual advances to some of his female colleagues but that his advances were not accepted by any of the employees, he also admitted persisting with the advances even when he was rejected, acknowledged to that he ought not to have made the said advances and admitted to have checked on one of the complainant's during investigations.
16. The Respondent state that based on the admissions of the claimant and after considering all facts and evidence before the disciplinary hearing, the Respondent resolved to terminate his services.
17. Contrary to the allegations by the claimant, the respondent states that they considered the Appeal filed by the claimant and established that not substantial reason was given that could change its former decision, as such the dismissal was upheld. Subsequently, it issued the claimant with Certificate of Service and paid all his terminal dues as set out in the termination letter.
18. The Respondent denied that the termination was predicated on malice and witch-hunt as alleged and stated that, the termination was based on complaints raised and evidence collected in the investigations. Additionally, the claim for violations under the constitution were denied.
19. The Respondent reiterated that the termination of the claimant's services was justified in the circumstances and that due procedure was followed in accordance with the law, Hence the claim herein is without merit and should be dismissed with costs.

Evidence

20. During hearing, the claimant testified as CW-1 and adopted his witness statement and stated he is currently jobless, having lost him employment on 9th August, 2023. He also produced the documents dated 9/8/2023 as his exhibit 1-6.
21. Upon cross examination, he testified that he is bound by the company's rules and regulations and that he is aware of the HR manual. He stated that Clause 5.1 of the Respondent policy provides for zero tolerance to sexual harassment. he testified that in April 2023, he had a meeting with Hillary Lombard



- who questioned him on alleged sexual harassment. He stated that he admitted to have had relationship with fellow employees but that he never has sexual contact with any of them. He also admitted to have asked some of the employee to go for a date with him but that none of the proposed dates ever materialized. He also stated that he mentioned Faith Baraza and Faith Maluki as some of the colleagues he had sought to have a date with but that none of the ladies accepted to go to any date with him. He further admitted to have asked an intern to go out with him. He testified that the socialized with many colleagues and admitted that most of the employee were junior than him.
22. Upon further cross examination, he testified that he admitted to have made sexual advances to Evelyn, faith and the attaché. He stated that he admitted on disciplinary hearing that he should have made one off advance and not persist with the advances. He also stated that he confirmed during hearing that the sexual advances ought not to have happened at all. He also confirmed that he contacted Jacqueline, one of the complainants, while the investigations were going on. he then confirmed that the minutes reflected what happened during the disciplinary hearing.
 23. The witness testified that he was invited to attend disciplinary hearing, when he appeared and confirmed that he was ready to proceed. He admitted that the witness statement were read to him. He also stated that he saw some of the witnesses, while other were hidden for witness protection. He then stated that his appeal was based on the fact that he never thought his advances were unwelcomed and also that none of the employees had agreed to his advances.
 24. On re-examination, the witness testified that before the expose by the media, he had not been invited to answer to these allegations. He also stated that during the said time, there is no evidence of demotion or appraisal of any of the complainant's as such, his advances did not affect his professional work.
 25. The Respondent summoned Hillary Lombard, an independent investigator, as RW-1, who stated that he is an independent investigator, who was contacted by the Respondent to carry out investigations at Ekattera, having carried out other investigations in Uniliver for some time. That he investigated this case among others. He stated that he has done investigations for the South African police for over 24 years especially on the area of sexual harassment. He adopted his witness statement of 23/2/2024 and produced the investigation report in the Respondent's bundle of documents as Respondent's exhibit.
 26. Upon cross examination, he testified that he came to investigate the matter after the BBC expose. He stated that most of his conclusion were arrived at based on the same documents given to the claimant. He stated that he was not aware if any of the complainants were demoted and or promoted as a result of the advances made by the claimant.
 27. On re-examination, he testified that he interviewed 7 witnesses including the claimant and that all the witnesses confirmed that the claimant had made sexual advances to them.
 28. The second Respondent's witness was Winnie Ochieng, a Business integrity officer in the Respondent's employ, in charge of East Africa plantation. She produced the Respondent bundle of documents filed on 2/5/2024 and supplementary documents filed on 5/3/2024 as the Respondent's exhibits and adopted her witness statement of 26/3/2024.
 29. Upon cross examination, she testified that the claimant has worked for the Respondent for 26 years without any disciplinary action and or complaint raised against him. She told this court that the first complaint received was from Joan's Husband, who stated that the claimant was pursuing his wife and soon after the media made the exposé and now the Respondent carried out investigations. She also stated that all the statements relied upon were made after the exposé. She stated that she never received a complaint from any of the employee that they were demoted for refusing the sexual advances. She denied firing the claimant to appease the international community that threatened to blacklist it.



30. On re-examination, she testified that the Respondent had a duty to investigate the allegations no matter the time they came in. She also stated that the complainants' stated that the advances were made way before 2023. Further that the claimant admitted to have made sexual advances to 3 people, as such the action taken against him was justified and the termination thereof was fair.

Claimant's Submissions

31. The claimant submitted on three issues whether due process was followed before dismissing the claimant, whether the respondent has discharged its duty in proving that the dismissal was lawful and whether the sexual harassment allegations were substantiated.
32. On whether due process was followed, it was submitted that the Respondent issued a Notice to show cause to the claimant on the 28th of April, 2023 and a response was required by 2nd May, 2023. And the hearing scheduled for 4th May, 2023, when the statements used as the basis of the Claimant's dismissal were not availed but only read out to him during the disciplinary hearing at which instance he was hearing them for the first time. Hence, he did not have time to prepare a rebuttal against the same.
33. It was submitted that the manner of questioning in the hearing does not in any way adhere to basic rules of natural justice as the Respondent imposed on the Claimant statements that they had already made concluded as such the hearing was not impartial. Further that there was no active complaint filed against the claimant in line with the structure at the Respondent, a clear indication of the Respondent's malicious nature and the process used was only for formality sake.
34. On reason for termination, it was submitted that the Employment Act under section 47(5) of the Employment Act states that:
- “For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”
35. He also relied on the case of *Ouma v Faulu Microfinance Bank Limited* [2023] (KLR) where it was held that:-
- “the burden of proof in a claim of unfair termination starts with the employee proving unfair termination or wrongful dismissal and if they discharge that burden, the burden then shifts to the employer to prove existence of valid reasons for the termination and procedural fairness.”
36. Similarly, it was argued that the Respondent has not discharged its duty as espoused in the Act. Hence the dismissal of the claimant was unfair in accordance with section 45 (2) of the Act. This he argued is because, firstly, there were no statements recorded by the alleged victims in court when the said person were mentioned and their names identified. It was argued that the witnesses that testified for the Respondent were only its officers and not the alleged victims, placing little credence on their evidence, given that information the presented before court was hearsay. In any event that no single victim alleged that they were punished for alleged sexual harassment or misconduct by the claimant.
37. It was submitted that the Respondent merely recount the narrative of the events leading up to the dismissal but did not provide the any evidence of the allegations, neither have they substantiated their reasons for terminating the Claimant's employment. Thus, the statutory threshold was not met.



38. On whether the sexual harassment allegations were substantiated, it was submitted that the matter of sexual harassment is in its nature traumatizing and dehumanizing to anyone on the receiving end. However, the right to employment must be protected. This includes ensuring any allegations of sexual harassment are proven according to section 43 and 45(2) of the *Employment Act*.
39. The Respondent stated that section 6 of the *Employment Act* provides that;-
- “(1)An employee is sexually harassed if the employer of that employee or a representative of that employer or a co-worker-(a)directly or indirectly requests that employee for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express—(i)promise of preferential treatment in employment; (ii)threat of detrimental treatment in employment; or(iii)threat about the present or future employment status of the employee;(b)uses language whether written or spoken of a sexual nature;(c)uses visual material of a sexual nature; or(d)shows physical behavior of a sexual nature which directly or indirectly subjects the employee to behavior that is unwelcome or offensive to that employee and that by its nature has a detrimental effect on that employee ’s employment, job performance, or job satisfaction.”
40. Accordingly, that the main elements of sexual harassment needed to be proven in this case were not proven since the claimant did not at any point verbally or otherwise conduct himself toward the said junior employees in a sexual manner. That the Claimant only asked the said employees on dates which the witnesses in the Respondent’s internal hearing corroborate and indicate that they turned down. That dates or conversation are exchanges between adult human beings and are not code for sexual relations in any way. Further that the alleged victims did not at any point express or make complaint that the Claimant’s conduct was unwelcome. This is evidenced further by the fact that the said employees did not make any complaints as to the conduct of the Claimant and only adopted a description of sexual harassment when they were nudged by the Respondent.
41. The Claimant submitted that the alleged victims were working with the Claimant in a peaceful, harmonious environment up until the respondent actions following the media expose. Therefore, that because of the inherently existent power imbalance, he was pushed into corroborating a narrative that the employer was interested in peddling.
42. In conclusion, it was submitted that the Respondent used the Claimant, with all intent and with purpose as a sacrificial lamb and a scape got to ward off the bad press that was plaguing it following the media expose by the British Broadcasting Corporation on the existence of Sexual Harassment in its workplace. Therefore, that the termination was not justified and the claim herein should be allowed as prayed.

Respondent’s Submissions

43. The Respondent submitted on three issues, whether the Respondent had a valid reason to terminate the claimant’s employment contract on grounds of sexual harassment, whether the Respondent followed due process in effecting the summary dismissal and whether the claimant is entitled to the reliefs sought.
44. On the first issue, it was submitted that the Respondent had all reason to believe that the claimant had engaged in sexual harassment. It argued that the claimant was promoted to the level of Divisional manager, were he was expected to perform his oversight role over several employees at the work place. while working as the supervisor, the claimant was bound by the Respondent’s HR Manual, the



Code of Business Principle(COBP) and the sexual harassment policy that outlaws any form of sexual harassment.

45. It was argued that the Respondent conducted investigations into the alleged sexual harassment by the Respondent and out of the 9 employee that came out to be interviewed, 4 stated that the claimant had sexually harassed them and other refused to reveal their identity as their feared the claimant who was in managerial role. It was argued further that the claimant admitted to have been interviewed by the Respondent on the allegations and given an opportunity to defend himself in a disciplinary hearing.
46. It was also argued that the Claimant admitted that have made sexual advances to the complainants but only denied having sexual encounters with the said employee. It is on this basis, that the Respondent submitted that by making sexual advances, the claimant was in breach of its rules and Regulations including the policy against sexual harassment as such, he was subject of the disciplinary action.
47. It was also argued further that the actions of the Claimant were for all intends sexual harassment both directly and indirectly in the way in which he pestered his victims to agreeing to his sexual advances. It was argued further that his actions created a state of apprehension among employees at the company who were afraid to report the issue to the Respondent as expressly stated by the 4th witness during investigations.
48. To support this, the Respondent relied on the case of *Ooko & Another V SRM & 2 others* [2022] KECA 44 (KLR) where the Court held that;-

“an employee is sexually harassed if the employer or a co-worker directly or indirectly requests that employee for sexual intercourse, sexual contract or any other form of sexual activity that contains or implies promise of preferential treatment in employment or threat of detrimental treatment. Further, an employee is sexually harassed if the employer, his representative or co-worker shows physical behavior of a sexual nature which directly or indirectly subjects the employee to behavior that is unwelcome or offensive to that employee... In our view, the letter and the formal complaint thereupon made by S were sufficient evidence to illustrate the unwanted nature of Dominic’s conduct, and that the same was communicated to both G4S Security and Dominic. We are in this regard in agreement with the pronouncements made by Morrison J in *Reed v Stedman* (1999) IRLR 299 that a characteristic of sexual harassment is that it undermines the victim’s dignity at work and constitutes a detriment on the grounds of sex, and that the lack of intent is not a defence. It was further held in that case that the words or conduct complained of must be unwelcome to the victim, and it is for her or him to decide what is acceptable and offensive. Therefore, the question as to what constitutes unwanted conduct is not what the court or tribunal would or would not find offensive. but whether the individual victim has made it clear that he or she finds the conduct unacceptable.”

49. On that basis, it was submitted that the Respondent has proved the reason for termination was reasonable, valid, fair and justified in line with section 43 of the *Employment Act*.
50. The Respondent also relied on the case of *Judicial Service Commission V Gladys Boss Shollei and Another* [2014] eKLR, where the Court held that;-

“From my own analysis of the record before us, I would very much doubt that there are many employers who, faced with conduct such as displayed by the 1st respondent, would have retained her in her position. I am not saying there would be none, only that such an employer would be a rarity indeed. As to the action of dismissing the 1st respondent, I find and hold



that it was an eminently reasonable action to take by an employer. It probably would have been the only reasonable and responsible cause of action left open to the employer. The dismissal therefore passes with ease the test propounded by Lord Denning in the same BRITISH LEYLAND case (ibid.); Was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might have reasonably dismissed him then the dismissal was fair.”

51. On the burden of proof of sexual harassment claims, the Respondent relied on the case of St Leonard’s Maternity & Nursing Home Vs LMM [2023] KECA 1148(KLR), where the Court held that :-

“We further wish to observe, just like did the learned trial Judge, that sexual harassment cases are personalized. Just like other sexual offences, more often than not, incidences of sexual harassment take place in private spaces pitting the perpetrator against complainant. They generally do not occur in the presence of any witness... The reasonable man test herein is not a novel invention... the objective severity of the harassment should be judged from the perspective of the reasonable person in the plaintiff’s position, considering all the circumstances.”

52. Therefore, that guided by the cited case law, it would have been improper for the Respondent not to take action against the claimant.

53. On due process, the Respondent submitted that the claimant’s dismissal was procedurally fair within the meaning of section 41 of the Act. In support of this, he relied on the case of Anthony Mkala Chitavi V Malindi Water & Sewage Company Ltd[2013] eklr, where the Court held that:-

“the ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee. Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible. Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”

54. Accordingly, it was argued that the Respondent notified the claimant of the allegations levelled against him, gave him time to respond to the charges and invited him for disciplinary hearing, which he attended with Mr. Simon Rop as his representative and Nancy Magoma as his witness, where he was heard on his defence. Further that the Appeal was also considered but that the Respondent upheld the dismissal. Therefore, that due procedure was followed.

55. It was argued that the claimant did not at any point complain of needing more time. On the witnesses not being serve beforehand, it was argued that the Respondent could not disclose the identity of the said employees in the bid to protect them considering that the claimant was their supervisor. In any event that the claimant admitted to trailing one of the victim.

56. On whether the claimant is entitled to the reliefs sought, it was submitted that the claimant has failed to demonstrate that the termination was unfair. On the other hand, the Respondent has tabled evidence in support of the reason for termination and procedure followed, hence the termination was justified and the reliefs sought are not merited.



57. In conclusion, the Respondent submitted that the claimant has fundamentally breached the trust placed upon him by the Respondent. That his actions amounts to gross misconduct and therefore their relationship has been severed by sexually harassing his juniors. Therefore, that the termination was based on genuine reason and due procedure. He thus urged this Court to dismiss the claim with an order of costs in favour of the Respondent.

Determination

58. The main complaint from the Claimant is that he was dismissed unfairly without any valid reasons because his accusers were not presented before him for cross examination and that he had no prior notice of the statements of the witnesses before the hearing.

59. He also contends that his appeal was not considered by the Respondents but they just upheld their initial findings.

60. The Claimant averred that no complaint was raised against him but that the Respondents concocted evidence against him based on a media story and that he was a victim of witch hunt.

61. From the evidence on record, the woes of the Claimant began with a Notice to Show Cause dated 28 April 2023, alleging he had breached the company's code policy on Respect, Dignity and Fair Treatment (Annexure GK1).

62. The letter in issue stated as follows:

RE: NOTICE TO SHOW CAUSE

The company has received allegations against you which are in breach of the following company policies as well as provisions of the [Employment Act](#) 2007.

1. Cod of Policy on Respect, Dignity and Fair Treatment which states that:-

Employees MUST NOT engage in any direct behavior that is offensive, intimidating, malicious or insulting. This includes any form of sexual or other harassment or bullying, whether individual or collective and whether motivated by race, age, role, gender, identity, color, religion, country of origin, sexual orientation, marital status, dependents, disability, social class or political views. Employees MUST NOT engage in any indirect behavior which could be construed as sexual or other harassment or bullying, such as making offensive or sexual explicit jokes or insults displaying, emailing, texting, or otherwise distributing offensive material or material of a sexually explicit nature, misusing personal information, creating a hostile or intimidating environment, isolating, or not cooperating with a colleague, or spreading malicious or insulting rumours.

2. Section 44 (3) of the [Employment Act](#) which states that an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.

Particulars of the Breaches

It is alleged that you, Geoffrey Kirui have been sexually harassing female colleagues by persistently asking them to get into sexual relationship with you. It is alleged that on various occasions you requested Faith Baraza, Everline Ngatha and another employee whose identity has been protected to get into sexual relationship with you. With all 3 employees, your advances towards them were persistent even after they said no the first time.



It is further alleged that you are/were in a sexual relationship with an employee called Varsity Chepngetich in exchange for favourable work allocation. Varsity is a Quality Clerk employed at Koiwa Estate who reports directly to you.

Lastly, it is alleged that you have been in a sexual relationship with an employee called Nancy Magoma employed in CTG for an unknown duration of time. Nancy was reporting directly to you when you were the Plant Manager at Mabroukie Factory in 2021.

This letter therefore demands that you show cause why disciplinary action should not be taken against you for breach of the Company Policies and Section 44 (3) of the *Employment Act* as outlined above. Please be advised that the alleged violations amount to gross misconduct as envisaged by Section 44 (Summary Dismissal) of the *Employment Act*, 2007.

In view of the above and in line with company disciplinary procedure, you are required to submit a written explanation to reach the undersigned not later than Tuesday 2nd May, 2023 at 5.00 pm detailing why disciplinary action should not be taken against you for the aforesaid breaches.

In case your reply is not received within the stipulated period, it shall be assumed that you have accepted the charges levelled against you and that you have nothing to say in your defence, and that the management reserves the right to take disciplinary action against you in accordance with the rules and regulations of the company and the laws of Kenya.”

63. The show cause letter above was to be responded to not later than 2 May 2023 at 5 pm.
64. The Claimant responded to this show cause letter vide his dated 2nd May 2023 which was a mere denial as follows:-

“RE: RESONSE TO SHOW CAUSE

I refer to your letter dated 28th April 2023 asking me to respond to the allegations against me regarding breach of company policies as stated in the letter.

Having gone through the letter and in view of the statement that I made early in the month of April, I wish to state that the allegations are not true and therefore no disciplinary action should be taken against me.

I am committed as a loyal employee to defend myself should it be necessary to do so when required.

Through this letter, I am requesting your office for inform one of the person - Nancy Magoma that she will be required in the hearing as my witness.”

65. The Claimant was thereafter invited to a disciplinary hearing vide a letter dated 3.5.2023 for a hearing scheduled on 4.5.2023. The Claimant has averred that though he was actually invited for a disciplinary hearing, he was not accorded sufficient time to respond to accusations against him. He also avers that he was not served with witness statements on time but that the same were read to him during the hearing.
66. Section 41 of the *Employment Act* 2007 states 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 grounds of



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”.

67. Indeed this is the hearing process expected of an employer. The law envisages that the process must be fair.

68. The Fair Administrative Actions Act (Article No 4 of 2015) also envisages that an employee must be subjected to a process which is fair, expedient, efficient and lawful. Section 4 (3) of the FAAA states as follows:-

“ 4. Administrative action to be taken expeditiously, efficiently, lawfully etc.

(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-

(a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;



- (c) cross-examine persons who give adverse evidence against him; and
- (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.
- (5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.
- (6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of *the Constitution*, the administrator may act in accordance with that different procedure.”

69. The Claimant has averred that he was not given adequate notice and information and materials he needed to rely upon in his defence.
70. It is indeed true that from the time the Claimant was notified of his hearing to the time of hearing, it was just a period of one day which may not have been adequate to prepare for the hearing.
71. That notwithstanding, the Respondents have averred that the Claimant had adequate time to prepare for his case having already been issued with a show cause letter prior to this hearing which had set out accusations against him.
72. In the Court of Appeal CA 62 of 2018 (Nakuru) Nebert Mandala Ombajo vs ICPAK (eKLR 2022) the learned Judges Musinga, Okwengu and Makhandia in determining on case where the appellant averred inadequate notice for a hearing process had this to say;

“The appellant submitted that the hearing notice served on him at 3pm to attend a disciplinary hearing the following day at 9.30 am was extremely short, unreasonable and rushed and the reference in the letter to disciplinary action, instead of hearing, was an indication that the Respondent had already made up its mind to terminate his employment and the invitation for disciplinary action was a mere formality.....”

The appellant had submitted that the disciplinary process was flared from the onset as the Notice to Show Cause did not give adequate time to respond. The appellant faulted the learned Judge for failing to note that he had through an email dated 18.2.2014 complained of the short notice and requested for a further 7 days but that his request for additional time was ignored and this resulted in denial of his right to a fair hearing.

In this regard, the appellant relied on Patrick Abuya vs Institute of Certified Public Accountants of Kenya (ICPAK) & Another 2015 eKLR.....”

“The learned Judge rightly stated that in employment matters the issue of procedural fairness is critical. The fact that appearing for the disciplinary hearing, the appellant had a few hours more than Patrick Abuya, did not make his situation any different from that of Patrick Abuya. Both the Appellant and Patrick Abuya were not given sufficient and adequate time to respond to the allegations or prepare for the disciplinary proceedings. The Respondent has not justified the urgency in undertaking the disciplinary proceedings on the March 4, 2014 when the letters were only written no March 3, 2014.



The fact that the appellant nonetheless did his best to respond to the allegations made against him and attended the disciplinary made against him and attended the disciplinary proceedings on the due date did not ameliorate the prejudice that was caused to him by the inadequate notice. It was expressive, unfair and unjust for the respondent to serve the appellant with a letter for a disciplinary hearing that was to take place the next morning. Such haste reduced the disciplinary hearing to a mere formality to achieve that which the respondent had already predetermined. There was no procedural justice and this vitiated the whole disciplinary process.”

73. Having stated the law herein, it is apparent that the events in the current case are however distinguishable to the Nebert Ombajo case herein where in the Ombajo case, the appellant had actually complained of the short hearing notice vide an email sent to his employer.
74. In the current case, there is no indication that the Claimant complained of being accorded inadequate time to present his case. It is apparent that he had already been served with a NTSC which set out the accusation against him and to which he had responded to within the time allowable and so may have felt adequate enough to face the disciplinary process. The issue of inadequate time for hearing was only raised in this claim which in my view I find is an afterthought.
75. The Claimant attended the hearing as invited on 4/5/2023. The letter inviting the Claimant for his hearing states as follows;

“RE: SUMMONS TO DISCIPLINARY HEARING

Reference is made to the Notice to Show Cause letter dated 28th April 2023 requiring you to show cause why disciplinary action should not be taken against you for breach the Code of Business Principles (COBP) and the [Employment Act](#) 2007.

In the said letter you were asked to submit a written explanation to reach the undersigned not later than Tuesday 2nd May 2023 at 5.00 pm detailing why disciplinary action should not be taken against you for the aforesaid offences.

Further reference is made to your response dated 2nd May 2023, the content of which have been reviewed in full. Without prejudice to the material content of the allegations, we consider that it is appropriate to discuss these allegations within a disciplinary hearing setting. The hearing is scheduled for Thursday, 4th May 2023 at 9.00 am at International Training Center (ITC).

You are entitled to bring a witness/witnesses to the hearing to testify in your defense. You are also entitled to bring another employee of your choice with you as your representative during the hearing in accordance with Section 41 of the [Employment Act](#) 2007.

In case you fail to attend the hearing at the specified date and time, it shall be assumed that you have accepted the charges levelled against you and that you have nothing to say in your defense, and that the management reserves the right to take disciplinary action against you in accordance with the rules and regulations of the company and the Laws of Kenya.”

76. The letter informed the Claimant of his right to bring his witnesses and an employee of his choice in accordance with section 41 of the [Employment Act](#) 2007.
77. The minutes of the disciplinary hearing have been submitted before this court as an exhibit. When the Claimant was asked if he was ready for the hearing he responded “yes”. He was asked if he was calling any witnesses and he said “yes I will be having a witness Nancy Magoma from Mabroukie”.



78. The accusations levelled against him were then presented to him as follows:

“It is alleged that you have violated the following company policies as well s provisions of the [Employment Act](#), 2007:

1. Code of Policy on Respect, Dignity and Fair Treatment which states that:-

Employees MUST NOT engage in any direct behavior that is offensive, intimidating, malicious or insulting. This includes any form of sexual or other harassment or bullying, whether individual or collective and whether motivated by race, age, role, gender, identity, color, religion, country of origin, sexual orientation, marital status, dependents, disability, social class or political views. Employees MUST NOT engage in any indirect behavior which could be construed as sexual or other harassment or bullying, such as making offensive or sexual explicit jokes or insults displaying, emailing, texting, or otherwise distributing offensive material or material of a sexually explicit nature, misusing personal information, creating a hostile or intimidating environment, isolating, or not cooperating with a colleague, or spreading malicious or insulting rumours.

2. Section 44 (3) of the [Employment Act](#) which states that an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.

Particulars of the Breaches

It is alleged that you, Geoffrey Kirui have been sexually harassing female colleagues by persistently asking them to get into sexual relationship with you. It is alleged that on various occasions you requested Faith Baraza, Everline Ngatha and another employee whose identity has been protected to get into sexual relationship with you. With all 3 employees, your advances towards them were persistent even after they said no the first time.

It is further alleged that you are/were in a sexual relationship with an employee called Varsity Chepngetich in exchange for favourable work allocation. Varsity is a Quality Clerk employed at Koiwa Estate who reports directly to you.

Lastly, it is alleged that you have been in a sexual relationship with an employee called Nancy Magoma employed in CTG for an unknown duration of time. Nancy was reporting directly to you when you were the Plant Manager at Mabroukie Factory in 2021”.

79. He responded denying the charges. After this, the Respondents presented a total of 9 witnesses. Witness No. 1, 2, 4 and 5 gave evidence under protected cover. Witness 1 stated that the Claimant had made sexual advances at her which she declined.
80. Witness No. 2 indicated that she had heard rumors that the Claimant was making sexual advances towards female employees.
81. Witness No. 3 Faith Barasa indicated that the Claimant had made sexual advances towards her and she declined. No. 4 on the other hand stated that she knew that one Everlyne Ngatha was in a romantic relationship with the Claimant Mr. Kirui.
82. Witness No. 5 indicated that the Claimant had made no direct sexual advances towards her but she knew that he was in a relationship with one Everlyne Ngatha.
83. Witness No. 6 Everlyne Ngatha stated that the Claimant had made sexual advances to her and also asked for sexual favours from one attachee Priscilla Mawia.



84. Witness No 7 Joan Cheron, No. 8 Gladys Osuna, No. 9 Nancy Magoma all indicated that the Claimant had not made any sexual advances on them.
85. The only unstartling issue in this case is the way evidence was presented. All the 9 witnesses testified but the Claimant was not given an opportunity to cross examine any of them.
86. The Claimant also never testified but was basically cross examined most probably by the panel and he admitted he asked female colleagues out on dates but the dates never materialized. He admitted asking Faith Barasa and Faith Maluki out but they both declined in a manner which did not hurt anybody. He declined going out with any employee or attachee. He also declined having any romantic relationships with female employees.
87. The Respondents have submitted that the Claimant was given a fair hearing and they pointed out that in the minutes of the disciplinary hearing the Claimant admitted to making sexual advances against female employees and in particular Faith Barasa, Everlyne, Faith Maluki and Daisy (page 216).
88. At page 218 he repeats that “(I didn’t manage to but I confirm I made sexual advances to the person called Daisy”.
89. He also indicated at page 222 that “The allegations that I made sexual advances is true but I did not insist I learnt today that one-off is enough and before today I thought 2 was ok I have learnt a lot from this investigation....”
90. Let me now turn to the fairness of the disciplinary process. As indicated above, the Claimant was not given an opportunity to cross examine the witnesses who gave advance evidence against him.
91. This breaches the provision of section 41 of the [Employment Act](#) 2007 cited herein. The charges were also read to the Claimant but he was not given an opportunity to present his case because from the minutes, he was only taken through lengthy cross examination by the panel in order to clarify the evidence of the Respondent’s witnesses.
92. The disciplinary hearing was flawed in many aspects. The failure to grant the Claimant an opportunity to present his evidence after charges were read to him and failure to have him cross examine the witnesses renders the entire process unfair and a breach of the Claimant’s right to a fair hearing.
93. As concerns the reasons for which the Claimant was terminated, the same are drawn from the termination letter which indicate his breach of code policy on Respect Dignity and Fair treatment where it is alleged that he sexually harassed female colleagues by persistently them to get into sexual relationships with him. The female colleagues were named accordingly. It was also indicated that he had a sexual relationship with an employee called Varsity Chepngetich in exchange for favourable work allocation.
94. The Claimant denied all these allegations but in principle he admitted he made some sexual advances to certain female employees but they turned him down.
95. Sexual harassment has been defined under section 6 of the [Employment Act](#) 2007 as follows:

“Section 6, (1) An employee is sexually harassed if the harassment.

employer of that employee or a representative of that employer or a co-worker—

(a) directly or indirectly requests that employee for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express

—



- (i) promise of preferential treatment in employment;
 - (ii) threat of detrimental treatment in employment; or
 - (iii) threat about the present or future employment status of the employee;
- (b) uses language whether written or spoken of a sexual nature;
 - (c) uses visual material of a sexual nature; or
 - (d) shows physical behaviour of a sexual nature which directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee and that by its nature has a detrimental effect on that employee's employment, job performance, or job satisfaction.
- (2) An employer who employs twenty or more employees shall, after consulting with the employees or their representatives if any, issue a policy statement on sexual harassment.
- (3) The policy statement required under subsection (2) may contain any term the employer considers appropriate for the purposes of this section and shall contain—
- (a) the definition of sexual harassment as specified in subsection (1);
 - (b) a statement—
 - (i) that every employee is entitled to employment that is free of sexual harassment;
 - (ii) that the employer shall take steps to ensure that no employee is subjected to sexual harassment;
 - (iii) that the employer shall take such
- disciplinary measures as the employer deems appropriate against any person under the employer's direction, who subjects any employee to sexual harassment;
- (iv) explaining how complaints of sexual harassment may be brought to the attention of the employer; and
 - (v) that the employer will not disclose the name of a complainant or the circumstances related to the complaint to any person except where disclosure is necessary for the purpose of investigating the complaint or taking disciplinary measures in relation thereto.
- (4) An employer shall bring to the attention of each person under the employer's direction the policy statement required under subsection (2)".

96. The Respondents own code of policy defines sexual harassment as follows:

“Ekatera defines sexual harassment as unwanted or unwelcome sexual conduct or advances which create discomfort, embarrassment or feelings of insecurity. Sexual harassment is a display of power which is intended to intimidate, coarsen or degrade another employee...”



97. The ILO Convention 190, Violence and Harassment Convention 2019 defines “violence and harassment” in world of work as follows:

“A range of unacceptable behaviours and practices or threats thereof whether a single occurrence or repeated that aim at, result in or are likely to result in physical, psychological, sexual or economic harm and includes gender-based violence and harassment”.

98. Making sexual advances to his female colleagues whether once or in many instances falls squarely under this definition of sexual harassment and violence and harassment at work.

99. Kenya has not ratified convention 190 but the Law of Sexual harassment is well domesticated in Kenya and by virtue of Article 2 of *the Constitution*, International law form part of the law of Kenya and by extension then it is apt also borrowing from this definition.

100. Section 43 of the *Employment Act* 2007 states as follows;

“43 (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”.

101. The gist of the law is that an employer can only terminate an employee if there are valid reasons.

102. Having considered the evidence on record, I come to the conclusion that there were valid reasons to warrant the Claimant’s dismissal.

103. Section 45 (2) of the *Employment Act* 2007 states as follows:

“

“(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— related to the employees 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”.

104. I have alluded to the unfair disciplinary process meted against the Claimant herein but find there existed valid reasons for the termination of the Claimant. It therefore follows that the termination of the Claimant herein was unfair in terms of Section 45 (2) of the *Employment Act* 2007.

Remedies_

105. Having found as above, I now turn to the remedies sought by the Claimant herein. The Claimant sought to be reinstated or



re-engaged to work. However having found that there were valid reasons for his termination, reinstatement or re-engagement cannot be an option for him.

106. He also sought to be paid compensation for unlawful and unfair termination. Again given that there were valid reasons for his termination, I will exercise my discretion and award him 3 months salary as compensation and only for the reasons that the disciplinary process was flawed = $3 \times 378,656 = 1,135,969.38/=$

107. As per his employment contract the contract could be terminated after issuing 2 months' notice. In line with this, I award the Claimant 2-month salary as notice pay accordingly
 $= 378,656.46 \times 2 = 757,312.92$

Total awarded – 1,893,282.3

Less statutory deductions

108. Respondents will pay costs of this suit plus interest at court rates with effect from the date of this judgment.

JUDGMENT DELIVERED VIRTUALLY THIS 9TH DAY OF JULY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of: -

Kipkoech for Claimant – Present

Wesonga holding brief Onyango for Respondent – Present

Court Assistant - Fred

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