



Mbugua v Resort (Cause E096 of 2022) [2024] KEELRC 1950 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1950 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E096 OF 2022**

M MBARŪ, J

JULY 25, 2024

BETWEEN

PHILIP MBUGUA CLAIMANT

AND

BAOBAB RESORT RESPONDENT

JUDGMENT

1. The issue in dispute – unlawful and unfair termination of employment. The Claimant is an adult male. The Respondent is a company in the hotel and tourism industry operating in Kwale County within the Republic of Kenya.
2. The Respondent employed the Claimant on 15 December 1996 as an Assistant Food & Beverage Manager. He rose through the ranks from an Assistant Food & Beverage Manager to Operations Manager, a position he held and finally resigned from on 14th March 2015 due to personal reasons.
3. In 2016, the Respondent invited and re-employed the Claimant as a Deputy General Manager vide a letter of appointment dated 6th October 2016. The Claimant's employment was inclusive of a payment package comprising of the basic salary and other benefits as listed below;
 - a. Gross Monthly Salary: 470,000/- subject to statutory taxes;
 - b. Medical for self and family as per the company policy, with a limit of 4 dependents, children below 18 years of age.
 - c. Family housing is to be provided for by the resort.
 - d. The pension scheme.
 - e. A company line to be used in the official communication.
 - f. Life insurance.



- g. Child education of 300,000/- annually paid directly to nominated schools.
 - h. Self-owned car with a fuel allowance of 20,000/monthly.
4. From January 2020 to the time of separation in August 2020, the Claimant's basic monthly salary gradually increased to Kshs. 581,800.
5. On 3rd June 2020, senior management of the Respondent convened a crisis meeting due to the devastating effects of the COVID-19 pandemic, at the said meeting, the Respondent's General Manager was tasked with scaling Human Resources since the Hotel & Tourism industry was on its knees due to the global cessation of movement. In the same month of June 2020, while the Claimant was on leave, eight of the Respondent's employees in a malicious and well-crafted scheme aimed at terminating his employment wrote, published and circulated letters to the General Manager broadcasting false information on and about the Claimant. They alleged that the Claimant took advantage of his position as the Deputy General Manager and occasionally harassed them sexually. The eight employees of the Respondent who raised complaints of sexual harassment against the Claimant are:
- 1. Jedidiah Murungi (Housekeeping Department)
 - 2. Habiba Amani (Kitchen Department)
 - 3. Judy Atieno (Animation Department)
 - 4. Susan Awino (Reservations Department)
 - 5. Eddah Wanjiku (Reservations Department)
 - 6. Felistus Kimunyi (Front Office Department)
 - 7. Joyce Memusi (Housekeeping Department)
 - 8. Truphosa Atieno (Accounts Department)
6. The claim is that the Claimant was shocked when he received an email on 3 July 2020 from the General Manager on the allegations of eight employees without any unjustifiable reasons or evidence alleging that he had been sexually harassing them for approximately two years. On the same day, the Respondent's General Manager informed the directors of these allegations and that the Claimant should "honourably resign" based on the allegations raised against him. This advice was done before the respondent could conduct any investigations into the matter and before the claimant was informed of these allegations.
7. On 4 July 2020, the Claimant responded to the General Manager's email expressing his concerns as to the allegations lodged against him. He referred to the said allegations as choreographed and malicious. When he was supposed to report back to work on 7th July 2020, a few days after burying his father who had succumbed to a prolonged illness, his brother and sister were diagnosed with cancer and was forced to seek an extension of his leave which was expressly approved by the General Manager and the Board of Directors who sympathized with him.
8. Through a letter dated 7 July 2020, the Respondent informed the Claimant that he had been suspended from his employment until the conclusion of the investigation and hearing of the matter was concluded.
9. Additionally, through a letter dated 8 July 2020, the Claimant addressed the allegation raised by the Complainants and reiterated there was a conspiracy to have his employment terminated. The



Claimant also questioned the Complainants' motive and their failure to adhere to the Respondent's Sexual Harassment Policy which required that matters of sexual harassment in the workplace be reported to the Gender Exploitation Committee within 24 hours of their occurrence, a fact well within the knowledge of the 8 Complainants. All eight Complainants decided to forward their written complaints of alleged sexual harassment to the Deputy General Manager in June 2020. No complaint had been reported to the Gender Exploitation Committee before. Consequently, raising such weighty allegations several months after the alleged occurrence is questionable and a precise indication of malice by the Complainants who made these complaints when the Claimant was on leave.

10. The Claimant had proceeded for leave on 6 April 2020 and it was not until June 2020 that all the Complainants coincidentally raised their concerns. The Complainants were choreographed in a scheme to have the Claimant resign or have his employment terminated by the Respondent. The Manager forwarded the allegations and the Claimant's responses to the Respondent's Disciplinary Committee for further investigations of the matter. The Disciplinary Committee proceeded to issue a notification of the disciplinary hearing for the 3 of August 2020. The Claimant requested the Disciplinary Committee to allow for the forensic analysis of the unaltered phone records and conversations between the Respondent's General Manager's phone and the eight Complainants for the details of their phone and email communication to be ascertained. The Disciplinary Committee declined the Claimant's request which was to form part of the evidence he intended to present before the Committee at the hearing to demonstrate that the allegations against him were a well-orchestrated scheme by the Respondent's employees who were intimidated by his exemplary performance in his line of work and thus planned on getting rid of him.
11. The Claimant through his advocates requested for the postponement of the disciplinary hearing from the 3 of August 2020 to the 2 and 3 September 2020 to adequately prepare his defence and plan to have his lawyers present during the hearing. The said request was declined and the Respondent proceeded with the hearing on 10 August 2020, despite the Claimant's sufficient notice of his advocates' unavailability on the stipulated 10 August 2020.
12. On the day set for the disciplinary hearing, the Respondent proceeded in the absence of the Claimant despite his intention to attend and present his defence in violation of the rights to a fair hearing under Article 50 of *the Constitution* and Section 41 of the *Employment Act*. The Disciplinary Committee was not impartial as two out of the three of its members namely; Gabriel Kipsang and Sharlet Lulu were conflicted as they were already members of the Gender Exploitation Committee who had pre-judged the Claimant based on the allegations and recommended the instigation of the disciplinary meeting. The chairman of the disciplinary panel Arvindan was mentioned by one of the Complainants as having prior knowledge of the complaints raised. This information could have prejudiced his findings/ outcome. The Respondent had not set out the procedure used in selecting members of the disciplinary committee which was hastily formed by the General Manager who had a scheme to get rid of the Claimant, to which he selected his preferred members to sit in the committee to swiftly and efficiently actualize his plans of ousting the Claimant.
13. In further violation of the Claimant's right to a fair hearing before an impartial tribunal or body, the Disciplinary Committee went on to deliver its findings on 17 August 2020 notwithstanding the Claimant's absence, they then proceeded to issue a termination letter dated 17 August 2020.

Dissatisfied, the Claimant appealed the decision and submitted the grounds of his appeal which was received by the Appeal Panel and the hearing date set for 23 September 2020. The Claimant responded through his advocates vide a letter addressed to Mohamed Hersi, the Respondent's Groups Operations Director and a member of the Appeal Panel, where he challenged the allegations raised against him and



- questioned the integrity of the disciplinary process initiated by the General Manager. The Appeal Panel upheld the decision of the Disciplinary Committee communicated in a letter dated 17 August 2020
14. The claim is that the Respondent terminated the Claimant's employment on grounds of sexual harassment without evidence presented by any of the eight complainants other than their oral and written statements. There was no evidence of any written messages or recorded conversations between the Claimant and the Complainants to back up their allegations of sexual harassment, despite ceaseless mentions of the explicit communication from the Claimant to the Complainants. Termination of employment was in disregard of sections 41 and 45 of the [Employment Act](#) which advocates for the adherence of procedural and substantive justice in the event of the termination of an employee's employment.
 15. The claim is that termination of employment was a well-orchestrated scheme by the General Manager to actualize the downscaling of the Human Resources proposed in the COVID-19 Crisis meeting held on 3 June 2020. Termination of employment was irregular, unlawful and unfair as there was no valid reason for his unprecedented dismissal from employment.
 16. The claimant is seeking the following orders;
 - a. A declaration that the Claimant's dismissal from employment was unlawful and unfair.
 - b. 12 months' salary as compensation for unlawful and unfair termination calculated at Kshs. 581,000 x 12 = 6, 973,200;
 - c. Punitive damages;
 - d. Costs of the suit.
 17. The claimant testified in support of his case that he worked diligently for the respondent until August 2020 and his last salary was Kshs.581, 800 per month. On 3 June 2020, the senior management of the Respondent convened a crisis meeting due to the devastating effects of the COVID-19 pandemic, at the said meeting, the General Manager was tasked with downscaling the Human Resources since the Hotel & Tourism industry was on its knees due to the global cessation of movement. In the same month of June 2020, while the claimant was on leave, 8 employees wrote, published and circulated letters to the General Manager broadcasting false information on and about me, they alleged that he took advantage of his position as the Deputy General Manager and occasionally harassed them sexually.
 18. The claimant testified that he was shocked by these allegations since he knew these were fabrications by the general manager. He asked that he be supplied with the evidence particularly the complaints made against him. He also learnt that the general manager had shared the information with the directors meant to injure his reputation and lead to termination of employment. The allegations made were not justified and meant that for 2 years these matters had not been reported until he took his annual leave.
 19. The claimant testified that on 3 July 2020, the general Manager informed the company directors of the allegations raised against him and that he should "honourably resign" based on the allegations raised. These communications were done before the respondent had undertaken any investigations or allowed the claimant a fair hearing meaning that there was a pre-determined decision to terminate his employment without justification.
 20. On 4 July 2020, the claimant replied to the allegations made against him and denied what the 8 complainants had said. He was due to resume work from annual leave on 7 July 2020 but he lost his parent and also had his siblings diagnosed with illness. He therefore requested more time off which was allowed but was issued with suspension pending investigations. In a letter dated 8 July 2020, the claimant replied to the allegations made. The claimant noted that the accusations made against him



- should have been reported to the Gender Exploitation Committee within 24 hours of their occurrence, a fact well within the knowledge of the 8 Complainants but this was not done. The respondent had no mechanisms for disciplinary hearing and the entire process was micro-managed by the general manager.
21. The claimant testified that he was invited for a disciplinary hearing on 3 August 2020. He was requested to be supplied with the unaltered phone records and conversations between the General Manager's phone and the 8 Complainants for the details of their phone and email communication to be ascertained. This was not allowed and the hearing proceeded despite the claimant writing that his advocates were only available on 2 and 3 September 2020. Following the disciplinary hearing, a notice terminating employment was issued.
 22. Upon cross-examination, the claimant testified that he had good working relations with his colleagues including the 8 complainants. All staff had a free working environment and interacted well and hugging was a usual and acceptable practice. He would freely hug his colleagues and did not receive any compliant. He did not receive any sexual harassment accusations until he took his annual leave. He had been a member of the Gender Exploitation Committee and no case was brought to his attention. He was therefore shocked to receive the complaints made against him and therefore asked for the details to appreciate what the allegations were and to be able to respond. This was not done but he responded and denied all that had been stated. He had good working relations with management including the general manager but there were efforts to reduce staff following the COVID-19 pandemic and this was used to terminate his employment.
 23. The claimant testified that the general manager orchestrated the termination of his employment for ulterior motives. He received the alleged complaints from the 8 employees, shared them with the directors and ensured the disciplinary committee was by persons who would ensure his employment was terminated. His requests to have the disciplinary hearing adjourned to be accompanied by his advocate were not respected and were not taken into account and the hearing proceeded in his absence. This was procedural and unfair and the orders sought should be issued.

Response

24. In response, the respondent admitted that the claimant was an employee save 8 female employees complained that the Claimant had been sexually harassing them. The Respondent placed the Claimant on paid leave until the completion of investigating the allegations of sexual harassment against the Claimant by the 8 female employees. through its Gender Exploitation Committee, the Respondent established that the reason the female employees did not report the sexual harassment within 24 hours was that they were afraid of reprisals from the Claimant who was by far their senior at work being the Deputy General Manager of the company.
25. On 25 July 2020, the Respondent issued the Claimant with a Notice for disciplinary hearing which was scheduled to be held on 3 August 2020. At the time, the Respondent did not have possession, control, or access to the phone records and conversations or email communications between the then General Manager of the Respondent and the 8 female employees.
26. On 4 July 2020, the Respondent shared with the Claimant all the materials that the Respondent had in support of the allegations of sexual harassment against him in good time to enable the Claimant to prepare his defence. The Respondent gave the Claimant sufficient time to prepare his Defence by granting the request made by the Claimant to postpone the disciplinary hearing from 3 August 2020 to 10 August 2020. The Respondent proceeded with the disciplinary hearing on 10 August 2020 in the absence of the Claimant after giving the Claimant sufficient notice of the new date of the disciplinary hearing, an opportunity to attend the hearing and give his evidence upon being satisfied



that the Claimant had chosen not to attend the disciplinary hearing or otherwise give his defence. Despite such non-attendance, the disciplinary committee fairly and impartially considered his written representations in the letters dated 8 July 2020, 17 July 2020, and 25 July 2020 before making its final decision. Hence the allegations that the respondent violated the right of the Claimant to a fair hearing under Article 50 of *the Constitution*, section 41 of the *Employment Act* are without merit.

27. The response is also that the allegations that the members of the disciplinary committee were biased against the Claimant are without proof. There was no haste in forming the disciplinary committee or bias in selecting members of the committee. The claimant had the opportunity to object involvement of any person in the disciplinary process and indeed through a letter dated 17 July 2020, he objected to the involvement of the then General Manager Sylvester Mbandi whereupon the said general manager ceased further involvement.
28. On 14 August 2020, the Respondent notified the Claimant that the findings of the disciplinary committee will be delivered on 17 August 2020 at 9 o'clock at the Porini Conference Room within Baobab Beach Resort. The Respondent issued the Claimant with a termination of employment letter on 17 August 2020,
29. The case against the claimant was that he was sexually harassing employees which violates the Policy Statement of the Respondent on Sexual Harassment, section 6 of the *Employment Act*, and is a serious criminal offence. There was a fair reason for terminating the employment of the claimant after taking into consideration the written complaints of 8 female employees, the consistent and detailed testimony of the said female employees at the disciplinary hearing, the response of the Claimant to all the complaints and all other written representations by the Claimant. The evidence taken and reported by the Gender Exploitation Committee, it was the duty of the employer to protect the female employees from sexual exploitation and harassment. The Respondent concluded that there was genuine reason to believe that the Claimant had sexually harassed the 8 female employees.
30. The respondent employed fair procedure.
31. The response is also that this Honorable Court does not have jurisdiction to hear or determine this matter because the truth or otherwise of the allegations of sexual harassment by the 8 female employees is issued sub-judice to previously instituted proceedings in which the Claimant has sued the 8 female employees and the then General Manager, one Sylvester Mbandi for defamation. The aforementioned previously instituted proceedings are;
 - a. CMCC NO. 1320 OF 2020 - Kwale
Philip Mbugua =Vs= Jedidah W. Murungi & Sylvester Mbandi
 - b. CMCC NO. E18 OF 2020 - Kwale
Philip Mbugua =Vs= Joyce Memusi & Sylvester Mbandi
 - c. CMCC NO. E14 OF 2020 - Kwale
Philip Mbugua =Vs= Truphosa Atieno & Sylvester Mbandi
 - d. CMCC NO. E15 OF 2020 - Kwale
Philip Mbugua =Vs= Judy Atieno & Sylvester Mbandi
 - e. CMCC NO. E16 OF 2020 - Kwale
Philip Mbugua =Vs= Habiba Amani & Sylvester Mbandi



- f. CMCC NO. E19 OF 2020 - Kwale
Philip Mbugua =Vs= Miriam Dayo & Sylvester Mbandi
 - g. CMCC NO. E17 OF 2020 - Kwale
Philip Mbugua =Vs= Felistus Kimunyi & Sylvester Mbandi
 - h. NO. E029 OF 2020 - Kwale
Philip Mbugua =Vs= Eddah Wanjiku & Sylvester Mbandi
 - i. CMCC NO. E022 OF 2020 - Kwale
Philip Mbugua =Vs= Susan Owino & Sylvester Mbandi
32. The issue of sub judice arises from the fact that the claim herein is directly and substantially in issue in the aforesaid previously instituted proceedings in Kwale and the matter directly and substantially in issue in this matter is the same. That is, whether on a balance of probabilities the court will believe the allegations of the foresaid 8 female employees that the claimant sexually harassed them during his employment by the respondent. The respondent applied to be joined as a defendant in the said previously instituted suits but the application was disallowed on 22 September 2020. There is an appeal pending before the High Court Civil Appeal No. 164 of 2021 Baobab Beach Resort & Spa vs Philip Mbugua and 2 others against this decision. The claim by the claimant herein should be dismissed with costs.
 33. In evidence, the respondent called Jedidah Murungi, Habiba Amani, Judy Atieno, Susan Awino, Eddah Wanjiku, Felistus Kimunyi, Joyce Memusi, Truphosa Atieno, and Silvester Mbadi. Various work records were filed including telephone communications between the claimant and the various employees concerning the complaints made about sexual harassment.
 34. The 8 employees who filed complaints of sexual harassment against the Claimant were called as witnesses for the Respondent. Habiba Amani testified that the Claimant would send her unsolicited money as "credit" which she understood was to make her accept his advances and the Claimant would often give her inappropriately long hugs which he admitted to in Court and even remarked that "if hugging is a crime, then I am guilty." Susan Owino testified that the Claimant sexually harassed her from 2018 to 2020 while at the reception where the Claimant knew that there were no cameras. that the Claimant would call her incessantly have inappropriate conversations with her and produce messages sent by the Claimant. Eddah Wanjiku testified that the claimant started harassing her in 2017 when she was on probation. That the sexual harassment had started negatively impacting her work. Joyce Mumesi testified that the Claimant asked for her number so that he could call her which he did using very sexual language and she reported the matter to her supervisor Miriam Dayo who changed her shifts to protect her from the sexual harassment and sometimes made sure she was accompanied by a trainee or a male colleague to make sure she is safe whenever she went to clean the Claimant house.
 35. Felistus Kimunyi testified that the Claimant harassed her by spanking her behinds and asking her "hizo vitu nitakula lini or nipe hizo vitu " and she was unable to keep track since it was an everyday occurrence. She testified that she expressly told the Claimant that she did not want his sexual advances but he persisted. She shared her traumatic experiences with her colleagues Jedida Murungi and Truphosa Atieno who informed her that she was experiencing the same at the hands of the Claimant.
 36. Truphosa Atieno corroborated and gave evidence that the Claimant sexually harassed her too. In one instance, the Claimant stood next to her table and started rubbing her back and feeling her bra strap. was startled and froze and when she recovered from the shock she expressly told the Claimant to never



- do that again. Judy Atieno testified that the Claimant verbally sexually harassed her. She attempted to get the sexual harassment incident in writing by text but the Claimant insisted on calling, claiming he was poor at texting.
37. Sammy Mwaivu testified that he received complaints of sexual harassment against the Claimant by several female employees of the Respondent including Habiba Amani and Felistus Kimunyi. he had also received complaints from another colleague by the name Rachel Mae who had gotten fed up with the sexual harassment and left employment with the Respondent.
 38. Silvana Lelesit confirmed that she interviewed the ladies who had complained after receiving complaints forwarded by the General Manager. the complainants and the Claimant were invited for the Committee hearings but only the Complainants attended. She corroborated the fact that in 2019 the Claimant, then chair of the Gender Exploitation Committee had mishandled a complaint of sexual harassment. the complaints in 2020 were unique in nature because the subject employee was a very senior person within the organization.
 39. Silvester Mbandi testified that he had an obligation to receive any complaints received by his office and channel them to the relevant authorities within the Respondent organization. He stated that he perceived that the sexual harassment was creating a toxic work environment and it called for swift and decisive action which is why forwarded the complaints to the Gender Exploitation Committee.
 40. At the close of the hearing both parties filed detailed written submissions. These are summarized.
 41. The claimant submitted that Respondent through its then General Manager, Sylvester Mbandi in conjunction with one Jedida Murungi made concerted efforts to terminate his employment and frantically recruited some of its female employees to back its malicious scheme. Habiba Amani, one of the alleged victims of sexual harassment noted that the Claimant was neither present at the Gender & Exploitation Committee hearing on 14 July 2020 nor the Disciplinary Committee hearing on 10 August 2020. In both instances, she proceeded to testify against the Claimant in his absence. she reported the alleged sexual harassment at Diani Police Station on 1st December 2020, a clear indication that it was an afterthought and a reaction to the Claimant filing a case against her in Kwale Case No. E16 of 2020. She testified that she was advised by Sammy Mwaivu to file her complaints.
 42. This evidence is replicated for all the witnesses called. None testified in the presence of the claimant.
 43. The claimant submitted that for want of procedure, the termination of the Claimant's employment was unfair. In the case of Walter Ogal Anuro vs Teachers Service Commission [2013] Eklr, the court held that due process before termination of employment is mandatory. the Right to a fair hearing is underpinned under Article 50 of *the Constitution* of Kenya. It is the Claimant's informed submission that the Respondent contravened the express provisions of Article 50 when it terminated his employment without according him a chance to be heard.
 44. Gabriel Kipsang and Sharlet Lulu sat at both the Gender Exploitation Committee meeting and the Disciplinary hearing and signed the reports emanating therefrom. Arvandan Dhamodharan who was the chairperson of the Disciplinary. The panels were biased and denied the claimant a fair hearing.
 45. Sexual harassment is criminal and as such the Respondent had the choice to conduct its internal investigation or involve the relevant investigative agency. the Respondent has failed to adduce any evidence of how it conducted investigations in respect of the sexual harassment allegations against the Claimant herein. In the case of Patrick Njuguna Kariuki v Del Monte (K) Limited, Cause No. 9523 of 2011 and the case of Mathew Kipchumba Koskei V Baringo Teachers Sacco the Court held that;



46. where the employer has initiated and concluded the disciplinary proceedings on account of a misconduct which also has substantially been subject of a criminal process for which the employee is exculpated or found innocent, the employer is thereby entitled to setting aside administrative punitive decision and the employee is entitled to relevant legal remedies as may be found to apply and to be just.
47. Without subjecting the claimant to a disciplinary hearing, the decision taken to terminate his employment was punitive and he claims notice pay, compensation and punitive damages. In *Daniel Musinga T/A Musinga & Co. Advocates v Nation Newspapers limited* (2006) eKLR, where the court awarded the Plaintiff Kshs. 10,000,000 in punitive damages.
48. The claimant submitted that the gender policy was never incorporated into the contracts of employment and therefore cannot form any basis of application as held in the case of *Oyatsi v Judicial Service Commission (Petition El 11 of 2021)*. The orders sought in the claim should be awarded with costs.
49. The respondent submitted that the Claimant with a senior manager but betrayed this trust and took advantage of his seniority to sexually harass the junior female employees of the Respondent. 8 female employees made reports to the respondent and faced with such an overwhelming number of complaints, having a legal obligation to maintain a sexual harassment-free working environment, investigations were initiated. The claimant was suspended to allow for investigations. the Respondent formed a genuine belief that the Claimant indeed sexually harassed the junior female employees. Accordingly, the Respondent terminated the employment of the Claimant in accordance with the law.
50. The standard of proof for valid reason for termination on the part of the employer is provided for under section 43 (2) of the *Employment Act* as 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. in the case of *Charles Musungu Odana v Kenya Ports Authority* [2019] eKLR as cited in the case of *Kombo v Riley Falcon Security Services Ltd* [2023] eKLR the court interpreted section 43 (2) of the *Employment Act* as follows;
51. It is now clear that the burden placed on an employer by Section 43 of the Employment - Act is to establish a valid reason that would cause a reasonable employer to terminate employment.
52. The Court of Appeal affirmed this position in the case of *Reuben Ikatwa & 17 Others v Commanding Officer British Army Training Unit Kenya & Another* [2017] eKLR and held that;
- In adjudicating on the reasonableness of the employer 's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts, it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts...
53. The respondent submitted evidence against the claimant that there were reports of him sexually harassing several employees, the matter was investigated by the Gender and Exploitation committee and he was invited to attend disciplinary hearing to make his representations but he failed to oblige.
54. The respondent submitted that All the employees who were sexually harassed except Silvana Lelesit testified that they were not aware of the Gender Exploitation Policy before they made their complaints and they only became aware of it at the Gender Exploitation Committee hearing. They were therefore not aware that they were supposed to report sexual harassment 24 hours after the incident. The employees were to make reports to the committee chairperson, who happened to be the claimant. He was the perpetrator. In the case of *Margot Rendall-Speranza, v International Finance Corporation*, (Decision of 1997) (1998) the World Bank Administrative Tribunal considered a matter where the



complainant had delayed in reporting sexual harassment by her superior for two years. The tribunal held that;

55. The Tribunal appreciates that delay in reporting instances of harassment may be explainable for reasons other than that the victim has welcomed the sexual advances. There may be strong pressures not to make even a well-based complaint, such as fear that one will be branded as a troublemaker, a fear that one's image for ethical probity may become tarnished, uncertainty about the definitions in the employer's policy or the commitment to its implementation, a wishful belief that the victim can handle the matter herself without creating undue inconvenience or embarrassment to others, and ultimately perhaps by a fear of retaliation by the harassing party.
56. There was no malice to the reports of sexual harassment. The claimant, through his conduct, engaged in misconduct leading to termination of employment. There were valid and genuine reasons for termination of employment under the provisions of Section 43 of the *Employment Act*. His claim that there was a conspiracy to terminate his employment is without foundation.

Determination

57. In response, the respondent raised the issue of jurisdiction. That this court has no power to hear and determine a case of sexual harassment by the 8 female employees, the claim is sub-judice to previously instituted proceedings in which the Claimant has sued the 8 female employees and the then General Manager, one Sylvester Mbandi for defamation. The basis of these objections were suits filed in Kwale Magistrates' Court;
 - a. CMCC NO. 1320 OF 2020 - Kwale
Philip Mbugua =Vs= Jedidah W. Murungi & Sylvester Mbandi
 - b. CMCC NO. E18 OF 2020 - Kwale
Philip Mbugua =Vs= Joyce Memusi & Sylvester Mbandi
 - c. CMCC NO. E14 OF 2020 - Kwale
Philip Mbugua =Vs= Truphosa Atieno & Sylvester Mbandi
 - d. CMCC NO. E15 OF 2020 - Kwale
Philip Mbugua =Vs= Judy Atieno & Sylvester Mbandi
 - e. CMCC NO. E16 OF 2020 - Kwale
Philip Mbugua =Vs= Habiba Amani & Sylvester Mbandi
 - f. CMCC NO. E19 OF 2020 - Kwale
Philip Mbugua =Vs= Miriam Dayo & Sylvester Mbandi
 - g. CMCC NO. E17 OF 2020 - Kwale
Philip Mbugua =Vs= Felistus Kimunyi & Sylvester Mbandi
 - h. NO. E029 OF 2020 - Kwale
Philip Mbugua =Vs= Eddah Wanjiku & Sylvester Mbandi
 - i. CMCC NO. E022 OF 2020 - Kwale
Philip Mbugua =Vs= Susan Owino & Sylvester Mbandi



58. In a ruling herein delivered on 4 May 2023, the court addressed these legal issues. The jurisdiction challenge was dismissed.
59. At the core of the claim herein is that the claimant was sexually harassing junior female employees of the respondent. On various dates from the year 2016 to the year 2020, different female employees were sexually harassed by the claimant who was the deputy general manager. There were complaints made by 12 employees all on 6 June 2020 to the general manager, under whom the claimant was working.
60. At the time of these complaints, the claimant was on his annual leave which had been extended after facing personal challenges and the loss of his parent and his siblings being diagnosed with terminal illnesses. The claimant commenced his annual leave on 6 April 2020 and it was not until June 2020 that all the Complainants were made. Part of the reasons given for making these complaints at this particular point was that the harassed employees heard that the claimant was due to return to work and feared that he would continue with his acts of harassment. Of particular interest to the court was the evidence by Ms. Jedidah Murungi who testified at length that she knew the claimant long before joining the employment of the respondent. he was a father figure to her having been introduced to him by her father and had maintained cordial ‘family-like’ relations until the claimant decided to sexually harass her while at work in June 2018. She narrated several instances in August 2018, December 2019, and other instances when she became pregnant. Upon returning to work after maternity leave, Ms. Murungi testified that the claimant picked on her and persisted with sexual harassment and when she refused to oblige, he started victimizing her. She gave instances that the Claimant issued an email on 5 October 2019 accusing her of failing to attend a meeting on 1st October 2019 yet she was on off duty the evening of 29 and 30 September 2019. The meeting had not been scheduled. She reported to work on 1st October 2019 and was informed that the notifications for the meeting were on WhatsApp yet she had been offline all through the off day. She verbally explained to the Claimant but four days later was issued with an email to tarnish her image at the workplace.
61. For her, Ms Murungi, this was the Claimant’s subtle way of communicating to her to either give in to his sexual advances or face the consequences.
62. The Claimant’s actions and words were sexual and amounted to sexual harassment at the workplace and was embarrassed and disappointed that despite her best efforts at work, the Claimant was taking advantage of his position to frustrate her merely because she had on several occasions rejected his inappropriate sexual advances.
63. Why did she decide to report these events to the respondent? her case was that she heard that the claimant would resume after annual leave on 7 June 2020 hence On 3/06/2020 she wrote a letter to the General Manager pleading with the Management to investigate my complaint of sexual harassment perpetrated by the claimant and put it to an end.
64. Sexual harassment in the workplace is prohibited under the law. Section 6 of the *Employment Act* has forbidden the act of direct or requests for sexual contact or the use of language or use of visual or show of a sexual nature that is unwelcome and offensive to that employee and that by its nature has a detrimental effect on that employee’s employment, job performance, or job satisfaction.
65. Where such conduct is compounded by acts that are defined under Section 6(1) (a) of the *Employment Act* to include;
- (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;
- 66. This is sexual harassment.
- 67. Though defined, sexual harassment happens in the private and most pervasive manner. Hence, under Section 6(2) of the *Employment Act*, an employer who employs more than 20 employees has the legal duty to consult with the employees and issue a policy statement in this regard;
 - (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.
- 68. What then should be in the policy?
- 69. Employers are guided under Section 6(3) of the *Employment Act*, under the policy against sexual harassment includes the following;
 - (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 investigating the complaint or taking disciplinary measures in relation thereto.
- 70. The legal duty is vested upon the employer to secure its employees against sexual harassment at the workplace. The employer should have in place a policy that defines what is sexual harassment and further take steps to ensure that there is no such harassment. Where such matters are reported, the employer must take action and discipline the employee who commits sexual harassment.
- 71. Fundamentally, the employer is required not to expose the employees who have filed complaints about sexual harassment. Protection should be ensured.
- 72. Did the respondent as the employer have such a policy? Did the employees including the claimant and those who made complaints have such a document? What was defined as sexual harassment?
- 73. In this case, the claimant readily admitted that the entire workforce at his duty station was very friendly and lived as a family. Hugging each other was the norm. He would hug his fellow employees as a sign of appreciation and greetings. He did not find offence in doing so. No employee complained about it. He was a member of the Gender Exploitation committee since the year 2016 and for the entire time, only one case of sexual harassment had been reported and the matter was addressed. He was therefore shocked to hear that he was alleged to have been sexually harassing 12 employees from the year 2016 to 2020 and none had been reported until he was about to resume work after taking annual leave.



74. Under the Declaration on Fundamental Principles and Rights at Work, the ILO defines sexual harassment as a sex-based behaviour that is unwelcome and offensive to its recipient. For sexual harassment to exist these two conditions must be present;
- 1) Quid Pro Quo, when a job benefit - such as a pay rise, a promotion, or even continued employment - is made conditional on the victim acceding to demands to engage in some form of sexual behaviour; or;
 - 2) Hostile working environment in which the conduct creates conditions that are intimidating or humiliating for the victim.
75. ILO Convention 190 on Violence and Harassment Convention, 2019 sexual harassment is defined under Article 1 to include the following;
- (a) the term “violence and harassment” in the world of work refers to 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;
 - (b) the term “gender-based violence and harassment” means violence and harassment directed at persons because of their sex or gender, or affecting persons of a particular sex or gender disproportionately, and includes sexual harassment.
76. The 1988 General Survey of the Committee of Experts of the ILO urges that sexual harassment is a form of discrimination.
77. For these provisions to have meaning, the employer is bound to secure its employees through a policy guide that outlines the definition under the ILO Convention and the *Employment Act*. In the case of Kenya Union of Commercial Food & Allied Workers v Meru Central Dairy Co-operative Union Limited [2015] eKLR the Court found the respondent culpable for failing to have in place a policy against sexual harassment leading to harassment of a female employee and further ordered the employer to issue a policy statement in this regard.
78. In the case of CNR; FITM & another (Respondent) (Cause E204 of 2021) [2022] KEELRC the court held that where an employer fails to put in place a policy guiding its employees on how to address sexual harassment at the workplace, to solely blame the subject employees who engage in such conduct is just but to escape responsibility. There is a duty in law to have a policy against sexual harassment and further to bring it to the attention of all employees and build on its measures for reporting and addressing such matters with protection for employees who lodge complaints.
79. In this case, having a Gender Exploitation Committee or Policy was not sufficient. The respondent as the employer should have done more to bring to the attention of all employees the policy and the procedures for securing their rights once they faced sexual harassment.
80. The witnesses called by the respondent were clear that they did not know any policy against sexual harassment. Those who had heard about it had not read it. Those who had read it, could not remember its contents or how to file a complaint. The majority were categorical, even if they had a complaint, which they did, the chairperson of the Gender Exploitation Committee remained the claimant for all his years of service. They had no way of making a complaint against their boss. Some knew of the only complaint ever filed. The subject employee lost her employment soon thereafter.



81. The Court of Appeal in the case of *Ooko & another v SRM & 2 others (Civil Appeal 195 & 197 of 2019 (Consolidated))* [2022] KECA while addressing a case of sexual harassment at the workplace 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 a 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
- ...
82. That addressed, the evidence about sexual harassment of employees in the service of the respondent was introduced in these proceedings to support the response that termination of the claimant's employment was justified and there were valid and genuine reasons. As outlined above, without a policy against sexual harassment at the workplace, without any policy present to define what constituted sexual harassment, without reporting procedures known to all employees including the claimant, to urge a case that there was sexual harassment committed by the claimant is hazy.
83. However, before the termination of his employment, the claimant was given a fair chance to attend and make his representations. This is a statutory imperative under Section 41 of the *Employment Act*. Every employee has the right to be issued with notice and allowed to attend on the shop floor with another employee of his choice. Through notice dated 25 July 2020, the respondent invited the claimant to attend a disciplinary hearing on 3 August 2020 to answer to allegations that he had sexually harassed EW at the workplace.
84. On 29 July 2020, the claimant responded and indicated that he would not be available.
85. Through a letter dated 31st July 2020, the respondent allowed the claimant to attend a disciplinary hearing on 10 August 2020. He did not attend.
86. The claimant testified that he requested to adjourn the disciplinary hearing on 3 and 10 August 2020 since his advocates were not available to attend. He proposed that his advocates would only be available in September 2020 and therefore, he would not be able to attend as directed.
87. The worst sin an employee can commit against his employer is to fail to attend the disciplinary hearing as directed. The claimant was on suspension on full pay. He was still the employee of the respondent until the termination of his employment through a notice dated 17 August 2020. He knew that there were investigations ongoing relating to various allegations including sexual harassment of various employees.
88. As an employee of the respondent, he was bound under the employment relationship to attend and address as reasonably directed. Any breach of taking proper and lawful directions was conduct contrary to the provisions of Section 44(3) and 44(4) (e) of the *Employment Act*;
- (e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;
89. Directions and instructions to attend a disciplinary hearing a lawful and proper commands and direction by the employer.
90. As an employee, the claimant was secured under the provisions of Section 41(1) of the *Employment Act* to attend with an employee of his choice and defend himself against the various allegations made



- against him. The motions of Section 41 of the *Employment Act* cannot stop allowing external persons to attend on the shop floor. These provisions are self-enforcing to allow the employer to establish the allegations based on the primary evidence on the shop floor. These provisions require that;
- (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.
91. Upon notice, the employee is entitled to have another employee or a shop floor union representative of his choice present during this explanation. To therefore fail to attend and take the view that the claimant would only attend when his advocates were available, the claimant frustrated the disciplinary process and the respondent was justified to terminate his employment.
 92. Where an employee is allowed the opportunity to attend a disciplinary hearing by the employer and fails to attend and address, he cannot blame the employer for terminating his employment. Whatever responses and representations the claimant may have had on the allegations made against him, his failure to attend to answer, he squandered the opportunity.
 93. In the case of *Dzila v Kwale County Assembly Service Board & 6 others (Cause 21 of 2020)* [2023] KEELRC the court held that where an employee squanders the opportunity granted for a fair hearing, the employer is justified to terminate employment for gross misconduct as envisaged under section 44 of the *Employment Act*.
 94. In the case of *Terry Muringo Muchiri v K-Rep Group Limited* [2021] eKLR the court in addressing a similar matter as herein held that;

...where an employee squanders the opportunity for a fair hearing, the employer is justified to terminate employment for gross misconduct as envisaged under section 44 of the *Employment Act*, 2007. ...
 95. In the case of *Matilda Tenge Mwachia v Kenya Industrial Estate Limited & another* [2021] eKLR the court held that;

Where the employee has the right to a hearing, the employer has the right to terminate the employee upon following due process. Where an employee squanders the chance to be heard the employer cannot be found to have acted unfairly where great effort was taken and is demonstrated to have been applied to have the employee heard but such employee remained adamant and made irrational demands to avoid a hearing.
 96. Therefore, under Section 41 of the *Employment Act*, there is a balance of rights. Upon suspension, the claimant was bound to attend at the shop floor and make his representations. He cannot be allowed to hold the employer at ransom and insist on attending as and when he wishes while still on the payroll of the respondent. To fail to attend a disciplinary hearing, the claimant frustrated his employment.
 97. Not notice pay is due or compensation.
 98. On the claim for punitive damages for matters that the claimant felt that his rights were violated, the failure to attend disciplinary hearing, his bundle of rights went with it. He cannot remain out on the shop floor, fail to attend disciplinary hearings when invited and then seek to benefit from such conduct. His right to a hearing ended when he failed to attend as directed through the motions of Section 41 of the *Employment Act*.



- 99. The claim for costs is also lost as the claim herein is found without merit.
- 100. Before conclusion, the various cases of alleged sexual harassment as outlined above, such only arose to prove that the respondent had valid, justified and genuine grounds leading to termination of employment. That is done with the failure by the claimant to attend a disciplinary hearing, the respondent cannot escape responsibility and failure to have an articulate policy against sexual harassment at the workplace. The complaints made by the various employees who testified in support of the respondent should be looked at against the respondent as the employer. To urge a case against the claimant would not achieve the desired results. As matters are pending before other courts arising from these complaints, this will suffice.
- 101. Accordingly, the claim herein is without merit and is hereby dismissed. Each party bears its costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 25 DAY OF JULY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

