



**Sawe v Ekaterra Tea Kenya PLC (Employment and Labour Relations Cause E012 of 2023) [2024] KEELRC 1870 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1870 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E012 OF 2023**

**HS WASILWA, J  
JULY 18, 2024**

**BETWEEN**

**DAVID SAWE ..... CLAIMANT**

**AND**

**EKATERRA TEA KENYA PLC ..... RESPONDENT**

**JUDGMENT**

1. This suit was commenced by a memorandum of Claim dated 7<sup>th</sup> August, 2023, filed through the firm of H& K law Advocates, on the basis that the claimant had been unfairly and unlawfully dismissed from employment. The claim sought for the following reliefs; -
  - i. A declaration that the Respondent's summary dismissal of the claimant amounted to unfair and unlawful dismissal and violated *the Constitution* of Kenya, the *Employment Act* and the recognized Common law principles of Employment law.
  - ii. A declaration that the Respondent's advertisement of the position of head of manufacturing vide an advertisement dated 19<sup>th</sup> March, 2023 amounted to constructive dismissal of the claimant and/or termination of the claimant's employment on account of redundancy.
  - iii. Compensation of Kshs. 41,026,007.90 being; -
    - a. Three (3) months' salary on lieu of Notice of Kshs. 3,001,903.02.
    - b. General damages for wrongful dismissal and unfair termination equivalent to Twelve (12) months salary amounting to Kshs. 12,007,612.1.
    - c. Gratuitous/severance pay for 26 years in the sum of Kshs 26,016,492.8.
  - iv. Exemplary and or punitive damages for malice.
  - v. Costs of the claim.



- vi. Interest on (ii),(iii) and(iv) at Court's rate from the date of the Award.
- vii. Any other relief the Honourable Court may deem fit to grant.

### **Claimant's case**

2. The claimant described the Respondent as a limited liability company incorporated pursuant to the laws of Kenya. That the Respondent carries out business of tea production and manufacturing in various parts of Kenya with its trade name having changed from Brooke Bond Limited to Uniliver Tea Kenya PLC and now eKatterra Tea Kenya PLC.
3. The Claimant states that he was employed by the Respondent on 11<sup>th</sup> February, 1997 as a field assistant under work level JC17 and deployed to the Respondent's Chagaik Estate on an entry salary of Kshs 156,852 per annum. After 6 months, he was confirmed to the said position on permanent and pensionable terms.
4. That he served the Respondent with diligence rising through the ranks as Assistant manager-Chebown and Kaptien Tea Estates, Field Technology manager-Engineering Estate, Manager-Kapkorech and Koiwa Tea Estate and Operations manager in Koiwa, Kaptien and Kimari Tea Factories.
5. In 2023, the claimant was promoted to senior management level 2B and transferred from Kericho Tea Estate to Kimugu Tea Estate by the letter of 9<sup>th</sup> December, 2013 now on a salary of Kshs 4,347,412 per annum and a car allowance of Kshs. 1,577,337 per annum. By the letter of 27<sup>th</sup> January, 2017, the claimant was appointed as the operations manager-Kimari operations unit still under work level 2B but on pay rise of Kshs. 5,533,591 per annum.
6. It is stated that when the Respondent restructured Uniliver Tea Kenya Limited to the current name Ekatterra Tea Kenya Limited, it retained and promoted the claimant to be the General manager-Kericho North, under work Level 2C at a gross monthly salary of Kshs 1,000,6634.34, a promotion that he earned through his hard work, commitment and contribution toward the Respondent's outstanding performance.
7. He stated that his woes began on 26<sup>th</sup> January, 2023, when Jeremiah Koskei, one of the manager's at the Respondent's employment, reached out to him about a letter send to him via WhatsApp by a person that identified himself as a BBC correspondent on allegations of sexual harassment in the Estate.
8. That he advised the said Jeremiah, to authenticate the letter before giving any response and follow the law under page 10 of the Code Policy of Living the Code. Further he asked the said Jeremiah to share the letter with him to forward to the Respondent's corporate Communication office for authentication and further advice. However, that the said Jeremiah, refused for fear that, the letter will be circulated.
9. Five days later on 31<sup>st</sup> January, 2023, the said Jeremiah, called him and informed him that he was now ready to share the said letter and that he would personally visit the communication office of the Respondent to share the said letter and in the evening of the same day, he informed him together with Mr. Odire, the County manager, that he had shared the said letter with one Livingstone Sambai, the manager in charge of Communication. Subsequently, he shared the said letter with Mr. Odire via email.
10. Having shared the said information with the communication manager and the Country manager for authentication and further action, the claimant states that, he had discharged his duty as a General Manager. However, that he was shocked to receive a Notice to Show cause on the 22<sup>nd</sup> April, 2023 on allegations of breaching the Respondent's policy on Living the code and Code Policy on Respect, Dignity and Fair Treatment.



11. The basis upon which the Show Cause was issued was of failing to report to the Respondent the letter served on the said Jeremiah Koskei by the BBC which was later televised under the title ‘True cost of our tea; Sexual abuse on Kenya tea farms revealed’ and on allegations that the claimant was in a sexual relationship with one Wiliter Chepkirui who is alleged to have been promoted from leaf inspector to Assistant Field manager and eventual Divisional manager.
12. That the claimant tendered his response to the Show cause by the letter of 24<sup>th</sup> April, 2024 and attended hearing on 27<sup>th</sup> April, 2023. He stated that as much as he was invited for hearing and advised to be accompanied by an employee of his choice, he was not served with statements and evidence to enable him respond adequately to the allegations against him.
13. That during hearing he was interrogated and evidence adduced including an alleged interview with Jeremiah Koskei and other employees, which evidence, he had not been supplied with prior to the hearing. The employees interviewed include; Awa Kipkoech, Wiliter Chepkirui, Florence Mitei, Margaret Langat, Caroline Ruto and Claimant’s wife (Lily Sawe), who is not an employee and none of their interrogations were served on the Claimant beforehand.
14. After hearing, it is stated that the Respondent dropped the allegation of sexual relationship with an employee for lacking evidence, However the issue of failing to report the BBC letter addressed to Jeremiah Koskei remained the main issue.
15. He stated that the hearing was hostile and demeaning as it touched on the claimant’s personal and intimate questions touching on his family and guesstimates drawn from the claimant’s friendship and close working relationship with his colleagues.
16. It is averred that on 8<sup>th</sup> May, 2023, the claimant was dismissed for allegedly breaching the Respondent’s code Policy on living the code as well as section 44(3) of the [Employment Act](#) on failing to report an actual breach of code that was brought to his attention. That his dismissal was effected without any evidence linking him to alleged breach.
17. That he appealed against the dismissal by his letter of 12<sup>th</sup> May, 2023 on the basis that he had handled the issue if Jeremiah Koskei professionally in accordance with the Respondent’s policies and the Respondent blew a very minor issue out of proportion.
18. He stated that in interviewing his wife who is not an employee of the Respondent, the Respondent was invading on his right to privacy.
19. The claimant states that the dismissal was premeditated because, while the disciplinary case was ongoing, the Respondent on 19<sup>th</sup> March, 2023 advertised for the position of Head of manufacturing, which person would be in charge of all factory operations, which was part of his job. In fact, that as soon as the claimant was terminated, the Respondent restructured the management into two; one manager in charge of tea Estate and another in Charge of factories, both which the claimant was in charge of. A further indication, that the Respondent wanted to get rid of him by all meant to enable it restructure its company.
20. He stated that there was nothing to show that the claimant was working in cahoots with the said Jeremiah to conceal the allegation. In any case, that the expose had happened earlier, thus, there was no prejudice that the claimant exposed the Respondent to.
21. He maintained that due to failure to established the main issue of sexual relationship with an employee, the Respondent looked for any other means to get rid of him in order to re-organize the management structure to avoid redundancy procedure and the resultant costs.



## **Respondent's case**

22. The Respondent entered appearance through the firm of Kaplan and Stratton on 1<sup>st</sup> September, 2023 and filed Defence to claim on 6<sup>th</sup> September, 2023, admitting to employing the claimant as illustrated in the claim and stated that the claimant at all material times was bound by the Respondent's policies.
23. It is stated that in January, 2023, following the televised expose by BBC, the Respondent carried out its independent investigations into the alleged sexual harassment claims in various estates and factories and it was discovered that the claimant had failed to report alleged claim of sexual harassment brought to his attention by one of the alleged perpetrator which was highlighted by BBC documentary. Also that it uncovered allegations that the claimant was in a sexual relationship with one of the employee's and even influenced her promotion in the company.
24. Consequently, in the bid to ascertain the veracity of these allegations, the Respondent served the claimant with show cause letter, setting out the particulars of the allegations in the letter and gave the claimant an opportunity to defend himself in a disciplinary hearing.
25. During hearing, it was established that the claimant was aware of the Code Policy on Living the Code and in particular, the requirement to immediately report actual or potential breaches of the said Polices. Secondly, the Claimant acknowledged having been told about the said sexual harassment allegations by Jeremiah Koskei on 26<sup>th</sup> January, 2023 but failed to take immediate action to report it, but waited for the perpetrator to report it by himself on 5 days later on 31<sup>st</sup> January, 2023 and lastly that the claimant chose to see the said perpetrator as a victim and protected him when the said employee was in place of authority and accused of grave issues of sexual harassments of various employees.
26. The Respondent states that the claimant was informed of the allegations against him and at no point did he ask for any documents. In the end, the Respondent dropped the claim of sexual relationship with a fellow employee and found the claimant culpable on failing to report the issue of sexual harassment immediately it was brought to his attention and therefore dismissed him for breach of the Respondent's policy.
27. Subsequently, his dues were calculated and paid as per the termination letter, then given his certificate of service.
28. The Respondent stated that contrary to the allegation by the claimant, in July, 2023, it encouraged, all its unionisable employees to take early retirement and or voluntary separation in the bid to flatten its organizational structure, an issue that could not have affected the claimant as he was not a unionisable employee.
29. On the advertised position of Head of manufacturing made on 17<sup>th</sup> March, 2023. The Respondent stated that the claimant was the General Manager of Kericho North and therefore that there was no nexus of the new role with the one the claimant was holding.
30. In conclusion, the Respondent stated that the termination of the claimant was justified in both reason and procedure and therefore, the claimant is not deserving of the reliefs sought.

## **Evidence**

31. During hearing, the claimant testified as CW-1 and adopted his witness statement dated 7/8/2023 and produced his list of documents as his exhibit 1-17 respectively.
32. Upon cross examination, he testified that according to his employment letter, he was to comply both company rules and regulations. He testified that failure to comply with the code of conduct would



- result to disciplinary action. He testified that clause 6 of the Sexual Harassment policy gives the scope of its application and states that it applies to all employees. He confirmed that he was familiar with the policy and the code and that the code required the reporting channels like the senior management to report breaches of any of the code and policy.
33. He testified that sometime in February, 2023, the BBC documentary highlighted incident of sexual harassment at 2 tea companies, which included the Respondent and the said Jeremiah Kosgei, was adversely mentioned as one of the perpetrator. He testified that Jeremiah reached out to him on 26<sup>th</sup> January, 2023 in confidence stating that he had received a letter from the BBC correspondent. That he read out the contents of the letter to him which was in his phone. He confirmed that the contents of the letter related to allegations of sexual harassment of female employees. He also confirmed that the perpetrator was not a victim. He also told this Court that Jeremiah had been accused of sexual harassment at work place and not his home, thus the issue was not personal.
  34. He testified that the latter was shared with office by the said Jeremiah albeit on 31<sup>st</sup> January, 2023. He maintained that he told the said employee to report the incident to the communication office as soon as possible but that he took the matter over the weekend and reported the same on Tuesday the following week. He testified that it did not occur to him that the perpetrator could have interfered with witnesses during the said period. He testified that the allegations against him were particularized in the Show cause letter, granted time to respond and invited for disciplinary hearing. The witness confirmed that he signed the minutes of the disciplinary meeting as a reflection of what transpired during disciplinary hearing.
  35. On re-examination, he testified that Jeremiah was not sure of the source of the letter and wanted advice on how to handle it. He testified that he advised him to report the issue to the Communication department of the Respondent for authentication as the letter needed to be responded to. He testified that Jeremiah told him he needed time to think about the allegations before he could report. He reiterated that the only reason he did not report immediately is because he doubted the authenticity of the letter, considering that it was send to the perpetrator via WhatsApp.
  36. The Respondent on the other called one witness, Winny Ochieng, the Business Integrity Officer, as RW-1. She testified that she is in charge of Kenya, Uganda and Rwanda and adopted her witness statement of 5/9/2023 and produced the Respondent's list of documents of 5/9/2023 as Exhibits. She told this Court that Jeremiah was transferred to Kapkorech Tea Estate in January, 2023. Nonetheless that the issue complained of happened in the Respondent's estate which was in the jurisdiction of the claimant. She testified that the claimant was part of the Respondent's report structure on sexual harassment issues. She testified that the claimant was tasked with reporting the issue whether they were authenticated or not. She informed this Court that by failing to report on time, the witnesses and victims mentioned were compromised and the Company suffered in that their certificate and licenses were withdrawn for 6 months and thus, they could not sell their tea.
  37. On the witnesses not present for cross examination, the witness told this Court that Jeremiah could onto be summoned as a witness because he was no longer an employee of the Respondent, having resigned. She testified that the claimant's wife was a part time employee at their Hospital and she interviewed her because some issue had been raised regarding claimant's premises. She confirmed that the claimant was not terminated for sexual harassment.
  38. She testified that the company restructure was done on 24<sup>th</sup> March, 2023, when the claimant was still an employee of the Respondent. Further that the advert was send to all manager email addresses. She confirmed that no employee lost their jobs as a result.



39. Upon cross examination, the witness testified that the BBC expose was carried out on 20<sup>th</sup> February, 2023. That she together with Jackline Cheronu, a member of the investigation team interviewed Jeremiah. She stated that they also interviewed the claimant twice but did not have him write a statement. She told this Court that the allegations in the letter by BBC correspondent related to Jeremiah Koskei and not the claimant. She testified that even though Jeremiah ordinarily did not report to him, the fact that he was informed of the letter gave him an obligation to report. She also confirmed that the Claimant had advised Jeremiah to share the letter with the Communication officer for authentication. She testified that the Communication department was tasked with authentication of documents.
40. Upon further cross examination, the witness testified that she was the lead investigator in the matter and that, they investigated the matter before issuing the claimant with a Show Cause letter. She confirmed that they did not share any statements and the investigation report with the claimant but that she read Jeremiah's statement to the claimant and asked him questions on the statement. Also that other panel members asked him questions on the statements. She denied being part of the panel that made a decision to terminate the claimant's services.
41. On the sexual harassment charges, she stated that during investigations, other employees mentioned that the claimant was in a sexual relationship with one Wiliter Chepkirui but that after investigation, there was no sufficient evidence to hold the charge, thus the allegation was dropped.
42. She testified that the basis of finding the claimant quilt was on failing to report the claim of sexual harassment that Jeremiah shared with him.
43. On the advertisement of head of manufacturing, she testified that the head of manufacturing was to be responsible over 8 factories in Kenya while the claimant was the head of only factories in Kericho. She confirmed that the new Head of Factories was hired on 20<sup>th</sup> July, 2023. She clarified that after termination of the claimant the new structure does not have the position of General manager.
44. On re-examination, the witness testified that the claimant admitted during hearing to failing to report on time the issue of sexual harassment. She also stated that the claimant did not complain at any point of the time being insufficient neither did he request for copies of the statement and the the investigation report. She admitted posing questions to the claimant during hearing but denied participating in decision making that terminated the claimant's services. She maintained that the restructuring would not have affected the claimant's position because it was merely to reduce the reporting lines. She testified that the document showing the Respondent's structure is not their document.

### **Claimant's Submissions**

45. The claimant submitted on four issues; whether the Respondent summarily dismissed the claimant unfairly and unlawfully, whether the Respondent's advertisement of the position of head of manufacturing rendered the claimant's position redundant, what are the remedies available to the claimant and who bears costs of this claim.
46. On the first issue, it was submitted that section 45(2) of the [Employment Act](#) placed the duty to prove termination of employment was fair on the employer. Similarly, that section 43 of the [Employment Act](#) requires the Employer to prove the reasons for termination and where the Employer fails, then the termination is deemed to have been unfair within the meaning of section 45 of the [Employment Act](#). In this, he relied on the case of [Mwangi V Family Bank Ltd \[2023\] KEELRC 2156\(KLR\)](#) where the Court held that the belief of facts must be genuine as opposed to being whimsical or capricious.



47. Accordingly, that the Respondent in this case has to demonstrate to this court that he believed the reason for termination to genuinely exist and that it followed due procedure.
48. On reason for termination, the claimant submitted that, he had been accused of two breaches of the Respondent's code; the first one was on allegations of failing to report information shared with him by Jeremiah Koskei pertaining to the allegations of sexual harassment levelled against the said Jeremiah and allegations that he had been in a sexual relationship with one Wiliter Chepkirui.
49. The Claimant submitted that Mr. Jeremiah approached him to help on how to deal with the contents of the letter whose authenticity he doubted. That the help sought by Jeremiah was unique and unprecedented where a senior manager was reaching out for help and under the Respondent's code, he was under an obligation to respect Jeremiah and to ensure that there was no retaliation against him.
50. It was submitted that he was informed of the letter on 26<sup>th</sup> January, 2023, and he reached out to the Country General manager, Mr Kenneth Odire and convened a meeting where they both prevailed upon Jeremiah to report the said letter to the communication department. Therefore, that the allegations that he failed to report the said letter were not true in light of the facts laid herein above, which facts were not controverted.
51. It was submitted that the matter was not reported immediately because it was unusual for an employee to report himself and secondly because the authenticity of the letter was unknown, thirdly that Jeremiah was in the senior management who understood his obligation to report, therefore that it was imperative to allow Jeremiah to personally share the letter with the corporate communication office to avoid the risk of profiling an employee in breach of the Respondent's code policy.
52. In light of the foregoing, it was submitted that the reason for termination was not justified nor was there any genuine reason to believe that they existed. In any event that he only took steps to ensure the allegations were reported and the dignity of the employee protected before the allegations were authenticated.
53. On what constituted a genuine belief, the Claimant relied on the definition given by the Court in *Osire V Mega Pack (K) limited [2023] KELERC 1504 (KLR)* where the Court held that:-

“Section 43(2) of the Act deserves a second look before the court decides on the substance of the dismissal. What the employer is required to have is genuine belief that the employee has misconducted himself or herself in the alleged manner, even if such belief later on turns out to be untrue. However, the belief must be genuine and not based on malicious, discriminative, speculative, weird, whimsical, and capricious allegations. What this court understands to be the totality of the genuine belief imperative is that the employer should have some prima facie evidence that the employee has engaged in misconduct that deserves disciplinary action. For such a belief to exist, the employer ought to have carried out some reasonable investigation and gathered the evidence against the employee. In my opinion, mere suspicion cannot be a ground for taking disciplinary action that may lead to dire consequences, including dismissal as it happened in this cause. Inasmuch as the test is partly subjective on the part of the employer, this court holds the view that the belief should be genuine and reasonable founded on prima facie evidence. While it is not the duty of this court to substitute its view for that of the employer, the court has a duty and indeed an obligation to intervene where the position taken by the employer is unreasonable and not founded on reasons that go beyond mere suspicion. If employers were to act against employees on mere suspicion of misconduct, the environment at the workplace



would become chaotic, uncertain, and untenable, hence not conducive for optimum productivity.”

54. On procedure, it was submitted that section 41 of the *Employment Act* provide the minimum standards of fair procedure that an employer ought to comply with. Accordingly that for procedure to be fair, the employer needs to particularize the allegations levelled against the Employee , furnish any statement and evidence on the employee and consider the submission by the employee in their defence. This was the position of the Court in Anthony Mkala Chitavi Vs Malindi Water and Sewarage Compnay Limited [2013] eklr and the case of David Wanjau Muhoro Vs Ol-Pajeta Ranching Limited [2014] eklr where the court listed three main ingredients of fair procedure being; sufficient opportunity to the employee to prepare, right to fully understand charges and right to documentation.

55. It was argued the ingredient of fair procedure under section 41 of the *Employment Act* are compulsory as was held in Kenfreight (EA) Limited Vs Benson K Nguti [2016] eklr as well as the case of Mary Chemweno Kiptui Vs Kenya Pipeline Company Limited [2014] eklr where the Court held that;-

“ section 41 of the *Employment Act* is couched in mandatory terms. That is where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair, as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice, the employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of their fair hearing principles as well as natural justice tenets.”

56. Consequently, it was submitted that the Claimant was not furnished with any documents before hearing, hence the claimant went to disciplinary hearing without full particulars and extend of the evidence against him that would enable him to properly prepare for the hearing. He argued that the disciplinary hearing was centred on an investigations report which was not given to him prior or during hearing. further that all the witnesses who had been interviewed as per the investigations report were not called as witnesses for cross examination during hearing. This he argued presented unfair advantage against him as he was not able to prepare adequately on some of the evidence presented.

57. On importance of furnishing employee with statement and evidence before hand, the Claimant relied on the Court of Appeal case of Postal Corporation of Kenya Vs Andrew K Tanui [2019] eklr where the Court held that;-

“ At the Board meeting, there is no evidence that an explanation of the grounds of termination was made to the respondent, and if so, in what language. The Board had in its possession the very document that formed the basis of the charges framed against the respondent but kept it away from him. Even in criminal trials, which are more serious in nature, an accused is entitled to the statements that support the charges laid against him. That is the essence of fairness even outside a judicial setting. The respondent faced serious indictments which could torpedo his entire career and destroy his future. In our view, this was a matter in which oral hearing was necessary, but none was held. Instead, all the respondent had was a technical appearance of less than five minutes with the Board, which evidence was not seriously challenged. For all those reasons, we agree with the trial court that the procedure adopted by the appellant was short of a fair one. We so find.”

58. Similarly, view were upheld by the Court of Appeal in Kenya Revenue Authority V Menginya Salim Murgani [2010] eklr.



59. On that note, it was submitted that due procedure was not followed. Moreover, that the Claimant was given short notice to appear for hearing and without being provided with any evidence and statement, it was impossible to look for witnesses as the particulars were scanty.
60. The Claimant submitted that Winny Ochieng was the lead investigator, the prosecutor in the disciplinary hearing and part of the team that recommended the dismissal of the claimant as such Winny, acted as the investigator, prosecutor and a judge in this case. In effect flouting the rules of natural justice. In support of this, the Claimant relied on the case of Mwangi V Family Bank Ltd [2023] KEELRC 2156 (KLR) where the Court emphasized on the need to accord an employee a fair hearing in accordance with the rules of natural justice.
61. On advertisement done while the claimant was still in employment, it was submitted that the claimant worked for the Respondent as the General Manager-Kericho North and was in charge of manufacturing and estates, however that the Respondent on 24<sup>th</sup> March, 2023 advertised for the position of Head of manufacturing way before the disciplinary action was taken against him, in effect abolishing the position of the Claimant as the head of manufacturing and Estates and rendering the claimant redundant without notice contrary to section 40 of the *Employment Act*. To support this, the claimant relied on the case of Barclays Bank of Kenya Ltd & Another V Gladys Muthoni & 20 Others [2018] eKLR where the Court held that;-
- “It is therefore not sufficient for an employer to state that there is a business reorganization, the business has moved or that there is a ‘section 40 situation’ and therefore the Court must infer a redundancy. Not at all. There must be a justification. The employer must demonstrate that there exists a genuine reason that requires the business to reorganize, reduce staff or restructure the business to viability...”
62. The claimant also relied on the case of Jane Khalechi Vs Oxford University Press E.S Ltd [2013] eKLR where the Court was of the view that genuine redundancy cannot be deduced where the roles of the employee remain unchanged.
63. Accordingly, that the events leading to the termination of the claimant was choreographed to ensure the claimant was terminated and the Respondent restructure its management.
64. On the reliefs sought, the claimant submitted with regard to notice that since he was the General Manager, Work Level 2C, he was entitled to 3 months’ notice.
65. The claimant also submitted that he is entitled to maximum compensation for unfair termination as provided for under section 49 of the *Employment Act*.
66. The claimant submitted that, by dint of the fact that the Respondent advertised for his position while still in employment, his position was declared redundant and pursuant to paragraph 33.3.3.2 of the Respondent’s Human Resource Manual, he is entitled to severance pay which the Respondent’s manual at appendix 1 sets at one month’s salary. Therefore, that he is entitled to severance pay for the 26 months worked.
67. It was also submitted that the claimant is entitled to one-way transport allowance for the termination which is calculated at half monthly gross salary as per appendix 1 of the Respondent’s Human Resource manual.
68. On exemplary damages, the claimant submitted that the disciplinary process was humiliating and embarrassing and thus, he ought to be awarded punitive damages. In support of this, he relied on the case of Bank of Baroda(Kenya) Limited Vs Timwood Products Limited;Civil Appeal No. 132 of



2001, where the Court held that in Kenya punitive or exemplary damages are awarded only under two circumstances; where there is oppressive, arbitrary or unconstitutional action by the servants of the government and where the action of the defendant was calculated to procure him some benefits not necessarily financial at the expense of the plaintiff and thirdly where such damages are authorised by statute. Similarly, the claimant urged this court to find the Respondent's action to be oppressive and award him punitive damages of Kshs. 1000,000.

69. On costs, it was submitted that costs follow event and having proved his case on the balance of probability, he deserves to be awarded costs of suit.

### **Respondent's Submissions**

70. The Respondent submitted on four issues; whether the Respondent had valid reasons to terminate the claimant's employment on grounds of breach of its policies, whether the Respondent followed due process in effecting the summary dismissal, whether the claimant has proved his claim against the Respondent and whether the claimant is entitled to the reliefs sought.
71. On the first issue it was submitted that the Respondent had sufficient reason to believe the allegations levelled against the claimant were true. It was argued that the Claimant was employed by the Respondent as a field assistant in 1997 and rose through the ranks to be the general manager and a member of Business Integrity Committee and therefore was bound by all the Respondent's policies and principles.
72. It was submitted that the Living the Code policy require that all employees and managers report any potential breaches of the Respondent's policies whether relating to oneself, their colleagues, people acting on Ekattera behalf whether accidental or deliberate.
73. Clause 5.6 of the Sexual Harassment policy give a detailed reporting channel to include; line managers, Local business integrity officer, any member of Business Integrity Committee and Code hotline.
74. Accordingly, that the claimant was informed by Jeremiah Koskei of a letter send to him by a BBC correspondent, on allegations of sexual harassment and being the General manager, he ought to have immediately reported the incident to the relevant office in line with the Respondent's policy.
75. On procedure, it was submitted that the claimant was issued with s Show Cause letter and invited for disciplinary hearing on 27<sup>th</sup> April, 2023 and in the invitation, he was advised to bring a representative and witness of his choice. During hearing, the claimant admitted that; the perpetrator approached him because of his position as senior office in the reporting channel, that the perpetrator read out the allegations to him but did not share the letter, that the contents of the letter were related to sexual harassment and that the said Jeremiah was a culprit and not a victim. Therefore, that in failing to take immediate action to report the issue of sexual harassment reported to him, the claimant breached the Respondent's COBP.
76. It was argued that as a result of the claimant failure to report the incident, the investigation process of the Respondent was hampered as the perpetrator had used the 5 days period to intimidate his victims and potential witnesses. Further that the Respondent was denied the opportunity to immediately address the issue, therefore subjecting the female employees to continuous danger, while the Respondent suffered reputation damages on account of the BBC documentary which cause it financial loss due to suspension of its licenses and certification by the rainforest Alliance which prevented the sale of its produce to global market.
77. In light of the foregoing, it was submitted that the Respondent had no other recourse but to terminate the service of the claimant for breach of its policy, therefore that the termination was reasonable, valid



fair and justified and in line with section 43(2) of the *Employment Act*. To support this, the Respondent relied on the case of Nazero Kariuki V Feed the Children Kenya [2013] eKLR and the case of Judicial Service Commissions Vs Gladys Boss Shollei & Another [2014] eKLR where Kiage J 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.”

78. Similarly, that the Respondent’s Human Resource manual at clause 3 provides that any breach of COBP would result to disciplinary action.

79. On allegation of redundancy, the Respondent submitted that the claimant has not tendered any evidence before this Court to link the dismissal with the alleged redundancy. Conversely, that the Respondent has demonstrated before this Court that the restructuring of its operations neither affected the claimant’s role nor did it form the reason for dismissal. In fact that the restructuring was done in July, 2023, two months after the dismissal of the claimant and that the said delayering only affected unionisable employees and not those in the management cadres. Moreover, that even after the delayering, no employee lost their jobs save for those that took voluntary early retirement.

80. It was submitted that the position of head of manufacturing advertised in March, 2023, had nothing to do with the claimant position, because while as the claimant was tasked with heading the tea Estates in Kericho North, the head of manufacturing was heading all factories in Kericho, Bomet and Limuru. Hence his job description was not affected by the employment of Head of manufacturing. The Respondent also denounced the new structuring method produced as evidence by the claimant and argued that the allegations that the said structure was obtained from the Respondent’s board room was not stated in the pleadings and since parties are bound by their pleadings, new issues cannot be raised in submissions stage. In support of this, he relied on the case of Daniel Otieno Migore V South Nyanza Sugar Co. Ltd [2018] eKLR.

81. The Respondent relied on the case of Anthony Mkala Chitavi V Malindi Water and Sewerage 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.”

82. Similarly, that the Court in Postal Corporation of Kenya V K Tanui [2019] eKLR, listed the four elements that must be discernible for the procedure to pass. These include an explanation of the



grounds of termination in a language understood by the employee, the reason for which the employer is considering termination, the entitlement of an employee to the presence of another employee of his choice when the explanation of the grounds of termination is made and hearing and considering any representational made by the employee and the person chosen by the employee.

83. On the right of documentation on sexual harassment case, the Respondent relied on the case of *Boniface Mzungu V Base Titanium Limited* [2020] eKLR where the Court held that

“Did he understand the charges? He did not state anywhere, at any time, that he did not understand the charges. He was advised majority of female Employees under his supervision had complained that he was sexually harassing them. In the letter to show cause, he was given the forms of sexual harassment alleged to have been practiced by him upon the Ladies under his supervision. Fraud was explained in the letter to have taken place, when the Claimant allowed R time off, but still paid her wages for the day absent, which wages were shared by R and the Claimant. These charges were communicated to the Claimant in black and white. The right of an accused Employee to documentation, in complaints of sexual harassment, is a complex right. Disciplinary hearing relating to sexual harassment cases is not an ordinary disciplinary hearing at the workplace. There are sensitivities that must be observed, to protect the integrity and confidentiality of the process, without compromising the call to fair administration of justice, to the victims and the villains of sexual harassment. The Respondent had an obligation to balance Claimant’s right to accessing documents in advance of the hearing, with the right of the complainants to confidentiality and protection against a backlash from the Claimant, who was in supervisory position over the complainants. The Court does not think the accused Employee’s right to documentation, before the disciplinary hearing, is an unqualified right. The complainants were young female Employees, in casual employment, under the supervision of the Claimant, and all from the same village. They had shared vulnerabilities. They definitely needed to be protected by the Respondent, and encouraged to express themselves, without fear of retaliation from their Supervisor. Section 6 [2] of the *Employment Act* requires Employers who employ 20 or more Employees, to have a policy statement on sexual harassment. Section 6[3] requires that such policy statement, shall include inter alia, a statement that the Employer will not disclose the name of the complainant, or the circumstances related to the complaint to any person, except where necessary for the purpose of investigating the complaint or taking disciplinary measure in relation thereto.”

84. The Respondent also relied on the case of *Rebecca Ann Maina & 2 Others V Jomo Kenyatta University of Agriculture and Technology* [2014] eKLR where the Court held that:-

“I differ with the interpretation rendered by Counsel for the Respondent on account of Article 35 as it leaves out the right conferred by Sub Article (1)(b) on access to information held by another person which is required for the protection of a right or fundamental freedom. An employee facing disciplinary action faces a real danger of losing their job and source of livelihood and to say that they are not entitled to information in the employer’s possession that would assist the employee in preparing their defence is to misread *the Constitution*. I need to add that in order to access the right under Article 35(1)(b), the employee must make a specific request for specific documents.”

85. On that basis, it was submitted that the Respondent followed due procedure in that it notified the claimant of the allegations levelled against him with specify in the Show cause letter, the claimant was given 48 hours to respond to the allegations in line with clause 22.2 of the Human Resource Manual.



In any event that the claimant did not complain about the time being insufficient to respond. Later that the claimant was invited for disciplinary hearing that took place 3 days later on 27<sup>th</sup> April, 2023 and informed of his right to be accompanied by a witness and a representative but he elected not to go with any and proceeded for hearing.

86. It was submitted that the investigation report could not be shared with the claimant because of the need to protect the identity of witnesses in line with clause 5.5 and 5.7 of the Sexual Harassment Policy. In further support of this, the Respondent relied on the case of Boniface Mzungu V Base Titanium Limited (Supra).
87. It was argued that the claimant did not indicate any prejudice it suffered by the failure to serve him with the investigation report before the said hearing. Moreover, that the claimant did not request to be supplied with any documentation. This notwithstanding, the statements were read to him and he was allowed to address each of the allegation levelled against him in length.
88. Contrary to the allegations that the said Winney Ochieng was the investigator, judge and the jury, the Respondent submitted that the said winney was only reading out the statement as per the investigation report and the panel posed out questions to the claimant. Also on allegations that his wife was not an employee of the Respondent, it was submitted that the Claimant's wife was employed by the Respondent part time in its Hospital in Uniliver Tea Central Hospital, a fact which the claimant admitted at paragraph 25 of his statement.
89. It was argued that upon conclusion of the disciplinary proceedings, the claimant made closing remarks admitting that he ought to have reported the matter immediately and confirmed that he learnt not to assume such issue. Therefore, that the procedure of disciplinary hearing was followed to the required standard. In support of this, the Respondent relied on the case of Onyonyi Vs Population Services Kenya [2023] KEELRC 2607(KLR), Where Justice Manani held that:-

“With regard to due process, the record shows that immediately the Respondent got wind of the Claimant's activities, it issued him with a notice requiring him to explain why he had acted in contravention of its HR Policy. The record also shows that the Claimant responded to the notice to show cause denying involvement in politics. Dissatisfied with the explanation, the Respondent convened a disciplinary session for the Claimant. Although the Claimant argues that the notice for the session was short, there is no indication in the minutes of the session that he raised this concern before the Disciplinary Panel. On the contrary, he is recorded as telling the panel that his response to the notice to show cause was sufficient and that he had nothing else to add to it. How can he then turn around to suggest that he was not afforded sufficient time to prepare his defense? Such suggestion is at cross purposes with the record of the proceedings before the Disciplinary Panel. The letter that invited the Claimant for the disciplinary session advised him of his right to call witnesses of his choice. At the same time, the minutes of the disciplinary session demonstrate that the Claimant was given time to ventilate his case. As a matter of fact, at the tail end of the minutes, the record shows that the panel asked the Claimant if he had anything that he wished to add to his initial presentation. The Claimant is recorded as stating that he had nothing to add. It is therefore surprising that he can now contend that he was denied an opportunity to fully present his case.”

90. On reliefs sought, it was submitted that the claimant has not proved that the termination was unfair in both reason and process as such the reliefs sought should be disallowed.



91. On maximum compensation, it was submitted that in the unlikely event that this Court finds the termination unfair, then compensation ought to be commensurate to notice period and since notice period in this case was to be one month, the client ought to be awarded one-month salary. In support of this, he relied on the case of *CMC Aviation Limited V Mohammed Noor* [2015] eklr.
92. On claim for severance pay, the Respondent submitted that the termination herein was not instigated by redundancy proceedings as such the claim of severance pay is not warranted. In support of this, they relied on the case of *Coca cola Est and Central Africa Limited V Maria Kagai Ligaga* [2015] eklr.
93. On notice pay, it was submitted that the contract of employment provided for 2 months' notice and not 3 months alleged by the claimant. Further that since the claimant was dismissed in line with section 44 (3) of the *Employment Act*, he is not entitled to any notice pay.
94. On gratuity pay, it was submitted that gratuity was not provided for in the contract of employment. Moreover, that the claimant was a paid up member of NSSF. Also that he was an enrolled member of Respondent's Zamara Fanaka Pension Fund, as a management employee. Hence the claim for gratuity should be disallowed.
95. On punitive damages, the Respondent cited the case of *Godfrey Julius Ndumba Mbogori and another V Nairobi City County*[2018] eklr, where the Court held that;-

“The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes V Barnard* [1964] AC 1129 where Lord Devlin set out the categories of case in which exemplary damages may be awarded which are: i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute. Lord Devlin also gave expression to 3 considerations which must be borne in mind in any case in which an award of exemplary damages is being claimed. The first category is that the plaintiff himself must be the victim of the punishable behaviour; the second category is that the power to award exemplary damages must be used with restraint for it constitutes a weapon and can be used either in defence of liberty or against liberty and thirdly, the means of the defendant, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages.”

96. Accordingly, it was argued that the claimant has not adduced any evidence to affirm that his claim fell within any of the categories contemplated above to justify an award of punitive damages.
97. On the prayer for one-way transport allowance, it was submitted that this prayer was not pleaded but introduced in submission stage and thus should be dismissed in its entirety. In support of this, he relied on the case of *Daniel Otieno Migore V South Nyanza Sugar Co. Ltd* and the case of *Raila Amolo Odinga & Another V IEBC & 2 Others* [2017] eklr where the Court held that;-

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law



is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

98. In conclusion, the Respondent reiterated that the Claimant breached its policy in failing to report the sexual harassment claim brought to his attention. Thus, the termination was justified and the case herein should be dismissed with an Order of costs made in favour of the Respondent.
99. I have examined all the evidence and submissions of the parties herein. The Claimant has averred that he was unfairly dismissed without any valid reasons and without adherence to a fair hearing.
100. The Claimant’s problems began with a NTSC letter issued to him dated 22/4/2023 which 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. Code Policy on living the Code

Make sure you know and understand the requirements of our code and code policies and

Immediately report actual or potential breaches of the Code or Code Policies whether relating to you, your colleagues or people acting on ekatera’s behalf and whether accidental or deliberate. This includes instances where business partners behaviour may not meet our standards.

Employees must not ignore or fail to report situations where you think there is or may be a breach of the Code or Code Policies.

2. Code Policy on Respect, Dignity and Fair Treatment which states that Employees must not

Engage in any direct behaviour 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, colour, religion, county or origin, sexual orientation, marital status, dependants, disability, social class or political views.

3. 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

On 26<sup>th</sup> January 2023, Jeremiah Koskei a former employee of the company approached you and informed you of allegations that had been levelled against him by the British Broad casting Corporation (BBC) and read out to you a letter that had been sent to him via WhatsApp demanding that he responds to allegations of sexually harassing company employees. It has been established that Jeremiah read the letter to you word by word, where you became aware of the content of the letter and its accusations. Despite receiving this information, you failed to report the issues which you had become aware of that amounted



to breaches of the Code of Business Principles and the Code Policy on Respect, Dignity and Fair Treatment which failure is in breach of the policy in Living the Code. Additionally, it is alleged that you have been in a sexual relationship with an employee called Wilter Chepkirui for an unknown duration of time and it is suspected or perceived that you as her skip line manager, influenced her promotion from a Leaf Inspector to an Assistant Field Manager. Wilter was again promoted to Assistant Divisional Manager while you were her skip level manager and it is alleged that your relationship with her was still ongoing at the time. This, if established would amount to a breach of the policy on Respect, Dignity and Fair Treatment.

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 of the [Employment Act](#) 2007.

In view of the above and in line with company disciplinary procedure, you are required to submit written explanation to reach the undersigned not later than Monday 24<sup>th</sup> April 2022 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 defense and that the management reserved the right to take disciplinary action against you in accordance with the rules and regulations of the company and the Laws of Kenya.”

101. From the above letter the complaint against the Claimant was breach of Company Policy on Living the Code and Code Policy on Respect, Dignity and Fair treatment. He was also accused of breaching section 44 (3) of the [Employment Act](#) coming from his contractual obligations under the contract of employment.
102. The Claimant responded to the Show Cause letter vide his letter dated 24/4/2023 wherein he responded as follows;

“Response to the Notice To Show Cause

I am writing in response to your notice to show cause letter dated 22<sup>nd</sup> April 2023 regarding allegations against me for breach of company policies – Code Policy on Living the Code and Code Policy on Respect, Dignity and Fair Treatment as well as provisions of Employments Act 2007 section 44 (3).

I would like to indicate that I am familiar with the ekatera code and code policies as well as the relevant provisions of the [Employment Act](#).

I would like to state as follows regarding the two allegations levelled against me:

1. Allegations on failing to report what Jeremiah read to me.

Jeremiah reached out to me in confidence on 26<sup>th</sup> January 2023 seeking advice on a message sent to him by unknown person through WhatsApp. He indicated that he was not sure if it was not a prank and was seeking advice on how to authenticate the source and whether to respond as asked.



He briefed me on the content of the message and actually red it out to me from his phone. I advised him that the best way was to share with the Company so that the communications department would assist as the allegations made were related to his role as an employee and Company reputation would be at risk. He was categorical that he was not going to share the message with anyone, not even me but said that he would think over it and would come back shortly. I told him to make up his mind as soon as possible and share.

Three days later on the evening of 30<sup>th</sup> January he called that he had agreed to share but would do it in person to the Communications Manager the next morning and later with CGM in ITC where we had a meeting. He did exactly that on 31<sup>st</sup> January. Together with Kenneth Odire (County General Manager) we convinced him to share it by email.

The message had been sent to Jeremiah by an outsider and he indicated at that point it was a personal matter but was only seeking advice on how to handle it. He refused with the message and that he would deal with it in person. Jeremiah was an experienced manager and was fully conversant with our reporting procedures and on that I had no doubt he would share.

Having convinced Jeremiah to share the message with the Company's communications department, which he did, I am convinced I discharged my obligation to the company. In any event, since Jeremiah refused to share the message with me or any other person at that point in time, there was no material for me to report except what Jeremiah had undertaken to personally report.

2. Allegations of sexual relations with an employee called Wilter Chepkirui

This allegation is in bad faith, unfounded and defamatory.

I have never had any close relationship let alone sexual relationship with Wilter anytime, anywhere within and outside the company. I want to believe that you have relevant evidence in whatever form and would be grateful if you could provide for me to respond adequately. Wilter is still an employee and should be available to give relevant evidence on this as a complainant.

On the alleged influence to her promotions, the company has a clear recruitment/promotion process in HR which includes advertising, interview by a panel (formed by HR) and appointment which is independent of the line. I don't recall participating in any state of this process to influence her promotions. I would be grateful as well if you could provide evidence of how I influenced the promotions.

From the foregoing I do believe there is no breach of any of the policies to warrant any disciplinary action against me.

I have discharged my duties diligently for the 26+ years' service and never ever contravened any of the policies and provisions of the *Employment Act*. The allegations are really unfair and aimed at damaging my dignity and tarnishing my dedicated service to the Company".



103. The Claimant was thereafter on 24/4/2023 invited to a disciplinary hearing to attend on 27<sup>th</sup> April 2023 at 9 am. He was informed that he could bring along a witness of his own choice during the hearing as per Section 41 of the Employment Act 2007.
104. On 27<sup>th</sup> April 2023 the Claimant appeared for the disciplinary hearing. Minutes of the said hearing have been annexed to the documents filed by the Claimant at pages 193 to 221 of his Memo of Claim.
105. The Claimant has argued that he was not subjected to a fair disciplinary process because he was not given any particulars of the extend of evidence against him to enable him prepare for the hearing. He also argued that the process was centred on an investigation report which was not given to him prior or during the hearing. He avers that the witnesses who had been interviewed as per the investigations report were also not called as witnesses to enable him cross examine them.
106. It is indeed true from the minutes of the disciplinary hearing that the hearing started by allegations against him being set out which he denied.
107. The Respondents then started a question and answer session for the Claimant relying on some statements of witnesses not present in the room.
108. The 1<sup>st</sup> statement was of one Jeremiah who is the employee who indicated he received a WhatsApp message from a person claiming to be from BBC on 25<sup>th</sup> January 2023 and he informed the Claimant of the same on 26<sup>th</sup> January 2023 who in turn told him to inform the Corporate.
109. There is no indication that the Claimant was given an opportunity to cross examine the witness. Further it appears that the Respondents cross examined the Claimant on the said witness statement but never really asked the Claimant to give his version of evidence on the allegations levelled against him. Some other witnesses Sydney and Winnie were also introduced in the hearing but it is not clear how.
110. These witnesses were on a freelance cross examination and there is no time the Claimant was asked to cross examine them.
111. The mode of hearing envisaged for a case where the employer is considering termination of an employee for any action on omission is provided under section 41 of the Employment Act 2007 which 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 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. misconduct.
- (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”.

112. The *Fair Administrative Action Act (Act No. 4 of 2015)* also envisages that an employee must be subjected to a disciplinary process which is fair, expedient, efficient and lawful. Section 4 of the *Fair Administrative Action Act* 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”.
113. From the disciplinary process that the Claimant was taken through, he was not given an opportunity to present his case. He was also denied an opportunity to cross examine the witnesses who spoke against him. He was never supplied with witness statements nor an investigation report.
  114. In all these it is clear that the Respondents acted in breach of the *Employment Act* 2007 and the FAAA. This is the position as was in the *Postal Corporation of Kenya Vs. Andrew K Tanui* (2019) eKLR where the Court of Appeal made an observation that the procedure adopted by the employer fell short of a fair process.
  115. It is my finding that the Claimant was subjected to an unfair disciplinary process.
  116. As concerns the reasons for which the Claimant was terminated 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”.
  117. It is indeed true that an employee can only be terminated after the employer has established the existence of valid reasons.
  118. The Claimant in this case is said to have flaunted the Respondent’s policies.
  119. The Respondents aver that the Claimant had knowledge of a report of his sexual harassment brought to his attention by one of the alleged perpetrators which was highlighted by BBC documentary and failed to bring to the attention of the Respondents.
  120. That the Claimant was also involved in sexual relationship with one of the employees and also influenced her promotion in the company.
  121. During the flawed hearing process, the Claimant admitted to being aware of the Respondent’s Code of Policy on Living the Code in particular the requirement to immediately report actual or potential breaches of the said policies. He also admitted that the said perpetrator Jeremiah informed him of the allegations of sexual harassment through a text from an unknown source claiming to be BBC.



122. The Claimant however said that the said Jeremiah was not willing to share the text with him and he told him to report to the corporate which he did.
123. The Claimant was terminated for breach of the Respondent's policy. From the evidence on record however the Claimant explained why he couldn't have made a report of the alleged sexual harassment because the alleged perpetrator was not willing to share the text with him and its authenticity could not be ascertained.
124. It is however true that the Respondent's policy clause 5.6 obligated all employees and Managers to report any potential breaches of the Respondent's policies whether relating to oneself, their colleagues, people acting on behalf of Respondents whether accidental or deliberate.
125. Despite the Claimant being informed of this potential breach, he did not report it to his superior and was therefore in breach of the Respondent's code. Having found as above, it is my finding that the Respondents had valid reason to warrant dismissal of the Claimant.
126. Section 45 (2) of the [Employment Act](#) 2007 however states as follows:
- “ 45 A termination of employment by an employer is unfair if the employer fails  
(2) to prove—
- (a) that the reason for the termination is valid;
- (b) that the reason for the termination is a fair reason—
- (i) related to the employees conduct, capacity or compatibility; or
- (ii) based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure”.
127. Given that the disciplinary process meted against the Claimant was flawed, I find that the dismissal of the Claimant was unfair in terms of Section 45 of the [Employment Act](#) 2007.
128. The Claimant was subjected to a disciplinary process on the 27<sup>th</sup> April 2023. He was thereafter summarily dismissed on 8/5/2023.
129. The Claimant however avers that while these processes were pending, the Respondent advertised for position of head of manufacturing vide an advertisement dated 19/3/2023 which he avers was the position he was occupying and hence the advertisement amounted to a constructive dismissal of his employment on account of redundancy.
130. The Claimant had been appointed and was serving in the capacity of General Manager, Kericho North under work level 2 C. The job advertised was Head of Manufacturing, Ekatera Tea Kenya PLC (R 60002). The Claimant in my view failed to demonstrate that the job he was occupying was the one that was advertised and in this case the issue of constructive redundancy does not arise.



## **Remedies**

131. Having found as above and in considering the remedies sought by the Claimant and given the flawed disciplinary process applied against him, I find that the Claimant is entitled to compensation which I find 6 months salary is adequate in the circumstances and I award him accordingly.

= 6 x 1,000,664.34

= 6,003,986.04

132. I also award him 2 months' salary in lieu of notice as per his appointment letter

= 2 x 1,000,664.34

= 2,001,328.72

Total = 8,005,314.72

Less statutory deductions

133. The Respondent will pay costs of this suit plus interest at court rates with effect from the date of this judgment.

## **CONCLUSIONS**

**JUDGMENT DELIVERED VIRTUALLY THIS 18<sup>TH</sup> DAY OF JULY, 2024.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

In the presence of: -

Kiplangat for Claimant – present

Bett holding brief Mrs Opuyo for Respondent – present

Court Assistant - Fred

