

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT KERICHO

ELRC CLAIM NO. E038 OF 2025
(Before Hon. Lady Justice Anna Ngibuini Mwaure)

DAVID BIRGEN.....

.....CLAIMANT

VERSUS

**LIPTON TEAS AND INFUSIONS
KENYA PLC.....**

.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a Memorandum of Claim dated 25th November 2024 seeking the following reliefs:

a. A declaration that the Respondent's summary dismissal of the Claimant's employment amounted to unfair and unlawful dismissal and violated the Constitution of Kenya, the Employment Act, 2007, and the recognized common law principles of employment law.

b. An Order of reinstatement or re-engagement of the claimant to employment with back pay

- and with no loss of seniority, privileges, salaries, allowances, and benefits.***
- c. In the Alternative to prayer (b) above, back pay from the date of the termination up to the date of Judgement.***
- d. A compensation of Kshs.5,992,960 being: -***
- i. Three (3) months' salary in lieu of notice in the sum of Kshs.449,472.00;***
 - ii. General damages for wrongful dismissal and unfair termination equivalent to Twelve (12) months' salary amounting to Kshs.1,797,888.00; and***
 - iii. Gratuitous/ severance pay for 25 years in the sum of Kshs.3,745,600.00.***
- e. An order for full remuneration up to his retirement at 60 years.***
- f. An Order for compensation by way of exemplary damages to the claimant for malice.***
- g. Costs of the claim.***
- h.h. Interests at Court rates on (d), (e), (f), and (g) above, from the date of filing of this claim until payment in full***

i. Any other further relief that the Court may deem fit to grant in the interest of justice.

Claimant's case

2. The Claimant avers that he was employed by the Respondent (formerly Unilever Tea Kenya Limited, now eKatera Tea PLC) from 1996, beginning as an artisan grade 3 and rising through several promotions to Senior Research Assistant II in 2008, then Field Assistant Manager in an acting capacity from 2013 to 2019.
3. On 2nd May 2019, the Claimant avers that he was formally offered the position of Assistant Field Manager with specified terms including salary, housing, probation, and leave entitlements, and was confirmed on 5th November 2019. A contract dated 6th November 2019 set his annual salary at Kshs.1,609,290/=.
4. Throughout his service, the Claimant avers that he worked diligently, earned commendations and promotions based on merit, and was never subjected to warnings, reprimands, or disciplinary action.
5. On 19th November 2021, the Claimant avers that he was suspended and issued with a show cause letter

alleging breach of the Respondent's sexual harassment policy, code of respect and dignity, and Section 44(4) (e) of the Employment Act, specifically accusing him of sexually harassing colleagues and giving preferential treatment in exchange for sexual favours.

6. The Claimant avers that he denied the allegations in his response dated 23rd November 2021 and was summoned to a disciplinary hearing on 2nd December 2021. Although the Respondent's letter allowed him to bring witnesses, he was not furnished with witness statements beforehand, and during the hearing, written interviews were presented without the witnesses being called for cross-examination.
7. The Claimant contends that he was denied a fair hearing, subjected to hostile and demeaning questioning, and that the process relied on unsubstantiated rumours rather than factual evidence.
8. The Claimant avers that he was summarily dismissed by the Respondent on 9th December 2021 for allegedly breaching section 44(3) of the Employment Act, 2007, and the Respondent's Sexual Harassment Policy, Code Policy on Respect, Dignity and Fair Treatment.

However, no finding was made on the alleged breach of

the Code Policy on Living the Code. He was further ordered to vacate the company house by 23rd December 2021.

9. The Claimant contends that the dismissal was unsubstantiated, as no evidence was presented to prove the allegations of sexual harassment, and that the disciplinary hearing was a sham, predetermined, and lacking fairness. He argues that the dismissal violated his constitutional rights, the Employment Act, the Fair Administrative Actions Act, principles of natural justice, and the terms of his employment contract.
10. The Claimant contests his summary dismissal, arguing that the allegations against him were false, malicious, and unsupported by evidence, and that no finding was made as to whether his conduct amounted to gross misconduct or negligence.
11. The Claimant asserts that the disciplinary process was flawed, as he was denied the opportunity to cross-examine witnesses, and that the reasons given were unrelated to his conduct, capacity, or compatibility, being instead based on unsubstantiated facts.

12. The Claimant further claims that interviews used against him lacked employee consent, violating the Respondent's own Code and vitiating the process.
13. Consequently, the Claimant maintains that his dismissal was unjustified both in substance and procedure, breaching his constitutional rights to fair labour practices, fair administrative action, and fair hearing under Articles 41, 47, and 50.
14. The Claimant states that the Respondent's actions caused him suffering, mental anguish, and financial loss, as he was earning Kshs.149,824/= monthly at the time, and despite issuing a demand and notice of intention to sue, the Respondent failed to respond or settle his claim.

Respondent's response to Memorandum of Claim

15. The Respondent, through its in-house counsel, Cindy F. Dana, filed a Response to Memorandum of Claim on 13th December 2024.
16. The Respondent admits that there have been no prior proceedings between the parties and acknowledges

the jurisdiction of the court, but denies all other allegations in the Claimant's Memorandum of Claim.

17. The Respondent maintains that the summary dismissal was lawful and justified, asserting that the Claimant engaged in sexual relationships with subordinates in exchange for preferential treatment, thereby breaching **section 44(4)(e) of the Employment Act, 2007**, as well as the Respondent's policies on respect, dignity, and sexual harassment.
18. The Respondent denies any unlawfulness in its actions, disputes the Claimant's entitlement to reliefs sought, and prays that the claim be dismissed with costs.

Claimant's reply to the defence to the response to the Memorandum of Claim

19. The Claimant filed a reply to the defence to the response to the Memorandum of Claim dated 10th February 2025.
20. The Claimant admits only the descriptive contents of paragraph 2 of the Respondent's response to the Memorandum of Claim but denies the rest, reiterating

the claims in the Memorandum of Claim and putting the Respondent to strict proof.

21. Specifically, the Plaintiff disputes the Respondent's denials in paragraphs 3, 5, 6, 7, and 8 of the response to the Memorandum of Claim, restating reliance on earlier pleadings that highlight procedural flaws, lack of evidence, and violation of constitutional rights.
22. The Claimant maintains entitlement to the reliefs sought, arguing that the Respondent's response to the Memorandum of claim is shallow, spurious, and a mere denial that fails to answer the claim.
23. Accordingly, the Claimant prays that the response be struck out and judgment entered in his favour as earlier pleaded.

Claimant's evidence in court

24. CW1, the Claimant, adopted his witness statement dated 25th November 2024 as her evidence in chief and produced the list of documents of even date marked as exhibits 1 to 20 respectively.
25. CW1 testified that he had worked for the Respondent for 25 years and was never subjected to a proper disciplinary process before receiving the Notice to

Show Cause. He stated that he had never received a warning letter and was only given one or two days to prepare for the disciplinary hearing without being provided with any documents beforehand, which he only saw on the hearing date. CW1 added that no witnesses were present, he was denied the chance to cross-examine, and the process was faulty and malicious. He therefore prayed that the court grant the reliefs sought in his claim.

26. In cross-examination, CW1 acknowledged being aware of the Respondent's sexual harassment policy, code of conduct, and the Employment Act, noting that soliciting sexual favours through threats or rewards was prohibited and reportable to supervisors. He admitted knowing some colleagues, including Naomi, Tabitha, and Robinson, but denied knowing Elizabeth before the incident. CW1 confirmed receiving a show-cause letter outlining allegations of sexual relationships with Naomi and Tabitha, and an alleged involvement with Elizabeth, which he denied. CW1 stated that Naomi admitted to a relationship and that other witnesses, such as Grace and Tabitha, made related claims. CW1 explained that work allocations were done by team

leaders, not himself, though allegations suggested otherwise. He maintained that he did not specifically assign some employees lighter duties, despite accusations.

27. At the disciplinary hearing, CW1 stated that he was allowed to bring witnesses, but none appeared, and he wished to cross-examine the Respondent's witnesses. Ultimately, CW1 was summarily dismissed for breach of sexual harassment and respect policies, though absolved of retaliation claims. He was informed of his right to appeal but did not pursue it, and was advised on payment of terminal dues.
28. In re-examination, CW1 explained that he was a supervisor overseeing tea pluckers and general labourers, with work assignments made by managers and welfare team leaders. He stated that he met Robinson while he was plucking tea, and Robinson complained that someone was involved with his wife, threatened him, and claimed to be part of the Mungiki, which led CW1 to report the matter to Tigoni Police Station. He added that Robinson had personal differences with the company, and he could not prepare his defence since he had not been supplied

with documents, had no witnesses, and did not cross-examine anyone. He emphasized that he did not appeal because the hearing process was faulty, malicious, and a sham, which discouraged him.

Respondent's evidence in court

29. RW1, Peter Ngeno, adopted his witness statement dated 25th March 2025 and the list of documents and supplementary documents, both dated 23rd March 2025 and 9th July 2025, which are marked as exhibits 1 to 10 respectively, as his evidence in chief.
30. RW1 testified that as a senior manager and chair of the disciplinary committee, he had prior experience conducting hearings and sought to ensure fairness in the Claimant's case. He explained that witnesses were not called due to the sexual harassment policy, which allows voluntary participation, and that investigators presented submissions instead. Although rumours circulated, he maintained that the investigation was not based on them, and the minutes contained the relevant statements, which the Claimant signed. RW1 denied any bias or conspiracy, noting that the Claimant was allowed to call his own witnesses but did not.

31. In re-examination, RW1 emphasized that the policy required witness statements but not attendance, that the Claimant had been promoted before the allegations, and that there was no plan to oust him. He reiterated that the committee was balanced, the Claimant had opportunities to defend himself, and the alleged attack arose from the harassment claims.
32. Parties were directed to put in their written submissions.

Claimant's submissions

33. On the first issue, the Claimant submitted that the allegations of sexual harassment were baseless, founded on rumours, and unsupported by evidence, contrary to **sections 43 and 45(2) of the Employment Act**. He relied on the cases of **Mwangi v Family Bank Ltd [2023] KEELRC 2156** and **Osire v Mega Pack (K) Ltd [2023] KEELRC 1504**, where courts held that employers must have a genuine belief based on prima facie evidence, not mere suspicion.
34. On procedure, the Claimant contends that **section 41 of the Employment Act** was violated since he was not furnished with witness statements or investigation reports, nor allowed to cross-examine witnesses, while

investigators improperly acted as accusers and decision-makers. Authorities such as **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] KEELRC 920 (KLR)**, **David Wanjau Muhoro v Ol Pejeta Ranching Limited [2014] KEELRC 296 (KLR)**, **Kenfreight (E.A) Limited v Benson K. Nguti [2016] KECA 409 (KLR)**, **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] KEELRC 905 (KLR)**, **Postal Corporation of Kenya v Tanui [2019] KECA 489 (KLR)**, and **Kenya Revenue Authority v Menginya Salim Murgani [2010] KECA 164 (KLR)** all underscore that fair hearings require disclosure of evidence, representation, and genuine opportunity to defend oneself. In **Sawe v Ekaterra Tea Kenya PLC [2024] KEELRC 1870**, the court condemned similar flaws where investigators doubled as judges and witnesses.

35. Finally, on remedies, the Claimant invokes **sections 49 and 50 of the Employment Act**, supported by **Hema Hospital v Wilson Makongo Marwa [2015] eKLR**, to argue for compensation aimed at redressing his loss rather than punishing the employer.

Collectively, these authorities demonstrate that the

Respondent's process was both substantively and procedurally defective, rendering the dismissal unlawful.

36. The Claimant urged the court to allow the claim as prayed.

Respondent's submissions

37. On procedure, the Respondent submitted that **section 41 of the Employment Act** was complied with since the Claimant was issued a show cause letter, responded, attended the disciplinary hearing, was allowed to call witnesses, and signed the minutes, citing the case of **Walter Ogal Anuro v Teachers Service Commission [2013] KEELRC 386** which requires both substantive justification and procedural fairness. On witnesses, the Respondent relied on the case of **Kenya Tea Growers Association Unilever Tea Growers Association v Kenya Plantation and Agricultural Workers Union [2018] KECA 458 (KLR)**, where the Court of Appeal held that victims of sexual harassment need not testify in person if detailed statements are provided.

38. On grounds for dismissal, the Respondent invoke **sections 43(2) and 45(2) of the Employment Act**

and cite the case of ***Oirere v Teachers Service Commission [2023] KEELRC 1474*** affirming the employer's managerial prerogative, and ***Leonard's Maternity & Nursing Home v LMM [2023] KECA 1148*** which emphasized judging credibility from the victim's perspective in sexual harassment cases. The Respondent further relied on ***CFC Stanbic Bank Ltd v Danson Mwashako Mwakuwona [2015] KECA 919***, which established the "range of reasonable responses" test, arguing dismissal was within that band.

39. On remedies, the Respondent cited the case of ***Munyi v S.A. Manyatta Secondary School [2025] KEELRC 228*** to argue that gratuity must be contractual, and ***Ngokonyo & 2 others v Telkom Kenya Ltd [2025] KESC 75*** to reject anticipatory salaries, noting permanent contracts remain terminable.
40. Overall, the Respondent submits that dismissal was substantively justified, procedurally fair, and thus the Claimant is not entitled to reinstatement, damages, or compensation, and costs should be awarded to the Respondent.

Analysis and determination

41. The court has considered the pleadings herein and the rival submissions by both counsel; the issue for determination is as follows:

- a. Whether the Respondent unfairly terminated the Claimant on the allegations of sexual harassment;*
- b. If (a) above is in the affirmative, whether the Claimant is entitled to the reliefs sought; and*
- c. Who should bear the costs of the suit.*

42. **Sections 41 and 43 of the Employment Act** provide for the procedural fairness and substantive justification when it comes to termination.

43. In ***Walter Ogal Anuro v Teachers Service Commission(supra)*** the court held as follows:

“...for a termination of employment to pass the fairness test, It ought to shown that there was not only substantive justification for termination but also procedural fairness....”

44. In ***Mary Chemweno Kiptui v Kenya Pipeline Company Limited(supra)***, the court stated as follows:

“The Respondent therefore Having failed to prove the reason for the termination,

this court finds that the termination of the claimant was unfair under Subsection 43(1) of the Employment Act. Further, in such circumstances, Section 41 would apply, and the court finds that this not having been a proper case for summary dismissal, the claimant would be entitled to a notification and hearing on the alleged grounds of misconduct, poor performance or negligence, failing which, as the case turns out to be, the termination was invariably unfair.”

45. In ***Kenfreight (E.A) Limited v Benson K.***

Nguti(supra), the Court of Appeal stated as follows:

“Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided), an employer was duty bound to explain to an employee in the presence of another employee or union official, in a language the employee understood, the reason or reasons for which the employer was considering termination of the contract. In addition, an employee is entitled to be heard and his

representation, if any, considered by an employer before a decision to terminate his contract of service was taken.”

46. In this instant case, the Claimant stated he joined the Respondent (formerly Unilever Tea Kenya Limited, now Ekaterra Tea PLC) in 1996 as an artisan grade 3 and steadily rose through the ranks, being promoted to Senior Research Assistant II in 2008 and later serving as Field Assistant Manager in an acting capacity between 2013 and 2019. On 2nd May 2019, he was formally appointed Assistant Field Manager under specified terms covering salary, housing, probation, and leave entitlements, and was confirmed on 5th November 2019. His contract, dated 6th November 2019, set his annual salary at Kshs.1,609,290/=. The Claimant avers that there were allegations of sexual harassment against him as a notice to show-cause letter was issued on 19th November 2021, which he responded to on 23rd November 2021, and later invited to a disciplinary hearing on 2nd December 2021, and he was later summarily dismissed on 9th December 2021. The Respondent, on the other hand, argued that it fairly terminated the Respondent in accordance with its

policies and sections 41 and 43 of the Employment Act.

47. Looking at the Respondent's Sexual Harassment Policy defines as "unwanted or unwelcome sexual conduct or advances which create discomfort, embarrassment or feelings or insecurity. Sexual harassment is a display of power which is intended to intimidate, coerce or degrade another employee." It may also be directed at an individual or a group of individuals and may occur between all combinations of sex. In the said policy, it explained forms of sexual harassment, which can be physical, verbal conduct and nonverbal conduct.

48. **Section 6 of the Employment Act** provides that sexual harassment occurs as conduct by an employer, representative, or co-worker that directly or indirectly pressures an employee into sexual activity through promises of preferential treatment, threats of detrimental treatment, or threats to employment status. It also includes the use of sexually explicit language, sexually suggestive visual material, or physical behaviour of a sexual nature that is unwelcome or offensive, and which negatively affects

the employee's job performance, satisfaction, or overall employment environment.

49. In ***Ooko & Another V SRM & 2 others [2022]***

KECA 44 (KLR), where the Court held that:

“An employee is sexually harassed if the employer or a co-worker directly or indirectly requests that employee for sexual intercourse, sexual contract or any other form of sexual activity that contains or implies promise of preferential treatment in employment or threat of detrimental treatment. Further, an employee is sexually harassed if the employer, his representative or co-worker shows physical behaviour of a sexual nature which directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee... In our view, the letter and the formal complaint thereupon made by S were sufficient evidence to illustrate the unwanted nature of Dominic’s conduct, and that the same was communicated to both G4S Security and Dominic. We are in this

regard in agreement with the pronouncements made by Morrison J in Reed v Stedman (1999) IRLR 299 that a characteristic of sexual harassment is that it undermines the victim's dignity at work and constitutes a detriment on the grounds of sex, and that the lack of intent is not a defence. It was further held in that case that the words or conduct complained of must be unwelcome to the victim, and it is for her or him to decide what is acceptable and offensive. Therefore, the question as to what constitutes unwanted conduct is not what the court or tribunal would or would not find offensive. but whether the individual victim has made it clear that he or she finds the conduct unacceptable."

50. The Claimant was accused of engaging in sexual relationships with certain staff members including Naomi and Elizabeth. These ladies admitted they had sexual relationship with the Claimant. Tabitha Mueni however testified that even though the Claimant had approached her for sexual relationship claiming that

his wife was far, she declined and he did not bother her again.

51. Several men like Robinson and Fred Ouko husband of Tabitha Mueni said they had heard that the Claimant was having affairs with their wives.

Robinson was husband of Elizabeth and the Claimant even reported him to the police station Tigoni for allegedly threatening to attack him with “Mungiki” support for moving around with his wife.

He says he was later released but he never got any promotion at the place of work again because of this saga.

52. One husband Mr. Ouko in his statement confessed the men who were working for the Respondent were suffering as the Claimant was enticing their wives for job promotions.

Robinson also said they preferred to have women leaders.

53. A lady staff called Grace also testified that Naomi who was her close friend admitted she was chatting with the Claimant on personal matters and matters related to work. The same Naomi would tell other employees

she would not go tea picking but would claim to be given other jobs by the Claimant.

54. Claimant denied all the allegations and infact claimed he had a heath related issue and was limited to having sexual activities.

55. The court has considered the Sexual Harassment Policy of the Respondent which states as follows:

“The sexual harassment policy provides for the definition of sexual harassment as,
“Unwanted or unwelcome sexual conduct or advances which create discomfort, embarrassment, or feelings of insecurity. Sexual harassment is a display of power which is intended to intimidate, coerce or degrade another employee.”

The policy further provides that soliciting sexual favour through use of threats or rewards is a form of physical sexual harassment.”

Having considered the evidence by all the witnesses, court finds on balance of probability the Respondents had reasonable grounds to hold the Claimant acted improperly towards a good number of female employees.”

56. Further, **Section 6 of Employment Act** provides as follows as far as definition of Sexual harassment is concerned

“An employee is sexually harassed if the employer of that employee or a representative of that

employer or a co-worker—

(a) directly or indirectly requests that employee

for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express—

(i) promise of preferential treatment in employment;

(ii) threat of detrimental treatment in employment; or

(iii) threat about the present or future employment status of the employee;

(b) uses language whether written or spoken of a sexual nature;

(c) uses visual material of a sexual nature; or

(d) shows physical behaviour of a sexual nature

which directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee and that by its nature has a detrimental effect on that employee’s employment, job performance,

or job satisfaction.

57. Obviously, cases pertaining to sexual harassment are intricate as there are never or rarely are there witnesses to the act.

In **LEONARD MATERNITY & NURSING HOME V**

LMM (2023) KECA the Court of Appeal stated

“Sexual harassment cases often occur privately so credibility and reasonableness must be judged from the victim’s perspective.”

58. In the case of **REED -VS- STEDMAN (1999) KLR**, the court held that the words or conduct complained of must be unwelcome to the victim and it is for her or him to decide what constitutes unwanted conduct as to what the court or tribunal would or would not find offensive but whether the individual victim has made it clear that he or she finds the conduct unwelcome.

59. The court also in the case **KIMALE -VS- CO-OPERATIVE BANK OF KENYA LIMITED CAUSE 202 OF 2017** held that by the Claimant’s conduct and his own admission of improper conduct against the Complainant herein, I find that the Respondent had fair and justified reasons to terminate the Claimant.

60. The Respondent on balance of probability had valid grounds to put the Claimant through disciplinary hearing for improper behaviour against women employees who were his juniors.

As for the procedure, the Claimant was sent on suspension by a letter dated 19th November 2021 and was asked to respond to the charges therein by 19th November 2021. After he wrote his response, he was invited for a disciplinary hearing dated 21st November 2021 and again the charges against him were set down clearly. He was informed he could avail a witness or witnesses at the hearing and he admitted he had a witness at the hearing.

61. The complaint he had was that he did not have a chance to cross-examine the witnesses who had given evidence against him. The Respondent explained that their Sexual Harassment Policy did not provide for witnesses to appear before the person accused of sexual harassment for the sake of their security.

62. The disciplinary hearing took place on 2nd December 2021 and as per minutes produced and signed among others by the Claimant, the same proceeded after lengthy engagement. The Claimant was served with the

summary dismissal letter dated 9th December 2021 thereafter. He was informed of his right to appeal within seven (7) days but he admitted he chose not to appeal as he felt he could not get justice.

63. The court finds the Respondents complied with procedure stipulated in Section 41 of the Employment Act in conducting the disciplinary hearing. **Section 41(1) of Employment Act** provides: -

“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.”

64. The court has analysed the pleadings and submissions of the respective parties as well as the case laws and has found on a balance of probability that the Claimant has failed to prove he was unfairly and unprocedurally terminated from his employment

by the Respondent. The Respondent succeeded in proving both substantial and procedural fairness was adhered to in making the decision to terminate the Claimant summarily.

65. The claim dated 26th November 2024 is therefore dismissed.

66. Each party will meet their costs of this case.

67. The Claimant will be paid his terminal dues if still unpaid as per his summary dismissal letter of 9th December 2021.

It is so ordered.

**Dated, Signed and Delivered virtually at Nakuru
this 13th Day of
March, 2026.**

**ANNA NGIBUINI MWAURE
JUDGE**

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of

the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE
JUDGE