

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT**  
**NAIROBI**  
**CAUSE NO. E777 OF 2023**

**PHOEBE NANCY MUTHONI ANDABWA .....**  
**CLAIMANT**

**VERSUS**

**ARICHEM LTD.....1<sup>ST</sup>**  
**RESPONDENT**

**KIRIMI ARITHI.....2<sup>ND</sup>**  
**RESPONDENT**

**JUDGMENT**

**Introduction**

1. This suit was lodged vide a Statement of Claim dated 25<sup>th</sup> September, 2023, wherein the Claimant seeks the following reliefs against the Respondents: -
  - i. A declaration and finding that the Claimant suffered unfair and unlawful termination by the Respondents.
  - ii. A declaration and finding that the Respondent is in breach of the provisions of Section 18 (4) of the Employment Act by failing to pay the Claimant her wages and terminal dues on dismissal.
  - iii. A declaration and finding that the Acts of the Respondents amounted to acts of defamation, slander of a woman, libel, and sexual harassment.

- iv. A declaration and finding that the Respondent is in breach of the provisions of Section 18 (5)(b) of the Employment Act by failing to deliver to a labour officer in the district in which the employee was working a written report specifying the circumstances leading to, and the reasons for the dismissal, stating the period of notice and the amount of wages in lieu thereof to which the employee would but for the dismissal, have been entitled; and
- v. General Damages for breach of contract and discrimination, punitive damages, exemplary damages, aggravated damages, and damages for discrimination, breach of legitimate expectation, and breach of the Claimant's rights to fair labour practice and fair administrative action as provided for under Articles 41 and 47 of the Constitution, assessed at Kshs.5,000,000
- vi. Payment of General, Punitive, aggravated, and exemplary damages for libel and slander of a woman assessed at Kshs.10,000,000
- vii. Payment of General, Punitive, aggravated, and exemplary damages for sexual harassment 10,000,000
- viii. An Order directing the Respondents to issue a formal retraction of the email dated 13<sup>th</sup> July 2023 and any written correspondences with respect to the alleged "SPECIAL RELATIONSHIPS WITH STAFF that the same be expunged and deleted forthwith from the Claimant's records and that the Respondents forward to her a formal retraction and an unequivocal apology both of

which should be placed in a place of prominence in the 1st Respondent' premises for a period of not less than one year.

- ix. The Respondent be ordered to pay the Claimant Kshs.196,000/- being 1 Month' Salary in lieu of Notice.
  - x. The payment of damages assessed at Kshs.2,356,800, equivalent to 12 months' pay for the unlawful and unprocedural termination of his employment.
  - xi. The Payment of the Claimant's terminal dues to be assessed at the hearing (pension fund, benevolent fund and KEWISCO Shares contributions) and her leave entitlement.
  - xii. An Order do issue directing the Respondent to furnish the Claimant with a Certificate of Service and a copy of her employment records.
  - xiii. That the Respondent pays the Claimant the costs of transcribing the audio clips assessed at Kshs.20,000 and the costs of the transcriber's attendance costs at the hearing.
  - xiv. Costs of the Claim and interest on all the amounts from time due until payment in full.
2. The Respondent filed a Response to the Statement of Claim dated 4<sup>th</sup> December 2023, denying the Claimant's claim.
  3. The Claimant's case was first heard on 13<sup>th</sup> May, 2025, when one Irene Kinya (CW1) testified in support of the Claimant's case, and produced the transcripts of video clips she prepared of the documents annexed as 2-8,11,14,16,30,31,32

and 33 in the Claimant's list and bundle of documents, and which were admitted as exhibits in the matter.

4. CW2, Charles Gitonga Mugambi, also testified in support of the Claimant's case on 12<sup>th</sup> November, 2025, and the Claimant, CW3, further testified in support of her case on the same day.
5. The Respondent's case was heard on the same date when the 2<sup>nd</sup> Respondent, Dr. Kirimi Arithi, the Managing Director of the 1<sup>st</sup> Respondent, testified in support of the Respondents. He adopted his witness statement and produced the Respondents' list and bundle of documents as exhibits in the matter.
6. Submissions were filed for both parties, which have been duly considered.

### **The Claimant's Case**

7. The Claimant states that she was employed by the 1<sup>st</sup> Respondent from 27<sup>th</sup> September 2007 until 18<sup>th</sup> July 2023, where she served as a Sales and Marketing Executive and earned a basic salary of Kshs.196,400 at the time of termination. She states that despite serving diligently and faithfully, her employment was unlawfully, unfairly, and procedurally terminated through a letter dated 18<sup>th</sup> July 2023.
8. The Claimant further states that from 2009 to early 2023, she was subjected to a hostile work environment caused by defamatory conduct from officers of the 1<sup>st</sup> Respondent, which damaged her reputation and affected her work performance. She avers further that the 2<sup>nd</sup> Respondent

subjected her to repeated unwelcome sexual advances, including verbal, physical, and visual conduct, suggestive comments, and unwanted touching, and that her rejection of these advances resulted in an intimidating and hostile working environment that left her feeling harassed.

9. The Claimant further states that the hostile and sexually charged work environment left her distressed, vulnerable, traumatized, and disempowered, and that the 2<sup>nd</sup> Respondent's unwanted sexual advances ultimately resulted in her unlawful and procedurally unfair termination.

10. She further avers that in April 2023, she was contacted by a colleague, Charles Gitonga Mugambi, who informed her that he had been suspended for allegedly concealing a purported "special relationship" with her. She states that according to Mr. Mugambi, the 2<sup>nd</sup> Respondent had fabricated allegations that the Claimant was involved in a three-way relationship with him and another colleague, Edwin Muthuri, and that they had been seen together at Quiver Lounge in Kitengela in February 2023. The Claimant maintains that the allegations were false and malicious, but despite Mr. Mugambi denying them, his employment was terminated after he refused to defame the Claimant to secure his own position.

11. The Claimant further states that upon confronting the 2<sup>nd</sup> Respondent about the allegations, which had also been disclosed to her husband, Conrad Andabwa, the 2<sup>nd</sup> Respondent admitted to acts of sexual harassment and

informed her that he could no longer work with her because her husband was aware of his conduct. She avers that the 2<sup>nd</sup> Respondent gave her the option of either resigning or being terminated.

12. The Claimant maintains that she declined to resign, insisting that she had committed no misconduct warranting disciplinary action or resignation, and argues that the 2<sup>nd</sup> Respondent made it clear that the intended termination of her employment was solely due to the sexual harassment allegations she and her husband had raised against him.

13. The Claimant avers that following her confrontation with the 2<sup>nd</sup> Respondent, the Respondents orchestrated a malicious and ill-motivated scheme aimed at damaging her reputation through defamatory allegations and thereafter manufacturing false and unsubstantiated accusations of misconduct and poor performance to justify terminating her employment.

14. She states that on 29<sup>th</sup> June 2023, she received an email from the 2<sup>nd</sup> Respondent raising concerns regarding her performance, which indicated that her duties involved market and product penetration, diversification, and customer engagement, requiring her to meet clients at least three days per week. She states that he alleged that from January 2023, she had only covered 98 customers, representing 33% of the department's clientele, and that her performance score stood

at 32.7% based on two annual visits per customer and 65.3% on half-year approximations.

15. The Claimant states that the email further alleged that she had failed to submit a marketing report for 2023 and had not provided progress meeting reports for 2022, despite the Respondent being aware of a marketing report she had prepared on 18<sup>th</sup> May 2023, which had not yet been discussed. She avers that she was also accused of failing to hold consultative review meetings with colleagues during 2023.

16. It is her case that the Respondents further asserted that her overall marketing performance was below standard and advised her to conduct quarterly forecasting meetings, increase customer visits, spend more time in the field, demonstrate greater aggressiveness and self-motivation, involve team members in planning, and hold regular management review meetings.

17. The Claimant further states that the email contained allegations regarding her alleged “special relationships” with younger male staff members and referenced a letter from the 2<sup>nd</sup> Respondent dated 12<sup>th</sup> August 2020. She avers that the email indicated that she had inappropriate relationships with several colleagues, including Mr. Marsapit and Mr. Gitonga between May and September 2021, Mr. Maluki between September and November 2021, and that she allegedly dated Mr. Marsapit from January to May 2022. It further alleged

that, around August 2022, she was involved with Mr. Charles Gitonga, and that in February 2023, she was seen at a restaurant in Kitengela with Mr. Gitonga and Mr. Edwin Muthuri.

18. According to the Claimant, the email accused her of being the person who seduced the younger male employees in all the alleged instances. She maintains that the allegations were false, defamatory, and malicious, although the email acknowledged that she had denied all the accusations.

19. The Claimant states that on 14<sup>th</sup> July 2023, she was shocked, embarrassed, and distressed by the contents of the email containing the allegations against her, and informed the 2<sup>nd</sup> Respondent that she had forwarded the matter to her advocates for an appropriate legal response. She avers that, before her advocates could respond, she was summoned to a meeting on 18<sup>th</sup> July 2023 and thereafter issued with a termination letter dated the same day. According to the Claimant, the termination letter cited her alleged failure to respond to the email of 29<sup>th</sup> June 2023, which the Respondents interpreted as evidence that she had not taken the issues seriously and had committed an act of disobedience.

20. She states that the letter further stated that the 2<sup>nd</sup> Respondent had conducted a performance review and concluded that her performance was below standard, and further referred to an email dated 21<sup>st</sup> June 2023 seeking a

meeting with her husband, Conrad, who had allegedly raised complaints concerning the conduct of the 2<sup>nd</sup> Respondent, and noted that despite meetings being scheduled, he failed to attend.

21. It is her case that the termination letter referenced the email dated 13<sup>th</sup> July 2023, stating that the Claimant had not yet responded to its contents and that, as a result, the 2<sup>nd</sup> Respondent was unable to conduct customer visits with her, and ultimately communicated the Respondents' decision to terminate her employment with immediate effect.

22. The Claimant states that the Respondents deliberately fabricated allegations of poor performance and misconduct to conceal the true reason for her dismissal, namely the sexual harassment allegations she had raised against the 2<sup>nd</sup> Respondent. She contends that the emails relied upon by the Respondents did not require any response, did not amount to notices to show cause, and contained unsupported and malicious accusations regarding her personal life and alleged relationships with colleagues.

23. She further maintains that no genuine performance appraisal or disciplinary process was ever conducted, no targets or policies had been communicated to her, and no evidence of poor performance was provided. On the contrary, she asserts that the department she headed consistently performed well and exceeded sales expectations.

24. The Claimant also states that the accusations against her created a hostile work environment that affected her ability to interact freely with colleagues and caused her mental anguish, embarrassment, and stress. She argues that even if the alleged personal relationships existed, which she denies, they could not lawfully justify termination because no company policy or law prohibited such conduct.

25. It is her case that she was never issued a formal notice to show cause, never subjected to a disciplinary hearing, and was denied an opportunity to defend herself, contrary to constitutional and employment law requirements. She therefore maintains that the allegations of poor performance were merely a pretext to justify an unlawful and unfair termination arising from her complaints of sexual harassment against the 2<sup>nd</sup> Respondent.

26. The Claimant further states that the email dated 13<sup>th</sup> July 2023, authored by the 2<sup>nd</sup> Respondent, was false, baseless, and maliciously circulated with the intention of damaging her reputation and character. She contends that the defamatory allegations contained in the email were disseminated and repeated among members of staff, thereby exposing her to ridicule, embarrassment, and reputational harm. It avers that this is the basis upon which she seeks damages against the Respondents for defamation, libel, and slander arising from the publication of the said email.

27. The Claimant further avers that she has gathered audio recordings which corroborate her claims that the Respondents' conduct before and leading to her termination was driven by malice and intended to protect the Managing Director from allegations of sexual harassment. She also states that the defamatory conduct continued after the events leading to her dismissal, as the 2<sup>nd</sup> Respondent and one Fridah Kirimi made derogatory and defamatory remarks about her during conversations with Mr. Mugambi.
28. It is her case that the statements disparaged her character and reputation and were subsequently repeated to other third parties. She states that the details of these remarks are captured in recorded conversations involving the 2<sup>nd</sup> Respondent, Fridah Kirimi, and Mr. Mugambi, and which she has produced in evidence.
29. The Claimant asserts that her termination was unlawful, unfair, and discriminatory, and carried out in violation of the Employment Act due to lack of due process and procedural fairness. She states that she was targeted for rejecting the 2<sup>nd</sup> Respondent's sexual advances and was dismissed without being issued a notice to show cause, given evidence, or afforded a fair hearing.
30. She further contends that the Respondents fabricated allegations of poor performance and misconduct without any valid performance management system, credible investigation, or prior warning. According to her, the

accusations regarding her personal relationships were baseless and malicious, intended to tarnish her reputation and justify her dismissal.

31. The Claimant also maintains that she was subjected to long-term sexual harassment, discrimination, and hostile treatment from 2009 to 2023, which culminated in her termination. She adds that she was denied terminal dues and a certificate of service, and that the entire process was driven by malice, discrimination, and retaliation rather than genuine performance concerns.

32. On cross-examination, the Claimant CW3, told the court that she received an email dated 21<sup>st</sup> June, 2023, but did not acknowledge receipt of the same nor reply to it. She further confirmed that the email gave her the opportunity to discuss the issue between her and the Respondents, but she did not take the opportunity to discuss it or to be heard.

33. It is the Claimant's case that she responded to only one email, but which, in her view, did not warrant her termination. She testified that she worked in the cosmetics department, which was the least performing.

34. It is her evidence that she reported at Isinya police station that she was sexually harassed on 17<sup>th</sup> August, 2023, when she was no longer working for the Respondents. She confirmed that she has not returned to the police station since making the complaint, does not remember whether she

wrote a statement about the complaint, and that investigations into the issue have never started.

35. She confirmed that she received a warning and had written an apology prior to termination.

36. The Claimant confirmed that she was paid one month's salary in lieu of notice, service pay, and leave pay.

37. It is the Claimant's prayer that her claim be allowed as prayed.

### **The Respondent's Case**

38. It is the 1<sup>st</sup> Respondent's case that the Claimant was appointed to their service vide a letter dated 27<sup>th</sup> September 2007. It denies allegations of unfair termination, maintaining that the Claimant was lawfully and procedurally dismissed in accordance with her employment contract.

39. The Respondents further state that management had concerns regarding the Claimant's conduct based on previous warnings in 2020 relating to the misuse of a company car and phone, as well as inappropriate relationships with junior staff members.

40. They aver that investigations were undertaken following reports that the Claimant, together with Charles Gitonga and Edwin Muthuri, had been seen drinking at Quiver Lounge in Kitengela, and that the Claimant had previously apologized in

2020 and undertaken to avoid such relationships within the company.

41. The 1<sup>st</sup> Respondent avers that the Claimant's appointment letter required her to conduct herself with loyalty, integrity, tact, and discretion so as not to bring the company into disrepute, both in her private and public conduct. They further state that call logs from the Claimant's company phone revealed frequent late night communication with younger male colleagues on non-work-related matters, while vehicle tracker records showed misuse of the company vehicle through unauthorized late-night trips. The Respondents state that between 2015 and 2020, the Claimant engaged in inappropriate relationships with several colleagues, namely Roy Mawira, Linus Muthomi, Michael Kilolong, and Robert Kinyua Nkonge.

42. It is the Respondents' case that the findings led to the Claimant being placed on compulsory leave from 28<sup>th</sup> May to 25<sup>th</sup> June 2020 for dishonesty and misuse of company resources after she was confronted with the allegations.

43. The 1<sup>st</sup> Respondent further states that following the investigations, the Claimant was issued a warning letter dated 12<sup>th</sup> August 2020, and that she wrote two apology letters dated 7<sup>th</sup> May and 11<sup>th</sup> September 2020, expressing regret over the incidents and assuring management that the conduct would not recur. It is their case that the Claimant's

colleagues admitted to the relationships and similarly issued apology letters in September 2020.

44. The Respondents state that the Claimant was surcharged Kshs.50,000 for misuse of the company car and phone. They aver that in relation to the events at Quiver Lounge, Edwin Muthuri confirmed during investigations that he had joined the Claimant and Charles Gitonga for drinks at Quiver Lounge, Kitengela, in February 2023 before leaving them there at about 11 p.m. The Respondent further states that when Charles Gitonga was questioned, he denied the allegations, became unruly, and was subsequently suspended and later dismissed for dishonesty and for compromising internal investigations by disclosing inquiry information to the Claimant.

45. The 1<sup>st</sup> Respondent states that it informed the Claimant that investigations were being conducted following information received from Edwin Muthuri regarding her conduct. They further aver that around the same period, the Claimant's husband, Conrad Andabwa, contacted the Finance Director, Fridah Kiriimi, requesting a meeting with management to discuss concerns relating to out-of-office marketing meetings allegedly attended by the Claimant and the 2<sup>nd</sup> Respondent, and that a meeting was scheduled for 12<sup>th</sup> June 2023 at 5:30 p.m., and the Claimant was asked to notify her husband, but neither the Claimant nor her husband attended.

46. The Respondents state that the 2<sup>nd</sup> Respondent later sent the Claimant an email dated 21<sup>st</sup> June 2023 addressing their failure to attend the meeting and proposing several alternative meeting dates up to 13<sup>th</sup> July 2023, but again, neither the Claimant nor her husband responded to the invitations or attended any of the proposed meetings.
47. The 1<sup>st</sup> Respondent avers that concerns had arisen regarding the Claimant's half-year performance in her marketing role, prompting management to send her an email addressing the issues, to which she failed to respond. The Respondent further states that its communications regarding the Claimant's conduct were based on information received about her alleged meeting with colleagues at Quiver Lounge in Kitengela, which management considered a recurrence of previous conduct for which the Claimant had earlier admitted wrongdoing and apologized.
48. According to the Respondent, it became untenable to retain the Claimant in employment due to the alleged inappropriate relationships with colleagues and concerns raised by her husband, leading to the issuance of a termination letter dated 18<sup>th</sup> July 2023.
49. The Respondents also state that the Claimant had previously received two warning letters: one dated 27<sup>th</sup> July 2017 for carelessness during stock-taking, and another dated 12<sup>th</sup> August 2020 relating to misuse of company property, alleged

inappropriate relationships with staff members, and dishonesty.

50. The 1st Respondent avers that the warning letters issued to the Claimant arose from her failure to comply with Clause 10 of her appointment letter, which required her to demonstrate loyalty, sincerity, and conduct beyond reproach. The clause further obligated the Claimant to conduct herself both privately and publicly in a manner that would not bring the company into disrepute, while exercising tact and discretion in dealing with staff and members of the public. Additionally, the Claimant was required to perform her duties in accordance with the company's instructions and policies issued from time to time.

51. The 1<sup>st</sup> Respondent acknowledges receipt of the demand letter and avers that the Claimant was paid one month's salary in lieu of notice on 28<sup>th</sup> August 2023, as well as terminal dues amounting to Kshs.1,390,264.83 on 23<sup>rd</sup> November 2023.

52. The Respondent further denies the existence of any pension or benevolent fund under the Claimant's employment terms, stating that such benefits were not provided for in the appointment letter and that it was not privy to any arrangement between the Claimant and KEWISCO.

53. The Respondent prays for dismissal of the suit with costs.

54. On cross-examination, the Respondents' witness confirmed that the transcription produced in evidence was accurate and that they had not challenged the recordings.

55. RW1 confirmed that the email of 29<sup>th</sup> June, 2023, did not ask the Claimant to respond to any specific issues. He stated that the audio recording confirmed that the Claimant was still filing her reports and that he had not produced evidence of a performance review evaluation before the court.

56. RW1 further told the court that the Claimant was ready to continue working if he had stopped harassing her. He confirmed that he did not issue her notice to show cause nor allow her an opportunity to make a representation. It is his case that he had not produced evidence showing that the Claimant performed poorly.

57. RW1 testified that he did ask the Claimant to respond to allegations of having been at Quiver and that socializing was not an offense. He averred that he did not admit to sexual harassment.

### **Analysis and Determination**

58. Having considered the pleadings, the evidence on record, and the submissions by the parties, the following issues arise for determination:

- a) Whether the Claimant was subjected to sexual harassment, discrimination, and a hostile work environment.

- b) Whether the termination of the Claimant's employment was substantively and procedurally fair.
- c) Whether the Claimant proved defamation against the Respondents
- d) Whether the Claimant is entitled to the reliefs sought.

**Whether the Claimant was subjected to sexual harassment, discrimination, and a hostile work environment**

59. The Claimant's case is that the 2<sup>nd</sup> Respondent subjected her to unwelcome sexual advances over a prolonged period and that upon rejecting those advances, she became the subject of hostility, malicious allegations, and eventual termination. The 2<sup>nd</sup> Respondent denies the allegations and maintains that the termination arose from the Claimant's misconduct and poor performance.

60. Section 6 of the Employment Act, 2007 provides: -

***"An employee is sexually harassed if the employer of that employee or a representative of that employer or a co-worker:-***

- a) uses language whether written or spoken of a sexual nature; or***
- b) shows physical behavior of a sexual nature which directly or indirectly subjects the employee to behavior that is unwelcome or offensive to that employee and that by its nature has a detrimental effect on that***

***employee's employment, job performance, or job satisfaction."***

61. The Court has carefully considered the audio recordings, the transcripts, emails, and oral testimony tendered in evidence before this court. Of significance is RW1's admission during cross-examination that the Claimant was willing to continue working if he had "stopped harassing her", and his confirmation that the transcripts and the audio conversations were accurate.

62. The Court further notes that RW1 did not deny having private discussions concerning the Claimant's personal relationships and admitted that socializing was not an offence under their company policy.

63. The Respondents placed considerable emphasis on the Claimant's alleged relationships with younger male employees, but no policy prohibiting consensual social interaction among employees was produced before the Court. Equally, no evidence was tendered demonstrating that the alleged relationships negatively affected work performance or caused operational prejudice to the 1<sup>st</sup> Respondent's business.

64. The Court further observes that the email by the 2<sup>nd</sup> Respondent dated 13<sup>th</sup> July 2023 to the Claimant went beyond legitimate managerial concern and delved extensively into the Claimant's alleged personal and intimate

relationships with colleagues. The tone and content of the email were demeaning, invasive, and unrelated to measurable employment obligations. The allegations, for instance, that the Claimant “seduced younger male staff” were particularly humiliating and unnecessary in the context of workplace management.

65. In ***Ooko & another v SRM & 2 others (Civil Appeal 1 95 & 19 7 of 2019 (Consolidated)) [2022] KECA***, the court described sexual harassment thus: -

**“... an employee is sexually harassed if the employer or a co-worker directly or indirectly requests that employee for sexual intercourse, sexual contact, or any other form of sexual activity that contains or implies a promise of preferential treatment in employment or threat of detrimental treatment. Further, an employee is sexually harassed if the employer, his representative, or co-worker shows physical behavior of a sexual nature which directly or indirectly subjects the employee to behavior that is unwelcome or offensive to that employee.”**

66. Further in ***Reed v Stedman (1999) IRLR 299***, Morrison J held 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. The court proceeded to hold that the question of what constitutes unwanted conduct is not

whether the court or tribunal would or would not find the conduct offensive, but whether the individual victim has made it clear that he or she finds the conduct unacceptable.

67. Sexual harassment, in my view, may be inferred from persistent unwelcome conduct and retaliatory actions following rejection of advances, even where direct evidence is difficult to obtain.

68. In ***Mwanyule v Said t/a Jomvu Total Service Station (2004) eKLR***, the Court emphasized that employers must exercise managerial authority fairly and without humiliation or abuse.

69. In the circumstances of this case, the Court is persuaded that the Claimant established, on a balance of probabilities, that she was subjected to a hostile and humiliating work environment orchestrated by the 2nd Respondent, and the allegations concerning her personal life were weaponized against her after she confronted him regarding sexual harassment.

70. The Court therefore finds and holds that the Respondents, through the 2<sup>nd</sup> Respondent, violated the Claimant's right to dignity and fair labour practices under Articles 28 and 41 of the Constitution and Section 6 of the Employment Act.

**Whether the termination of the Claimant’s employment was substantively and procedurally fair**

71.A termination of employment is considered fair and lawful, where the employer adheres to Article 47 of the Constitution and Sections 41, 43, and 45 of the Employment Act, 2007, in effecting the termination. These provisions place on the employer the burden of proving valid and fair reasons for termination and demonstrating that fair procedure was followed.

72.In the case of ***Charles Musungu Odana v Kenya Ports Authority [2019] eKLR***, the Court stated;

***“It is now clear that the burden placed on an employer by Section 43 of the Employment Act is to establish a valid reason that would cause a reasonable employer to terminate employment.”***

73.On substantive fairness, the Respondents cited poor performance, misconduct, dishonesty, and inappropriate relationships with colleagues as the reasons for termination.

74.On the allegations of poor performance, the Respondents failed to produce any performance appraisal reports, targets, evaluation tools, warning letters on performance, or evidence of a structured performance management process to justify a termination premised on poor performance. In ***National Bank of Kenya v Samuel Nguru Mutonya [2017] KEELRC 1274 (KLR)***, the Court held that where poor

performance is alleged, an employer must demonstrate the expected performance standards, the deficiencies complained of, and the support provided to the employee before termination.

75. RW1 admitted on cross-examination that no performance review evaluation was produced before the Court, which leads the court to the finding that poor performance was not at all proved.

76. On misconduct arising from alleged inappropriate relationships, the Respondents through their witness (RW1) admitted that socializing was not prohibited and further failed to produce any policy outlawing consensual association among employees. Further, the alleged conduct largely concerned the Claimant's private life and was unsupported by cogent evidence of workplace impropriety.

77. In ***British American Tobacco (K) Ltd v Kenyan Union of Commercial Food and Allied Workers (Kuc/aw) [2019] eKLR***, which quoted with approval the decision of ***Anthony Mulaki V Addax Kenya Limited, Cause No. 822 of 2012***, where the Court held as follows:-

***"In examining the validity of reasons, the court was correctly directed by the Respondent to the case of BRITISH HOME STORES LTD v BURCHELL (1980) LC.R. 303 E.A.T. where it was held that for the court to***

***uphold the decision by the employer as being fair, it must be shown that:-***

- (a) The employer must believe at the time of termination that the employee is guilty of the allegations against him/her***
- (b) The employer had reasonable grounds upon which to sustain that belief; and***
- (c) The employer carried out as much investigation as reasonable in the circumstances, the employer need only be satisfied on the balance of probability."***

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78. The Court is persuaded that the allegations of misconduct and poor performance were used as a pretext to justify the Claimant's removal following her confrontation with the 2<sup>nd</sup> Respondent over sexual harassment concerns.

79. The Court therefore finds that the Claimant's termination was substantively unfair and unlawful.

80. The second limb in determining the fairness of a termination concerns the procedure adopted in the termination. Section 41 of the Employment Act is couched in mandatory terms and requires an employer contemplating termination on grounds of misconduct, poor performance, or incapacity to explain the allegations to the employee in the presence of another employee or shop floor representative and to hear the employee's representation before making a decision.

81. The evidence on record demonstrates that the Claimant was never issued with a formal notice to show cause. RW1 expressly admitted during cross-examination that he did not issue a notice to show cause and did not accord the Claimant an opportunity to make representations before termination.

82. In the case of **Anthony Mkala Chitavi v. Malindi Water & Sewerage Company Ltd [2013] eKLR**, the court had this to say on fair process: -

***“The ingredients of procedural fairness, as I understand it within the Kenyan situation, are that the employer should inform the employee as to what charges the employer is***

***contemplating using to dismiss 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.”***

83. Further, in ***Walter Ogal Anuro v Teachers Service Commission [2013] KEELRC 386 (KLR)***, the Court held that for termination to pass the fairness test, there must be both substantive justification and procedural fairness.

84. Likewise, in ***Kenfreight (E.A.) Limited v Benson K. Nguti***, the Court of Appeal affirmed that failure to comply with Section 41 renders termination procedurally unfair.

85. The emails relied upon by the Respondents as inviting the Claimant for discussions on the issues cannot substitute the disciplinary hearing contemplated under Section 41. Further, the email dated 29th June 2023 merely raised concerns and did not constitute a notice to show cause. Indeed, RW1 admitted that the email did not require the Claimant to

respond to any specific accusations or issues, which confirms that it was never intended to be a notice to show cause.

86. The Court therefore finds and holds that the Respondents wholly failed to comply with the procedural fairness requirements under the law.

87. In the upshot, I find the termination of the Claimant's employment both procedurally and substantively unfair and unlawful.

### **Whether the Claimant proved defamation**

88. It is now settled that to succeed in a claim for defamation, a Claimant must establish that the statement was defamatory, that it referred to the Claimant, that it was published to a third party, and that it was false and malicious (See ***Phinehas Nyaga vs. Gitobu Imanyara [2013] eKLR.***)

89. The 2<sup>nd</sup> Respondent's email to the Claimant, dated 13<sup>th</sup> July 2023, contained allegations that the Claimant maintained inappropriate relationships with younger male employees and "seduced" them. The email was circulated within the Respondent's management structure and discussed among employees.

90. In my considered view, the contents of the email were plainly defamatory, as the allegations attacked the Claimant's moral character and portrayed her as immoral and manipulative.

91. Further, the Respondents did not lead credible evidence to prove the allegations to the required standard as to justify the contents of their emails.

92. The Court further notes that the publication was unnecessary for legitimate disciplinary purposes and grossly exceeded reasonable workplace communication. In ***SMW v ZWM [2015] eKLR***, the Court emphasized that defamatory imputations affecting a woman's chastity and moral standing are particularly grave and attract substantial damages.

93. The Court is therefore satisfied that the Claimant has proved defamation on a balance of probabilities.

#### **Whether the Claimant is entitled to the reliefs sought**

94. The Court having declared the Claimant's termination unfair and unlawful, entitles her to compensation pursuant to Sections 49 and 50 of the Employment Act, 2007.

#### **Compensation for unfair termination**

95. In ***Alphonse Maghanga Mwachanya v Operation 680 Limited [2013] eKLR***, the Court held that in determining an award of compensation, the court is to consider the 13 factors set out under section 49 (4) of the Employment Act.

96. Considering the Claimant's long service of about 16 years, the humiliating circumstances surrounding the termination of her employment, the retaliatory conduct by the 2<sup>nd</sup> Respondent, and the failure to observe due process, the Court returns that the Claimant has proved a case for maximum compensation and proceeds to award her compensation equivalent to twelve (12) months' gross salary.

### **Notice pay**

97. The Claimant admitted having received one month's salary in lieu of notice. This claim, therefore, fails.

### **Sexual harassment and discrimination damages**

98. Given the prolonged hostile work environment and the retaliatory conduct by the 2<sup>nd</sup> Respondent, the Court awards general damages for sexual harassment in the sum of Kshs.2,000,000.

### **Defamation damages**

99. The Court further awards general damages for defamation in the sum of Kshs.500,000.

### **Aggravated damages**

100. Having awarded the Claimant on account of unfair termination, sexual harassment, and defamation, which in aggregate form the basis for the claim of aggravated damages, to award the Claimant aggravated damages will, in my view, amount to unjust enrichment.

101. This claim thus fails.

### **Terminal dues**

102. The Claimant admitted receiving terminal dues amounting to Kshs. 1,390,264.83. The claims for notice pay, service pay, and leave pay are therefore settled.

103. The claims relating to the pension fund, the benevolent fund, and the KEWISCO shares were not specifically proved and are declined.

### **Certificate of Service**

104. The Respondent shall issue the Claimant with a Certificate of Service within fourteen (14) days pursuant to Section 51 of the Employment Act.

### **Costs of transcription**

105. The Court awards the Claimant Kshs.20,000 being transcription expenses, which were proved in evidence.

106. In whole, the Claimant's claim succeeds and orders granted as follows:-

- a) A declaration that the Claimant's employment was unfairly and unlawfully terminated.
- b) A declaration that the Claimant was subjected to sexual harassment
- c) A declaration that the Claimant has proved a case of defamation
- d) The Respondents shall issue the Claimant with a Certificate of Service within 14 days of this Judgment.
- e) An order that the Respondent pay the Claimant: -
  - i. 12 months' salary as compensation for the unfair termination at Kshs.2,356,800/-
  - ii. General damages for sexual harassment in the sum of Kshs.2,000,000/-
  - iii. Damages for defamation of Kshs.500,000/-
  - iv. Transcription costs of Kshs.20,000/=
  - v. Costs of the suit and interest from the date of this Judgment until payment in full.

107. Judgment accordingly.

**SIGNED, DATED, AND DELIVERED BY VIDEO-LINK AND IN  
COURT AT NAIROBI THIS 14<sup>TH</sup> DAY OF MAY, 2026.**

**C. N. BAARI  
JUDGE**

**Appearance:**

Mr. Kimathi present for the Claimant

Mr. Mureithi present for the Respondents

Ms. Esther S- C/A

