



**Ouma v Faulu Microfinance Bank Limited (Cause E015 of 2022)
[2023] KEELRC 2809 (KLR) (9 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2809 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE E015 OF 2022
JW KELI, J
NOVEMBER 9, 2023**

BETWEEN

HAWKINS OUMA CLAIMANT

AND

FAULU MICROFINANCE BANK LIMITED RESPONDENT

JUDGMENT

1. The Claimant upon termination of his employment by the Respondent filed a Statement of Claim dated 31st May 2022 and filed in this court on 2nd June 2023 seeking the following reliefs:-
 - a. General damages for unlawful dismissal being every monthly pay i.e., Kshs. 143,519 x 12= Kshs. 1,722,228/=
 - b. 3 months' salary in lieu of notice Kshs. 143,519 x 3=Kshs. 430,557/=
 - c. General damages for defamation.
 - d. Unpaid salary for March 2022 Kshs. 143,519/=
 - e. Service pay 1 month x 8 x 143,519= Kshs. 2,296,304/=
 - f. Exemplary damage.
 - g. Kshs. 83,493,420/- being loss of future earnings(for remaining 22 years capturing annual cost of living of 6% every 1st of April of each year.)
 - h. Costs of this case and interest thereon at court rates.
 - i. Any other or further relief that this court sees fit in the interests of justice
 - j. Costs of the suit.



2. The Statement of Claim was accompanied by his verifying affidavit to the claim sworn on 31st May 2022; his list of documents dated 31st May 2022, bundle of documents; his list of witnesses dated 31st May 2022 and his Witness statement dated on even date.
3. The claim was opposed by the Respondent who entered appearance through the firm of L.G Menezes & Company Advocates on the 21st July 2022. The Respondent filed a Reply to the Statement of claim dated 6th February 2023 and filed in this court on 7th February 2023. Contemporaneously, the Respondent's filed its list of documents dated 6th February 2023 and its bundle of documents.
4. The Respondent on 10th July 2023 filed the witness statement of Maurine W. Kahiro.

Hearing

The claimant's case

5. The Claimant's case was heard on the 20th June 2023 when the Claimant testified on oath(CW), adopted his written witness statement filed on 22nd June 2022 and adopted as his evidence- in- chief, and produced his documents as exhibits C-1 to 12, as per his list of documents dated 31st May 2022. The Claimant was cross-examined by counsel for the Respondent, Mr. Maganga.

The Respondent's case

6. The Respondent's case was heard on 26th July 2023 where its witness Maurine Kahiro (DW1) testified on oath as the Respondent's witness of fact. He adopted his written witness statement dated 10th July 2023 as his defence evidence in chief, and produced defence documents filed on 10th February 2023 as exhibits D-1 to 12 as per its list of documents. The witness was cross-examined by counsel for the Claimant, Ms. Tolo.

Claimant's case in summary

7. The Claimant was at the time of his termination a Sales and Service Centre Manager employed as such by the Respondent on 5th March 2019(C-Exh-1). He states that he was suspended through the letter of 2nd February 2022(C-Exh-4) and through a show cause letter of 10th February 2022(C-Exhh-5) cited for sexual misconduct. He states that disciplinary hearing was held on 2nd March 2022(C-Exhb-7) and he was summarily dismissed vide the letter dated 10th March 2022(C-Exh-8).
8. The Claimant stated that he worked diligently through his employment, only to be dismissed for allegedly having abused his position to engage in sexual misconduct with junior staff.
9. The Claimant states that the Respondent allowed the publishing of an email (C-Exh-3) which was capable of being read by all staff, through which the Claimant was accused of sexual misconduct, which he claims portrayed him as untrustworthy, unprofessional and an unscrupulous man, which injures his character in the eyes of the right-thinking members of the society.
10. The Claimant alleged that, he is unable to secure employment anywhere, as the Respondent is duty bound in the banking practice to report to other industry players of incidents of dismissals, which he states will lead to him to remain unemployed in his remaining lifetime and to that end, seeks for a salary for the remainder of his life of Kshs. 83,493,420. The claimant states that the Respondent's internal disciplinary mechanisms, the rules of natural justice and the *Employment Act* were breached for want of valid reasons and fair procedure in his termination.



11. The Claimant claims that due to the whistle blower's claims that he was sleeping with two junior staff and imputing unchastely on him, yet he is a married man of clean morals, he has suffered injury. He states that he is a family man, a devout catholic, a chairperson in various groups in the society (C-Exh-10 &11) and due to the publication, he has suffered from shame, contempt and his name lowered in the eyes of the right-thinking members of the society.
12. The Claimant argues that he was never given a copy of the investigation report nor evidence of the accusations against him, nor were witnesses availed for hearing and cross-examination. He states that the chairperson at the hearing had a grudge which is documented; the decision against him was predetermined; the composition of the disciplinary tribunal was against natural justice, as they were the accusers, prosecutors, witnesses and judges in one and the said composition was against the Human Capital consequence and Grievance policy.

The Respondent's case

13. The Respondent's case is that the claimant was employed as a Service Centre Manager on 1st March 2019(R-Exh-1) and states that the Claimant was aware before his termination of the reasons for his termination of sexual misconduct with junior staff.
14. The Respondent denies that the Claimant worked diligently and asserts that it complied with the Human Capital Manual procedure(R-Exh-7) before termination of the claimant's employment for having abused his position by engaging in sexual misconduct with junior staff. The Respondent states that a whistle blower through an email of 31/1/2022 reported that two female employees had fought each other allegedly over the Claimant, and investigations were commenced under Clause 10.9(a) of its Human Capital Manual(Hereinafter "Policy") due to the seriousness of the allegations.
15. That the Claimant was suspended on 2nd February 2022(R-exh-2) to pave way for investigations under Clause 10.9(a) of its manual and a show cause letter was issued on 10th February 2022(R-Exh-4) disclosing the names of the staff undergoing sexual harassment, as per its policy clause 10.9(b).
16. The Claimant replied to the show cause letter on 14th February 2022(R-Exh-5) and was invited through the letter of 24th February 2022 (R-Exh-6) to a disciplinary hearing on 2nd March 2023. The Respondent informed the Claimant of his right to have a witness at the meeting.
17. The Respondent submits that after the disciplinary Hearing on 2nd March 2023, pursuant to clause 9.3 of its Policy, the Claimant was unanimously dismissed(R-Exh-9) subject to section 45(2) of the Employment Act, as per the Minutes of the Disciplinary committee(RExh-8).
18. The Respondent argues that the Claimant objectified young female employees under his supervision and evidence showed a credible pattern of sexual harassment as defined under section 6 of the Employment Act and Clause 16 of its Policy.
19. The Respondent stated that the Claimant was aware of the allegations against him as per the whistle-blower's email, the show cause letter and the invitation to the hearing, which were sufficient for his defence and he did not suffer any prejudice having not been given the witness statements prior to the disciplinary hearing.
20. The respondent states that in line with Clause 16 of its Policy, it balanced the Claimant's rights to accessing documents before the hearing, with the right to protect the whistle-blower, who the investigations revealed could have been the Respondent's employee whom the claimant exercised supervisory powers over and in the interest of maintaining confidentiality.



21. The Respondent states that the composition of the disciplinary panel as per the Minutes of 2nd March 2022 complied with rules of natural justice and included a Senior Manager, institutional Banking Human Capital Partner, Fraud & Forensics officer, head of Collections, legal Officer, and senior Manager, Transaction Processing Centre in compliance with Clause 10.9(d) of its Policy.
22. The Respondent states that the Claimant was procedurally terminated in line with the provisions of the *Employment Act* and denies that the claimant continues to suffer financially and in terms of his reputation and dignity due to the Respondent's actions.
23. The Respondent denies having published the publication accusing the Claimant of sexual misconduct and states that the Claimant acknowledged having received the email directed to the Respondent that narrated the incident that occurred at the Respondent's premises which prompted the commencement of investigations and subsequent disciplinary proceedings against the Claimant.
24. The Respondent argues that allegations of defamation cannot stand as the Claimant was taken through a procedural disciplinary process, during which he was asked if he understood the charges against him.
25. The Respondent asserts that the allegations that the Claimant cannot obtain employment elsewhere due to the alleged duty of the Respondent to inform other industry players of dismissals is false as the respondent issued the Claimant with a Certificate of Service(R-Exh-10).
26. The Respondent asserts that the disciplinary procedures complied with Section 6(3), 36,41(1), 4494), 45 (2) and 43 of the *Employment Act*.
27. The Respondent asserts that the Claimant was dismissed for good cause and is thus not entitled to the reliefs sought.

Written Submissions

28. The court gave directions for filing of written submissions after the hearing. The parties complied. The Claimant's written submissions drawn by Namatsi & Co. Advocates were dated 24th August 2023 and filed in court on 13th September 2023. The Respondent's written submissions drawn by Chris Maganga instructed by L.G. Menezes & Co. Advocates were dated 30th September 2023 and received in court on the 2nd October, 2023.

Determination

Issues for determination.

29. The Claimant in his written submissions identified the following issues for determination:-
 - a. Whether the Claimant was unlawfully, unprocedurally and unfairly dismissed from employment.
 - b. Whether or not the Claimant was defamed.
 - c. Whether the Claimant is entitled to compensation for unlawful unprocedural and unfair termination from employment as prayed for in the memorandum of claim.
30. The Respondent in its written submissions identified the following issues for determination:-
 - a. Whether the Termination of the Claimant's employment was unfair
 - b. Whether the Claimant was defamed by allegations of sexual misconduct?



- c. Appropriate remedies..
31. The Court having considered the issues addressed by the parties in their submissions and pleadings was of the considered opinion that the question of whether the Claimant was a former employee of the Respondent was not in dispute and thus the issues to be addressed in the determination of the dispute were as follows:-
- a. Whether the termination of employment of the Claimant by the Respondent was lawful and fair.
 - b. Whether the Claimant was defamed?
 - c. Whether the Claimant was entitled to the reliefs sought.

Issue 1. Whether The Termination Of Employment Of The Claimant By The Respondent Was Lawful And Fair.

Summary of facts

32. The Claimant argues that there was no valid reason to terminate his employment as there was no evidence provided to prove the allegations of Sexual misconduct with junior employees against him and that he was not accorded a fair hearing as he was never given the investigation report or was the evidence of any witnesses availed for him to defend himself, which he submits violated Section 41, 43 and 45 of the Employment Act.
33. The Respondent on the other hand submits that there was evidence that the Claimant used his position to engage in sexual misconduct with junior employees which is against the company policy and section 6 of the Employment Act and that a proper procedure was followed before terminating the claimant.
34. Section 43 of the Employment Act, 2007 provides that:
- (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.
35. Section 45 (2) of the Act provides that:
- (2) A termination of employment by an employer is unfair if the employer fails to prove-
 - a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason -
 - (i) related to the employee's 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.”
36. The applicable test in claims of unfair termination of employment is that of a reasonable employer which test was exemplified by Lord Denning in *British Leyland UK LTD V Swift* (1981) I.R.L.R 91 where the reasonableness test was defined to wit:- ‘ the correct test is: ‘ was it reasonable for the employer



to dismiss him? If no reasonable employer would have dismissed him , then the dismissal was unfair, but if the reasonable employer might reasonably have dismissed him, the dismissal was fair..”

Analysis and findings on Substantive fairness

37. The burden of proof in employment claims

The burden of proof in a claim of unfair termination starts with the employee proving unfair termination or wrongful dismissal and if they discharge that burden, the burden then shifts to the employer to prove existence of valid reasons for the termination and procedural fairness as stated in section 47(5) of the *Employment Act* to wit:

‘47

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”(emphasis given)

38. The Show cause Letter of 10th February 2022 (R-Exhb-4) issued to the Claimant by the Respondent read in part:-

“we refer to the incident that occurred in Bondo Branch on 1st February 2022, involving your lead generators , M.O(Court) and A.A.M(Court) who was recently arrested for fighting. Investigations have revealed that you took advantage of your position engaged in a romantic relationship with staff who are your direct reports , which resulted in reputational risk to the bank. It is also revealed that you persisted in unwelcome sexual advances on A.A.M.(Court), which constitutes sexual harassment contrary to Human Capital Policy Clause 8.70 sub clause xxvii, and *sexual offences Act*. No. 3 of 2006(Laws of Kenya).....”

39. The Summary dismissal letter of 10th March 2022 (R-Exhb-4) issued to the Claimant by the Respondent then stated in part that:-

“After due investigations and review of your explanations during the disciplinary hearing, you were found liable of abusing of your position to engage in sexual misconduct with your junior staff, contrary to Clause 10.1. of the Human Capital Manual.”

40. I find that Clause 8.70 of the manual quoted on the show cause letter related to Public Holidays and had no bearing on sexual harassment.

41. The Claimant argued that no evidence relating to the sexual misconduct against him was availed by the Respondent, while the respondent urged that investigations had revealed that the claimant was engaged in sexual relations with his junior employees.

42. During the hearing, DW stated that the Investigation Report which contained the witness statements recorded about the Claimant were not availed to the Claimant for confidentiality purposes, but the said investigation report proved that the claimant was guilty of sexual misconduct. He stated that the two ladies M.O. and A.A.M who were the victims of the sexual harassment could not make a complaint against the Claimant as the Claimant was their immediate line Manager.



43. The Offence of Harassment including Sexual harassment and its proposed sanction was outlined in Clause 10.13(No. 20.) of the Respondent's policy-Exh-7). Additionally, Clause 16 of the policy outlined what amounts to Harassment. It was defined as follows:-

“Harassment is a behavior, which could be verbal, physical, deliberate, unsolicited and unwelcome. This includes unwelcome remarks, jokes innuendos about a person's body, attire; leering; practical jokes; which cause awkwardness or embarrassment, and acts which cause humiliation; insult, or intimidation. Harassment is prohibited in the workplace and all employees should be made aware of this fact and it should be clear that it will not be tolerated.....”

44. The said clause 16 went further to outline the forms of sexual harassment prohibited as follows:-

- i. Verbal harassment in the form of derogatory comments or slurs;
- ii. Physical harassment in the form of assault; impeding or blocking movement, any physical interference with normal work or movement;
- iii. Visual harassment through derogatory posters or drawings;
- iv. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.

45. The policy additionally stated that:-

“If an employee encounters such behaviour from anyone , including supervisors, fellow employees, or vendors, they need to bring the problem to the attention of his/her supervisor or the next level supervisor , and /or the Head of Human Capital. Employees are asked that if they encounter such behaviour, they should not instigate or spread rumours of alleged harassment among fellow employees. This may cause more damage to the individuals involved and the organisation. If the situation involves the immediate supervisor, the employee should contact someone else in the direct line of command or the Head of Human Capital.”

46. The policy clearly indicated that any complaints would be handled under special privacy safeguards and the confidential documentation of all allegations and investigations would be retained for appropriate action.

47. Section 6 of the *Employment Act* provides that :-

- ‘(1) An employee is sexually harassed if the employer of that employee or a representative of that employer or a co-worker—
- (a) directly or indirectly requests that employee for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express—
 - (i) promise of preferential treatment in employment;
 - (ii) threat of detrimental treatment in employment; or
 - (iii) threat about the present or future employment status of the employee;
 - (b) uses language whether written or spoken of a sexual nature;
 - (c) uses visual material of a sexual nature; or



(d) shows physical 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."

48. Sexual harassment is defined in *Black's Law Dictionary, Tenth Edition* as "a type of employment discrimination consisting in verbal or physical abuse of a sexual nature, including lewd remarks, salacious looks and unwelcome touching".
49. The main elements of sexual harassment needed to be proved in this case were, was there any requests for sexual favors, unwanted verbal, non-verbal or physical conduct of a sexual nature? Secondly, was the purpose or effect of the conduct, to violate the victim's dignity or create an intimidating, hostile, degrading humiliating, or offensive environment for her. In addition, was there a less favourable treatment or detriment that arose as a result of the rejection or submission to the unwanted conduct.
50. Sexual harassment is a traumatizing and dehumanising act to the victim however those allegations of sexual harassment still need to be proved and it is not sufficient for an employee to only allege that she was sexually harassed. The right to employment must be protected and should only be taken away for valid reasons consistent with section 43 and 45(2) of the *Employment Act (supra)*
51. In the show cause letter, the Respondent urged that the Claimant had sexually harassed two ladies one, M.O. and A.A.M. who had allegedly on 31st January 2022 fought over the Claimant. During Investigations that culminated in the writing of the investigation Report(R-Exh-3), M.O. denied any relations with the Claimant while A.A. M. as stated in the Investigation report(D- exhibit 3) claimed that the Claimant had helped her land an opportunity to work at the Respondent's Bondo branch and she expected no pestering from the claimant. She stated that she was surprised when the Claimant later on pestered her for sexual favours which ended with them visiting a VCT centre before she gave in to the claimant's advances. She stated that the claimant had "verbally" told her that their relationship would not break as they underwent a process(I(identify)B(be friend)A(attack)E(not told- either death/ subtle threat). The said interview indicated that the said A.A.M did not want to put the Claimant in trouble and she was yet to do a formal complaint. The said investigation report noted that A.A.M. had not made any official complaints against the Claimant and that she had been forced by circumstances to be involved with the Claimant.
52. The contents of this allegations in the Investigations Report were not presented to the Claimant to counter, there was no proof of any visits to the alleged VCT center by A.A.M. in the company of the Claimant; there was no physical proof at all that the Claimant had indeed harassed the said A.A.M.
53. The Claimant at the disciplinary hearing had indicated that the A.A.M. had infact been pestering him and calling his wife, which made him block her number on his wife's phone and that of the Claimant. The Respondent in their finding found that A.A.M had been forced into a relationship with the Claimant and her conflict with M.O. was because she found that M.O. had a pre-existing relationship with the Claimant. This was only assumed, there was no actual evidence.
54. There was no complaints by A.A.M as pertaining to the Claimant's alleged sexual advances and she did not report the same anywhere. A Sexual harassment claim, one must state clearly that the acts of the other person, the harasser are unwanted. The Court of Appeal in *Ooko & another v SRM & 2*



others (Civil Appeal 195 & 197 of 2019 (Consolidated)) [2022] KECA 44 (KLR) (4 February 2022) (Judgment) (W Karanja, M Ngugi & P Nyamweya, JJA) held that....

“On whether the ELRC erred in holding and finding that the claim for sexual harassment has been proved on a balance of probabilities, the applicable threshold and standard was set in *R v Birmingham City Council ex parte EOC* (1989) AC 1155 that it is enough that the victims considered reasonably that they had been treated less favourably, and there must be a reasonable ground for this perception. Likewise, the US Supreme Court held in *Oncale v Sundowner Offshore Services* 523 US 75 (1998) that the objective severity of the harassment should be judged from the perspective of the reasonable person in the plaintiff’s position, considering all the circumstances.

.....

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.....” (Emphasis added)

55. There was no complaints from the alleged victims of the alleged sexual harassment that the Claimant’s conduct toward them was unacceptable. The contents of the interview by A.A.M had not been notified to the Claimant and the claimant could not know which acts the Respondent considered Sexual Harassment. There was no evidence that the Claimant had prevented the alleged victims, A.A.M. and M.O. in performance of their duties due to the alleged harassment, and the only issue the Respondent relied on was that the fight between A.A.M. and M.O. at the Police station could have had a reputational risk on the Respondent on the alleged rumours of a supposed relationship between the Claimant, A.A.M. and M.O.
56. In the Respondent’s Investigation Report, the conclusions by the Investigator pointed to a case of scanty information, but went ahead to find that the allegations against the Claimant were credible. The Investigator stated that a fight that had happened at the respondent’s premises proved the sexual relations with the alleged victims. How a fight between third parties could have been connected with the Claimant, who stated he was away from the Branch, raises questions. There was no direct evidence relating to the alleged relations between A.A.M. , M.O. and the Claimant. The investigator based his conclusions on the rumours and hearsay from the employees interviewed to conclude that, “on 31st January 2022, there was an altercation at Bondo branch between M.O. and A.A.M. over allegations that borders among other things on the alleged relationship..... An offence of sexual harassment against Hawkins Ouma could be detected , but there was no Complainant...”
57. How the altercation between A.A.M and M.O showed proof that the Claimant had sexually harassed the said persons was not shown. For Sexual harassment to stand there must be prove that the victim has considered the acts of the harasser to be unwanted and called the victim out or reported the same.



58. The email from the Whistle blower titled, “Embarrassment in Faulu Bondo Branch-Manger Hawkins Ouma Seducing and Sleeping with a junior employee M.O”; was not a complaint for sexual harassment emanating from the alleged victims. The Anonymous Loyal Client referred to incidences that had occurred in the Respondent’s branch, where an alleged second wife of the Claimant had come to the branch to seek M.O. for ruining her marriage and which case, had caused a scene at the Respondent’s branch, and that the Claimant was not working but was rather involved with the said M.O. in sexual relations. This claims by the whistle-blower were not backed by any evidence. There was no video or photographic proof which could have substantiated the allegations made by the said whistle blower. The Respondent in its investigations could have unearthed its evidence if the instances of sexual misconduct alleged took place at its premises.
59. Under the Respondent’s Policy Clause 2.3.10, whistle-blowers were to report matters concerning suspicions of fraud and matters of Sexual Harassment could only be made by employees concerned. The Whistle blower policy which was Appendix 1 in the said policy, outlined under item 6.1(Pg.88), that the Whistle blowing could only be for serious malpractice. Under pg. 93 of the said policy it was stated that “serious malpractice does not usually include personal employment grievances (such as bullying, harassment, discrimination or general complaints over unsatisfactory probation reports, performance evaluations, discriminatory work assignments, equal employment opportunities, sexual harassment, or any other personal grievances. These shall be referred to Human Resource Department and/or any other mechanisms which shall be established by the Bank from time to time to deal with such grievances.”
- However, in cases where an employee genuinely considers the issue to be endemic within the firm or their department and no action has been taken in response to a complaint directed to the Human Resources Department , then the Whistle blow may be appropriate.”
60. DW confirmed during hearing, that there had been no previous incident of sexual harassment against the Claimant. Therefore, the whistle blower policy could not be used to report an instance of sexual harassment, which is a personal issue that can only be reported by the victim. The Respondent’s claim against the Claimant was largely based on the Whistle blower’s email, which was hearsay to say the least, as no evidence of any such allegations were available.
61. DW confirmed further during hearing that the Human Capital Policy was made available to all employees. The avenue by an employee who felt that they had been sexually harassed was available, since where the harasser was an employee’s immediate supervisor, the Policy allowed an employee to report the same to another line manager. The argument by the Respondent that the alleged victims could not report to the Claimant who was their immediate boss was unsubstantiated.
62. Based on Section 45 of the *Employment Act* as to whether the reason for the termination was a fair reason, there was no evidence of the alleged sexual misconduct availed by the Respondent, there was no proof provided by A.M, and the Claimant could not have known the nature of allegations against him from A.M. when the Respondent choose to withhold the investigation report which contained the Interview with A.M. at the Disciplinary hearing.
63. Consequently, it is my Holding that the allegations on sexual misconduct/sexual harassment were not proved by the Respondent on a balance of probability. The Reasons for the dismissal were not valid.

Analysis and Findings on Procedural fairness

64. Section 41 of the *Employment Act* which provides as follows:-



- (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 the explanation.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”
65. Section 41 of the Employment Act is couched in mandatory terms where an employer fails to follow these mandatory provisions whatever outcome of the process is bound to be unfair.
66. The Claimant claimed that he was not provided with the Investigation report that bore the allegations against him and neither did the witnesses appear before the hearing for him to cross-examine them. The claimant further urged that he was not accorded a fair hearing as the Respondent’s Disciplinary committee as constituted violated the Respondent’s policy and the same was arbitrary as they were the accusers, prosecutors and judges.
67. Section 41 of the Employment Act mandates that before an employee is dismissed a mandatory hearing be conducted and an employee accorded the opportunity to be heard and any of his representatives heard. The court of Appeal in Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR observed on procedural fairness that :-‘13. There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed ...”(Emphasis supplied)
68. As per the Formal Disciplinary procedure in Clause 10.9 of the Respondent policy, the Claimant was issued with a show cause letter on 10th February 2022 and invited him to provide his response, which he did on 14th February 2022. He was invited to the Disciplinary Hearing vide the letter of 24th February 2022 which informed him of his right to be accompanied by a colleague (internal staff).
69. The Claimant argues that the specific charges against him were not availed and reasons for his termination were not provided.
70. DW testified that the investigation report contained the Interviews of the witnesses who testified against the claimant((Noel, Wesonga, Merab and Akinyi) but the witness statements and the report was not availed to the Claimant for confidentiality issues relating to sexual harassment, and that the allegations against the Claimant were sufficiently provided in the show cause letter which named the victims of the sexual harassment and the allegations against the Claimant.
71. For procedural fairness, it is not dispute that the Claimant was notified of his right to be accompanied by a fellow employee. What the claimant raises is the issue of the charges levelled against him and the evidence against him to be able to defend himself. The Respondent argued that the Investigation Report could not be availed to the Claimant on account of confidentiality, yet the victims of the said sexual harassment were made known to the Claimant.



72. I do Hold that the Respondent had the responsibility of providing the Claimant with the evidence that was against him for him to defend himself. That is a basic tenant for fair hearing. The allegations against the Claimant by A.A.M. in the investigation report went deeper to allegations of visiting a V.C.T. centre, yet the Show Cause letter pointed only to a case of persisted unwelcome sexual advances. The details of the nature of the persistent sexual advances were left out by the Respondent who already had the investigation report, and denied the Claimant an opportunity to understand the nature of the alleged sexual advances he had against A.A.M. The Respondent denied the Claimant an opportunity to understand the extend of the charge against him and the failure to avail the witnesses during the disciplinary hearing further fell short of the requirement of procedural fairness, bearing in mind that the Claimant did not have any concrete information of the nature of the offences against him.
73. The Respondent's disciplinary panel, which had the investigation Report during the Disciplinary hearing, conducted the said hearing bearing with them evidence that was not available to the Claimant, who had not been provided with the same. The Claimant in his response to the Show cause letter had requested to be supplied with copies of the witness statements of his accusers, but the Respondent did not respond to the said request and went ahead to invite the Claimant to a hearing where he had no knowledge of offences against.
74. I agree with the Claimant that the Respondent's disciplinary panel was the Accuser, the Prosecutor and charge, having failed to provide the Claimant with the copy of the full particulars of allegations against him, and relying on the investigations report they had prepared to interrogate the Claimant who was unaware of its contents at trial and arrived at a decision.
75. The allegations that the Claimant could call the victims of the alleged Sexual harassment to testify on his behalf are unfounded as the Claimant did not know the extent of the allegations against him and did not know what the said victims had told the Respondent's investigators. The Respondent had the obligation to present all evidence against the claimant, including inviting the alleged victims of the sexual misconduct for the Claimant to cross-examine them. There was no point in alleging confidentiality when the Claimant had already been informed of his alleged victim's names.
76. Justice Nzioki wa Makau in *Freddy Kipkorir Lang'at v Co-operative University of Kenya* [2021] eKLR stated that:--

“9. The decision of *Walter Ogal Anuro v Teachers Service Commission* (supra) held in paragraph 23 thereof as follows:-“23. It is not in contest that the Claimant was taken through some form of a disciplinary process. However, upon analysis of both the investigation and the disciplinary processes, the Court formed the opinion that the Respondent failed the test of procedural fairness in that it did not take its investigations full circle. In the light of the seriousness of the allegations against the Claimant and the resultant consequences, the Respondent should have done more, but it took the easy option and placed the Claimant and the impostor on the same chopping block. For this reason, I find the termination of the Claimant's employment by way of summary dismissal unfair for want of due procedure. In this case, the Respondent similarly did not go the whole way by disallowing the Claimant an opportunity to defend himself. The tenets of procedural fairness encompass advance and reasonable notice of not only the steps to be taken in the disciplinary process but also documentation to prepare a defence where such documentation is in the custody of the Respondent as in this case. Put another way, if one is accused of misleading the employer and the evidence for such is



the correspondence with a third party, it is incumbent upon the employer to lay the whole case against the employee by availing the full accusation and await the response or defence of the employee. In the final analysis the termination herein is found to have been ipso facto unfair for want of procedure.....” I do uphold the decision by my brother Justice Nzioki wa Makau to apply in the instant case where, similarly, the Claimant was not availed the investigation report and the witness statements relied on to terminate his employment contract.

77. The Claimant went further to argue that the Hearing panel was wrongly constituted contrary to the policy. DW testified that the Panel comprised of a Forensic Investigator, Mr. Katei, Senior Manager Institution Banking(Thomas Ogallo) and others as per the Minutes of 2nd March 2023(R-Exh-8).
78. The Policy under 10.9(d) states that the disciplinary committee would comprise of 5 managerial staff from Information technology, operations and Customer service, finance , human capital , business Development , retail banking, credit , risk and compliance and Legal. The said composition would also be dependent on the role size of the staff under investigation.
79. The panel during the Claimant’s hearing comprised of a Senior Manager, Institutional banking; Human Capital Partner(secretary); Fraud and Forensic officer; Head of collections, legal officer and Senior Manager Transaction processing Center. Bearing in mind that the Claimant was in the management line, the composition of the Disciplinary was to be comprised of other managers above the Claimant who exercised supervisory authority over the Claimant.
80. There was no proof that the email of 25th April 2019(C—Exh-12) from Thomas Ogolla questioning the Claimant’s branch performance in any way affected the outcome of the disciplinary hearing or showed any instance of bias as against the Claimant . The Claimant had in fact replied to the same email by Ogolla of 25th April 2019, acknowledging the issues raised therein and promised to work to improve performance. On this instance there was no proof of unfairness.
81. In the upshot, it is my finding and determination that based on the failure by the Respondent to avail to the Claimant the evidence against him which was in its possession, the disciplinary hearing fell short of procedural fairness.

Issue B). Whether the claimant was Defamed?

82. The Claimant argued that the allegations levelled against him were malicious and serious and imputed criminality on his part which harmed his public standing. He submitted that he may not be able to get another job.He argued his claim for defamation met the legal ingredients of:
 - (a) That the statement must be defamatory;
 - (b) The statement must refer to the plaintiff;
 - (c) The statement must be published by the defendant; and
 - (d) The statement must be false. (see. *John Edward v standard Limited* (2006) eKLR.
83. The Claimant submits that he is a respected member of the society and the allegations that the particulars of sexual misconduct lowered his standing before the right-thinking members of the society.
84. The Respondent states that the claim for defamation was not proved and the same was not in the Claimant’s pleading and the same should be disregarded. The Respondent states that the Claimant did not prove the statement that he was involved in a sexual misconduct was made to a third party, and



in any event, the Respondent in its investigation proved the sexual misconduct and the Claimant did not in any way prove the harm he suffered.

85. Relying on the Authority quoted by the respondent *Phinebas Nyagah v Gitobu Imanyara* [2013] eKLR, the Court held that:-

- “ 16. Defamation is a tort and is defined as the publication of a statement which, tends to lower a person in the estimation of right-thinking members of the society generally or which tend to make him be shunned or avoided. The defamatory statement is one which has tendency to injure the reputation of the person to whom it refers by lowering him in the estimation of the right thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike and disesteem and typical examples are an attack upon the moral character of the plaintiff attributing to him any form of disgraceful conduct such as crime, dishonesty, cruelty and so on. Publication is the communication of the words to at least one other person other than the person defamed. Publication to the plaintiff alone is not enough because defamation is an injury to one’s reputation and reputation is what other people think of a man and not his own opinion of himself. An action for defamation is essentially an action to compensate a person for the harm done to his reputation. Defamation is not about publication of falsehoods against a person; it is necessary to show that the published falsehood disparaged the reputation of the plaintiff or tended to lower him in the estimation of right thinking members of society generally. An injurious falsehood may not necessarily be an attack on the plaintiff’s reputation. The words must be maliciously published and malice can be inferred from a deliberate or reckless or even negligently ignoring of facts. See *J P Machira Vs. Wangethi Mwangi and Nation Newspapers* Civil Appeal No. 179 of 1997.
17. As opposed to slander, libel is punishable per se without proof of damage and the actual sum to be awarded is “at large” and although a person’s reputation has no actual cash value, the Court is free to form its own estimate of the harm taking into account all the circumstances.
18. The elements of the tort of defamation are that the words must be defamatory in that they must tend to lower the plaintiff’s reputation in the estimation of right-minded persons, or must tend to cause him to be shunned or avoided. Whereas mere abusive words may not be defamatory, the speaker of the words must take the risk of his audience construing them as defamatory and not simply abusive, and the burden of proof is upon him to show that a reasonable man would not have understood them in the former sense. However, in libel, the words cannot be protected as mere abuse since it is presumed that the defendant had time for reflection before he wrote them. Secondly, the words must refer to the plaintiff. Thirdly, the words must be malicious. Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice but the law does not weigh in a hair balance and it does not follow merely because the words are excessive, there is therefore



malice. Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the defendant in the course of the proceedings. Malice can be founded in the publication itself if the language used is utterly beyond the facts. The failure to inquire into the facts is a fact from which inference of malice may properly be drawn. Any evidence, which shows that the defendant knows the statement was false or did not care whether it be true or false will be evidence of malice. See *Godwin Wachira vs. Okoth* [1977] KLR 24; *J P Machira vs. Wangethi Mwangi* (supra)..."

86. In the instant case, the Claimant in its particulars of defamation stated:-

- a. "The Claimant sleeping with two junior staff.
- b. Imputing unchastely on the claimant, a Married man of clean morals.

That as a result of the said publication , the Claimant is a respected member of the society , a family man, a devout catholic and a chairman of various groups in the society to suffer shame , contempt and his name has been lowered in the eyes of right thinking members of society."

87. The statement by the claimant alleged that the Respondent had defamed the Claimant as above. Basing on the finding in Phinehas Nyagah(supra)the Court Finds that the Claimant failed to state to whom the Defamatory statements were made to; in that the Suspension and Dismissal Letter were only issued to the Claimant and the Respondent's senior management(read employer) and no proof that the contents of the same were made available to third parties. The Show cause letter did not state that the Claimant had slept with two staff and there was no evidence that the Claimant has been ridiculed in the public.

88. In Phinehas Nyagah (supra) 'An action for defamation is essentially an action to compensate a person for the harm done to his reputation. Defamation is not about publication of falsehoods against a person; it is necessary to show that the published falsehood disparaged the reputation of the plaintiff or tended to lower him in the estimation of right thinking members of society generally. An injurious falsehood may not necessarily be an attack on the plaintiff's reputation. The words must be maliciously published and malice can be inferred from a deliberate or reckless or even negligently ignoring of facts."

89. The Investigations by the Respondent into the alleged sexual misconduct were necessitated by the whistle-blower's email. Even though the Respondent failed to prove the said allegations, it undertook investigations not with the malice necessary for a claim for defamation but, possibly, in order to exercise its mandate as an employer to ensure that sexual harassment is not prevalent in its workplace.

90. The claimant did not produce evidence that he has suffered any humiliation. A fear for anticipated humiliation does not amount to such and thus no defamation was proved.

91. I do hold that no Defamation was proved.

Issue C). Whether the claimant is entitled to the reliefs sought.

92. I Held that the reason for the Claimant's dismissal was not valid and that the procedure leading to the summary dismissal of the Claimant was unprocedural. I further Held that no Defamation was proved. The issue to determine now is whether the Claimant was entitled to the reliefs sought. The Claimant had prayed for:-

- i. General damages for unlawful dismissal being every monthly pay i.e., Kshs. 143,519 x 12= Kshs. 1,722,228/=



- ii. 3 months' salary in lieu of notice Kshs. 143,519 x 3=Kshs. 430,557/=
- iii. General damages for defamation.
- iv. Unpaid salary for March 2022 Kshs. 143,519/=
- v. Service pay 1 month x 8 x 143,519= Kshs. 2,296,304/=
- vi. Exemplary damage.
- vii. Kshs. 83,493,420/- being loss of future earnings(for remaining 22 years capturing annual cost of living of 6% every 1st of April of each year.)
- viii. Costs of this case and interest thereon at court rates.
- ix. Any other or further relief that this court sees fit in the interests of justice
- x. Costs of the suit.

Claim for General damages for unlawful dismissal being every monthly pay i.e., Kshs. 143,519 x 12= Kshs. 1,722,228/=.

- 93. On finding unfair and unlawful termination of employment the court proceeds to determine the remedy or remedies to issue to the employee guided by section 49 of the [Employment Act](#).
- 94. As at the time of his dismissal the Claimant's Letter of offer((R-Exh-1) indicated that the Claimant's monthly salary was Kshs. 120,000/=. The Claimant testified that he was earning a salary of Kshs. 143,519/= but did not provide proof of any pay slip indicating the said sum.
- 95. The Claimant prayed for the maximum compensation allowed. Compensation for unfair termination/ dismissal is guided by the Statutory capping under Section 49 of the [Employment Act](#), 2007. (See [Kenya Ports Authority v Festus Kipkorir Kiprotich](#) [2014] eKLR) where the court held: " In making an award of compensation, the court has to take into account a raft of considerations such as; the conduct of the employee which to any extent caused or contributed to the termination, failure by an employee to mitigate his losses attributable to the termination, opportunities available to the employee for securing comparable or suitable employment with another employer amongst others."
- 96. From the hearing and as held herein, the Claimant was at the Managerial level of his career and having found that the Respondent did not prove fair termination and considering that the Claimant who at the time of hearing was 39 years old may or may not find suitable alternative employment and taking into account that there was no procedural fairness and the claimant had loans taken from the employer hence sudden financial burden. The Claimant did not demonstrate the efforts he had taken to mitigate his loss by possibly looking for another employment. There was no effort. I find that 10 months salary compensation is a fair compensation for the unlawful and unfair termination of the Claimant's employment which I hereby award as per the consolidated salary in his letter of offer(R-exhibit 3) as the only evidence placed before the court on his salary. Thus 10 months x Kshs. 120000 total compensation award of Kshs. 1,200,000/- .

Claim for 3 months' salary in lieu of notice Kshs. 143,519 x 3=Kshs. 430,557/=

- 97. Having found that the Claimant's dismissal was unfair, payment in lieu of notice is payable. The Claimant sought for three months. The letter of offer attached had no notice period. The court in absence of evidence of payable notice period applies the statutory notice pay of one month under



section 35 and 36 of the Employment Act. . The claimant is awarded notice pay in lieu for Kshs. 120,000/-

Claim for General damages for defamation.

98. The claimant did not prove that he had been defamed by the respondent this claim fails.

Claim Unpaid salary for March 2022 Kshs. 143,519/=

99. During hearing the Claimant confirmed that he had been paid, the salary for the days worked in the month of March. This claim fails.

Claim for Service pay 1 month x 8 x 143,519= Kshs. 2,296,304/=

100. During hearing the Claimant confirmed that he was enrolled on NSSF. Service pay is not payable as per section 35 (6)(d) as the Claimant was under NSSF. This claim fails.

Claim for Exemplary damage.

101. Relying on the decision of Leonard Getboi Kamweti vs National Bank Of Kenya Limited (2020)eKLR, (Koome, Kiage & Murgor, JJ.A) the Court of Appeal, set out circumstances for grant of exemplary damages as :_

“The appellant complains that he was not awarded exemplary damages for maliciousness and bad faith which was the sole motivating factor in terminating his employment. It is trite that exemplary damages, are only awarded in limited instances. The categories of cases in which exemplary damages should be awarded are set out, at paragraph 243 of Halsbury’s Laws of England, as follows: -

“Exemplary damages should be awarded only in cases within the following categories: -

- (1) Oppressive, arbitrary or unconstitutional action by servants of government;
- (2) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff; or
- (3) Cases in which the payment of exemplary damages is authorized by statute.”

102. The Court has no jurisdiction to award exemplary damages as it is not one of the remedies prescribed in section 49 of the Employment Act.

Claim for Kshs. 83,493,420/- being loss of future earnings(for remaining 22 years capturing annual cost of living of 6% every 1st of April of each year)

103. The court in Kenblest Kenya Limited v Musyoka Kitema [2020] eKLR quoted with approval that:-“..The Court of Appeal in SJ v Francesco Di Nello & another [2015] eKLR put the issue in this way:

“Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity.



Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved.

This was the position enunciated in *Fairley v John Thomson Ltd* [1973] 2 Lloyd's Law Reports 40 wherein Lord Denning M. R. said as follows:

“It is important to realize that there is a difference between an award for loss of earning as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.”

Learned counsel for the respondent was therefore wrong in stating that loss of earning capacity was not pleaded and that it must be proved as though it was a claim under loss of income or future earnings.”

104. The Claimant claimed that the Respondent is bound by banking practice to inform other industry players of his dismissal and thus he will remain unemployed for the better remaining part of his life. The Claimant did not provide proof that he has sought for employment and has been denied employment due to his termination. By dint of Section 49 of the *Employment Act*, The Claimant is educated and can obtain employment in a different industry, if at all, different from those within the respondent's Banking industry. The claimant has not proved that he cannot gain employment and has not shown any proof that he applied for any employment and the Respondent issued a statement that he was of bad morals. The court further finds that this claim does not fall under remedies prescribed for the Court to apply under section 49 of the *Employment Act*. This claim fails.

Claim for Costs of this case and interest thereon at court rates.

105. Costs follow the event in which case the Claim for unfair dismissal was successful.

Conclusion and Disposition

106. The court holds that the dismissal of the Claimant from employment of the Respondent was unfair and unlawful. The court enters judgment for the Claimant against the Respondent as follows:
- a. Notice Pay Kshs. 120,000/-
 - b. Compensation pay for Kshs. 1,200,000/- (award a and b subject to PAYE deduction only)
 - c. Interest awarded at court rates on a and b from the date of judgment until payment in full.
 - d. Cost of the suit.
107. Stay of 30 days granted.
108. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 9TH DAY OF NOVEMBER 2023

JEMIMAH KELI

JUDGE

In The Presence Of:-



For Claimant : In person

For Respondent: Wangoda

