



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 841 OF 2017

BETWEEN

BONIFACE MZUNGU.....CLAIMANT

VERSUS

BASE TITANIUM LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Nyambura Kamau Advocates, for the Claimant

Otieno & Company, Advocates for the Respondent

JUDGMENT

Pleadings.

1. This Claim revolves around sexual harassment at the workplace.
2. The Claimant filed his Statement of Claim on 7th November 2017.
3. He avers, he was employed by the Respondent mining company, as a Laboratory Assistant on 1st August 2013. He rose through the ranks, becoming an Exploration Field Technician, a position he held until 26th May 2017 when his contract was terminated on account of sexual harassment. His last salary was Kshs. 56,557 monthly. He was alleged to have sexually harassed a number of female Employees who were under his supervision.
4. He avers, written complaints from the Co-Employees he is alleged to have sexually harassed, were not availed to him before he was called to disciplinary hearing. The nature of the complaints was not disclosed to him. He was issued a letter to show cause, on 25th April 2017. He was expected to respond by 28th May 2017, while disciplinary hearing was slotted for 4th May 2017. There was no adequate time to prepare for the hearing. The accusations remained vague. He was also bereaved, and unable to respond to the letter to show cause by 28th May 2017. On 2nd May 2017 he wrote to the Respondent through his Advocates, seeking details of the accusations. Nothing was supplied, which the Claimant states, amounted to breach of his right to information.
5. He nonetheless appeared for hearing on 9th May 2017. Hearing went on for 3 days, closing on 11th May 2017. The Claimant avers, hearing was a cosmetic process, and the panel no more than a kangaroo court. He was ambushed through witnesses brought by the Respondent. He did not know up to that point, who he was alleged to have sexually harassed. He was asked to defend himself before charges were substantiated. The Chair assumed the role of prosecution. The Claimant was cross-examined on written complaints and statements which were never availed to him. The panel failed to take into account that the complainants were unhappy after being transferred internally, by the Claimant. The complainants ganged up against the Claimant as a result of the transfer.

6. The Claimant avers, the Respondent did not satisfy the requirement of section 43 of the Employment Act, by showing valid reason, to justify termination.

7. He appealed against dismissal decision through a letter dated 16th June 2017. He was heard on appeal on 28th June 2017. He states, hearing on appeal was another sham. On 17th July 2017, he received Respondent's letter affirming dismissal.

8. He prays for Judgment against the Respondent for:-

- a. Declaration that termination was unfair.
- b. A declaration that Respondent did not prove harassment under Section 43 of the Employment Act.
- c. A declaration that the Respondent's decision to deny the Claimant evidence to be used against him was illegal and unconstitutional.
- d. General damages for tarnishing Claimant's name.
- e. Reinstatement without loss of benefits.

Alternatively:-

- f. Compensation for unfair and unlawful termination equivalent of 12 months' salary at Kshs. 678,684.
- g. Severance pay at 15 days' salary for 4 years of service at 33,934.
- h. House allowance in arrears of 4 years at Kshs. 407,210.
- i. Interest.
- j. Costs.
- k. Any other suitable reliefs.

9. The Respondent filed its Statement of Response on 5th December 2017. It is agreed that the Claimant was employed by the Respondent, and his contract terminated, as pleaded by the Claimant. The Respondent states, exact names of the complainants were not disclosed to the Claimant on notice to show cause, but he was made aware a majority of female colleagues, under Claimant's supervision, had complained. There were 7 female colleagues under Claimant's supervision, so he could not say he was ambushed. He was advised the complaints included explicit demands for sexual intercourse, and allegations of threats in making those demands. Details of demands and threats were disclosed.

10. The time to respond to notice to show cause was not unreasonably short. The Claimant did not seek extension at that point. He asked for more time on disciplinary hearing, through his Advocates, which the Respondent granted. The charges were not so vague as to be unanswerable. The Claimant could have responded, and denied knowledge of the allegations. He sought adjournment of disciplinary hearing, which was granted, from 4th May 2017 to 9th May 2017.

11. On lack of supply of complainants' details to the Claimant, the Respondent explains that the complainants were apprehensive disclosure would affect their personal safety. They specifically asked the Investigator not to disclose their names to the Claimant. The Claimant was advised the complainants would be available in persons, to give evidence. He would be free to seek adjournment to prepare for cross-examination, after hearing the complainants. During the actual hearing, the Claimant was again advised about this and confirmed he was happy to make his responses after hearing the complainants. He did not suffer prejudice, as a result of the safeguards accorded to the complainants. The Respondent relied on section 6 [3] [v] of the Employment Act in justifying non-disclosure of complainants' details.

12. Hearing was not cosmetic; neither was the panel a kangaroo court. It was fair and impartial. He heard the testimonies of the complainants and was called upon to respond. He opted to respond immediately. He did not seek adjournment. The Chair was fair and asked questions fairly. A fair and valid verdict was arrived at. The Employment Act 2007 was complied with in full. The Respondent followed the Employment Act on sexual harassment as well as its Workplace Policy. The Claimant appealed. He was again heard fairly on appeal, and dismissal decision sustained. He claimed in his letter of appeal to have fresh exculpatory evidence, which he failed to adduce on appeal. The complainants did not gang up against the Claimant as alleged. The Respondent urges the Court to dismiss the Claim with costs.

13. The Claimant, Respondent's General Manager Simon Keith, and the Respondent's Human Resource Manager Edith Kiragu, all gave evidence on 4th March 2020 when the hearing closed. The Claim was last mentioned on 4th February 2020 when Parties confirmed filing of their Submissions, and delivery of Judgment reserved for 20th March 2020. The Court was unable to deliver the Judgment on 20th March 2020, owing to a supervening global crisis- Covid-19. The Court subsequently took its Easter break and annual leave. Apologies to the Parties for the delay in release of the Judgment.

Claimant's evidence.

14. The Claimant restated in his oral evidence, the contents of his Pleadings and Statement of Witness. He testified that he was dismissed on 25th May 2017, and received confirmation of the decision on appeal, on 17th July 2017.

15. He was called by the Human Resource Manager to General Manager's office on 19th April 2017. He was handed a letter of suspension. He was alleged to have sexually harassed female colleagues. The Human Resource Manager did not quiz the Claimant before suspension. The Claimant supervised about 14 Employees, 7 of whom were females. The particular section comprised 4 rooms. The Claimant moved in between and was never in a secluded place, with any of the female Employees. He did not harass any of the Ladies. He was not shown the Investigation Report. He was heard on 9th May 2017 and 10th May 2017. He did not have details of the allegations.

16. One of the Ladies S, worked with another Lady M. They would mix sand and take it outside for washing. S alleged that the Claimant placed a condom at her workplace. No one else, including M, saw the Claimant place the condom at the workplace. Condoms were readily available at the workplace.

17. Second complainant was R. She was cleaning sand/soil for mineral extraction. The Claimant could assign her other duties. She alleged that the Claimant attempted to forcibly have sex with her. He showed her a condom, and demanded for sex.

18. Third complainant Faith wanted some days off. She hugged the Claimant and wanted his approval for the days off. The Claimant declined the plea for days off. Faith turned around alleging the Claimant wanted to sleep with her. Termination was baseless. It was not founded on valid and fair reasons.

19. Cross-examined, the Claimant told the Court he seeks house allowance in arrears. His pay slip says salary was consolidated. The letter to show cause did not name the complainants. It mentioned 'majority of female Employees.' The Claimant supervised 7 female Employees. He did not have the opportunity to reply to the letter to show cause. At the hearing, he heard the complainants. He was advised, he could ask them, questions. He did not ask for time after the complainants gave their evidence. He attended hearing on 9th May 2017 and 10th May 2017. He skipped the last hearing on 11th May 2017. The minutes of the disciplinary hearing are exhibited by the Respondent. Claimant's witness, Emmanuel gave evidence which was disregarded. The male Employees under the supervision of the Claimant, used to say they heard the allegations of sexual harassment against the Claimant. It was thought the Claimant had an affair with R. She claimed to have a differently-abled Child, and needed extra time to attend to the Child. She compelled the Claimant to accompany her to the dumpsite, where she attempted to compromise the Claimant. She would have reported immediately, if it was true that the Claimant attempted to rape her. The Claimant appealed against dismissal. He said he wished to present fresh exculpatory evidence. He called Emmanuel, who said nothing. The allegations by the complainants were unfounded. The Claimant had a cordial working relationship with them.

20. Redirected, the Claimant told the Court he was not shown the Investigation Report. The Human Resource Manager Edith did not ask him any questions regarding the complaints.

Respondent's evidence.

21. General Manager Keith, adopted his Witness Statement, which underscores the contents of the Statement of Response. On cross-examination, he told the Court that he interacted with the Claimant in the exploration team. Keith was not sure how investigations were carried out. He relied on the investigations report in taking action against the Claimant. He recommended the Claimant is disciplined. There were statements recorded by various Witnesses. Keith did not record the statements. He met some of the complainants. Keith did not meet Angelina and did not know what she said. He did not take part in the disciplinary hearing. Redirected, he told the Court that disciplinary process was based on recommendations in the investigations report. The decision to terminate had nothing to do with the interactions between Keith and the Claimant.

22. Human Resource Manager, Edith Gathoni Kiragu, told the Court that the Respondent engaged casual Employees in 2016 to assist in mineral exploration. There was a complaint made by S that the Claimant, who was her Supervisor, sexually harassed her. Claimant's Supervisor, Austin took S's statement. Other complainants came forward. Austin prepared a report.

23. The Respondent has diversity standards. The policy document is on every notice board. The Respondent holds tool-box talks with its Employees. The complainants were interviewed. Management advised this is done confidentially, due to the nature of the complaints. The complainants needed protection. They were all from the same locality. The Claimant was therefore not provided with their statements and details in advance. He was allowed to cross-examine them upon hearing. He was present at the hearing. The Respondent did not have any case where Employees ganged up against one of them. Termination was fair. Edith sat on appeal. The Claimant was heard. His witness John did not give evidence, while the other witness Emmanuel, told the appeal panel that he was waiting to catch the Claimant red-handed, before he could take a firm view on the sexual harassment allegations.

24. Cross-examined, Edith told the Court the initial complainant was L, then. L had a bad leg. She said she was forced to wear a pair of working shoes by the Claimant, which did not suit her physical disability. She said the Claimant was harassing her, asking for a date. There was no corroboration of the complaints. All the 14 Employees under the Claimant's supervision were acquainted with the complaints. Godfrey, one of the Witnesses, was also alleged to have sexually harassed one of the Ladies. He said he saw the Claimant hugging one of the Ladies in an abnormal style. He also said he heard about the condoms. The Lady in question confirmed the hug was abnormal. At page 88 of Respondent's documents, Faith states the Claimant grabbed her from behind. All the Ladies were from the same village. John was Claimant's witness. He was called on appeal but never gave evidence. Emmanuel said he was waiting to catch the Claimant red-handed. Edith made specific findings on the allegations. Management considered this and initiated disciplinary hearing.

Submissions.

25. The Claimant submits, relying on the decisions of the E&LRC in *Anthony Mkala Chitavi v. Malindi Water & Sewerage Company Limited [2013] e-KLR*, and *David Wanjau Muhoro v. Ol- Pejeta Ranching Limited, [2014] e-KLR*, that fair disciplinary hearing

comprises:-

- a. Sufficient opportunity to the Employee, to prepare.
- b. Right to fully understand the charges.
- c. Right to documentation.

26. He submits these rights were denied to him.

27. He submits lastly, adopting the Court of Appeal decision in **Reuben Ikatwa & 17 others v. Commanding Officer, British Army Training Unit & another [2017] e-KLR**, that, the disciplinary panel must go beyond the views of the Employer, and make a wider inquiry to determine whether a reasonable Employer, could have decided to dismiss based on the facts available. The panel, as an industrial jury, must determine whether in the particular circumstances of each case, the decision to dismiss the Employee fell within the band of reasonable responses.

28. The Respondent adopts two decisions of the E&LRC in **P.O. v. Board of Trustees, A.F. & 2 others [2014] e-KLR** and **N.M.L v Peter Petrausch [2015]**, submitting that it is the duty of the Employer and other responsible persons, to prevent or deter the commission of acts of sexual harassment at the workplace. These decisions amplified sexual harassment to include unwelcome, sustained behaviour, direct or indirect, such as: *physical contact and advances; sexual favours; sexually coloured remarks; showing of pornography; and other verbal and non-verbal conduct of a sexual nature, that is unwelcome or humiliating to the other gender*. The Claimant made sexual advances and threatened female colleagues who were under his supervision. The complainants did not welcome his marauding advances. His actions lie squarely within the definition of sexual harassment in the decisions above, and in Section 6 of the Employment Act.

Issues.

29. The issues, as traditionally is with majority of unfair termination Claims, can be summarized as follows:-

- a. Whether there was valid reason or reasons, to justify termination of Claimant's contract of employment.
- b. Whether the decision was arrived at fairly.
- c. Whether the Claimant merits the remedies sought.

The Court Finds:-

30. The Claimant was employed as a Laboratory Assistant by the Respondent, a mining company based at the South Coast of Kenya, in Kwale, on 1st August 2013. He was promoted to the position of Exploration Field Technician, a position he held until 26th May 2017, when the Respondent terminated his contract, on the ground that the Claimant sexually harassed a number of female Employees, who worked under his supervision. His last gross monthly salary is shown in his pay slip of May 2017, to be Kshs. 56,557.

31. He was suspended in a letter dated 19th April 2017, and required to show cause, why he should not face disciplinary action, and invited to disciplinary hearing, in one letter dated 25th April 2017. The Court does not think this was appropriate, because the Employee needs to have the opportunity to show cause first, before the decision to take him through the disciplinary hearing is made. What purpose is served by the letter to show cause, if the decision to have disciplinary hearing has already been made, at the point of showing cause?

32. He was required to make a response by 28th April 2017. He wrote to the Respondent on 28th April 2017, saying he needed more time because he was bereaved. He was granted more time, responding through Maragia Oraro & Company Advocates, on 2nd May 2017.

33. He demanded to be supplied with written complaint/s of the sexual harassment. He asked for adequate time to prepare his defence. He took issue with the additional charge of 'fraud against the company,' raised in the letter to show cause, but not in the letter of suspension.

34. The Respondent wrote back on 3rd May 2017, advising the Claimant that complaints of sexual harassment constitute confidential information which could not be disclosed to third parties [Claimant's Advocates?]. It was the duty of the Respondent to protect the identities of the complainants, at least until they came forward to give evidence at the hearing. The Respondent advised further that during the hearing, the Claimant would have the opportunity to cross-examine the complainants, and would be at liberty to seek adjournment after hearing the complainants. He would be allowed adjournment to prepare for cross-examination. The Respondent explained that the information disclosed in the notice to show cause and invitation to attend disciplinary hearing, was sufficient, and no prejudice would be suffered by the Claimant, by not having complainants' statements, names and details in advance.

35. Was the position taken by the Respondent necessary and did it prejudice the Claimant? This requires the Court to examine, on the whole, whether the Respondent observed procedural fairness.

36. The Court has observed at the outset that combining letter to show cause, with the notice of disciplinary hearing was a procedural misstep. The Respondent however, mitigated this misstep, by allowing the Claimant more time to reply to the letter to show cause, which he did through his then Advocates.

37. In ordinary disciplinary proceedings, it is correct as submitted by the Claimant, on authority of **David Wanjau Muhoro** and **Anthony Mkala Chitavi [citation above]**, that the right of a fair hearing requires that the Employee has sufficient opportunity to prepare; the right to fully understand the charges; and the right to documentation.

38. There is enough evidence to show that the Claimant was given adequate time to prepare for the hearing. He was suspended on 19th April 2017. The letter of suspension discloses he had discussed the allegations against him with the Respondent, before the letter issued. He was advised in the letter that the Respondent had received written complaints from members of his team, alleging sexual harassment. The Claimant was then issued the letter to show cause, dated 25th April 2017, and required to respond within 3 days, on 28th April 2017. He requested for more time, a request which was allowed. He was to respond by 2nd May 2017, which he did through his Advocates. He was then heard in full, on 9th – 11th May 2017. He attended the hearing on 9th and 10th May 2017, opting to skip the session on 11th May 2017. He was never rushed. He was accommodated at every turn.

39. Did he understand the charges? He did not state anywhere, at any time, that he did not understand the charges. He was advised majority of female Employees under his supervision had complained that he was sexually harassing them. In the letter to show cause, he was given the forms of sexual harassment alleged to have been practiced by him upon the Ladies under his supervision. Fraud was explained in the letter to have taken place, when the Claimant allowed R time off, but still paid her wages for the day absent, which wages were shared by R and the Claimant. These charges were communicated to the Claimant in black and white.

40. The right of an accused Employee to documentation, in complaints of sexual harassment, is a complex right. Disciplinary hearing relating to sexual harassment cases is not an ordinary disciplinary hearing at the workplace. There are sensitivities that must be observed, to protect the integrity and confidentiality of the process, without compromising the call to fair administration of justice, to the victims and the villains of sexual harassment. The Respondent had an obligation to balance Claimant's right to accessing documents in advance of the hearing, with the right of the complainants to confidentiality and protection against a backlash from the Claimant, who was in supervisory position over the complainants. The Court does not think the accused Employee's right to documentation, before the disciplinary hearing, is an unqualified right. The complainants were young female Employees, in casual employment, under the supervision of the Claimant, and all from the same village. They had shared vulnerabilities. They definitely needed to be protected by the Respondent, and encouraged to express themselves, without fear of retaliation from their Supervisor.

41. Section 6 [2] of the Employment Act requires Employers who employ 20 or more Employees, to have a policy statement on sexual harassment. Section 6[3] requires that such policy statement, shall include *inter alia*, a statement that ***the Employer will not disclose the name of the complainant, or the circumstances related to the complaint to any person, except where necessary for the purpose of investigating the complaint or taking disciplinary measure in relation thereto***'

42. The Respondent balanced the Claimant's right to documentation with the complainants' right to confidentiality and protection against potential victimization, by advising the Claimant that full disclosure of the names of the complainants and their written complaints would be made at the hearing. The Claimant was reassured the he would be given adjournment if necessary, to enable him cross-examine the complainants and witnesses. He was not prejudiced. The reassurance was made in the letter from the Respondent to his then Advocates, dated 3rd May 2017. It was also communicated to the Claimant on the floor of the disciplinary hearing. The Claimant was made aware in the letter to show cause, that a majority of the female colleagues had complained against him. It was not necessary for the purpose of investigation and disciplinary hearing that the names of the complainants and their complaints were made known to the Claimant, before the hearing date.

43. The rest of the procedure was meticulously in conformity with the Employment Act 2007 and Respondent's Unacceptable Performance and Misconduct Standard.

44. The Claimant was suspended. He was informed about the allegations against him. He was asked to show cause, and replied to the notice to show cause. He was invited to disciplinary hearing, which took place over a period of 3 days, 9th May to 11th May 2017. He was heard and allowed to cross-examine all the witnesses lined against him. Witnesses with evidence favourable to the Claimant testified. A decision to terminate his contract, rather than to summarily dismiss him, was made. He lodged an appeal. A panel differently composed heard the Claimant in person on appeal. He was allowed to call his own witnesses, and to once again, test the evidence of star complainant SN, on cross-examination. The General Manager - External Affairs and Development J Schwartz, wrote to the Claimant on 17th July 2017, explaining point by point, in erudite language, why the Claimant's appeal was unsuccessful. The Claimant was paid salary for days worked annual leave and notice which after tax, amounted to Kshs. 63,712. He was further offered personal counseling for himself and his family, through Respondent's independent Employee Assistance Programme, which was available for 3 months after termination.

45. The Court is satisfied that the Respondent met the requirements of fair procedure under Sections 41 and 45 of the Employment Act, and under its own workplace disciplinary procedures.

46. Was termination based on valid reason/s?

47. There were two accusations against the Claimant: sexual harassment and fraud against the Respondent. Ultimately, he was absolved of fraud, but found guilty and his contract terminated, of sexual harassment. The Court shall therefore examine whether the charge of sexual harassment was established.

48. There were at least 5 out of 7 female Employees who complained in one way or the other, about direct and indirect sexual harassment by the Claimant.

49. Investigation against the Claimant was triggered after a Tool Box Talk to Employees, from Austin Ochieng', Exploration Geologist. On

28th March 2017, Ochieng was informed by one of the female Employees SM, that she was insulted by team leader Godfrey Muasya. According to the statement of Ochieng' insult bordered on sexual harassment. S complained that Godfrey told her, '*nitakutomba mumeo akitazama*' [Kiswahili for, '*I will make love to you as your husband watches.*']

50. As Ochieng was investigating the allegations against Godfrey, he was approached by another Employee SN, who complained of widespread sexual harassment in the Laboratory Section.

51. Contemporaneously S sought advice from Community Liaison Supervisor Rose King'oo on the happenings at the Laboratory. She confided that the Claimant had been allocating hard tasks to her, and always insulted her, after she declined Claimant's sexual advances. The Claimant would shut the door to Laboratory once S was in. He placed condoms on the desk to provoke S. She complained to Rose that the Claimant favoured a colleague named R, who had apparently caved in to Claimant's advances. R was paid for days she was absent from work, and get free milk from the Claimant.

52. R shared the complaint with Ochieng'. This led to other complaints by S's colleagues. S sought fair treatment review from Simon Wall, External Affairs Manager on 11th April 2017.

53. The Claimant complained about the manner investigations on the alleged sexual harassment against him commenced. His view is that complaint was against Godfrey, not against him at the beginning and that he was wrongly drawn in. The Court agrees with the Respondent that it is immaterial how investigation was commenced. Investigations on sexual harassment at the workplace can legitimately be initiated, even on the strength of whistleblower information. There was nothing wrong in commencement of investigations, and in examining the role of the Claimant, in what appeared to be a widespread occurrence of sexual harassment at the workplace.

54. Sharon recorded a long statement, disclosing incidences of sexual harassment against the Claimant. She also alleged that the Claimant favoured R. When other Ladies enquired from R why she was favoured by the Claimant, she retorted, '*mimi huwa nampa Boniface kuma, so kama mwataka, mpeni*' [in Kiswahili, '*I normally engage in sex with Boniface, so if you wish to have his favour, engage in sex with him*'].

55. And so, other Ladies opened up after S. AN states she was called by the Claimant to his office, and asked if she could accompany the Claimant to the town of Ukunda, for a sex session. She declined. The Claimant held her by the stomach and pressed it. She told the Claimant if he wanted sex, he should not force it on her. From then, A states that the Claimant became a hard taskmaster to her.

56. FM states that the Claimant would lock the office door and unexpectedly, touch her inappropriately.

57. R who was characterized as the Claimant's lover by the other Ladies, states in her statement that the Claimant went with her to pour out water at a secluded dumpsite. At the dumpsite, the Claimant demanded to have sex with her. He was holding a condom. R also confirmed that she was paid wages for days she was not at work by the Claimant, which amount she shared with the Claimant.

58. S states the Claimant insulted her, saying she was like luggage on a bicycle, and he could impregnate both S and her husband, and then beat them up. He asked other Employees for S husband's cellphone number, which was not availed. He told S he would visit her house at night. S states that the Claimant ought to have known Employees came to the Respondent to work and earn an income; they were not there in search of sex.

59. Nearly all the Ladies affirmed in their investigatory statements, and upon hearing at the disciplinary forum, that R cautioned then against accompanying the Claimant to the dumpsite, having herself suffered sexual demand from the Claimant, when she was enticed to accompany the Claimant to the dumpsite.

60. Male witnesses John Kyalo Kioko and Emmanuel Mutua state they had heard about the Claimant making sexual advances to the Ladies, but they did not witness the Claimant in action.

61. The Claimant made general denials at the disciplinary hearing. His position was repeatedly stated to be, that the Ladies had conspired against him, to make wild allegations of sexual harassment because they were not happy with his discharge of his supervisory role.

62. The Court is of the view that there was a credible pattern, and practice, of sexual harassment by the Claimant, against the Ladies who worked under his supervision. As a supervisor, the Claimant indulged in *quid pro quo* sexual advances, threats and outright physical violence. He gave milk, paid wages for days not worked, to some of the Employees, in advancing his objective. Those who did not go along with the Claimant's wishes, bore the brunt of doing the hard tasks, such as pushing loaded wheelbarrows. He displayed condoms at his office, and confronted R while holding a condom at the secluded dumpsite. He caused divisions among his supervisees, with some feeling others were favoured after pandering to the Claimant's eroticism. Section 43 of the Employment Act, does not require the Employer to prove reason/s in justifying termination, beyond reasonable doubt as the Claimant appears to think. The reason/s for termination under Section 43 [2], are 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. Allegations of widespread sexual harassment against the Claimant, were genuine reasons to justify termination. There is no reasonable Employer, confronted with the complaints arrayed against the Claimant, who would fail to genuinely believe reasons exist, to terminate the aggressor Employee's contract. He brought condoms to the workplace, which he would occasionally display to the startled Ladies. While he denied having the condoms before the disciplinary hearing, he told the Court that condoms were in abundance and readily available at the workplace. Did the ready availability of condoms if this was true, give the Claimant *carte blanche*, to dangle condoms before every other Lady, and demand to have sex with them? The incident at the dumpsite involving R was telltale evidence of sexual harassment. He enticed R to go with him to the dumpsite, while ordinarily, the role of pouring out water, was reserved for male Employees. R, although clearly not a favourite of the other Ladies, is to be commended for sharing her ordeal with the other Ladies, and cautioning them against falling into the predator's grasp. It is clear that the Claimant engaged in direct and indirect sexual harassment against multiple female Employees. The Respondent was able to show a clear pattern and practice of sexual harassment perpetrated by the Claimant. It was not necessary to have every Lady held to strict proof on their allegations; it is sufficient that these allegations in their totality, indicated there

was a clear pattern and practice, of unwelcome sexual advances made by the Claimant against his female supervisees. This was a Supervisor who objectified young female Employees placed under his supervision. The Respondent had an obligation under the Employment Act and its Workplace Sexual Harassment Policy, to act against the Claimant.

63. Having read the disciplinary proceedings, the appeal proceedings, investigatory statements, and evaluated the evidence of the Parties carefully; and relying on Section 6 of the Employment Act, as well as the decisions of the Court in *P.O. v. Board of Trustees AF & 2 Others [2014] e-KLR* and *N.M.L v. Peter Petrausch [2015] e-KLR*; the Court is satisfied that the Claimant was engaged in serial sexual harassment of female Employees placed under him. He gave no plausible reason, to establish his claim that the Ladies conspired against him. He abused his supervisory role, by sexually harassing young and casual female Employees. He acted like Don Juan, the Harvey Weinstein of the Kwale mining fields. The Respondent is to be lauded for moving appropriately, to stomp out sexual harassment at its workplace. Its conduct of swift, fair and balanced investigations and disciplinary process should be replicated by Employers at large, when confronted with the menace of sexual harassment at the workplace. The Claimant is not entitled to reinstatement or compensation for unfair termination. His salary was consolidated, and the prayer for house allowance in arrears is misplaced. He did not leave employment on redundancy, and is not entitled to severance pay. The declaratory orders sought are totally misplaced.

64. Lastly, as mentioned at the outset, release of Judgment to the Parties has been delayed owing to the Covid-19 pandemic. The Judgment cannot be delivered in Open Court, as required under Rule 28 [3] of the E&LRC [Procedure] Rules 2016, without exposing the Parties, their Advocates, the Staff and Officers of the Court, to the pandemic. The City of Mombasa where the Trial Court is stationed is currently a no-go zone, a pandemic hotspot. Other modes of delivery such as online platforms require some degree of physical attendance in Court of Staff to facilitate setting up of the facilities. The Staff have to commute to Court to facilitate online delivery. Electronic transmission is hampered because not all Parties and their Advocates have, or have supplied, the Court with e-mail addresses. Some Parties are unrepresented. The wheels of justice must keep in motion. The Court adopting Rule 38 of its Rules, and for the safety and health of all the participants, has therefore prepared, signed and released the Judgment from the Trial Judge's home at Chaka, Nyeri County. Copies of the Judgment shall safely be made available from the Registry and shall as soon as practicable be accessible through Kenya Law Reports web portal.

IT IS ORDERED:-

a. The Claim is declined.

b. Costs to the Respondent.

Dated, signed and released at Chaka, Nyeri County, for dispersal to the Parties, this 29th day of May 2020.

James Rika

Judge