



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 93 OF 2020

(Formerly Bungoma ELRC Cause No. 17 of 2018 and

Kisumu ELRC Cause No. 70 of 2017)

Before Hon. Lady Justice Maureen Onyango

EMMANUEL MAMBO ODUORY.....CLAIMANT

VERSUS

ONE ACRE FUND.....RESPONDENT

JUDGMENT

The Claimant, Emmanuel Oduory instituted this suit vide a Statement of Claim dated 24th February 2017 and later filed an Amended Statement of Claim dated 29th May 2018 against the Respondent, One Acre Fund, an international organization duly registered in Kenya.

The Claimant avers that he was employed by the Respondent as an Analytical Soil Lab Manager by a letter of employment dated 31st August 2015 commencing on 7th September 2015 for a period of 2 years and at a monthly salary of Kshs.100,000. That on 9th November 2016, he was awarded salary increment from Kshs.101,300 to Kshs.128,500; his house allowance adjusted by 15% to Kshs.19,275; airtime allowance of Kshs.5,000; and transport allowance of Kshs.2,600.

He avers that on 30th November 2016, the Respondent suspended him over allegations of sexual harassment against him and the suspension letter set a hearing date on 7th December 2016. That he consequently surrendered his work items to his supervisor and temporarily closed the soil laboratory. That on the day set for hearing he was grilled in the presence of one Human Resource witness. That the Respondent served him with a Show Cause letter on 15th December 2016 while he was still on suspension and he was further required to attend another hearing session on 10th January 2017 over new allegations of harassment and intimidation. That he responded to the show cause on 16th December 2016 denying involvement in the new allegations and requested for details of the same. On the said 10th January 2017 at the hearing, the Respondent refused to itemise the allegations and demanded his response to a series of questions. The Claimant avers that in both hearing sessions, the Human Resource witness Grace Odongo refused to sign against the hearing notes.

He avers that, the Respondent served him with a letter dated 24th January 2017 summarily dismissing him for gross misconduct for *abuse of office, gross negligence, harassment and intimidation, misappropriation of resources and interference with the investigation process*. That save for sexual assault, harassment and intimidation, the other allegations were not drawn to his attention in the two show cause letters nor at the two hearing sessions. That all the other allegations were made when he was out of office on suspension and that no complainant was availed or evidence adduced at the hearing sessions for him to substantively defend himself. He contends that he suffered employment related defamation as the allegations of sexual assault were false and malicious. Further, that the Respondent continued to use his name to import foreign goods without an import licence which exposed him to possible criminal charges.

The Claimant prays for judgment and or orders against the Respondent for:

- a . *A declaration that the summary dismissal was illegal, unfair and unprocedural.*
- b . *An Order to have Respondent to expunge all records of sexual assault, defamation and other allegations from the Claimant's personal HUMAN RESOURCE file premised by the Respondent.*
- c . *One Month salary compensation in lieu of Notice of dismissal at Kshs.152,750*
- d . *12 Months' salary compensation for general damages occasioned by the unlawful and unfair summary dismissal and breach of*

employment contract at Kshs.1,833,000.

e . General damages in lieu of retraction, publication, correction and apology for the defamation at Kshs.1,500,000.

f . General damages for employment related defamation over sexual. assault allegations and other allegations at Kshs.45,000,000.

g . General damages for misuse of his name when he was not in office during the suspension period at Kshs.1,000,000.

h . The costs of the suit.

i . Interests at court rates until payment in full.

The Respondent filed an Amended Memorandum of Defence dated 12th June 2018 admitting to have employed the Claimant. It denies that Grace Odongo refused to sign against the hearing notes. It avers that it summarily dismissed the Claimant in accordance with its **Human Resource Policy and Procedures Manual, the Employment Act and the principles and tenets of natural justice**. That it duly communicated to the Claimant the allegations leveled against him but he chose not to respond to them. It denies the allegations of using the Claimant's name for import purposes. It contends that the claim herein is incompetent, bad in law and an abuse of the process of court. It further avers that the sexual assault allegations which had duly been reported by some employees working under the Claimant were withdrawn by the employees after harassment and intimidation by the Claimant. It denies publishing any of the allegations to third parties. It prays that the Claim be dismissed with costs.

When the matter came before this Court for mention on 26th May 2020, the Claimant indicated that parties had a consent to dispose of the matter by way of written submissions.

Claimant's Submission

The Claimant submits that the defence does not contain bona fide triable evidentiary issues against the suit to warrant judicial examination or interrogation and that therefore, the suit stands unchallenged with uncontroverted evidences. That the Respondent has no documentary rebuttal evidence against the cause of action and has just replicated the Claimant's evidence including the letters of employment, suspension, show cause, dismissal and the human resource disciplinary hearing notes. He submits that the lack of evidence by the Respondent amounts to mere statements and that the Respondent tried to defeat the cause of justice by causing unnecessary delays. Simply put, the Claimant submits that the defence does not disclose any reasonable defence in law and is an abuse of the process of the court.

He submits that the Respondent did not explain to him the reasons for dismissal before summarily dismissing him thus denying him the opportunity to prepare and have another employee present if he so wished, as required by law. Further, that the Respondent breached his right to a fair hearing in failing to provide any detail, evidence or nature or items of the allegations of harassment, intimidation, abuse of office, negligence of duty, misappropriation of respondent's resources, interference with the non-existent investigation and sexual assault that would have allowed him to defend himself in a meaningful way. That the Respondent therefore unfairly and wrongfully dismissed him from employment for lack of procedural and substantive fairness in contravention of **Sections 41, 43 and 45 of the Employment Act, his contract of employment and the Respondent's Human Resource Policy Manual**.

On whether he was defamed by the Respondent, the Claimant submits that the sexual assault allegations leveled against him triggered his suspension from office and were not the reasons penned for his dismissal. That the allegations purposed to defame him, taint his reputation, dent his character and lower him in the estimation of his supervisor, workmates and seniors or any right thinking person in the society or the organization by dint of **Section 3 of the Defamation Act**. That this made it easy for the Respondent to dismiss him from his job and kill his budding professional career. The said allegations also raise criminal liability against him and that the defamatory words which were false and improbable caused damage and injury to him. Further, that the defamatory words were published to third parties before, during and after his suspension including Jacinta Nganga, Grace Odongo, Dr. Patrick Bell, and the Agriculture Research Team where he was a member, among others.

He contends that failure by the Respondent to establish plea of justification or privilege in a defamation suit makes the Claimant's evidence go unchallenged as was held in the case of **Margaret Wachira v Wachira Waruru & Another [2001] eKLR**. The Claimant submits that he shall suffer continuing damage and harm to his reputation and career if the sexual assault allegations are not expunged as employers always do reference/background checks with previous employers. That by dint of **Section 75 of the Employment Act** which prohibits employers from keeping records of their employees that are materially false, the Respondent and any relevant labour office should expunge all the records with false information of the sexual allegations premised in the Claimant's Human Resource personnel file and other files against him.

He submits that although suspension is a non-administrative act which the Employment Act is silent about, Courts have adopted administration of suspension against an employee based on an employer's Human Resource Policy and Procedures Manual because of the detrimental effect it has on an employee's reputation, advancement, job security and fulfillment. That the suspension could only have been valid if it was based on objectively justifiable reasons and in the absence of such justifiable reasons, it is only malice with intent to defame and dismiss the Claimant from his job. That in disregard to criminal burden of proof, the Respondent had no objectively justifiable reasons to believe or be suspicious that the Claimant had the propensity of committing such heinous criminal acts of sexual assaults prior to implementing the suspension against him. That the Respondent contravened its own Human Resource Manual on pre-suspension steps which include:

i. Accused staff to be afforded opportunity to respond before suspension is implemented.

ii. Statement of complaint will be shared with the accused staff.

iii. Accused staff is made aware of allegations against them including complainants.

iv. Accused staff is given opportunity to respond.

He also submits that his evidence on the Respondent impersonating him during suspension and immediately after suspension have not been rebutted or controverted by the Respondent's evidence and that this claim remains unchallenged.

The Claimant submits that considering the unlawful dismissal from employment, he is entitled to one month salary in lieu of notice of Kshs.155,000 as provided for under his contract of employment and that the Kshs.152,000 pleaded was a typo error. He urges this Court to consider the remaining period of the contract, gravity of the allegations, the manner in which the contract was terminated and other factors as the Court may deem fit to invoke to award him full compensatory damages. That he is entitled to an award of damages because due to the illegal dismissal, he was incapacitated to pay rent during the incomplete period of the contract of employment and was vilified when his landlord dragged him to Kakamega rent tribunal. He was further declared redundant by his new employer, Crop Nutrition Lab Services upon learning of the sexual assault allegations from the Respondent.

He refers to the case of **Ezekiel Nyangoya Okemwa v Kenya Marine & Fisheries Institute [2016] eKLR** where with regards to defamation and diminished employability, it was held that the Court understood the claimant had suffered multiple violations and ordered the respondent to pay the claimant a sum of Kshs.53,455,593 in compensatory damages and arrears in salary. The Claimant finally submits that in the absence of the Respondent's rebuttal evidence, the Claimant is entitled to all damages prayed for as was held in the case of **Daniel Kioko Mwangangi v Gray's Oak Hotel [2020] eKLR**.

Respondent's Submission

The Respondent submits that **Section 44 of the Employment Act** provides for summary dismissal of an employee without notice or with less notice than that which the employee is entitled to when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service. That the Claimant's lack of co-operation with the disciplinary hearing team also amounted to gross misconduct under **Section 44(4)(d) and (e)** and that his conduct thus justified his summary dismissal. It further submits that the show cause letter dated 15th December 2016 expressly informed the Claimant that he could be accompanied to the hearing session by a representative who must be an employee of the Respondent.

It submits that defamation is defined in **Winfield in J.A Jolowicz. and T.Ellis Lewis - Winfield on Tort 8th Edition** 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 tends to make them shun or avoid that person*". That the allegations of sexual harassment that were put to the Claimant for him to defend himself against were duly received from staff working under him and cannot thus amount to defamation. That the Employment Act empowers any employer to discipline any employee and that such discipline does not amount to defamation of that employee's character. The Respondent cites the case of **Wycliffe A Swanya v Toyota East Africa Ltd & Anor, Nairobi Court of Appeal No. 70 of 2008** where the Court of Appeal set out the elements of defamations as follows:-

"...It is common ground that in a suit founded on defamation the plaintiff must prove:-

(i) That the matter of which the plaintiff complains is defamatory in character.

(ii) That defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.

(iii) That it was published maliciously..."

It is submitted by the Respondent that the prayer by the Claimant seeking to expunge all records of sexual assault, defamation and other allegations from his personal human resource file cannot be granted as these are permanent records statutorily provided for under **Section 74 of the Employment Act**. That since the Claimant was lawfully summarily dismissed he is not entitled to notice or payment in lieu of notice and should further not be compensated. It contends that if the Claimant was to be compensated for his dismissal, it can only be done for the remaining 7 months and not outside the contract of employment which ran from September 2015 to August 2017.

The Respondent submits that since its Human Resource Department was doing their work, there was no need for an apology or retraction. That **Section 6(2) of the Employment Act** mandates the employer to issue a policy statement on sexual harassment which the Respondent has addressed in its Human Resource Policy Guidelines Manual that any employee found culpable is subject to summary dismissal. That there is no basis for the proposed sum of Kshs.1.5 Million, Kshs.45 Million and Kshs.1 Million as general damages since the same have not been proved on a balance of probability as required by law and should thus be disallowed. Further, that the Claimant has not proved the issue of impersonation to the right standard of proof as under the Evidence Act as no evidence has been produced before the Court to show when these restricted goods were imported and the date they were delivered in the country. That being on suspension does not stop the employer from using the employee's credentials prior to the suspension.

Analysis and Determination

The first issue for determination is whether the Claimant's summary dismissal from his employment by the Respondent was illegal, unfair and unprocedural. The second is whether the Claimant has proved or established the claim of defamation against the Respondent and the third issue is whether the Claimant is entitled to the reliefs sought in his Claim.

Section 41 of the Employment Act provides that:

(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision on 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.

Under **Section 45 of the Employment Act**, the employer must not only prove that the reason for termination is valid and fair but also that the employment was terminated in accordance with fair procedure as under Section 41 of the Employment Act. In the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR**, Mbaru J. held:

“Invariably therefore, before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity. Once this is established the employee must be issued with a notice, given a chance to be heard and then a sanction decided by the respondent based on the representation made by the affected employee. It is now established best practice to allow (or an appeal to such an employee within the internal disputes resolution mechanism and with due application of the provisions of section 5(7) (c) of the Employment Act. Where this procedure is followed an employer would have addressed the procedural requirements outlined under section 41 and any challenge that an employee may have would be with regard to substantive issues only.”

In the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** the court held that for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.

In the instant suit, the claimant was served with a letter sending him of “*PAID TEMPORAL LEAVE*” dated 30th November 2016 which reads as follows –

30th November 2016

Dear Emmanuel Mambo

Following concerns brought to our attention over allegations of sexual assault by you in your area of work as the Soil Lab Manager, we would like to request that you temporarily stay away from duty as from this date until the completion of all HR follow up processes.

You will be accorded the opportunity with HR to give your side of the story. Do plan to attend a session with HR on the 7th of December 2016 at 10.00 am at the HR conference room, Fashion place Bungoma.

As our per our confidentiality policy pg. 14 in One Acre Fund Kenya policy and procedures manual: confidential documentation of all allegations and investigations will be retained and appropriate corrective action taken including discharge when justified, to remedy all violations of this policy.

One Acre Fund therefore will not allow audio or video recordings of internal processes. You are however allowed to come with internal representation by any other employee of One Acre Fund for fairness and objectivity.

Your attendance to all meetings that HR may invite you to in the next coming days is mandatory and failure to do so may lead to decision(s) being taken without further reference to you.

Note: This temporal leave means you are not required to carry out your duties during this period therefore you are required to hand over any One Acre Fund work tools to HR within 24 hours.

Please note that this is a HR process to facilitate management's decision into the alleged misconduct and also to allow you the opportunity to present your case.”

He was thereafter issued with a show cause letter which is reproduced below –

“Dear Emmanuel Mambo,

Following reports of allegations of you harassing your team in your area of operation as Analytical Soil Lab Manager, please treat this as a show cause notice for you to explain why you should not be dismissed from work, as this is considered a Gross misconduct in One Acre Fund, HR policies and procedures manual, section six, code of conduct. Harassment and intimidation of employees is also considered to be reckless and careless performance of duty pursuant to the Kenya Employment Act of 2007.

One Acre Fund has a high standard of work ethics and the behaviour above is considered unacceptable under One Acre Fund HR Policies.

HR department would like to request that you respond to this show cause letter in writing to the HR Manager by Monday the 19th of December 2016 at 2.00 pm. Do hand in your hard copy written and signed response to HR Manager by the above stated time at our Fashion Place office in Bungoma.

Also plan to attend a hearing session with HR Manager on Tuesday the 10th January 2017 at 2.00 pm at Fashion place building HR conference room. You have the right to come for this hearing session accompanied by a representative who must be an employee currently with us.

Your attendance to all meetings that HR may invite you to in the next coming days is mandatory and failure to do so may lead to decision(s) being taken without further reference to you.

Please note that this is a HR process to facilitate management's decision into the allegations of gross misconduct that we have with you and also to allow you the opportunity to present your case. We also expect you to minimise contact with One Acre Fund staff except for the HR and the Investigation department who will reach out to you during this period.”

The claimant responded by letter dated 16th December 2016 as follows –

“Human Resource Manager,

One Acre Fund,

P.O. BOX 482-50200,

Bungoma (K).

Emmanuel Mambo Oduory,

Analytical Soil Lab Manager,

One Acre Fund,

P.O. BOX 96-50100,

Kakamega (K)

16th December 2016

Salutations!

RE: RESPONSE TO ALLEGATIONS OF SOIL LAB TEAM HARASSMENT BY EMMANUEL MAMBO ODUORY

First of all, I take this opportunity to relay my heart most appreciations for hiring me to the position of Analytical Soil lab manager to perform various roles and duties including setting up the soil lab, staff recruitment and. training for professional development and as internal soil spectroscopist for One Acre Fund inter alia. Once again, thank you!

I received your letter dated 15th December 2016 that reflected reports of allegations of me harassing my soil lab. team in my area of operation at the current capacity. The letter stated "Following reports of allegations of you harassing your team in your area of operation as Analytical Soil Lab Manager, please treat this as show cause notice for you to explain why you should not be dismissed from work, as this is considered a Gross misconduct in One Acre Fund, HR policies and procedures manual, section six, code of conduct. Harassment and intimidation of employees is also considered to be reckless and careless performance of duty pursuant to Kenya Employment Act of 2007."

With honesty and truthfulness, I state herein that I have never harassed or intimidated at any given time my team (Chrispinus Shibachi, Agnes Indimuli, John Opiyo, Mohammed Likhayo and Moses Orod) which I have trained on soil spectroscopy work. Of such allegations, am not aware of what type of harassment or intimidation to which team member (as complainant) I committed what on which date(s) and where. I believe every allegation needs to be rightly reported, confirmed and proven as true before the defendant can show cause in effect.

I remain compliant to your direction and decisions!

Yours faithfully,

Emmanuel Mambo Oduory”

The claimant thereafter attended and disciplinary hearing. The minutes of the disciplinary hearing are reproduced below –

“One Acre Fund Kenya human resource disciplinary hearing notes taking guide on 10th January 2017 for Emmanuel Mambo

Names of Attendees

1. Emmanuel Mambo – staff member
2. Grace Odongo
3. Beatrice Macsallah
4. Jacinta Ngangah – secretary

The employee is not accompanied. There was written commination sent to the employee notifying him of the hearing.

Notes

Allegations of sexual assault at the office.

Do you have any idea over the allegations of sexual assault?

He said no.

Do you know a female casual who previously worked at the soil lab by the name Isabella Akhsama

Yes, I knew her.

Beatrice went through the show cause response letter. Mambo said that he believes that One Acre Fund staff are guided by the polices and that they should go through the policies. Beatrice asked Mambo if he remembered the sexual assault allegations raised initially and Mambo said that he remembered the sexual allegations against him. Mambo presented a 2015 policy manual and he believed that there were no major changes.

Beatrice said that when investigations started it was determined that they were now dealing with harassment and intimidation which Mambo was later served with a show cause letter on intimidation and harassment.

Mambo quoted the policy manual on page 13 of the 2015 July 9th which said employees on receiving end of harassment wrote a complain within 7 days which is signed and dated. He further quoted page 14 of the policy manual on the 2015 manual. Mambo read on page 15 of the policy manual. Mambo also read on page 44 of the policy manual – terminations and procedures under summary dismissal (human resource will conduct investigations to gather facts). Beatrice asked Mambo if he had read page 3 under deviation of the policy manual which Mambo said yes.

Mambo said that he was not aware of how many allegations were there that if they were itemised, mambo could have responded to each of them. Mambo requested that you itemize those allegations so that he responds to them. Grace interjected and said that there was no need of itemizing them because they were captured in the set of questions Mambo was going to respond to. Mambo requested that the items be listed to that he can respond to them in writing and mambo further said that the human resource had not told him of the allegations apart from the sexual harassment.

Beatrice further requested Mambo to agree to go through the set of questions. Mambo insisted that he will not respond to the set questions/allegations against him which he is not aware of them. Mambo was asked to step out and then he came back. Beatrice told Mambo that now that he is not willing to respond to the allegations we are not going to continue with the session. We will ask Mambo to leave and get back to him on our decision.

Mambo said that he hopes that the deviation to this manual does not include One Acre Fund not observing the principles of natural justice as per the policy.

SIGNED

10th January 2017”

The claimant was thereafter issued with the letter of summary dismissal. The grounds for dismissal as set out in the letter of summary dismissal are the following –

Date: 24/01/2017

Emmanuel Mambo Oduory

P. O Box 40284

Mombasa.

cc:

County Labour Officer of Bungoma

Bungoma County

Dear Emmanuel Mambo,

Thank you for your service with One Acre Fund and your dedication to our farm families. Together, we have made a positive difference in their lives. As you are aware, we put Farmers First in everything that we do. Our mission is to provide world-class service to our farmers, because they deserve nothing less.

We care about our employees deeply, and work with them closely to provide mentorship and professional development. In certain cases however, certain types of conduct are so severe that one incident of misconduct will lead to the employee being immediately terminated without warning in accordance with summary dismissal policy in Kenyan law.

It is with great regret that we inform you that we are ending your service with immediate effect due to your misconduct.

An internal investigation was done and confirmed that there was a case to answer on the allegations of harassment of your team in your role as Analytical Soil Lab Manager, as this is considered gross misconduct under the One, Acre Fund HR policies and procedures manual, section six, code of conduct. Harassment and intimidation of employees is also considered to be reckless and careless performance of duty pursuant to the Kenya Employment Act of 2007. One Acre Fund has, a high standard of work ethics and the behaviour above is considered unacceptable under One Acre Fund HR Policies:

" while the policies and procedures in this manual are guidelines for management action, a written manual cannot address every potential workplace situation that might arise, therefore OAF reserves the right to manage its employees as management deems fit or as circumstances warrant. OAF reserves the right to deviate from this manual and employee handbook policies and procedures at any time."

On the 15th December 2016 you were served a show cause notice detailing the allegations and asked for reasons as to why disciplinary action should not be taken against you. From your response letter and a hearing session with the HR managers in the presence of a HR Associate on 10th January 2017, you refused to cooperate in answering the questions and therefore we have come to conclusion of the matter and have made the decision based on the following reasons:

- **Abuse of office position:** You continually abused your position as the Soil Lab Manager whereas hiring and firing of casuals. You assigned yourself the role of hiring and terminating casual staff at the Soil Lab, disregarding the HR Department which is supposed to carry out said duty. This had been clearly communicated during your on boarding and the Human Resource Management Training in which you attended.
- **Gross Negligence of Duty:** As part of your role as the Team Supervisor, you have denied accountability of the daily operations and have no recount that two casual staff who worked for the Soil Lab were not paid and without any communication were terminated from their roles.
- **Harassment and intimidation:** You have continually harassed your subordinates through vulgar language, unprofessional conduct, threats and sackings.
- **Misappropriation of One Acre Fund Resources:** It is evident that you misappropriated the resources of One Acre Fund, even during the suspension. One Acre Fund has paid for your taxi transport for activities not related to the Soil Lab activities. You also allowed some casuals to use the soil lab warehouse as a residential area without due regard to the One Acre Fund Organizational policies.
- **Interference with the process of Investigation:** HR instructed you to maintain minimal / limited conversation with the OAF staff during the Investigation period; you have instead resorted to make inquiries through the remaining casuals and also giving instruction on work related activities against the HR instructions.

Your final dues will be paid as follows:

- Gross salary until the termination date Kshs155,375.17 (before taxes)
- Any outstanding annual leave days (1 year and 7 days accrued leave) Kshs.152,932
- This pay out is subject to deductions on statutory and any existing One Acre fund Loans balance

- *Your loan balance: Emergency loan is Kshs.50,655.03 and Cash Loan is Kshs.116,666.63.*

Therefore, One Acre Fund will pay you a total of Kshs.47,457.00. This amount will be transferred to your salary account within 30 days of this letter date.

We request that you return any and all One Acre Fund property that was obtained during your employment with us. This includes:

- **Laptop**

The payment of your remaining, salary is contingent upon your agreement to comply with the above terms. If you do not willingly handover this property, One Acre Fund reserves the right to reclaim its property from you including taking legal action. This is in-line with the terms and conditions as outlined in the HR policy manual.

You will be issued with a certificate of service.

It is One Acre Fund's policy to protect its confidential information. We wish to remind you that you signed a confidentiality policy, which applies even after you leave One Acre Fund.

We hope that you accept these conditions honourably and gracefully, and are sorry to end your working relationship with us on these terms. Please note that you have the right to appeal this dismissal. If you wish to appeal, please do so in writing within 30 days from the date of receiving this letter, stating your grounds of appeal in full. Kindly send your appeal letter to: kenyacombpliance@oneacrefund.org and hand in a hard copy to the HR manager."

It is evident that the grounds in the letter of dismissal were never put to the claimant in either the letter sending him on compulsory leave or the show cause letter. As rightfully stated by the claimant during the disciplinary hearing, no allegations had been put to him. At the hearing he requested for itemised allegations in writing and an opportunity to respond thereto in writing. The disciplinary panel, instead of doing so, concluded that he was not willing to respond to the allegations against him and thus recommended his summary dismissal.

From the foregoing, it is clear that the respondent did not comply with Sections 41, 43 and 45 of the Employment Act as the grounds listed in the letter of summary dismissal were never communicated to the claimant either in the letter sending him on compulsory leave or in the notice to show cause. It is further evident that there was not disciplinary hearing as the claimant insisted that the allegations ought to be put in writing and an opportunity given to him to respond to the same before he could be subjected to a disciplinary hearing based on those grounds. Section 41 of the Employment Act is succinct that the employer shall, before terminating the employment of an employee, explain to the employee the reason for which the employer is considering termination. This did not happen in the claimant's case.

The respondent's own manual provides very elaborately the procedures for both sexual harassment and disciplinary process. For sexual harassment complaints, the respondent's Human Resource Policies and Procedures Manual provides that –

“Making a Formal complaint: *After discussing the problem, the staff may wish to make a formal complaint, which can be done by calling the HR Hotline - 0711-918034 or in writing to-the HR Department within seven days. The staff complaining should write, sign and date a brief written summary of the Incident(s) of alleged harassment. This statement will be shared with the person being complained about.*

- *Formal complaints are dealt with as quickly as possible, and in normal circumstances within one month. A decision will be made by the HR Manager and/or Department Lead after consultation with the parties, as to the most appropriate managed Intervention process given the circumstances.*
- *It is recognized that some alleged behaviour may constitute serious misconduct and possibly a criminal offence in which case It will be referred to appropriate external authorities.*
- *The HR Manager &/or Director of Operations may set up processes to resolve complaints impartially, sometimes involving a mediator. Such processes are confidential and agreed to by both parties.*
- *Complainants have the right to withdraw from the process at any stage. However, this does not necessarily halt further Investigation and/or action, e.g. disciplinary procedures, by the organization where there is a perceived risk, or such action is appropriate, or where there would be legal implications if some action is not taken,*
- *Regardless of the outcome of the proceedings complainants do not suffer any consequences unless the accusations were deemed malicious.*

All complaints will be promptly handled, and special privacy safeguards will be applied in handling harassment complaints. Those reporting the complaints will be Informed before the nature of the complaint or the written statement is shared with any party outside of the HR Department and will reserve the right to withdrawal from the process if they deem necessary. In cases where the identity of the person filing the complaint is released, HR will make all reasonable efforts to transfer the person reporting the allegations to a different department or manager if investigation is deemed to adversely Impact them and their performance or career trajectory. Supervisors will enforce the policy consistently and fairly.

Confidentiality:

Confidential documentation of all allegations and investigations will be retained and appropriate corrective action taken including discharge when justified, to remedy all violations of this policy.

- One Acre Fund is committed to maintaining confidentiality unless there are exceptional circumstances involving probable risk to the safety of any individual, or where maintaining confidentiality would be unlawful.
- Due to the One Acre Fund observes the principles of natural justice and procedural fairness by ensuring that anyone whose interests may be adversely affected by a complaint is aware of the allegations against them, including the identity of the person making the allegations, and given the opportunity to respond.
- One Acre Fund will not always be able to act on anonymous complaints.
- The parties involved with or affected by complaints dealt with under these procedures are entitled to a fair hearing and are kept fully informed throughout the process.

Sanctions that may be applied:

- Allegations that are proved true shall be dealt with as per the employee rules on discipline as set out in our HR manual and the Government of Kenya Employment Act.
- Alleged serious misconduct proved correct may, with the consent of the complainant, be referred to external law enforcement agencies. This would include alleged cases of physical assault, sexual assault and rape.
- Should any person make a complaint that is found to be false or vexatious, sanctions may be applied through procedures set out in the disciplinary policies outlined in this manual.

NOTE – Failure to prove a claim of harassment is not equivalent to a false allegation?

Representation: At any time during the management of allegations on harassment a complainant or respondent may seek internal representation by any other employee for fairness and objectivity.

Fair Hearing/Notice to Show Cause – If, after the issuance of the final written warning, the employee's performance still falls to meet expectations, termination is the next step. However, prior to termination, the employee must be provided an opportunity to respond both verbally and in writing before termination is implemented.

- The employee will be given 3 business days to prepare their statement. HR will book a place and time for the Hearing within a reasonable time after receiving the employee's written statement (show cause letter).
- The Hearing is conducted under the direction of the Human Resources department, involving a Senior HR representative and the Field Leader or Department Head. The employee is given time to present evidence to address the gaps and any mitigating circumstances impacting their performance.
- If desired the employee may bring an individual of their choice to support them at the hearing.
- Between the time the manager and HR representative decide a termination is necessary and when the actual Fair Hearing is conducted, the employee may be placed on paid administrative leave depending on the impact of the situation on the department.
- Upon completion of the hearing, the manager and department head, in consultation with Human Resources, will make a decision regarding the employee's future employment with One Acre Fund.

Termination – If termination is decided upon, the employee will be issued a written letter by HR of the termination, outlining the reasons leading to the termination, the effective date of the termination, information on benefits and severance to be provided (if any) and what steps should be followed if they decide to appeal the termination.

- The termination letter is to be read in full to the employee and a witness.
- The employee is required to return all One Acre Fund Property, including staff ID cards to the HR department and to payback all outstanding loans. Once completed HR will issue a Certificate of Service.
- HR will close the employee's email account immediately.

Summary Dismissal

Summary Dismissal occur when acts of gross misconduct are experienced. Gross misconduct is defined as acts or omissions on the part of employees which are considered intolerable behaviour.

Gross misconduct includes the following: theft or dishonesty; gross insubordination; wilful destruction of One Acre Fund property; falsification of records; reporting for duty under the Influence of intoxicants; absenteeism, use of abusive or Insulting language, disorderly conduct, employee is arrested for a criminal offence punishable by Imprisonment and Is away from work for more than ten (10) business days, and other similar acts involving Intolerable behaviour by the employee. In the event of gross misconduct, the employee may be placed on paid administrative leave pending an investigation. Human Resources must be notified immediately.

- When a theft, shortage, questionable loss of One Acre Fund funds or property or fraud has occurred and an employee is suspected, the manager must contact their department head and Human Resources.
- The manager and HR will conduct a preliminary Investigation to determine the facts, authenticity and severity of the accusation. Complaints must be substantiated by the complainant.
- At any point in the process, HR may involve the Ant-fraud team or external bodies on a case to case bases to conduct the Investigation and compile a report within reasonable time frame which Is shared with the HRC.
- HR will contact the accused, explain the situation and issue a show cause letter to the employee, who in turn must respond within 48 hours.
- HR in liaison with the manager and Department Head make a decision based on the employee's response and company policy to either send the staff on temporal leave or suspension as appropriate as investigation continues.
- The HR representative sets up the date of hearing based on the report received and submissions from the affected staff. The Hearing is conducted under the direction of the Human Resources and the employee Is given time to present evidence to address the gaps and any mitigating circumstances impacting their performance.
- Upon completion of the hearing HR and the Department Head will make a decision regarding the employee's future employment with One Acre Fund based on company policy.
- HR to Issues a communication to the affected staff within 48 hours.
- If termination is decided upon, the employee will be Issued a written letter by |-IR of the termination, outlining the reasons leading to the termination and the effective date of the termination.
- The termination letter Is to be read In full to the employee and a witness.
- The employee Is required to return all One Acre Fund Property, including staff ID cards to the HR department and to payback all outstanding loans. Once completed HR will Issue a Certificate of Service.
- HR will close the employee's email account immediately.”

From the foregoing, it is clear that the respondent did not comply with its own procedure in handling the claimant's disciplinary process.

For these reasons I find the summary dismissal of the claimant unfair both substantively for want of valid reasons, and procedurally for want of hearing and I declare accordingly.

Remedies

The claimant prayed for expunging of all records of sexual assault, defamation and other allegations from the claimant's personal human resource file premised by the respondent. I do not think this is necessary as during the disciplinary hearing, the respondent informed the claimant that the only charges against him were harassment and intimidation. In the minutes of the disciplinary hearing, it is stated –

“Beatrice said that when investigations started it was determined that they were now dealing with harassment and intimidation which Mambo was later served with a show cause letter on intimidation and harassment.”

Also the show cause letter at page 14 of claimant's bundle filed with claim stated the charges as thus –

“Dear Emmanuel Mambo,

Following reports of allegations of you harassing your team in your area of operation as Analytical Soil Lab Manager, please treat this as a show cause notice for you to explain why you should not be dismissed from work, as this is considered a Gross misconduct in One Acre Fund, HR policies and procedures manual, section six, code of conduct. Harassment and intimidation of employees is also considered to be reckless and careless performance of duty pursuant to the Kenya Employment Act of 2007 ...”

I therefore find that the respondent’s records are already clear that the charges of sexual harassment were abandoned and there is no need to make any further corrections of the record or to expunge the same from the respondent’s records. The prayer is therefore declined.

Having found the termination unfair, the claimant is entitled to payment of one month’s salary in lieu of notice. I award him the same at **Kshs.152,775**.

The claimant prayed for maximum compensation in the sum of Kshs.1,833,000. Taking into account all circumstance of his case, especially the length of service, the manner in which his employment was terminated as well as the grounds thereof, I award the claimant 7 month’s gross salary as compensation in the sum of **Kshs.1,069,425**.

The claimant further prayed for general damages in lieu of retraction, publication, correction and apology for defamation at Kshs.1,500,000 as well as general damages for employment related defamation over sexual assault allegations and other allegations at Kshs.45,000,000. He further prayed for general damages in the sum of Kshs.1,000,000 for misuse of his name when he was not in office during the suspension period.

The claimant did not prove defamation. As rightfully submitted by the respondent, in order to establish a claim of defamation, the claimant must prove that the respondent has published or is responsible for the publication of the defamatory material and that the same is reasonably understood to refer to the claimant either by name or by other means of identification. No evidence was adduced by the claimant that the letter of suspension containing the allegations of sexual harassment against him went outside official communication within the organisation. It was thus privileged communication. Further, the respondent retracted the same as was clarified to the claimant during the disciplinary hearing.

For these reasons, the prayers for general damages are not merited and are dismissed.

In conclusion judgment is entered in favour of the claimant in the total sum of Kshs.1,222,200. The claimant will have the costs of this suit and interest shall accrue at court rates from date of judgment. He will further be issued with a certificate of service in terms of Section 51 of the Employment Act.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF AUGUST 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE