



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 13 OF 2014

(Before D. K. N. Marete)

KENYA PLANTATION & AGRICULTURAL

WORKERS UNION.....CLAIMANT

VERSUS

UNILEVER TEA KENYA LIMITED.....RESPONDENT

JUDGEMENT

This matter came to court vide an Amended Memorandum of Claim dated on 4th August, 2014. The issue in dispute is there in cited as;

“Unlawful, illegal and unfair dismissal of five employees, i.e Gedion Muzami, Samwel Kosgey Bii, Julius Jackson, Peter Ouma Mwai and Michael N. Nyakwaye, and their consequent eviction from their quarters thereof”

The respondent in a Memorandum of Defence dated 20th May, 2015 denies the claim and prays that it be dismissed with costs.

The claimant's case is that as a union in this sector, she has a valid Recognition Agreement with the respondent. They have also concluded a Collective Bargaining Agreement (CBA) agreement with the respondent.

The claimant's other case that on diverse days between 27th November, 2013 and 15th April 2013 the respondent dismissed five employees who double as members of the claimant union on allegation of violating a document termed called Code of Business Principles (COBP) as follows;

1. Gedion Muzami

i. The grievant was employed by the Respondent on 27/1/1996 as a general worked. In the year 2001, he was promoted to the position of acting green leaf clerk which position he held for three years. He was then transferred to management recreation centre as an acting clerk. In 2005 he was transferred to the field as a green leaf clerk. In the same year, he was transferred to the position of crop protection supervisor in acting capacity. In 2009, he was again transferred to the main office as SHE Q clerk. His duties entailed compilation of SHE Q reports, coordination of SHE Q issues, training of employees, monitoring compliance of company policies and standards

inter alia. He worked for the Respondent for over twelve (12) years in acting capacity which is a violation of the CBA.

ii. On 26/03/2014 the grievant reported to work and at around 08.30am the Respondent's office messenger came by and informed him that the unit manager wanted to see the grievant at his Kapgwen Office. Upon his arrival, the grievant found the welfare assistant manager, the unit manager and eight shopstewards.

iii. The grievant was then issued with show cause notice which required him to show cause why disciplinary action should not be taken against him for violating the COPB. The said show cause notice did not disclose the particulars of the alleged breach. On 08/04/2014 the grievant was issued with a suspension letter.

iv. On 02/04/2014 at around 7.00pm the grievant was instructed to report to the welfare assistant manager and company security officer at the unit's main office. Upon his arrival, the security officer informed him that the company had decided to relocate him to a place outside the company premises.

v. On 03/04/2014 the Respondent sent its messenger to deliver a show cause letter to the grievant herein. The show cause letter required the grievant to show cause why disciplinary action should not be taken against him for breach of the COPB.

vi. On 05/05/2014 the Respondent caused another letter to be delivered to the grievant. The letter required to respondent to attend a disciplinary hearing on 07/04/2014. On the said date the grievant attended the disciplinary hearing as required. One, Mr. Hillary Lombard presented the Respondent's case by reading what he termed as affidavits and/or statements. The said investigator did not call any witness to testify against the grievant herein. The grievant was neither afforded the opportunity to cross-examine the complainant, one N B A nor the witnesses during the hearing.

vii. The Claimant avers that the allegations leveled against the grievant are of serious nature and that the Respondent cannot adjudicate on issues touching on criminal law. The Claimant further avers that no criminal charges were leveled against the grievant and that the complainant did not furnish any medical evidence of defilement.

2. Samwel Kosgey Bii

i. The grievant was employed by the Respondent in January 2001 as a general worker. Before his dismissal, the grievant had worked with the Respondent as a security guard for three (3) years, acting leaf inspector for two (2) years, sack holder and hand tea plucker. At the time of dismissal, the grievant was earning a daily wage of Kshs.385.

ii. On 13/03/2014 the grievant arrived home at 8.00pm after a meeting at the branch office at the Claimant's branch offices. Upon arrival at his house, he found that his wife who had deserted her matrimonial home had come back. He sought to know where she had been and where she had left their children. In the course of the night, the grievant was awoken by a call of nature and woke up to release himself outside his house. A night guard shone his torch at the grievant and enquired why the grievant had come out of his house naked upon which the grievant went back to his house.

iii. On 14/03/2014 the grievant reported to work as usual and at around 10.00am he was called by the Assistant Estate Manager on his mobile phone and summoned to the assistant manager's office. Upon his arrival at the assistant manager's office he found the welfare assistant manager with the assistant estate manager. The grievant was asked to explain what had transpired during the night and after rendering his explanation, he was asked to go back to work.

iv. The grievant continued with his normal duties until 17/03/2014 when he was summoned by the

manager and issued with a show cause notice. The letter required him to explain why disciplinary action should not be taken against him for breach of COBP. He was suspended for three days to allow for investigations.

v. On 19/03/2014 the grievant was issued with a letter inviting him to a disciplinary meeting scheduled for 20/03/2014 but due to his engagement scheduled for that date, he requested that the hearing be scheduled for 21/03/2014 which the Respondent obliged.

vi. On 21/03/2014 the grievant attended the disciplinary hearing where statements of witnesses were read to him. The said witnesses were not present at the said hearing and the grievant was not afforded the opportunity to cross-examine the witnesses even the complainant. On 27/03/2014 the grievant was issued with a dismissal letter. The grievant had worked with the Respondent for thirteen (13) years without any record of indiscipline.

3. Julius Jackson

i. The grievant was employed by the Respondent on 06/04/1994 as a general worker and assigned the duties of acting green leaf clerk, a position he held for one year after which he was transferred to Security & Welfare team in acting capacity. In the year 2001 the company posted an advertisement seeking to recruit team leaders and the grievant applied. He was interviewed for the position and he was appointed to take the job through a letter dated 31/07/2001. His starting salary was Kshs.6,524 per month. His duties since then kept on being changed by the Respondent.

ii. On 23/02/2014 the grievant herein requested the Divisional Assistant manager to allow him casual leave which was granted. The grievant proceeded on leave for two days that is 24/02/2014 and 25/02/2014.

iii. On 24/02/2014, the grievant in the company of his girlfriend went to a social place in Kericho town. At around 5.00pm the grievant asked the lady to go home and attend to her children who by that time were going back home from school. He gave the lady Kshs.1,000 for groceries. He also told the lady to organize the children well as they were to leave the grievant's place.

iv. At around 6.30pm the grievant left to join the lady where she resides at a place known Alfa Omega, which place is outside the company premises. He joined the lady and her children for supper. He gave the lady kshs.8,000 to keep in safe custody. He agreed with the lady that once she was done with the children she would join him at a nearby social place. At the social place, they were joined by friends with whom the socialized until around 10pm when Jackson realized that the lady was not in their company.

v. After waiting for a while to see whether she would return, the grievant decided to check whether she had gone to her house. He knocked the door and the lady's son opened the door for him. He realized that the lady had not come back to her house. The grievant decided to sleep and at around midnight, someone knocked the door. The grievant opened and found out that it was the lady knocking.

vi. The grievant let her in and enquired from the lady where she left to but instead of responding, she picked a quarrel with the Respondent and thereafter started screaming and shouting "thief" thereby attracting neighbours. The neighbours enquired from her who the thief was and she pointed at the Respondent. The neighbours did not act as they knew the grievant to be the lady's boyfriend. Eventually, the neighbours left them and told them to resolve their issues by themselves.

vii. The lady locked her house and left, leaving the grievant herein outside. The caretaker of the premises called the landlord about the issue and the landlord instructed him to break the lock of the house to allow the grievant ingress to the house.

viii. On 25/02/20104 the lady came back at around 5.35 am upon which the grievant asked her to

give his Kshs.8,000 back. The lady told him that she had lost the money during the commotion the previous night. He sat the grievant and the lady down and they agreed on how the lady would pay the grievant.

ix. On 05/03/2014 the grievant was summoned by the unit manager in his office where he found the manager in the company of ER/IR manager. He was informed that a lady by the name Daisy had complained to the company that the grievant had caused her bodily harm. He was issued with a letter requiring him to show cause why disciplinary action should not be taken against for violating the Code of Business Principles. The grievant showed cause through a letter dated 07/03/2014. On 10/03/2014 the grievant was invited for a disciplinary hearing scheduled for 13/03/2014.

x. On the date scheduled for hearing, the grievant attended the disciplinary hearing where statements written by the said Daisy and other witnesses were read to him. The complainant and the witnesses were not present during that hearing. He requested to be allowed to bring witnesses to testify that he was in a relationship with the said Daisy and he was told that another meeting would be held on 18/03/2014 where he would be allowed to bring witnesses. On 18/03/2014 the management declined to listen to the grievant's witnesses stating that the witnesses were not employees.

xi. On 20/03/2014 the grievant reported on duty at his usual time and at around 11.00am he was summoned by the Unit Manager and was issued with a dismissal letter.

xii. The claimant avers that the grievant was not afforded a fair hearing by the Respondent by virtue of his witnesses being barred from testifying and also by the fact that he was not allowed to cross-examine the complainant and the other witnesses.

xiii. The event leading to the dismissal of the grievant herein above occurred outside the premises of the Respondent. The correct place for the lady to report her alleged assault was to the police. The Respondent usurped the function of the state of maintaining law and order and in particular by dismissing the grievant for alleged assault that did not occur at its premises which in any event is denied.

4. Peter Ouma Mwai

i. The grievant was employed by the Respondent in March 1995 and deployed at its Chelimo Estate, now Kericho Estate as a general worker. At the time of dismissal, he was earning a daily wage of Kshs. 386.

ii. On 05/12/2013 the grievant reported to work as usual. At around 11.00am, the estate manager came to where he was working and asked him to accompany him to a meeting at the Respondent's International Training Centre (ITC). On arrival, they found the Director in charge of agriculture with two other persons who introduced themselves as Code of Business Specialists from London. One of the specialist, a Mr. Mackenzie handed the grievant a show cause letter dated 05/12/2013. The show cause notice raised accusations of sexual harassment. On 07/12/2013 the grievant submitted a show cause notice to Mr. Mackenzie at the ITC.

iii. The grievant was later invited to attend a disciplinary hearing at the same venue on 10/12/2013. On the day scheduled for hearing, the grievant attended the hearing but the Respondent did not avail the complainant or any other witness. The Respondent caused statements written by the complainants and witnesses thereof to be read to the grievant. The grievant informed the Respondent that he was not aware of the allegations and that he had been framed. The Respondent told the grievant to leave and await further communication.

iv. On 07/12/2013 the grievant left his house to work. Upon his arrival at his work station he was informed to report to ITC. Upon his arrival, he was issued with a letter of dismissal and instructed to leave the Respondent's premises immediately.

v. *The Claimant avers that the grievant herein was not given a fair hearing. First, the grievant was not given the opportunity to cross-examine the complainant and the grievants herein. Secondly, the grievant was not given the opportunity to put forth his defense. His dismissal was therefore unlawful, illegal and unfair in the circumstances.*

5. Michael N. Nyakwaye

i. *The grievant was engaged by the Respondent as a seasonal employee and thereafter his employment status was changed to permanent in April 2005. He was employed as a general worker and deployed at Kerenga division.*

ii. *On 21/11/2013 the grievant reported on duty and was summoned by the company's chief clerk who informed him that he was required at the ITC. He walked to the ITC where he found the Company's director together with two other persons and the grievant's manager. He was given a letter requiring him to show cause why the Respondent should not take disciplinary action against him for breach of the code of business principles and the Respondent's sexual harassment policy.*

iii. *The grievant showed cause through a letter dated 23/11/2013 upon which he was issued with another letter dated 23/11/2013 advising him to attend a disciplinary hearing on 25/11/2013 at 10.30 am at the ITC.*

iv. *On 25/11/2013 he attended disciplinary hearing where an affidavit sworn by an undisclosed grievant was read to him. He was then asked to narrate his experience as an acting team leader to the panel. He was then released from the disciplinary hearing and told the panel would communicate to him.*

v. *On 27/11/2013 the estate manager called the grievant herein above on his cell phone and directed him to meet him at the ITC. Upon arrival at the ITC, the grievant was issued with a letter of summary dismissal.*

vi. *The claimant avers that the grievant was not given a fair hearing since he was not allowed the opportunity to put forth his defence and the he was not afforded the opportunity to cross-examine the complainant and any other witness thereof.*

It is the claimants that the COBP was neither brought to the attention of the employees nor was it part of a CBA *inter partes*. This also raises grave issues of law not in consonance with law prevailing in Kenya.

The respondent has also locked the grievants houses thereby causing them untold suffering, mental anguish and toucher.

She prays as follows;

a) *Gratuity for the years they have served with the Respondent at the rates provided for in the CBA;*

b) *Monthly salary for a period of twelve (12) months;*

c) *House allowance from the time of dismissal until judgement;*

d) *In lieu of leave for the period dismissed;*

e) *Leave travelling allowance for the period of dismissal;*

f) *An equivalent of two month's salary in lieu of notice of termination;*

g) *To produce all the household goods that were withheld by the Respondent when the grievant*

was thrown out or payment in lieu;

h) Damages for unlawful, illegal and unfair dismissal;

i) Interest on (a), (b), (c), (d), (e), (f), (g) and (i) above.

The respondent denies the claim and proffers the following in answer;

4. **Gideon Muzami** was summarily dismissed from his employment on 14th April 2014 for defiling a minor. The dismissal was carried out lawfully and fairly as follows;

a. The Claimant on 26th March 2014 was informed in the presence of eight shop stewards that he was been considered for dismissal for defilement of a minor. The minor is the daughter of one of the Respondent's employees who resides within the Respondent's villages and was the Claimant's neighbour. The Claimant was issued with a letter which informed him that he would be on suspension until 8th April 2014 to allow for further investigations.

b. The Claimant was requested to leave the Respondent's housing on 2nd April 2014. This was to protect the Claimant from interfering with the investigations. The Respondent however procured alternative accommodation for the Claimant at a nearby hotel where he was also provided with three meals a day.

c. On 3rd April 2014 the Claimant was issued with a notice to show cause letter and requested to respond in writing to the issues raised therein. The Claimant responded to the said letter and after review of his responses, the Respondent invited the Claimant to attend a disciplinary hearing.

d. The said disciplinary hearing took place on 7th and 8th April 2014 and the Claimant attended with 9 shop stewards to represent him.

e. The Respondent's representatives read out the affidavits recorded by the witnesses. The witnesses were not present physically at the hearing so that their identities could be protected. The Claimant and his representatives were however given an opportunity to question the information provided in the affidavit and the documents. The Employment Act does not provided for the cross examination of witnesses during disciplinary hearing. Disciplinary hearings are not the same as criminal hearings. The Employment Act further provides that names of complainants of sexual harassment are not to be disclosed. The Claimant in any event also gave his own account of the events and allegations made against him. He was at all times aware of the allegations against him and cannot feign ignorance.

f. The Claimant failed to give satisfactory answers and representations against the questions that he was asked and the issues that arose in the affidavits. There was overwhelming evidence that the defiled minor had been detained by him for him for three days.

g. It appeared during the hearing that the Claimant failed to understand that sexual relations with a minor was criminal, irrespective of whether she had consented or not and whether she had a child from a previous relationship. The Claimant was in breach of the Respondents Code of Business Principles which provides that all employees "must respect the dignity and human rights of colleagues and those they come into contact with."

h. The Respondent did not adjudicate against issues touching on criminal law. The defilement has been reported in Kericho police station and assigned OB No. 18/27/3/2014. The police are yet to follow up on the matter. However, the Respondent as a responsible employer had a duty to safeguard the security of its employees.

i. Gideon appealed the decision on 16th April 2014 and the appeal was heard on 6th May 2014.

Annexed hereto and marked “Appendix 1” are the letters and documents referred to above and the minutes of the disciplinary meeting and appeal.

5. **Samwel Koskey Bii** was summarily dismissed from employment on 26th March 2014. The reason for the dismissal was that he stripped naked and sexually harassed his neighbour, who is also the Respondent’s employee. The termination procedure that was followed was as follows;

a. The Claimant was issued with a notice to show cause letter as well as a suspension letter on 17th March 2014. He was informed that the Company was considering terminating him from employment for sexually harassing a fellow employee. The Claimant was also requested to prepare a written explanation on the allegations made against him.

b. The Claimant submitted his written defence and was thereafter requested to attend a disciplinary hearing scheduled for 20th March 2014. The Claimant however requested for the hearing to be postponed to 21st March 2014.

c. The hearing was postponed to the 21st March 2014 as requested by the Claimant. He attended the hearing with 7 unit shop stewards to represent him. Affidavits of witnesses were read to the Claimant as well as his representatives. They raised questions and the Claimant was given an opportunity to narrate his own account of the alleged sexual harassment.

d. There were 5 eye witness accounts that were presented to the Claimant. They all had seen the Claimant outside of his house naked and pouring urine on the female victims residence. Further, the Claimant also made threats of sexual violence to the said victims residence. Further, the Claimant also made threats of sexual violence to the said victim. The Claimant during the hearing admitted being outside of his house naked.

e. The Claimant was subsequently summarily dismissed from his employment on 26th March 2014. He appealed the summary dismissal and the appeal was heard on 6th May 2014.

Annexed hereto and marked “Appendix 2” are the letters and documents referred to above and the minutes of the disciplinary meeting and appeal.

6. **Julius Jackson** was summarily dismissed from employment on 20th March 2014 for sexually harassing a junior employee. The termination procedure that was followed was as follows;

a. The Claimant was issued with a notice to show cause letter on 7th March, 2014. In that letter, he was requested to give a written explanation responding to the allegations made against him.

b. The Claimant submitted his written representations to his Unit manager on 7th March 2014. After carrying out investigations and considering the Claimants written representations, the Respondent on 10th March 2014 requested the Claimant to attend a disciplinary hearing on 13th March 2014 and that he should attend the same with a shop floor representative. The Claimant requested to have the meeting postponed to 18th March 2014 and the Respondent agreed.

c. During the disciplinary hearing, the Claimant alleged that he and the junior employee who had complained of sexual harassment had been involved in a relationship. However, the victim as well as five other witnesses confirmed that the Claimant had been harassing the victim over a long period of time and that she had even vacated the premises allocated to her by the Respondent to rent a house in another area to avoid the Claimant. She had also sought to be transferred to work in another group. Further, there was evidence that the claimant had physically attacked the Claimant at her new residence prior to his dismissal, a fact which he admits. One of the witnesses also testified that he was aware that another woman had also complained of harassment by the Claimant and had even left employment because of it while others testified that they had seen the

Claimant insult the victim during the time she was residing at the Respondent's premises.

d. The Claimant's assertion that the physical attack on the victim occurred outside of the Respondent's premises and should therefore not have been a ground for his termination is misconceived. The victim was his junior and in particular a coworker, he therefore ought not to have conducted himself inappropriately or offensively. The Employment Act does not state that sexual harassment must occur only during work hours or in the Employers premises. The reason for the termination was therefore justified.

e. The claimant appealed his dismissal and the same was heard on 6th May 2014.

Annexed hereto and marked "Appendix 3" are the letters and documents referred to above and the minutes of the disciplinary meeting and appeal.

7. Peter Ouma Mwai was summarily dismissed on 17th December 2013 for compromising and inducing witnesses to mislead the Respondent's experts from investigating sexual harassment claim in the Respondent's tea estates. The purposes of the investigations was to establish whether there was any sexual harassment occurring amongst the Respondent's 5,000 employees working in its tea estates and to determine what measures the Respondent had requested the Claimant to assist in the process by publicizing the exercise amongst the Respondent's employees and requesting any victims of sexual harassment to attend before the investigations team and give their evidence. The Claimant was selected because of his rapport with the employees and received payment for his role. The termination procedure that was followed is outlined below:

a. The Claimant was issued with a notice to show cause letter on 5th December 2013 which explained the reasons for which the Claimant was being considered for termination. The Claimant responded to the aforementioned letter on 6th December 2013. He denied all the allegations made against him.

b. The Claimant written representations were considered and the Respondent requested the Claimant to attend a disciplinary hearing on 10th December 2013. He was informed that he should attend the hearing with another employee of his choice or a shop floor representative pursuant to section 41 of the Employment Act.

c. The Claimant attended the hearing with a representative, Dickson Sang who both made representations after the affidavit evidence of four witnesses was read to them. The witnesses testified how the Claimant had requested them to present themselves before the Unilever team that that been investigating sexual offence allegations and the Independent Ombudsman that the Respondent had contracted to hear testimonies of victims. The Claimant had also advised them to lie to the team that they had either been sexually harassed or present false information.

d. The Claimant was summarily dismissed for breaching the Respondents Code of Business Principles particularly, the

e. The Claimant appealed the decision to dismiss him and the same was heard on 27th January 2013. The Respondent declined to accede to the Claimant's request.

Annexed hereto and marked "Appendix 4" are the letters and documents referred to above and the minutes of the disciplinary meeting and appeal.

8. Michael Nyambasora Nyakwaye was an acting plucking team leader at the Respondent's Kerenga tea division. He was summarily dismissed on 27th November 2013 for sexually harassing a female tea plucker, his junior, on various dates between 2009 and 2013. The dismissal was carried out fairly and lawfully as follows;

a. The Claimant was issued with a notice to show cause letter on 21st November 2013 wherein he was requested to prepare a written explanation as to why disciplinary action should not be taken against him on the allegation of sexual harassment of one of a junior employee.

b. The Claimant responded in writing on 22nd November 2013 and denied that he had sexually harassed the employee and further stated that he was aware of the Respondent's human resource policies and code of business conduct relating to the same.

c. The Respondent considered the Claimant's representations and invited the Claimant to attend a disciplinary hearing on 25th November 2013. He was requested to attend the hearing with representation.

d. The Notice to Show Cause hearing was held on the agreed date and the Claimant was represented by a fellow employee, Lawrence Okari. During this meeting the victim of affidavit was read to the Claimant and he was given an opportunity to make representation on the same.

e. The victim had testified that she had sought a transfer to work in another tea farm as a result of the sexual harassment she suffered. The victim had a leg injury and yet chose to move to another tea division farther from her home to avoid the Claimant. She only sought a transfer back after she was made aware that the Claimant had taken up another position and would therefore not interfere with her work.

f. The Claimant was given an opportunity to appeal his dismissal. His appeal was heard on 27th January 2014 and the Respondent declined to accede to the appeal.

Annexed hereto and marked "Appendix 5" are the letters and documents referred to above and the minutes of the disciplinary meeting and appeal.

It is the respondent's further case that the grievant had contravened COBP principles which requires them to carry themselves out with integrity and respect of human rights. They were also required to comply with the respondent's sexual harassment policy both of which they were always aware, through various training.

The respondent's other case is that the grievants were requested to move from the company premises and offered hotel accommodation for the time of their suspension till dismissal thereby ousting prejudice on their part. This was because of the vulnerability of the victims and witnesses against the dismissed employees arising out of genuine fear that the grievants could harm or victimize them.

The respondent's further avers that the reasons for termination were justified and reasonable. This is because investigations had been carried out, leading to the dismissal of the grievants in earnest belief that the complaints made against them had occurred.

The respondent's case is further expressed in the Memorandum of Defence as follows;

14. The Respondent denies the Claimant's assertion that the reasons for the dismissal have no impact on the employer employee relationship. All of the Claimants were terminated for sexually harassing the Respondent's employees and in the case of Gideon Muzami defiling a minor. Section 6 of the Employment Act provides that an employee is sexually harassed if a coworker of the employee shows physical behavior of a sexual nature which directly or indirectly subjects the employee to behavior that is unwelcome or offensive to that employee. It is irrelevant whether such conduct occurred during working hours or outside of the Respondent's premises.

15. The summary dismissal procedure that was followed was fair and lawful. The employment Act does not require witnesses to be physically present during notice to show cause hearings and that they should be cross examined. Disciplinary hearings are not the same as criminal proceedings.

The Employment Act further provides that names of complainants of sexual harassment are not to be disclosed. Each of the Claimants together with their representatives were given an opportunity to make representations in response to the affidavits and allegations presented to them.

16. The Respondent denies the Claimants allegation that the Respondent usurped the roles of state by maintaining law and order. The Respondent has a duty as a responsible employer to safeguard the security of its employees pursuant to Article 29 and Article 53(d) of the Constitution. The Respondent also has a fundamental duty to protect the personal safety of the surviving victims and others associated with the cases and the alleged offender from possible retribution from other employees residing at the Estate. It is important that the offender does not face any physical violence while at the said Estate.

17. The Claimant Union has abdicated its duty of defending all of the Respondent's employees particularly women, who are also their members. The Union has instead opted to defend the five dismissed employees who were accused of crimes against women. The Respondent is surprised that the Union has shown no concern for the rights of the women who require their protection. The court ought to protect these vulnerable members of society from abuse, harassment and discrimination.

18. The return of the five dismissed employees back to the Respondent's premises has instilled fear amongst other victims who have already made complaints and may deter other vulnerable women and children from complaining and seeking protection.

19. The Police who are the custodians of security have conducted investigations on the complains of sexual defilement and harassment occurring in the Respondent's housing estates, however this honourable Court ought to take judicial notice of the fact that they do not have adequate resources and skills to deal with the complainants. The women and children are relying on the Respondent's own security procedures and mechanisms to protect them.

The issues for determination therefore are;

1. Was the termination of the employment of the grievants was wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. The claimant does not file any written submissions in support of the claim. This is not explained, or at all. Perhaps she may have opted to rely on her case as pleaded.

The respondent in her written submissions dated 7th December, 2017 elaborately sets out a case in support of lawful termination of the grievants for violation of the sexual rights of their colleagues and others at the work place. They seek to amplify the defence by reliance on the following documents;

- *Memorandum of Defence filed on 20th May 2015*
- *Witness statement of Stanley Cheruiyot filed on 24th February 2016*
- *Witness statement of David Sawe filed on 24th February 2016*
- *Witness statement of Siddharth Ramaswamy filed on 13th April 2016*

The respondent further submits her legal basis for termination as follows;

*6.2 In addition, pursuant to Section 6 of the Employment Act, employers have a duty to prevent and punish sexual harassment occurring in the workplace and must adopt all necessary measures to guarantee a safe working environment for all employees. Justice Rika in the case of **P O v Board of Trustee, A F & 2 others [2014] eKLR** made reference to the Indian Supreme Court case of*

Vishaka & Ors v. the State of Rajasthan & Ors, [JJ, 1997] [7] [SC 384] where the Supreme Court had held that “ it is the duty of the Employer or other Responsible Persons in the Workplace, to prevent or deter the commission of acts of sexual harassment and to provide the procedure for resolution, settlement or prosecution of acts of sexual harassment by **taking all steps required**”.

6.3 The employer’s duty, particularly for those employers that also provide housing, is not limited to the work place only, instead it extends to ensuring that the employee’s security and well being is safeguarded even in their homes. In the case of **P O v Board of Trustee, A F & 2 others (supra)**, Justice Rika referred to the 1988 General Survey of the Committee of Experts of the ILO, on the Application of the ILO Convention Concerning Discrimination in Respect of Employment and Occupation, 1958. The Judge explained that “the Committee highlighted the importance of taking effective measures to prohibit both quid pro quo and hostile environment sexual harassment at work. It was noted that confining sexual harassment to criminal procedures has generally proven inadequate, as the criminal laws may deal with the most serious cases, but not the range of conduct in the context of work that should be addressed as sexual harassment, and the burden of proof in criminal cases is higher, with limited access to redress. Justice Rika on this basis held that the employment court had jurisdiction to hear a case of sexual harassment even where the alleged harassment was subject to criminal proceedings and had occurred in South Africa outside working hours.

The respondent further buttresses and amplifies her case by relying on the authority of **P O v Board of Trustee, A F & 2 others [2014] eKLR** as follows;

“... UN Convention on the Elimination of All Forms Against Women [CEDAW] and the ILO consider acts to constitute sexual harassment when the victim has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment – known respectively as quid pro quo.” Julius’

Again, **Halsbury’s Laws of England, Fifth Edition, Volume 40, Para. 724** provides that;

Whether an employer acted reasonably or unreasonably in treating a reason as sufficient reason for dismissing employee must be determined in accordance with equity and the substantial merits of the case. The key consideration of an employment tribunal is, therefore, the reasonableness or otherwise of the employer’s conduct, not the injustice to the employee.

In **Browne-Wilkinson J in Iceland Frozen Foods Ltd v Jones [1983] ICR 17** the court observed thus;

‘The function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.’

In conclusion, the respondent submitted on the role of this court in a determination of acts of sexual harassment at the work place as follows;

5. it is the Respondent’s humble submission, base on the foregoing decisions that the jurisdiction of this Honourable Court is not to rehear and rehash (rehearse?) the disciplinary process by expecting testimonies from the female complainants as well as the eye-witnesses in court. The Employment & Labour Relations Court is not a criminal court. Instead the court is to consider whether based on the facts tabled before the disciplinary hearing the Respondent made a reasonable decision to dismiss the employee. **Nazareno Kariuki v Feed the Children, (supra)** where the court held that;

“...the role of the court is not to reconstruct the internal disciplinary procedures adopted by an employer or to improve on the decision by the employer but to check whether in the particular

circumstances of the case, the employer acted in a reasonably fair manner.”

The respondent's case, and particularly her submissions on the subject have let the cat out of the bag. This court is duty bound to hear and determine issues of sexual harassment in and out of the work place. These however must always apply to such work place relations.

The criterion for determination of such issues and disputes is that of reasonableness and fairness on the part of the employer in determining or dismissing the culprit employee. It is the onus of the court to make an assessment of the circumstances of the case and make a determination on such reasonableness by the employer. The law and international conventions do not expect the court to fall into the conundrum of a criminal court in such a determination. Far from it, this court retains its civil jurisdiction under all circumstances. This must also be appreciated by all and sundry. It therefore must carry out its functions with this in mind.

This is a heavily contested matter. This can be explained by the fact that the subject is only gaining ground in our jurisprudence. Parties are bound to manage this with various degree of emotional background. I however find an overwhelming case in favour of lawful termination laid out by the respondent. The respondent through and through expresses a forceful case of sexual harassment meted by the grievants to their female colleagues at the work place. The respondent further demonstrate a reasonable and structured approach to a determination of the issue through elaborate disciplinary proceedings in which the grievants were found culpable and dismissed from employment. The grievants were awarded an opportunity to be heard and indeed participated in these proceedings. I cannot fault this. It was fair. I therefore find a case of lawful termination of employment and hold as such.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. She is not. Having lost on a case of unlawful termination of employment, she becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their own costs of the claim.

Delivered, dated and signed this 11th day of December 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Miss. Omwaka for the claimant union.
2. Mrs. Kimani instructed by Kaplan & Stratton Advocates for the respondent.