REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NUMBER 105 OF 2019

HENRY OMUSUNDI MAINA .....CLAIMANT

-VERSUS-

ARTICLE 19 EASTERN AFRICA .....RESPONDENT

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

JUDGMENT

1. The claimant was a former Regional Director of the respondent. Aggrieved with the decision by the employer to terminate his employment on allegations against him of sexual harassment and bullying at the work place, the claimant filed a statement of claim dated 17th January 2020 and received in court on the 20th February 2020 seeking for the following relief-

a) A declaration that the termination of the Claimant's employment by Respondent was unlawful;

b) A declaration that the Claimant's fundamental rights enshrined under Article 26, 41, 47 and 50 of the Constitution of Kenya, 2010 have been contravened and infringed on by the Respondent;

c) A declaration that the Claimant is entitled to the payment of damages and or compensation to be assessed by the Court for the violation and contravention of his fundamental human rights by the Respondent as provided for under Article 26, 41, 47 and 50 of the Constitution of Kenya, 2010;

d) General damages for unlawful termination of employment equivalent to the Claimant's remuneration of twelve (12) months totalling to Kshs. 5,684,580.00 as stipulated under the Contract of employment;

e) Compensation for 190 days untaken leave totalling to Kshs. 3,461,754.80;

f) Under payments during the period of employment being 27 months totalling to Kshs. 5,755,617.00;

g) Full salary from the date of breach of employment contract to the date of intended lapse of the said Contract of employment from 1st January 2019 totalling to Kshs. 4,263,435.00;

h) Interest at court rates on (c), (d), (e), (f), (g) and (h) from the date of filing suit up to payment in full;

i)Orders that the Respondent be condemned to pay costs of the suit.

2. In support of the claim the claimant filed his witness statement dated 17th January 2020 and list of documents of even date together with the bundle of documents.

3. The Respondent filed its Response to the Claimant's Memorandum of Claim on 20th March 2020 and received in court on the 28th March 2020, offering contest to the facts in the Statement of Claim. In support of the response was a witness statement by

Mugambi Kiai dated 1st June 2020. The respondent further filed list of documents dated 7th September 2020 together with the bundle of documents and a further list of documents dated 9th September 2020 being the Respondent's Human Resources Manual.

4. The Claimant then filed a Response to the Respondent's response to the Statement of Claim dated 16th July 2020.

Hearing and evidence

5. The claimant's case was heard on the 18th June 2025 before me when the claimant testified on oath, adopted his witness statement dated 17th January 2020 as his evidence in chief, and produced his documents under list of even date *as C-exhibits 1-22* and further relied on the statement of claim and the prayers therein. The claimant was cross-examined by counsel for the respondent, Mr. Willis Otieno and re-examined by his counsel, Mr. Mukuha h/b Bwire. The claimant's case was closed.

6. On even date the respondent's case was heard before me with Mugambi Kiai as RW1 who testified on oath and adopted his witness statement dated 1st June 2020 as his evidence in chief and produced the respondent's documents under list dated 7th September 2020 as *R-exhibits 1-21* and the Human Resources Manual filed under the further list of document dated 9th September 2020 as R-exhibit 22. RW1 was cross-examined by counsel for the claimant, Mr. Mukuha and re-examined by his counsel. The respondent's case was marked as closed.

BACKGROUND TO THE CASE

The claimant's case

7. The claimant contended that his employment contract was unfairly terminated for lack of valid reasons and procedural fairness and sought the relief stated above. The claimant stated that vide an employment contract commencing on the 3rd day of August 2009, the Respondent engaged the him as its Regional Director, on a contract of two years renewable, subject to funding. The employment contract was renewed last on 1st day of 2017 for a contract of three years. Vide letter dated 2nd March 2019, the claimant was invited to a meeting with the Chairperson of the Respondent's board, Mr John Gachie and Executive Director, Mr Thomas Hughes, to discuss allegations of bullying and harassment against him which meeting was held on 4th march 2019. As per witness statement of the claimant(re-produced in verbatim) the following happened before his termination:-

'During the said meeting held on 4th March 2019, the impugned, baseless, flimsy, unfounded, unsubstantiated, untenable and/or malicious allegations made against me were outlined by the Chairperson.

I was further notified of a suspension for a period of 10 working days (between 4th March 2019 to 15th March 2019) to allow for an investigation into the impugned allegations to commence and be concluded.

Following the said meeting, the chair of the Respondent notified the Respondent's staff that an investigation with respect to me had commenced and that the Respondent's Executive Director would be providing interim management until the investigation is concluded.

It was alleged that on or about 18th January 2019, allegations of bullying and harassment against me detailed in two whistle-blower complaints were brought the attention of the Chairperson of the Respondent's Sexual Harassment Committee, Ms.

Dinah Musindarwezo, who in turn notified the Respondent's Board and Executive Director, Mr. Tom Hughes of the impugned allegations for determination on the next steps.

It was claimed and alleged that I had:

i. sent suggestive text messages, WhatsApp, email and phone messages to staff and interns alluding to or asking for sexual favours;

ii. attempted engagement in inappropriate physical contact with a colleague; called upon female staff to find a solution to the toxic work environment allegedly created by rumours of sexual harassment in the Eastern African Office;

iv. Staff members who did not accept my sexual advances were denied written employment contracts, had poor performance reviews, had their work discredited in staff meetings and were denied salary increments;

V. Gender bias and discriminatory treatment between female and male staff.

The impugned investigations were conducted and a Draft Investigation Report with exhibits, complainants, witnesses and interview statements submitted on 29th March 2019.

I prepared and submit a response to the said draft investigation report sitingreport indicated that the last of the impugned interview of the complainants and under the guise that the investigations required more time vet the investigation witnesses were conducted before 31st March 2019.

In addition to the foregoing, during the said meeting the Respondent in blatant violation of the my rights, despite having issued a suspension letter, no details of the allegations against me were afforded contrary to Section 41 of the Employment

employee, on the grounds of misconduct, poor performance or physical incapacity Act, that mandates an employer to, before terminating the employment of an explain to the employee, in a language the employee understands, the reason for which the employer is considering termination.

That having made numerous oral request and a written request vide an email dated 24th April 2019 for critical documents that would aid me to prepare for the disciplinary hearing, the Respondent in a reply dated 2nd May 2019, despite being obligated to avail the said documents by law and Rules of Natural Justice, in complete and utter disregard to due process denied me access to the said documents as guaranteed by Article 47(1) of the Constitution as read together with Section 41 of the Employment Act.

During both sessions of disciplinary hearing. I raised concerns about the retrospective application of policies that were developed way later after the alleged and or impugned incidents complained against but no action was taken to remedy this irregularity.

I raised concerns about the conflict of interest given that the lead investigation, Morteza May was directly responsible for review and issuance of employment contracts and management of HR people systems, one of the issues complained against by the Complainants but the same was equally brushed off without being dealt as legitimately expected, this is a clear case of one party being judge, jury and executioner.

On or about 9th March 2019, barely 5 days into the impugned investigations, I featured in the day's publication of the Nation Newspaper, a newspaper of national coverage, that read as follows: "Scandalous Official Cornered.

A senior official in the Nairobi Office of an international civil society organization that defends freedom of expression and information is deep in a scandal so murky that he will be lucky to come out with his reputation intact. The man has been

suspended on accusations of sexual harassment-some involving interns and high handedness. His employers have sent a team to Kenya and the shocking findings so far are likely to be kept secret even though the man's name isa) The impugned incidents of sexual harassment allegedly occurred long before the adoption of the Sexual Harassment Policy adopted on 13th November 2018 and the Whistle Blowing Policy adopted on 22nd May 2018:

l The complaints by some of the Complaints do not adduce any evidence to support the said complaints;

c) That the impugned allegations and subsequent investigations against me were a fishing expedition that started long before any complaint was raised and an investigation authorized by the board;

d) The problematic, as Mr. Morteza May is the main investigator is the Head of Human Resource at Article 19 International, who has the role of developing human resources policies manage human resources, and of pertinence issuance and ensuring all staff have contracts;

e) On the other hand, Ms. Jacqueline Mkoshi Okanga, who is the co-investigator, was known to me and did have some personal differences, that were disclosed nor did she recuse herself from the matter, thereby obviating any fairness in any process;

f) The allegations that I sent suggestive text messages, emails and calls are unfounded and without basis, none of the said allegations have been substantiated and or corroborated;

g) The allegations are made by third parties in this case Complainant No. 2 who is not privy to any interactions that I had with the Complainant No. 1 and the same has not be substantiated by Complainant No. 1;

h) The allegations in relations to Complainant No. 3 are fabrications as the statements and interviewee all allege that the said texts messages and emails were sent during an Article 19 Eastern Africa retreat in Mombasa, despite the fact that the Respondent has never held a staff retreat in Mombasa in period of the alleged harassment.

i) The complaint by Complainant No. 3 is a fabrication as I was not in the office on the said day and the successive week as I had travelled to Banjul, then Gambia for the 50th session of the African Commission on Human and Peoples rights.

I did send a personal email to one digital policy fellow, that was geared at having a discussion on her progress and the same could not even in the remotest of versions be construed as eliciting any sexual favours nor contribute the communicational privacy of the claimant and the digital policy fellow; to her resignation; That complainant No 2 illegally violated and infringed on

k) As a matter of fact, in her resignation letter cited unequivocally that her unpredictable class sessions and an upcoming examination could not allow her to perform optimally, the reason therefore was not harassment as was now coined by the Respondent;

1) I am a stranger to having knowingly or inadvertently had any inappropriate physical contact with Complainant 3, as a matter of fact Complainant 3 failed to state precisely when the alleged incident happened, neither did she adduce any evidence to support the outrageous claims despite her workstation having been in an open plan setting and if such an inappropriate physical contact happened it would have been flagged by the entire office who would in turn attest to it.

m) There is no substantiation of the claims that any member of staff or intern has been intimidated or bullied, any and all claims that the members of staff have lacked contracts as a way of intimidating and bullying them and use of salary increments as

a mode of intimidation and bullying are all baseless. None of the Complainants produced any evidence to even remotely suggest that I refused to sign their contract as and when it was duly prepared by the responsible officer.

n) The function of issuance of contracts is domiciled to the office of the Finance and Administration Officer in consultation with the Head of Human Resource and not with me and or my office.

o) I am a stranger to having knowingly or inadvertently exercised any gender discrimination against the female colleagues in the office.

Notwithstanding and without prejudice to the prominence of the aforestated irregularities and inconsistencies, I contend that the Respondent's Human Resource Manual, Section 9.2.1 (b) (I) requires that there must be a good reason and clear evidence for the process to start and not witch hunting.

I contend that the process that led to my termination was not started in good faith and there was no clear evidence, as such the investigators went on a predetermined extensive fishing expedition latching on dubious and or lame claims to justify the disciplinary action.

On or about 4th March 2019, when I was issued with a suspension letter, I was promised that the allegations would be investigate and dealt with within 10 days of the said date, but to the my dismay the investigations dragged for over three months during which period the impugned suspension was whimsically extended so damaged that it will be impossible to retain him in the organisation-let alone hire him for any high-profile role elsewhere. [Sunday Nation-Talk of the Day)

I aver that the leakage of the said information to the press at such a preliminary in breach of the cardinal principle of confidentiality and protection of the person, stage

on unsubstantiated and un-investigated allegations by the Respondent was the actions of the Respondent were geared at soiling my name and personality to be public by destroying my reputation irreparably, in utter violation of my rights protected at Article 28 and 31 of the Constitution of Kenya.

On 11th March 2019, without sufficient notice, I received a letter from the Respondent inviting me for an interview on 12th March 2019, which was not adequate time to prepare for my defence, in addition to the foregoing the Respondent had not yet informed me of the actual charges levelled against me and or sufficient details to afford me a chance to prepare for the hearing, contrary to the provisions of Article 50 of the Constitution as read together with Section 41 of the Employment Act.

During the interview on 12th March 2019, which apparently was convened to afford me an opportunity to respond to the allegations levelled against me by persons unknown to me, the substance of the allegations was equally unknown to me and during such short notice. I made a request to be availed a list of questions that the Committee intended to put me to task on in relation to the foreign allegations

Vide a letter dated 14th March 2019, the Respondent, the Respondent forwarded to me a list of general questions that did not in any way outline the allegations against me, the complainants and or what evidence was available to corroborate the said allegations.

In addition to the foregoing, in its continued violation and frustration of my right to a fair hearing, the Respondent required that I do avail a response to the said questions in writing by 5.00 pm on 15th March 2019 barely a day after the said questions had been availed to me.

That notwithstanding, motivated by my will to fight and protect my dignity and employment, I responded to the interview questions before close of business on the 15th March 2019 as had been directed.

On or about 29th March 2019, I was served with a Draft Investigation Report and Complainant statements, this was the very first time that I got to see the substance of the allegations against me vide the Complainants' No. 2, 3 and 4 statements. But the statement of Complainant No. 1 was missing yet the report claimed it had been included. As such the said report was incomplete.29. On the even date at around 8.45am and 1.28pm I received several calls and text immediately fashioned an email seeking to address the issue of media leaks by the messages from Mr. Elvis Ondieki of the Nation Media Group, on this issue, I thus Respondent.

30. This was followed by a second publication about me on the 31 March 2019 printout of the Nation Newspaper.

After the fact, the Respondent attempted to address my query vide a letter dated 2nd April 2019 barely reiterating the essence and importance of confidentiality but substantive was to the press.

On or about 4th April 2019, I received a letter from the Respondent whimsically extending my suspension to 29th April 2019 without any reasonable explanation, the dumbfounding reason was that the same was extended for the purpose of carrying out an investigation into the impugned allegations, this was despite the fact that the investigations had already been completed on 29th March 2019 and a draft response to that effect served upon me on the said date.

I aver that on or about 8th April 2019, I responded to the Draft Investigation Report as has been demonstrated herein above.

On or about 17th April 2019 at around 5.44 pm, I received a Notice of Disciplinary Hearing from the Respondent, as was its custom inviting me for a hearing that was to be held on the morning of 18th April 2019 barely a few hours before the said hearing was to be conducted.

During the said hearing on 18th April 2019, I once again raised the issue of leaks to the media and the effect of such leaks based on mere allegations given nothing substantive on me had been shared. I also pointed out that the respondent had indicated in the media article that I was being accused of financial impropriety and high handedness but the Committee Chair brushed off the Claimant's concerns just as he had previously done.

Further and pertinently so, at the start of the hearing, I also made a request to be fashioned with a set of the allegations with specifics, because I had requested for the same on 4th March 2019 to no avail, but the same was brushed off by the Chairperson. Surprisingly 7 hours into the hearing, I was given the statement of Complainant No. 1 and I was required to proceed with the hearing without due regard to due process. Complainant Number 1 was neither a member of staff nor an intern. This was contrary to the claims in the suspension letter and all other formal communications. The Committee reluctantly agreed to adjourn the proceedings.17. On or about 24th April 2019, I wrote an email to the Chairperson of the Sexual Harassment Committee of the Respondent, requesting for critical sets of information to allow me prepare for the second hearing, being

a) the whistle-blower complaints;

b) Minutes of board meetings;

c) statement by the investigators with regards to Complainant No. 4;
d) Communications between Complainants and Article 19,

e) Issue of retrospective application of the Policies,

f) Retention of the Investigator and co-investigator;

g) Confidentiality of the process;

h) Cross Examination of Witnesses; and

i) The calling of witnesses on the my behalf.

On 29th April 2019 at around 7.03 pm, I received a letter whimsically extending my suspension again to 24th May 2019 on the premise that the investigations were still on going, yet the issue was already part heard before the Committee and there was no indication that there were any pending investigations.

On or about 2nd May 2019, I received a letter from the Respondent in response to the aforestated email dated 24th April 2019, wherein the Chairperson person addressed the issues above as follows: -

a) the whistle-blower complaints; the committee refused to avail the same to me on the basis that the said complaints were confidential and could not be shared in accordance with the Respondent's Whistleblowing Policy, which is in complete violation of the Article 35 (1) (b); Article 47(1) and Article 50 of the Constitution, provisions of the Fair Administrative Actions Act, 2015 and Section 41 of the Employment Act.

b) Minutes of board meetings: this request equally dealt a blow on the premise of confidentiality, which is in complete, in complete violation of the Article Article 35 (1) (b); 47(1) and Article 50 of the Constitution, provisions of the Fair Administrative Actions Act, 2015 and Section 41 of the Employment Act.

c) Statement by the investigators with regard to Complainant No. 4: this request was also denied on the premise of confidentiality and I was directed to make reference to the Draft investigation report which does not offer the said information, in complete violation of the Article 35 (1) (b); Article 47(1) and Article 50 of the Constitution, provisions of the Fair Administrative Actions Act, 2015 and Section 41 of the Employment Act.

d) Communications between Complainants and Respondent: this request was also denied on the premise of confidentiality especially in relation to the communication

between the Respondent and Complainant No. 1, in complete violation of the Article 35 (1); 47(1) and Article 50 of the Constitution, provisions of the Fair Administrative Actions Act, 2015 and Section 41 of the Employment Act.

e) Issue of retrospective application of the Policies: in reply to this request the Committee erroneously applied the provisions of Clause 4 of the Respondent's Whistleblowing Policy as to mean any sexual harassment whether recent or historical, contrary to legal substantive fairness. The legal substantive breach aside, the Committee of the Respondent grossly misconceived the provisions of the said Clause 4. The Clause proceeds as follows, at pertinent part: "... Act that is being committed, has been committed or is likely to be committed."

The Policy does not in any way suggest that it would apply to historical issues and or events, if that was the case the same would have been expressly stated in the said Policy, wherefore application of the Policy Retrospectively with the sole aim validating this illegality is grossly illegal.

f) Retention of the Investigator and co-investigator: this issue was not substantively dealt with by the Committee as there is clear conflict, the Investigator is the person tasked with the role of issuance of contracts, which is one of the allegations levelled against me, how can one investigate that which he ought to do against a person who is not tasked with such a role. Equally the complaint against the co-Investigator was equally ignored, all in gross violation of the my inviolable fundamental right to fair trial, guaranteed by the Constitution (Article 50).

g) Confidentiality of the process: the Committee affirmed that it had made it clear to all persons involved in the investigation, that the investigation would be undertaken with strict confidentiality but did not suggest any steps taken to redress the publications that had already been published in the Nation Newspaper and the calls by other stakeholders and bloggers.

h) Cross Examination of Witnesses: this request was denied on the premise that it could not be accommodated as the Respondent had already submitted written statements as part of this investigation to attend the hearing, this is a blatant violation of the provisions of Article 50 of the Constitution, Section 45 of the Evidence Act and Section 41 of the Employment Act.i) The calling of witnesses on the Claimant's behalf: this request was granted.

The said letter then went ahead to schedule the second hearing, that was scheduled six (6) days from the said date.

Surprisingly, accompanying the said letter were the Statements of Complaint No. 3 and Interviewee 6, that had been altered based on my response to the Draft Investigation Report.

By this letter, the Committee also confirmed that it had narrowed down the charges to the following:

a) Allegations of sexual harassment by Complainant 1 and 3;

b) Allegations of sexism made by Complainant 3;

c) My conduct through the investigations.

On the 9th of May 2019, I attended the said hearing and at the end of it, I was guaranteed that the report of the Committee would be ready within 10 days from the said date.

On or about 24th May 2019, I received a letter from the Respondent whimsically extending my impugned suspension again to 31 May 2019, without an explanation as the investigation had ended but the said letter still based premise on the notion that investigations were still ongoing.

On 31 May 2019, I received a Show Cause Notice at 9.30 pm, directing that I do share my response by close of business of on 6th June 2019, which was barely three (3) working days which practically unreasonable and quite short.

In the Show Cause Notice, the Respondent's Sexual Harassment Committee had instead of determining the three (3) issues as indicated under paragraph 42 above, made findings on the following:

a) Allegations of sexual harassment; and

b) Allegations of Bullying

I contend that, having been assured that the allegations of bullying had been dropped by the Committee and having not made any representations concerning it, I could not then be called upon to show cause on an allegation that was never called upon to be defend during the Disciplinary Hearings, this is quite unprocedural, illegal, and an egregious violation of the Claimant's inviolable

fundamental right to fair trial guaranteed by the Constitution, read with section 41 of the Employment Act.

Despite having been issued such a small timeline to fashion a response to the Show Cause Notice, I worked within the limitations and fashioned the Committee with a response on 6th June 2019 showing sufficient cause and citing the following irregularities:

a) The issuance of hearing notices very late despite repeated protests, mostly day to the hearing date, which events prejudiced his preparedness for effective defence.

b) Refusal by the Committee to avail statements of the Complainants, despite having called upon me to respond to charges levelled against me without this vital information.

Complainant No. 1, whose ostensible complaint is one on which the Show Cause Notice indicts me on, was given to me after several requests, and hours after hearing had begun, making it nearly impossible to defend.

d) That complainant 1 and Complaint 4 are neither members of staff nor interns. All formal communications from the respondent indicated that allegations were made by staff and interns.

e) The Committee blatantly refused to furnish me with critical information from the investigation, which was critical to my defence, and which I was entitled to by Law and of pertinence under the Respondent's Human Resource Manual.

f) The investigator, Morteza May, was also a member of the jury, highlighting the unprocedural approach of the committee to this issue.

g) The Sexual Harassment Committee purported to discipline me over polic that were not in place when the said allegations are said to have be committed by applying the said policies retrospectively.

h) The Committee made findings on bullying, a charge that the Committee ha assured me in writing that it would not be pressed against me and on whicd reliance I did not defend.

i) The illegal leaking of the investigation with the media contrary to the Respondent's Policies.

j) And, the general violation of the principles of natural justice and fairness throughout the entire process. On or about 17th June 2019, despite having showed adequate cause and raising the aforestated irregularities requiring redress, vide a letter the Respondent dismissed me from my employment in the following terms:

a) My employment is dismissed with immediate effect from 17th June 2019.

b) I am not entitled to pay in lieu of notice.

c) I am entitled to terminal benefits including for days worked up to the time of the dismissal and any accrued leave days not taken up to the date of dismissal.

In accordance with the Respondent's Human Resource Manual, Clause 9.2.5, being dissatisfied with the decision of the Committee, I filed a Notice of Appeal on 24th June 2019 with regards to the said dismissal setting out a number of grounds including but not limited to contravention of the Respondent's Human Resource Manual and all notions of fairness under the Constitution of Kenya, 2010 and all attendant laws.

In blatant disregard to the grounds of appeal, the Respondent's International Board vide a letter dated 1st July 2019, dismissed the said Appeal on the premise that there was no evidence of the absence of due process or a deliberate attempt to malign me, the board went on to state that I had not provided any evidence beyond which I had provided before the disciplinary panel and the investigation committee.

In its conclusion, the Board upheld the Respondent's Regional Board decision as conveyed in the letter dated 17th June 2019 as being final, without affording me a chance to be heard."

8. The claimant contended that his dismissal from employment on 17th June 2019 was arrived at unlawfully and unfairly without any just reason, and/or cause, in absence of due cause and not within the meaning and/or ambit of dismissal of an employee contrary to the provisions of sections 2, 41, 43 and 45(4)(b) & (5) of the Employment Act No. 11 of 2007. That the termination of his employment by the Respondent was unfair given that in all the circumstances of the case, the Respondent did not act in accordance with justice and equity in terminating my employment contrary to the provisions of sections 2, 41, 43 and 45(4)(b) & (5) of the Employment Act No. 11 of 2007. The Respondent failed to follow the stipulated and required process for terminating my employment as

provided by its own Human Resource Manual and sections 41, 43 and 45(4)(b) & (5) of the Employment Act No. 11 of 2007.

The respondent's case

9. Conversely, the respondent admitted the employment and stated that the Claimant was its Regional Director from 1st January 2017 under a three-year Contract of Employment. The Respondent received allegations of sexual harassment and bullying against the Claimant. Guided by the Human Resources Manual of the Respondent, the Chairperson and his line manager invited him to a meeting scheduled on 4th March 2019 for a discussion on the allegations. After this meeting, the Claimant was informed of the allegations against him and was suspended from employment to pave way for investigations. The Claimant was invited to an interview which was part of the ongoing investigation. The Sexual Harassment Committee held a disciplinary hearing with the Claimant. The Respondent prepared and submitted a draft investigation Report on the allegations of sexual harassment, bullying and sexism in 2019, which report was shared with the Claimant (Page 17 Respondent's bundle). The Claimant was given an opportunity to appear before the investigations committee and to make representations which he actually did. When the draft report was report was prepared, the Claimant was given an opportunity to respond to the same and he indeed did respond (Page 29 Respondent's bundle) A final report was thereafter prepared taking into account the Claimant's response in May 2019 (Page 88). A transcript of the proceedings before the committee is found in pages 151- 280). They demonstrate the Claimant was at all times present at the proceedings of the committee and accorded an opportunity to participate in the same.

10. The Respondent served a Notice to Show Cause dated 31st May 2019 to the Claimant (Page 65 Respondent's bundle), to show cause why disciplinary action should not be taken against him by 6th June 2019. Consequently, on 10th June 2019, the Claimant submitted his response to the notice (Page 69 Respondent's bundle).On 17th June 2019, the Respondent communicated its decision to the Claimant, dismissing him from employment with immediate effect stating that he was only entitled to his terminal benefits including for days worked up to the time of the dismissal and any accrued leave days not taken up to date of dismissal. (Page 81 Respondent's bundle). The Claimant sent in a Notice of Appeal on 27th June 2019 seeking to appeal the decision on dismissal from employment (Page 84 Respondent's bundle). In response, the Respondent upheld the decision of the board stating that there was no absence of due process or a deliberate attempt to malign him (Page 86 Respondent's bundle).

DETERMINATION

11. The parties filed written submissions of which the court perused and considered in the determination.

Issues for determination

12. The claimant outlined the following issues for determination in the suit-
    a. Whether the claimant's employment was unlawfully /unfairly terminated?
    b. Whether the reliefs in the memorandum of claim can issue?-

13. Conversely the respondent outlined the following issues for determination in the suit-

a) Whether the Respondent had a basis to institute legal proceedings against the Claimant.

b) Whether the termination of the Claimant's employment was fair and followed the due process of the law.

c) What orders the court should issue. What remedies if any the Claimant is entitled to.

13. The court, taking the foregoing into account, was of the considered opinion that the issues placed by the parties for determination in the suit were -

a. Whether the claimant's employment was unfairly terminated?

b. Whether the relief in the statement of claim was merited.

Whether the claimant's employment was unfairly terminated?

14. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the Employment Act to wit:- '*45(2) A termination of employment by an employer is unfair if the employer fails to prove—*

(a) that the reason for the termination is valid

(b) that the reason for the termination is a fair reason—

(i) related to the employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.'' To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the Employment Act (Walter Ogal Anuro v Teachers Service Commission[2013]eKLR).

Substantial fairness.

15. Substantive fairness relates to the reasons for the termination. The burden of prove of unfair termination is according to the provisions of section 47(5) of the Employment

Act to wit- '*(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.''* The claimant as per his case as summarised above alleged that the reasons for termination of sexual harassment and bullying at the work place were not established as true(see the claimant's case above). The burden to prove the reasons as valid lied with the respondent (employer) and is according to section 43 of the Employment Act to wit – '**43. *Proof of reason for termination***

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee''

16. The claimant was issued with letter dated 17th June 2019 being communication of dismissal and disclosing the reason for the termination as follows- '*Following a full investigation, the Board considers your explanations to be unsatisfactory because it does not provide any new material for the Board to take into account as to why the disciplinary action should not be taken against you (ARTICLE 19 Eastern Africa HR Manual General Guidelines relating to the Disciplinary Process 9.2.1.a.iii).*

On careful consideration of the circumstances and your response, the board has unanimously decided to summarily dismiss your employment for gross misconduct for the following reasons:

1) Allegation of sexual harassment

i) sending suggestive text and whatsapp messages, phone calls to complainant 1 were unwelcome and of a sexual nature.

2) Allegation of bullying

i) Staff Contracts

The Board's decision is guided by:

ARTICLE 19 Sexual Harassment Policy;

ARTICLE 19 Eastern Africa Human Resources Manual, section 3.6;

ARTICLE 19 Eastern Africa Human Resources Manual, section 9.4;

ARTICLE 19 Eastern Africa Human Resources Manual, Annex 3;

ARTICLE 19 Eastern Africa Human Resources Manual, section 10.4; and

ARTICLE 19 Bullying and Harassment Policy section 8.3.

You are therefore dismissed with immediate effect from 17th June 2019. You are not entitled to notice or to pay in lieu of notice, however you are entitled to your terminal benefits including for days worked up to the time of the dismissal and any accrued leave days not taken up to the date of dismissal in accordance with ARTICLE 19 Eastern Africa Human Resources Manual section 10.9. You will receive a letter confirming this separately and the need to hand over any ARTICLE 19 properties you may currently hold.

As per the ARTICLE 19 Eastern Africa Human Resources Manual, section 9.2.5, you have the right to appeal against our decision and, should you wish to do so, you should

write to Gayathry Venkiteswaran (International Board Member) at gayathry.venkiteswaran@gmail.com within 7 days of receiving this letter giving full reasons why you believe the disciplinary action taken against you was inappropriate or too severe.''

17. The court discerned from the above letter the reasons for termination were –
    a. *Allegation of sexual harassment- sending suggestive text and whatsapp messages, phone calls to complainant 1 were unwelcome and of a sexual nature.*
    b. *Allegation of bullying- related to Staff Contracts''*

18. On the issue of sexual harassment, during cross-examination, the claimant confirmed he received the complaint of sexual harassment and bullying. He told the court there was a process followed which he did not think was investigation. That he participated in the investigations and requested for more time to respond(page 17 of respondent's bundle). He confirmed the extension was given vide letter dated 3rd April 2019. He confirmed that on the 5th April 2019 the committee postponed the meeting to 10th April 2019. That he was invited for disciplinary hearing on the allegations. He confirmed that he was given the investigation report (page 29 of the respondent's documents) and made his comments on it. That he was served with a show cause letter and responded. He confirmed receipt of letter that stated he had been dismissed and informed him of right of appeal. He appealed by sending notice of appeal to Gayathry. He confirmed that was not the right person to appeal to under the manual (page at page 84 of respondent's documents). He confirmed to have received response to the appeal (page 86 of the

respondent's documents). He confirmed he was the alleged perpetrator mentioned in the report (page 107 of respondent's documents).

19. On whether the conduct stated in the investigation report (at page 107 of the respondent's bundle of documents) was sexual harassment, the claimant told the court that it could be offensive but not sexual harassment. On being asked whether asking to 'tuck in bed a female colleague'' or sing lullaby while at the door is not sexual harassment the claimant told the court that those words were neither offensive or sexual harassment.

20. On further cross-examination of the claimant on the complaint by EK and complainant No. 3, wherein EK believed the perpetrator was intimidating her and threatened not to pay her salary, whether the conduct attributed to bullying, the claimant stated that it depends on the context. On the complaints at page 117 (Respondent's document)of the report the claimant told the court the complaints were fabricated as complainants 3 and 5 were not employees of the respondent on the alleged dates. The claimant confirmed it was accepted practice to keep sexual harassment complaints confidential, but qualified that the accused must be informed of their rights. The claimant contended that the issuance of the complainants' statements and details to him was not enough to cover the accused person's rights.

21. During re-examination, the claimant told the court he was issued with the statement of complainant No. 1 at the disciplinary hearing and that was the first time he interacted with the statement. He was also provided with statements of some of the other complainants. He was not given opportunity to cross-examine the witnesses. That he wrote to the respondent asking for the statements and opportunity to cross-examine the

complainants (page 184-187 of his documents being letter dated 2nd May 2019). He was not issued with the Board Minutes and statement of complainant no. 4. The claimant further told the court his complaint of the retrospective application of the sexual harassment policy was not addressed. That he had issue with the policy as it came to effect after the allegations. The claimant told the court that Article 19 is a freedom of expression. That one of the rights under Article 19 is right to offend. That there were threats since 2018 on his job. That the statement of complainant No. 2 and 6 did disclose any culpability on his part.

22. Conversely during cross-examination of RW1 , he told the court the sexual harassment policy was adopted on 13th November 2018 and the whistle blower policy on 22nd may 2018. That the allegations were before the policies. RW1 told the court the policies have a retrospective clause as stated in their response. He could not point to the specific clause but stated that the employer had responded that the retrospective application was allowable. RW1 told the court the details of the harassment were not stated in the notice of invite to the first meeting and stated that the meeting was a conversation with the claimant on the process to follow. The outcome of the meeting was suspension as investigations were being carried out. That the specifics of the allegations were given to the claimant during the investigations and under notice of 16th April 2019. That complainant 1 was a whistle blower and spoke of sexual harassment by the claimant. He told the court that the recipient of the text messages was an intern. RW1 told the court complainant No. 1 (at page 10 of draft investigation report)stated she was scared and feeling harassed on receipt of the text messages and called EK(No. 2) and told him the Director had texted her a series of texts and was at her door. That complainant 1 was a whistle blower. RW1 was not aware of how the investigators got the text messages but

believed they were shared by the whistle blower. He had no evidence that there was a mission on 7th August 2018 in Mombasa. He said the issue was raised and determined and referred to pages 140-147 of the respondent's documents.

23. On the accusation against the claimant of bullying and complaint of withholding employee contracts , RW1 told the court that the regional director signs all employee contracts which were prepared by the Human Resources manager for the Regional Director to sign. He told the court there were no contracts prepared and not signed by the claimant, and none were presented before the disciplinary hearing. The allegations was that there was threat and delay in some contracts not being signed. RW1 told the court that there was allegation of intern having resigned on being sexually harassed. He confirmed in the resignation letter the intern did not complain of sexual harassment but cited work issues. He confirmed that the allegation of bullying came later and was not in earlier letters. On the appeal by the claimant RW1 told the court it was decided on documentation.

24. During re-examination RW1 told the court the appeal was considered by the board which stated that there was no new evidence. RW1 told the court the respondent's human resources manual had comprehensive provisions on sexual harassment and other forms of harassment and was in existence before the sexual harassment policy (at page 26 of the human resources policy, R-exhibit 2). That the manual had adopted section 6 of the Employment Act and section 6 of the Sexual Offence Act which were in place before the said allegations arose. RW1 told the court one Morteza appeared at investigation stage on behalf of sexual harassment complaint committee.

Decision on issue 1

25. Sexual harassment is defined under section 6 of the Employment Act as follows:- '*6(1) An employee is sexually harassed if the employer of that employee or a representative of that employer or a co-worker—*

(a) directly or indirectly requests that employee for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express—

(i) promise of preferential treatment in employment;

(ii) threat of detrimental treatment in employment; or

(iii) threat about the present or future employment status of the employee;

(b) uses language whether written or spoken of a sexual nature;

(c) uses visual material of a sexual nature; or

(d) shows physical behaviour of a sexual nature which directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee and that by its nature has a detrimental effect on that employee's employment, job performance, or job satisfaction."

26. Within the framework of ILO Convention No. 111(Discrimination (Employment and Occupation) Convention, 1958, and according to the 2002 General Observation of the ILO Committee of Experts on the Application of Conventions and Recommendations (ILO Committee of Experts), definitions of sexual harassment contain the following key elements: 1. "*(1) (quid pro quo) Any physical, verbal or non-verbal conduct of a sexual nature and other conduct based on sex affecting the dignity of women and men, which is unwelcome, unreasonable, and offensive to the recipient; and a person's rejection of, or submission to, such conduct is used explicitly or implicitly as a basis for a decision which affects that person's job; or (2) (hostile work environment) Conduct that creates an intimidating, hostile or humiliating working environment for the recipient."* In Ouma v

Faulu Microfinance Bank Limited (2023) e KLR the court observed as follows on sexual harassment-' *48.Sexual harassment is defined in Black's Law Dictionary, Tenth Edition as "a type of employment discrimination consisting in verbal or physical abuse of a sexual nature, including lewd remarks, salacious looks and unwelcome touching. The main elements of sexual harassment needed to be proved in this case were, was there any requests for sexual favors, unwanted verbal, non-verbal or physical conduct of a sexual nature? Secondly, was the purpose or effect of the conduct, to violate the victim's dignity or create an intimidating, hostile, degrading humiliating, or offensive environment for her. In addition, was there a less favourable treatment or detriment that arose as a result of the rejection or submission to the unwanted conduct.Sexual harassment is a traumatizing and dehumanising act to the victim, however, those allegations of sexual harassment still need to be proved and it is not sufficient for an employee to only allege that she was sexually harassed. The right to employment must be protected and should only be taken away for valid reasons consistent with section 43 and 45(2) of the Employment Act (supra).*'' I uphold the decision to apply in the instant case.

27. The claimant challenged the validity of the reasons of the termination of his contract of service and had 2 witnesses record statements with the employer to the effect that he had a personal relationship with complainant No. 1 . The claimant relied on Article 19 (also the name of the respondent) to say that one of the freedoms of speech was the right to offend. He told the court the said text messages could be offensive but did not amount to sexual harassment. The court is obliged to navigate the tension between safeguarding freedom of speech(Article 19 of the International Covenant on Civil and Political Rights and article 33 of the Constitution of Kenya) and protecting employees from sexual harassment, which infringes on their dignity and safety at the workplace. Article 19 states

as follows- *'Article 19-1. Everyone shall have the right to hold opinions without interference.*

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (order public), or of public health or morals.'' The constitutional guarantee of freedom of expression (Article 33 of the Constitution of Kenya equivalent of Article 19) is not absolute and is limited when it conflicts with other fundamental rights, including the right to dignity (Article 28) and protection from discrimination (Article 27). Article 33(3) states- '*In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.'' The* court finds that freedom of speech does not extend to conduct that constitutes sexual harassment or creates a hostile environment at the work place. The work place includes field work. The court rejected the assertion by the claimant that asking a colleague vide text to '*tuck them in bed or sing lullaby while at their door'' was* not sexual harassment and or that it was neither offensive or sexual harassment. A pivotal element in sexual harassment claims is the "unwelcome" or "offensive" conduct criterion, which Kenyan courts interpret primarily from the complainant's subjective viewpoint but

also call for objective standards. The Court is aware of judicial inconsistency on whose perspective should prevail, sometimes leading courts to scrutinize complainants' behaviour for indications they accepted the conduct.

28. Complainant No. 1 recorded a statement as per the investigation report(page 106- 109 of respondent's bundle). The claimant received the report during the disciplinary hearing and was given time (the meeting was adjourned) on request to study it. The statement was as follows, in part- '*While at Lotus Hotel Mombasa at around 11 pm, complainant 1 received WhatsApp messages (Exhibit 2) from the alleged perpetrator who indicated that he was at her hotel room door asking if she could entertain some disturbance from him. He asked her if he could sing her a lullaby. She responded that she did not want any sexual engagement with him and that she did not wish to be caught up in an ethical quagmire. He persisted with further text messages that she ignored. She felt extremely scared and called EK who was in the same hotel and informed him that she was uncomfortable with the unwanted advances from the alleged perpetrator. EK advised her not to respond to the text messages. Further, on 28th August 2018 during a work mission in Kisumu, complainant 1 once again received WhatsApp messages (Exhibit 2) from the alleged perpetrator that read-" i heard you wondering why they keep booking us in rooms next to each other, does that mean I disturb you"? to which she responded "it was on a light note". The alleged perpetrator once again wrote "I will pass by to tuck you in" and again complainant 1 responded that she had a partner and respected herself. She did not want to have any form of sexual engagement with the alleged perpetrator. Complainant 1 states that this behaviour from the alleged perpetrator and her refusal of his advances left her frustrated and affected her productivity thus affecting her contractual relationship with Article 19 on the consultancy and any future*

opportunities.'' (see pages 15-19 of the investigation report at pages 106 to 108 of the Respondent's bundle*).*The court established that it was apparent from the statement of complainant No. 1 corroborated by that of EK, the said advances of sexual nature by the claimant were not welcome to the colleague. The claimant was said to also have targeted complainant 3 with similar message of ''can I come and tuck you in bed.'' The complainant stated that she got scared and ran out of her room to a work colleague's room (page 19 of the investigation report found at page 110 of the Respondent's bundle).

29. The claimant's response was captured at page 33 of the report (page 124 of the respondent's bundle). The claimant confirmed he had communication with the complainant 1 but stated that since the text messages were transmitted by a third party(EK), there was manipulation and the same was not what they had communicated. He told the committee he had the text messages and could not share them citing confidentiality and privacy. That the forwarded messages were not original having not been printed directly from complainant no. 1 gadget and relied on section 105 of the Evidence Act. The claimant denied having been at the door of the complainant and could not recall calling complainant 1. At the same time the claimant had Sylvia Kendi record a statement to effect that complainant 1 and the claimant had a close intimate relationship. A further witness statement of Julias Nganyi Amakanji also stated that he was a taxi driver and had picked the claimant and the complainant 1 from Nairobi West (court assumed it is was a social joint) and dropped her at South B and that the claimant had introduced complainant 1 as his girlfriend(see pages 125- 126 of the respondent's bundle). The claimant denied the allegations by Complainant 3 and provided alibi of Patricia Mukuru that he was not at Naivasha on alleged date.

30. During the internal disciplinary hearing the claimant did not call the 3 witnesses to support his case nor did he call them at this hearing. The allegations by the 2 persons (Kendi and Amakanji) were not corroborated or tested through cross-examination. The court believed that the text messages were from the claimant to Complainant 1 as admitted. That further the claimant had opportunity to prove the alleged manipulation by fact of the messages having been forwarded to EK but failed to prove the manipulation either before the disciplinary committee or even this court. Was privacy more important to him than his job? He alleged the grounds were not valid yet failed to prove the alleged manipulation.

31. The Labour Court Appeal South Africa in Motsamai v Everite Building Products (Pty) Ltd (JA21/08) [2010] ZALAC 23; [2011] 2 BLLR 144 (LAC) (4 June 2010) held- '*Sexual harassment is the most heinous misconduct that plagues a workplace, not only is it demeaning to the victim, it undermines the dignity, integrity and self-worth of the employee harassed. The harshness of the wrong is compounded when the victim suffers it at the hands of his/her supervisor. Sexual harassment goes to the root of ones being and must therefore be viewed from the point of view of a victim: how does he/she perceive it, and whether or not the perception is reasonable.*'' The acts of the claimant were serious and affected the work environment. Indeed, the claimant told the female employees to sort the toxic environment after reports of sexual harassment were received at the headquarters anonymously. Complainant 1 stated that the advances of sexual in nature by the claimant were not welcome.

32. The claimant led a case that the sexual harassment policy was not in place at time of allegations and was thus illegally applied retrospectively. The respondent stated that the human resources manual had always provided for sexual harassment. The manual

was produced. Clause 3.6 provides for sexual and other forms of harassment which includes unwelcome sexual advances. The claimant did not deny the manual was in place at the time when the allegations happened. Sexual harassment is provided for under section 6 of the Employment Act and the Sexual Offences Act. The court holds that the lack of the sexual harassment policy at time of the allegations did not affect the culpability of the claimant. The attempt by the claimant to belittle the complaints of sexual harassment against him as amounting to right to offend in exercise of right of expression under Article 19 did not escape the attention of the court. The court found it was a defence based on technicality in the circumstances to challenge the application of the said sexual harassment policy taking into account the existing human resources manual and statutes.

33. On the reason of bullying, the claimant admitted it was the responsibility of the Regional Directors to sign contracts of employment. The court finds no basis to fault the employer's finding that the failure to issue contracts created tension for the employees who felt bullied by words of the claimant including threat of failure to pay salary.

34. The test of valid of reason of dismissal is that of a reasonable employer and not of the court or a reasonable man as held by Lord Denning in the case of ***BRITISH LEYLAND UK LTD. v. SWIFT [1981] IRLR 91*** stated as follows:***"The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite***

reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him" Was the respondent a reasonable employer? I return in the positive taking in to account the evidence before the court. The court is further guided by the Court of Appeal in Ondari v National Hospital Insurance Fund [2025] KECA 687 (KLR) where the court on reasons for termination observed:- '*The appellant complained that the termination process was unfair; he also blamed the trial court for finding that the court's duty was not to verify the truth of the reasons advanced for terminating employment. According to him, the trial court's reasons are contrary to and contradict Section 45 of the Act. In several of its decisions, this Court has held that it has no supervisory role and is not required to substitute the thoughts of an employer, where the employer has a valid reason to terminate employment and where due process has been followed.*'' In the instant case the court established the conduct of the claimant amounted to sexual harassment. Any reasonable employer would have taken the step to terminate his service to protect other employees and also shield itself from liability over sexual harassment claims.

35. In the upshot, the court holds the reasons for termination of the employment of the claimant and stated that they met the standard in section 43 of the Employment Act. The respondent demonstrated to the court it had reasons to believe the said acts of sexual harassment and bullying at the workplace by the claimant existed.

36. On the procedural fairness the same is to meet the requirements of section-' *41. Notification and hearing before termination on grounds of misconduct(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 of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make."

37. The respondent produced documents before the court on the process including the investigation report. The claimant faulted the process on documentation and the right to cross-examine the complainants. The claimant confirmed that he was given the statements of the complainant 1 and others during the hearing and on his request the hearing was adjourned and the court noted he had sufficient time to peruse the statements before the hearing resumed. The claimant did not inform the court the prejudice he suffered on failure of the complainants to be called. The court found the claimant was well versed with the facts and did not deny the facts and especially of complainant No. 1 and EK who laid enough basis of the sexual harassment claims. The court took judicial notice that sexual harassment is sensitive and there is need to protect the complainants from further victimization by facing the perpetrator. In the instant case the claimant admitted there was text message communication with the complainant 1 and he had the same. The claimant alleged that the relationship with the complainant No.1 was consequal and relied on 2 witnesses who he failed to call at the disciplinary hearing to corroborate his version of story. He did not also call them before court. The

court in the circumstances finds no basis to fault the process upto the appeal. The process under section 41 was substantially complied with as the claimant was informed of the reasons the employer was contemplating the termination, there were investigations which the claimant told the court he participated in, he was availed the investigation report and statements of the complainants and especially the complainant no.1 of which the court made the finding of prove of sexual harassment. The claimant had opportunity to have his witnesses and they recorded statements. He was heard and his representations recorded and the employer responded to his appeal. The Court of Appeal in Unilever Tea Kenya Limited v Kenya Plantation & Agricultural Workers Union [2025] KECA 830 (KLR) clarified that there is no legal requirement for the victim of sexual harassment to testify at a disciplinary hearing. The trial court in the case had found that the Respondent's termination was unlawful partly because: 1. The sexual harassment policy relied upon by the Appellant was outdated; and 2. The victim did not testify, and the witness who testified had not directly witnessed the alleged acts of sexual harassment. The Court of Appeal disagreed with this reasoning. It held that once a case of sexual harassment is established, it matters not whether there was a sexual policy in place or not. This is because sexual harassment is a recognized offence in Kenya. The Court of Appeal further emphasized that victims of sexual harassment are not legally required to testify in person. What matters is the sufficiency of the evidence in support of the allegation. Consequently, the court overturned the Employment and Labour Relations Court's decision and held that the Appellant had demonstrated valid reasons for the termination. The court observed-'*We must also make it clear, that there is no legal requirement that victims of sexual harassment testify in person. What matters is the sufficiency and credibility of the evidence in support of the allegation. Here we have evidence on record to demonstrate that the grievant sexually*

manipulated an employee and that she was too traumatised to be presented before court. In our view, the trial court did not consider the weight of the allegation and the overwhelming evidence against the grievant. With respect, the trial court took a light and lenient view of the evidence presented before it.'' I uphold the foregoing decision of the superior court and hold that there is no basis to fault the process before the respondent against the claimant.

38. In conclusion the termination is held as lawful and fair,

Whether the claimant was entitled to reliefs sought

39. The claimant sought various reliefs which the court considered on merit -

a) A declaration that the termination of the Claimant's employment by Respondent was unlawful;

b) A declaration that the Claimant's fundamental rights enshrined under Article 26, 41, 47 and 50 of the Constitution of Kenya, 2010 have been contravened and infringed on by the Respondent;

c) A declaration that the Claimant is entitled to the payment of damages and or compensation to be assessed by the Court for the violation and contravention of his fundamental human rights by the Respondent as provided for under Article 26, 41, 47 and 50 of the Constitution of Kenya, 2010;

d) General damages for unlawful termination of employment equivalent to the Claimant's remuneration of twelve (12) months totalling to Kshs. 5,684,580.00 as stipulated under the Contract of employment;

40. The court held the termination was lawful and fair hence the above reliefs are disallowed.

41. ***On claim for Compensation for 190 days untaken leave totalling to Kshs. 3,461,754.80;***

On perusal of witness statement the claimant did not speak on issue of leave. The issue only appeared as a prayer. He submitted as follows on the leave-'*As relates the prayer for compensation for 190 days untaken leave totalling to Kshs. 3.461.754.80. That the Claimant is indeed entitled to this entire amount as the Claimant was entitled to leave as provided under Section 28 of the Employment Act, further noting that the Respondent did in the impugned notice of termination (Refer to page 83 of the Respondent's Bundle of Documents), accede to the Claimant's entitlement as relates accrued leave days not taken up to the date of dismissal, and despite said acknowledgment the sum in issue was never remitted to the Claimant until present date. That the custodian of the records as relates the untaken leave days is the Respondent as employer under Section 74 of the Employment Act...behooves the employer to disabuse the allegation by tendering evidence before the trier. The Respondent as the employer didn't. A claim of lack of evidence as relates this limb of the reliefs from the Respondent should not be entertained as none was ever raised with the Claimant whether during trial and through pleadings and further the obligation to disabuse the said claim rested with the Respondent as above.*'' To buttress the claim for leave the claimant relied on the decision in Del Monte Kenya Limited v Kyengo [2024] eKLR, wherein the court held thus:

"*The Appellant's assertions that the Respondent did not prove that he never went for leave is untenable since the appellant was the custodian of employment records by virtue of section 74 of the Employment Act. The Appellant should have produced the Respondent's leave applications forms or payments of the same to illustrate that he went on leave or he was paid for the same.''*

42. Conversely, the respondent submitted that the claimant failed to demonstrate the 90 days of leave were due. That vide a letter dated 31st May 2019, the respondent advised the claimant to take any outstanding leave days pending the conclusion of the disciplinary process.

43. The court perused the said letter dated 31st May 2019 and noted it was the show cause letter. The letter asked the claimant to respond by 6th June 2019 and at same time stated effective 5th June 2019 the claimant was to take his outstanding leave days pending the conclusion of the disciplinary process. Annual leave is a statutory right under section 28 of the Employment Act. The court finds that it is unfair labour practice to have asked the claimant to respond to a show cause while at same time he was required to be on leave. The claimant did not state why he never took leave before the disciplinary process started and was thus only entitled to maximum of 18 months' days of leave under section 28(4) of the Employment Act, which states- '*(4) The uninterrupted part of the annual leave with pay referred to in subsection (3) shall be granted and taken during the twelve* consecutive months of service referred to in subsection (1) (a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection (1)(a) being the period in respect of which the leave entitlement arose.'' The Employer had obligation to prove the claimed leave days being custodian of records and failed to do so. Indeed the letter of termination stated any leave days due were payable(page 83 of the Respondent's documents). The claimant is awarded leave days equivalent of 18 months of the contract salary of Ksh. 5,684,580 per annum thus Kshs. 473715 per month making award of **Kshs. 710,572.50** .

44. **Claim of underpayments during the period of employment being 27 months totalling to Kshs. 5,755,617.00;** - In his witness statement the claimant never clarified how this underpayment arose. The respondent just denied the claims in general and this issue did not arise at the hearing. The court is guided by section 108 and 109 of the Evidence Act to wit- '***108.*** *The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.*

109. *The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.''* The claimant did not establish a claim of underpayment by demonstrating to the court the months in which he was paid less than the contract salary or any other basis. He did not discharge his burden of underpayment in order to require the employer to provide evidence to the contrary. The claim fails.

45. ***On the claim for full salary from the date of breach of employment contract to the date of intended lapse of the said Contract of employment from 1st January 2019 totalling to Kshs. 4,263,435.00;*** - The court holds that the claim is not a remedy available under the Employment Act and the prayer was not established. It is disallowed.

CONCLUSION

46.In conclusion, the court held the termination of the employment was lawful and fair. The court hereby enters judgment for the claimant against the respondent, of award of 18 months' salary of leave in lieu for the sum of **Kshs. 710,572.50** with interest at the court rate from the date of filing of suit. The claimant is awarded costs of the suit.

47.Stay of 30 days granted.

48.It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 26TH DAY OF SEPTEMBER 2025.

J.W. KELI,
JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Claimant :-Absent

Respondent: Mbanga h/b Willis Otieno