REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NUMBER E 232 OF 2021

BETWEEN

MARK NGUGI MWAURA ……. CLAIMANT

VERSUS

G4S KENYA LIMITED ……. RESPONDENT

Rika J
Court Assistant: Bernard Kirui

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Kwamboka Marie & Associates, Advocates for the Claimant

Hamilton Harrison & Mathews, Advocates for the Respondent

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JUDGMENT

1. The Claimant filed his Statement of Claim, on 16th March 2021.

2. He states that, he was offered employment by the Respondent, as a Management Trainee, on 3rd March 2000.

3. He was appointed as Acting District Manager Nakuru, on 1st April 2001. On 31st August 2018 he was appointed Regional Operations Manager, stationed at Nairobi. He held this position, until 22nd December 2020,

when he states, the Respondent unfairly and unlawfully terminated his contract.

4. His last gross monthly was Kshs. 270,400.

5. On 13th November 2020, he was issued by the Respondent, a letter to show cause why, disciplinary action should not be taken against him.

6. He was alleged to have influenced irregular transfer of a Guard, Anne Mukami, who was his junior, to a different assignment; making sexual advances to a her; and engaging in borrowing and lending of money with her.

7. He responded denying the allegations, through his letter, dated 2nd December 2020.

8. He was forced by the Respondent's Human Resource Director, to undergo DNA testing, using his own resources, to establish if he had fathered the

daughter of Mukami. It was alleged that he had an unholy relationship with Mukami, resulting in the birth of the girl.

9. The DNA test was done at the Bioinformatics Institute of Kenya. It turned out negative, but the Respondent still terminated his contract on allegations of sexual harassment.

10. The transfer of Mukami, was within the docket of the Customer Service Manager [CSM]. The Claimant did not influence her transfer. Mukami returned from maternity leave, reported to her CSM, Peter Gakuo, who only sought from the Claimant, if it was alright to transfer her, to Coca Cola Upper Hill. Coca Cola had placed a request to the Respondent, for a female Guard, to serve as a Receptionist.

11. Anne Mukami, was herself dismissed by the Respondent for giving false information to the Respondent, that the Claimant had sired her daughter. The Claimant was nonetheless dismissed, on the strength of the same false information.

12. The charges against him, contained in the letter to show cause; the reasons given in justifying termination in the letter of termination; and letter issued by the Respondent on appeal, were inconsistent.

13. The Claimant states that the Respondent failed to follow its own Disciplinary Policy, the Employment Act and the Constitution. There was no valid reason shown, to justify termination.

14. He states that procedure was fundamentally flawed. The Disciplinary Committee had an interest in the outcome. The Panel created to hear his Appeal was biased against the Claimant.

15. The Claimant appealed through a letter dated 31st December 2020. One Mr. Lawrence Okello, was appointed as the Appeal Officer, through a letter dated 7th January 2021. The Claimant was advised that his Appeal would be treated as a review of the original disciplinary hearing, based on evidence that was not represented at the first hearing. The Claimant submitted fresh evidence, through a letter dated 12th January 2020.

16. He received the appellate decision, on 9th February 2021. He had been advised on 7th January 2021, that the Appeal would be determined within 2 days.

17. On 3rd February 2021, he received an e-mail from the Respondent, also addressed to other Managers and Supervisors, attaching a document titled **'' The G4s Sexual Harassment Policy.''** He was required to read, understand and sign the document, after he was already out of employment. There was no such policy availed to him, at the time of his appointment.

18. He was not issued a Certificate of Service.

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

a. Declaration that termination of his contract was unfair and unlawful.

b. 1-month salary in lieu of notice at Kshs. 270,400.

c. Salary for days worked up to 22nd December 2020.

d. Accrued annual leave.

e. Gratuity/severance pay, at Kshs. 1,081,000.

f. All terminal benefits and compensatory damages.

g. 12 months' salary in compensation for unfair termination at Kshs. 3,244, 800.

h. Certificate of Service to issue.

i. Costs.

j. Interest.

20. The Respondent filed its Statement of Response, dated 30th April 2021. It is conceded that the Claimant was employed by the Respondent, as

pleaded in his Claim. His last gross monthly salary, at Kshs. 270,400 is not disputed.

21. Termination was fair and based on valid reason. The Claimant was engaged in sexual harassment contrary to the Respondent's Africa Region Employee Handbook. Clause 15.1.5 of the Handbook, defines sexual harassment to include *quid pro quo* harassment.

22. The clause bars all cadre of staff, from influencing, or attempting to influence an Employee's employment status, by coercing an Employee to surrender to sexual advances.

23. On 4th September 2020, a Security Guard manning a client's premises at Absa Bank ATM, at Githurai, Nairobi, Anne Mukami, reported to the Respondent's Human Resource Director, that she had been in a sexual relationship with the Claimant, in 2016 and 2017.

24. Mukami reported that as a result of the relationship with the Claimant, she birthed a baby girl, and that the Claimant, who was her boss, subsequently declined to offer her child support.

25. She alleged further, that the Claimant used his position as Regional Operations Manager- Nairobi North, to influence her transfer from working as a Guard at Nairobi Hospital, to work as a Receptionist at Coca Cola Limited Head Office, at Upper Hill, Nairobi.

26. The role at Coca Cola had an additional responsibility allowance of Kshs. 10,000 monthly.

27. Mukami alleged further, that the Claimant borrowed from her Kshs. 200,000, as a result of their sexual relationship, which he then refused to pay her back.

28. The Human Resource Director constituted an Investigation Committee. The Committee called a meeting involving the Claimant and Mukami, on 6th October 2020. The Claimant admitted he had sexual relationship with Mukami, from 2016 to 2017.

29. The Committee submitted its report on 7th October 2020, recommending that action is taken against both Lovers.

30. The Claimant was issued a letter to show cause, dated 1st December 2020. He responded on 2nd December 2020. He was issued a letter dated 8th December 2020, inviting him to disciplinary hearing.

31. He attended disciplinary hearing, in the company of a Shop Steward. He again admitted having a sexual relationship with Mukami. He was already in the relationship, when Mukami approached her Customer Service Manager [CSM], seeking transfer from Nairobi Hospital. The Claimant admitted that he discussed the proposed transfer with the Customer Service Manager, before transfer was authorized.

32. The Customer Service Manager gave evidence at the disciplinary hearing. He explained that the process of transferring Guards, involved identifying and shortlisting qualified Guards, introducing them to a client, wherein they were subjected to interview, before taking up the new assignment. Anne Mukami was the only Guard identified and interviewed for the position of Receptionist, Coca Cola, Upper Hill. It was concluded that the

Claimant influenced Mukami's transfer. He was found to have engaged in sexual relationship with Mukami, and influencing her transfer based on that relationship.

33. The Claimant's contract was terminated through a letter dated 22nd December 2020.

34. He appealed and was heard on 12th January 2021. He was subsequently informed that his Appeal was unsuccessful. He was advised that his terminal benefits had been computed and deposited in his bank account.

35. Termination was fair and lawful, based on the Employment Act, the Respondent's Human Resource Manual and the Constitution. He was not requested, or forced, by the Respondent, to undergo DNA testing. He informed the Committee that Mukami had alleged that he fathered her child, and he produced the DNA report, to discount her allegation.

36. The charges, and reasons given on termination, were consistent. Engaging in sexual relationship with a junior staff was against the Respondent's Sexual Harassment Policy.

37. The charge concerning borrowing of money from a junior staff was dropped, after the Claimant defended himself successfully. Nothing therefore turns, on that charge.

38. The Disciplinary Committee was impartial. The Human Resource Director was only a member of the Committee, and did not receive the DNA report from the Claimant. The Finance Director Lawrence Okello, heard the Appeal on 28th January 2021. There was no new evidence presented, and there was no review as alleged by the Claimant. His Appeal was declined on 9th February 2021. He was informed of the reasons for dismissal of the Appeal.

39. The Respondent has always had a Sexual Harassment Policy in the Employee Handbook. The e-mail to staff dated 3rd February 2021, was merely to remind staff, of the existing Sexual Harassment Policy.

40. The Claim has no merit. The Certificate of Service has always been ready for collection. The Claimant was paid notice, salary for December 2020, and 9 days of pending leave, as part of his terminal benefits. His contract did not have provision for gratuity. It was not terminated on account of redundancy, to justify the prayer for severance pay.

41. The Respondent prays the Court to dismiss the Claim with costs.

42. The Claimant gave evidence and rested his case, on 27th October 2022. The Respondent's Accountant, Eric Manyara Githongo, gave evidence on 14th March 2023, while the Respondent's Human Resource Business Partner, Anne Gitonga, gave evidence on 4th October 2023, 16th February 2024 and 12th March 2024 when the hearing closed.

43. The Claim was last mentioned before the Court on 9th July 2024, when the Parties confirmed filing and exchange of their Closing Submissions.

44. The Claimant adopted in his evidence-in-chief, his Witness Statement and Documents – [1-15]. He restated his employment history and the terms

and conditions of employment, with the Respondent, as outlined in the Statement of Claim. He emphasized that he did not have the mandate to transfer staff. He was compelled to go for DNA testing by the Respondent, when Mukami claimed child support from him. He told the Court that he did not sexually harass Mukami. He had a working relationship with her. The Respondent did not establish the presence of sexual harassment. Mukami was dismissed for lying about the relationship she had with the Claimant.

45. On cross-examination, the Claimant confirmed his employment details. He met Eric Githongo, who was the investigator of the sexual allegations. The Claimant confirmed that he was engaged in a sexual relationship with Mukami.

46. He was aware of the Disciplinary Policy, but not the Handbook. His contract, clause 11 B, advised him to conform to the Respondent's circulars and instructions. The Handbook defined sexual harassment, including *quid pro quo* harassment. He discussed Mukami's transfer with the Customer Service Manager. He approved transfer. There was an additional allowance earned by Mukami on transfer to Coca Cola.

47. Mukami was to replace another Guard who had gone on maternity leave. She was the only Guard taken to serve at Coca Cola. By the time of transfer, she was no longer in a sexual relationship with the Claimant.

48. The Claimant conceded that he was issued a letter to show cause. He replied. He was invited for disciplinary hearing. The invitation and the letter to show cause contained the same charges. He was advised on his procedural rights. He attended hearing, with a representative who was also his witness. He admitted sexual relationship. Termination letter stated the same reasons, disclosed in the disciplinary notice, and letter to show cause, except the charge concerning borrowing of money.

49. He was heard on Appeal. Appeal was to be heard within 14 days. It was stated elsewhere that the Appeal Officer shall make the decision within 2 days.

50. The Claimant was not dismissed. His contract was instead terminated. He was paid notice. He was paid salary for December 2020. Net sum paid, was Kshs. 227,882. It was deposited in his favour, on 4th March 2021.

51. Redirected, he told the Court that his relationship with Mukami lasted about 2 months. He did not know at the time, that she was a Guard. It was not the Claimant's responsibility to transfer staff. He was not in a position to influence her transfer. The allowance at Coca Cola was not determined by the Claimant. It was the responsibility of the Sales Team. The complaint letter shown to the Claimant, was undated.

52. Accountant Eric Manyara Githongo, relied on his Witness Statement and Documents filed by the Respondent [1-13] in his evidence-in-chief. The Claimant engaged in a sexual relationship with a junior Employee. The Employee lodged a complaint to the Human Resource Director. The Claimant also abused his role, by transferring the Employee to Coca Cola Upper Hill, from Nairobi Hospital. She was being promoted to be a Receptionist. Promotion should have been done competitively by the client, Coca Cola.

53. Mukami was simply recommended by the Claimant and the Customer Service Manager, and transferred. On 28th September 2020, the Human Resource Director instituted investigations. It was established that the Claimant had sired a child with Mukami. He influenced her transfer to Coca Cola, at Upper Hill, Nairobi.

54. Cross-examined, Manyara told the Court that Mukami recorded a statement, confirming sexual relationship with the Claimant. The relationship was going on in 2020. The complaint letter was not signed and dated, by Mukami. She was not a Witness before the Court. The complaint was authentic, and received by Management.

55. Transfers are done by Customer Service Managers, Human Resource Manager and the Operations Manager. The Human Resource Manager had the overall mandate on transfer.

56. Manyara was part of the Disciplinary Committee. The complainant was Mukami. She was also listed as an accused person. The Committee came up with findings and recommendations. It was a finding that the Claimant and Mukami were friends. It was found that Mukami was appointed by

Coca Cola on merit. Manyara did not have evidence to the contrary, on the appointment. Mukami remained an Employee of the Respondent. She was paid an allowance in addition to her regular remuneration.

57. The DNA report concluded that the Claimant was not the father to Mukami's child. The Respondent had recommended that the sexual harassment complaint, is investigated further. Manyara was not aware of further investigations carried out.

58. The transfer took place, before the complaint. The Respondent relied on the sexual complaint by Mukami, in taking action against the Claimant. Transfer was the responsibility of the Customer Service Manager. The CSM knew the Guards best. Manyara could not say that Mukami did not merit to work at Coca Cola. She was interviewed by Coca Cola. She worked at Coca Cola, between 2017 and 2020. The Respondent did not recognize that she did not merit appointment, only in 2020.

59. Redirected, Manyara told the Court that the complaint was submitted on 14th September 2020. The Claimant was consulted by the Customer Service Manager on transfer. He gave his concurrence. The Human

Resource Manager was not involved. Mukami attended hearing as a complainant, but also, had her own case to answer. The hearing involved both the Claimant and Mukami.

60. DNA test was negative. The result established that the Claimant did not sire Mukami's daughter. There were issues of concern, notwithstanding this negative test. The Respondent recommended further investigations. Mukami's contract was also terminated.

61. Anne Gitonga adopted her Witness Statement, as her evidence-in-chief. Different departments were represented at the disciplinary hearing. The Human Resource Director was not a member. Finance Director Lawrence Okello, heard the Claimant's Appeal. He gave a phone call to the Claimant, discussing the Appeal. The outcome was communicated to the Claimant.

62. The Disciplinary Policy regulates Appeals. A decision is to be made within 2 days. The Appeal itself is to be conducted within 10 days. The decision is to be communicated as soon as practicable. The Appeal was heard within the constraints of Covid-19 pandemic.

63. The Sexual Harassment Policy was incorporated as part of the Claimant's contract. It had been in place since 2018.

64. The Claimant was given opportunity to be heard. He had 2 Witnesses and a Representative, David Muthee. He was paid Kshs. 227,882 in terminal benefits.

65. Gitonga presented a video recording of the disciplinary hearing, held on 8th December 2020. She filed a certificate of electronic evidence dated 8th March 2023, under Section 106B of the Evidence Act. Robert Kanyi, an Engineer employed by the Respondent's Advocates, filed a similar certificate, confirming receipt of the evidence from Gitonga, by way of a flash drive. He preserved the evidence on HP desktop.

66. The recording captures the disciplinary hearing. The contents of the video recording are as bracketed below.

67. [The Chair went through the Claimant's procedural rights. The Claimant confirmed notification of the charges. He admitted he was in a sexual

relationship with Mukami. He affirmed that he was in the relationship, by the time she was transferred. He came to know her while he went for routine guard parades, at Nairobi Hospital, where Mukami guarded].

68. [Mukami was captured in the recording, admitting her relationship with the Claimant. She was aware that the Claimant was her boss. She states that she was aware of policy, prohibiting sexual relationships between Employees, at work].

69. [The Claimant states that where there was a change in job title, a job interview was necessary. It would be done by the Human Resource Department. The Guard was required to transit to Receptionist at Coca Cola. The client, Coca Cola, was to pay more. The Claimant states that the Human Resource Department was involved. He states that Mukami was appointed because she was competent, not because she was in a sexual relationship with the Claimant. The Respondent, not him, settled on Mukami to work at Coca Cola].

70. Gitonga explained, that the practice, was that more than 1 Employee was supposed to be availed to the client for interview. The Operations

Department would identify the Employees. The Customer Service Manager Peter Gakuo, was junior to the Claimant.

71. [Gakuo explained in the video recording that there was a variable allowance of Kshs. 10,000, to be paid to the transferred Employee. He identified various other Employees. He did not know that the Claimant was in a sexual relationship with Mukami. He explained further, that Mukami was pregnant while at Nairobi Hospital. She was required to stand almost the whole day guarding. Coca Cola would be suitable to her, because she would be sitting as a Receptionist. Gakuo stated that he consulted the Claimant, and that he took Mukami to Coca Cola on trial, before she was fully engaged. She told Gakuo that she had requisite experience, having worked as a Receptionist in the past].

72. Gitonga told the Court that the Customer Service Manager, Gakuo, was the person on the ground. He knew that Mukami had the requisite experience. He consulted the Claimant, and they agreed to transfer Mukami. The Claimant used his influence improperly.

73. [Mukami was recorded saying that the Claimant was in a full sexual relationship with her in 2016. The Claimant used to go to her parades. He would call her and give her lifts, to her residence at Roysambu, Nairobi].

74. [Mukami states that she would not say that she was sexually harassed by the Claimant. This would be harsh. She would not wish to lie. She was not a married woman at the time she met the Claimant. She states that she liked the Claimant as a boyfriend, and only ended the relationship in 2019, because her love for him died].

75. Cross-examined, Gitonga told the Court that the Respondent has Sexual Harassment Policy. Termination was on 22nd December 2020. The Respondent circulated its Sexual Harassment Policy to staff, through an e-mail dated 3rd February 2021, after the Claimant had left employment. It was not because of the allegations against the Claimant, that the policy was circulated.

76. Mukami was not explicitly named, in the letter of termination. The Chair, Jackson Miano, did not sign the minutes. The Claimant's case and that against Mukami, could not be heard separately. Each was unique.

77. Sexual harassment was disclosed, by the Claimant's persistent offer of lifts, to Mukami. He would call her colleagues, when her phone was turned off, indicative of sexual harassment. The complaint was neither signed nor dated by Mukami.

78. Gitonga told the Court that Mukami's contract was also terminated. She was found to have knowingly, had sexual relationship with the Claimant, for personal gain. She lacked integrity. She worked at Coca Cola for 2 years. The issues leading to termination came to light only in 2020, after Mukami complained.

79. Gitonga agreed with the Advocate for the Claimant, that in the video recording, Gakuo states that the Claimant did not influence Mukami's transfer. Gitonga however insisted that the Claimant influenced transfer. The minutes show that Mukami initiated the transfer move. DNA results were negative. The Respondent's position was that Mukami was not truthful and lacked integrity. Giving someone a lift, can amount to sexual harassment. Sexual harassment was established.

80. Further cross-examined, Gitonga told the Court that the Respondent held that Mukami initiated the relationship with the Claimant, for personal gain. It was found that Mukami's child was not sired by the Claimant. She said she was at some point, in love with the Claimant. She fell out of love, when sexual harassment set in.

81. Redirected, Gitonga emphasized that there was policy on sexual harassment, in the Handbook. Clause 13 defines *quid pro quo* harassment. The circular attaching Sexual Harassment Policy, issued after the Claimant left, was a periodic reminder. The Claimant was bound to observe policy by his contract. In the case against the Claimant, Mukami was a Witness. She used her position, to harass the Claimant to transfer her to Thika, initially. This was not in issue however. In issue was her reassignment from Nairobi Hospital to Coca Cola, Nairobi.

82. The issues are, whether termination of the Claimant's contract was based on fair procedure; whether it was based on valid reason; and whether the Claimant merits the reliefs sought.

The Court Finds: -

83. The Claimant was employed by the Respondent, initially as a Management Trainee, on 3rd March 2000.

84. He rose through the organogram, becoming a Regional Operations Manager. He held this position, until 20 years later, on 22nd December 2020, when the Respondent terminated his contract.

85. His last monthly gross salary was Kshs. 270,400.

86. The letter of termination dated 22nd December 2020, outlines 2 grounds justifying termination: engagement in sexual relationship with a junior staff [Anne Mukami], under his region of responsibility, leading to broken trust with his Employer, for acting in a manner that could taint the Respondent's image; and, using his position to influence the transfer of the junior staff [Anne Mukami] to a role that had benefit, without following due process, in breach of the G4s Disciplinary Code on sexual harassment.

87. **Procedure**: The Claimant was issued a letter to show cause, dated 1st December 2020.

88. The letter communicated 3 allegations against the Claimant: influencing transfer of Mukami; sexual harassment of a junior staff; and engaging in borrowing/ lending of money with a junior staff.

89. The last allegation was dropped subsequently, after the Claimant explained his position, and it is not necessary therefore, to explore the allegation further, in this Judgment.

90. He responded to the letter at length, in his letter dated 2nd December 2020.

91. The letters to show cause and the response, were preceded by an unsigned and undated complaint against the Claimant, attributed to Mukami, and a report dated 7th October 2020, compiled by a Committee which had been convened to investigate the complaint.

92. The Investigation Committee met the Claimant and Mukami on 6th October 2020. It recommended further investigations.

93. The Respondent does not seem to have undertaken further investigations as recommended, but acting within its margin of discretion, advanced the process to disciplinary hearing.

94. The Claimant was invited for disciplinary hearing to take place on 8th December 2020. The invitation letter, comprehensively communicated to the Claimant his procedural rights, ranging from the presentation of the charges, to appeal.

95. The Claimant was heard on 8th December 2020, in the presence of his colleague, David Muthee.

96. The hearing was recorded both in writing and electronic media. Both forms of evidence have been availed to the Court.

97. A decision was taken to terminate the services of the Claimant for engaging in sexual relationship with a junior, and influencing her transfer from Nairobi Hospital to Coca Cola, Upper Hill, Nairobi.

98. The decision was communicated to the Claimant, through a letter dated 22nd December 2020.

99. 2 reasons were given in justifying the decision- engagement in sexual relationship with a junior staff and influencing transfer of that staff, to a role which had an additional benefit, in breach of the Sexual Harassment Policy.

100. The Claimant was advised of his right of review / appeal, within 14 days of receiving the letter of termination.

101. He lodged his Appeal dated 31st December 2020, within a week of termination.

102. Steven Barry, Regional Cluster Director- East Africa and Managing Director, wrote to the Claimant on 7th January 2021, appointing Finance Director, Lawrence Okello, as the Appeal Officer. The letter explained to the Claimant his procedural rights on hearing of the Appeal.

103. The Claimant wrote to Lawrence Okello on 12th January 2021, restating his grounds of Appeal.

104. Okello wrote to the Claimant on 9th February 2021, advising that he had reviewed the Appeal, listened to recording of the disciplinary hearing, and reviewed all submissions and documentation. He was satisfied that the decision to terminate the Claimant's contract, was proper and should be upheld. He restated that termination was on account of sexual harassment, and irregular transfer of Mukami.

105. The Court has not found anything in this procedure, that was in fundamental departure, from the minimum standards of fairness, contemplated by Sections 41 and 45 of the Employment Act.

106. From the inception to the end, the charges and reasons given in justifying termination, and in rejecting the Appeal, were consistent.

107. If the charge concerning borrowing of money from a junior staff, was not referred to on termination and appeal, it was because the Respondent listened to the Claimant's explanation, was contented, and dismissed the allegation.

108. It was not a fundamental departure from the standards of fairness, that the complaint attributed to Mukami, was undated and unsigned. The Lady appeared before the Disciplinary Committee, at the same time with the Claimant, and did not dispute that she filed a complaint against the Claimant.

109. Complaints of sexual violations need not be signed or dated to be valid. They are frequently made anonymously. In **Boniface Mzungu v. Base Titanium Limited [2020] e-KLR**, the Court, citing Section 6 [3] of the Employment Act, upheld that the Employer need not disclose the name of the complainant, or the circumstances related to the complaint to any person, except where it is necessary for purposes of investigating the

complaint, or for purposes of disciplinary hearing. A complaint of sexual harassment is not rendered invalid by lack of a date, signature or even the name of the complainant. These are formalities, that have no effect on the validity of the complaint. What matters most, is that the recipient of the complaint undertakes thorough investigation of the complaint, and takes further action, as is deemed necessary. The record shows that the Respondent received, and investigated the complaint, culminating in the disciplinary action against the Claimant.

110. On cross-examination, the Claimant conceded that he was interviewed by the Investigator. He was aware of the Disciplinary Policy on sexual harassment. Since he was aware, it did not matter if the same policy was, in the Employee's Handbook, a document which he alleged he had not aware about. It would not matter that the policy was circulated through e-mail, after the Claimant left employment. He had knowledge of the policy while he was in service. Circulation was a reminder to remaining staff. It did not matter that the reminder, was triggered by the matters involving the Claimant and Mukami.

111. There is similarly no merit, to the Claimant's submissions, on breach of the clause, on the timeframes, for delivery of the decision on Appeal. He was mixed-up on cross-examination, alleging that the Appeal should have been delivered within 4 days, before correcting himself to 14 days. The Court is satisfied that the decision was made and communicated to the Claimant within a reasonable time, at a time when normal conduct of business, was severely limited by Covid-19 pandemic.

112. **Procedure** was fair and in accordance with the minimum statutory standards of fairness.

113. **Validity of reasons**: The Claimant's end, was brought about through his relationship with a Lady Guard [Guardette], named Anne Mukami.

114. The Claimant was accused of having a sexual relationship with Mukami, which was deemed by the Respondent, at some point, to have morphed into sexual harassment.

115. It was alleged and concluded by the Respondent, that the Claimant influenced the transfer of Mukami from guarding at Nairobi Hospital, where she was compelled to stand for most hours, to Coca Cola Upper Hill, where she would sit as a receptionist, and earn an additional allowance of Kshs. 10,000 monthly. Transfer, the Respondent alleged, was carried out contrary the Respondent's Human Resource Policy and Procedures.

116. The accusation against the Claimant was that he engaged in a sexual relationship with the Claimant, which was deemed inappropriate, and therefore in the province of sexual harassment.

117. The Respondent appears not to have drawn the line, and fully appreciated the difference, between a sexual relationship, and sexual harassment.

118. Not every sexual relationship at the workplace, results in sexual harassment.

119. As long as there are Employees of different gender, [or even of the same gender], working in the same space, it is inevitable that romantic or sexual relationships will arise.

120. Such relationships start naturally, through the eternal law of attraction, conventionally between opposite genders.

121. Workplace romance, raises complex legal issues. To what extent should an Employer regulate romantic relationships between Employees?

122. The Employer may have legitimate concerns about workplace romance, with the fear of such relationship resulting in sexual harassment claims, a leading concern. There are concerns about conflict of interest, where a Manager and a Subordinate Employee, are lovers. Friction between the lovers may poison the work environment and affect productivity. A spurned lover may feel they no longer want to work in the same space with their former lover, and leave employment, thereby throwing the Employer's investment on training of its Employee, to waste.

123. In progressive jurisdictions, the Courts have intervened in favour of protecting workplace romance, so long as it does not affect work performance.

124. Employers ought to be cautious about interfering in workplace romance, as such interference may amount to invasion of privacy rights of their Employees.

125. The US Supreme Court, in **Lawrence v. Texas [539 U.S. 558 [2003],** held that the right of intimate association, includes the right of consenting adults, to engage in private sexual activity. The Supreme Court struck down a Texas Law, which banned private, consensual homosexual activity, holding that the law did not justify its intrusion into personal and private lives of individuals.

126. Following this decision, a California Court of Appeal in **Barbee v. Household Automotive Finance Corporation, [113 Cal. App. 4th 525 [2003**], held that an Employee may have a legally protected right, to pursue an intimate relationship at work.

127. Workplace romance may even strengthen the Employer's business, if it blossoms and results in a family. Bill and Melinda Gates met at the Microsoft workplace, where Bill was the CEO and Melinda an Employee. They built the globally renown Microsoft brand.

128. The danger for Employers, appears to be, where a sexual relationship morphs, into something else, less romantic. What begins as a beautiful, workplace romance, may transform into an abusive relationship, where for instance, one partner demands for work-related favours from the other, in order to continue with the romance.

129. A Subordinate in a relationship with a Manager may demand the intervention of the Manager, in obtaining promotion at the workplace. She or he, may demand favourable performance assessment, for purposes of career progression. Such demands move a romantic relationship, into the abusive arena of sexual harassment, and are damaging to the Employer's business.

130. In this case, it is alleged that the Claimant, abused his relationship with his Subordinate Mukami, that he sexually benefitted from her, and in turn,

influenced her transfer to a better-paying position with Coca Cola, a client of the Respondent.

131. The Court was left in perplexity, on the Respondent's conclusion, that the Claimant engaged in sexual harassment. In the view of the Court, there was evidence of sexual relationship between the Claimant and Mukami. There was no convincing evidence, that the sexual relationship, morphed into sexual harassment.

132. The position taken by the Respondent was perplexing, because Mukami was herself charged with having a sexual relationship with the Claimant for personal gain. She was found guilty of having this relationship, and also, of failing the integrity test, by falsely alleging that the Claimant was the father of her daughter, and of persistently blackmailing the Claimant for money. A sexual relationship for personal gain, and a false allegation that the Claimant fathered her child, are classic cases of the Lady sexually harassing the Man.

133. How was this villain, who was convicted by the Respondent, also a victim of sexual harassment, perpetrated by the Claimant?

134. Sexual harassment normally has a victim and a villain, at different ends, and it is difficult to see how sexual harassment can be mutual.

135. In her own evidence as recorded by the Respondent, Mukami stated she was in a consensual relationship with the Claimant, from the time she was guarding at the Nairobi Hospital. She agreed to have the relationship, knowing well, that the Claimant was her boss.

136. The relationship grew, and there was no evidence, in any form, of the Claimant demanding or receiving sexual favours from Mukami, in order to assist her advance her career at the Respondent.

137. It was not sexual harassment, for the Claimant to offer lifts to Mukami, or call her repeatedly while she was working at Nairobi Hospital. This was simply evidence of a man, a paramour, who was lovesick, not evidence of a sexual harasser. The Claimant's behaviour was never unwelcome to Mukami.

138. In the video recording, Mukami specifically stated that she would not say that she was sexually harassed by the Claimant. She stated that she would be lying, if she said she was sexually harassed by the Claimant. She did not say no to his advances, she stated in the recording. Mukami stated that she was not married, by the time she met the Claimant, and loved him as a boyfriend. This was a consensual, romantic involvement, of 2 adults. Throughout, there was no evidence of the Claimant, making unwanted sexual approach to Mukami, and Mukami, not welcoming those advances. She never perceived anything done by the Claimant, as sexual harassment.

139. She ceased having the relationship with the Claimant in 2019, because her love for him died. The Claimant did not insist on continuing with the affair. She did not state that she stopped the relationship because of any abuse by the Claimant, or even allude to, sexual harassment by the Claimant. Why then, did the Respondent read sexual harassment, in the relationship between the Claimant and Mukami?

140. The Supreme Court of India, in the cause celebre case, **Vishaka & Others v. The State of Rajasthan & Others [JJ] [1997] [7] [SC. 384**], defined sexual

harassment to comprise unwelcome, and determined behaviour, such as physical contact and advances; sexual favours; sexually coloured remarks; and showing of pornography and other verbal and non-verbal conduct of a sexual nature, that is unwelcome or humiliating to the other person. This definition is reflected in our domestic jurisprudence such as **P.O. v. Board of Trustees, A.F. & 2 Others [2014] e-KLR**, and is legislated under Section 6 of the Employment Act.

141. The Claimant and Mukami, both agreed, that they were in a sexual relationship. At no time was any behaviour by the Claimant, rebuffed by Mukami. She welcomed the Claimant into her life, until the love died in 2019. She even thought that the Claimant fathered her child, and pursued child support from the Claimant, but her belief was discounted by science.

142. There was no evidence of *quid pro* quo sexual harassment. *Quid pro quo* sexual harassment occurs when a superior, uses his or her power, to persuade a junior staff into granting sexual favours, in return for a work-related favour. In the case of **Boniface Mzungu v. Base Titanium Limited [supra**], the Claimant, a supervisor, was found to have engaged in *quid pro quo* sexual harassment, by giving some female Employees milk to

drink, and giving others unmerited allowances, in exchange of sexual intercourse. Did Mukami sleep with the Claimant because of any favours by the Claimant?

143. There is similarly no evidence of the second form of sexual harassment, the hostile work environment sexual harassment. This second form, occurs when an Employee is subject to unwelcome sexual advances, innuendos or offensive gender-related language, that is sufficiently severe or pervasive from the perspective of a reasonable person of the same gender as the offended Employee.

144. Mukami's written complaint, which appeared at odds with her video evidence, was not established. She had alleged that she was sexually harassed by the Claimant, resulting in pregnancy. In her electronic evidence, she said she was not sexually harassed, and she would be lying, if she said so. Her allegation about the Claimant being the father of her child was disproved through DNA testing. She was in fact, convicted and dismissed by the same Respondent, for giving false information against the Claimant. She also complained that she was always frustrated by another supervisor she named as Amos Mageto, since she was employed

by the Respondent. It is notable that Mukami, was at the time of lodging the complaint, seeking child support from the Claimant. Her complaint was largely informed by her misperception that the Claimant sired her child, and refused to provide child support. The report by the Investigation Committee preceding disciplinary hearing, indicates that Mukami specifically asked the Respondent to ensure the Claimant provided child support. But science was not on her side, and was of the view, that the child was not sired by the Claimant.

145. There was dispute on who initiated DNA testing. The Claimant states he was compelled to do so by the Respondent, while the Respondent told the Court that the Claimant initiated the testing, while confronted with the demands of child support from Mukami. According to the Respondent, the Claimant volunteered DNA evidence to the Respondent, to rebut the claim by Mukami, for child support.

146. The Court does not think the question as to who initiated DNA testing, is material to the resolution of the dispute herein. The outcome of the testing was not disputed. The Claimant submitted himself to the testing, and was not prejudiced by the testing. If the Respondent initiated testing,

the Claimant ought to thank the Respondent, because the outcome, significantly tipped the scales of evidence, in his favour. It is observed that the DNA Report Issuance Form, was to be received by Elijah Sitima, a Manager at the Respondent. It is not likely that the Claimant initiated DNA testing, only for the result to be received directly, by the Respondent's Management. It is likely, but not significant, that the Respondent initiated DNA testing, intending to settle the dispute for child support, between its 2 Employees.

147. The complaint by Mukami, was contradicted by her own evidence at the disciplinary hearing, and critically, by scientific evidence. It was a complaint informed by her relentless pursuit of child support, from the Claimant.

148. The Respondent drew the mind of the Court to the transfer of Mukami to Coca Cola Upper Hill, from Nairobi Hospital, as a smoking gun on the charge of sexual harassment, and specifically *quid pro quo* sexual harassment.

149. The evidence does not support the allegation that the Claimant influenced Mukami's transfer, little less that sexual harassment was at play.

150. Peter Gakuo was the Customer Service Manager, who transferred Mukami to Coca Cola. He transferred her and assigned to her an allowance of Kshs. 10,000 monthly. He stated in the video recording, that Mukami was suitable for the receptionist role. She told him she had worked as a receptionist in the past. He took Mukami to Coca Cola for trial, before Coca Cola enlisted her, where she worked for over 2 years.

151. Human Resource Business Partner, Anne Gitonga, confirmed what Peter Gakuo told the disciplinary hearing. She told the Court that the Customer Service Manager, was the person on the ground. She stated that Gakuo was aware, that Mukami had previous experience as a receptionist. Gitonga told the Court that Mukami was identified by Gakuo.

152. Githongo told the Court that the Human Resource Manager, has the overall mandate on transfer of Employees. He told the Court further that Mukami was appointed by Coca Cola on merit. He did not have any evidence suggesting appointment was not on merit. He testified that the

Respondent did not establish direct, or indirect call by the Claimant to Mukami for sex, in exchange of any workplace favours. The transfer came before the complaint. Why did the Respondent come to the conclusion that Mukami, was assigned to Coca Cola through sexual intervention?

153. Was the Claimant's sexual relationship with Mukami, even if not morphing into sexual harassment, prohibited at the workplace?

154. Clause 14 of the Respondent's Sexual Harassment Policy, would suggest that sexual relationship was prohibited.

155. It states that, romantic and/ or sexual relationship between individuals working for the same Employer, in a supervisor–supervisee relationship, constitutes conflict of interest. The policy is unclear, referring to potential for conflict of interest, in the same breath, as actual conflict of interest.

156. It specifically prohibits romantic or sexual relationship, between Employees where one, has influence or control over the other's conditions of employment, and between supervisor and supervisee.

157. Is this prohibition constitutional?

158. The Court is convinced that this policy, is unconstitutional. Primarily, it is a serious invasion of privacy rights of Employees, which have protection under Article 31 of our Constitution. The Article states that every person has the right to privacy. Sexual relationships are private. The right includes the right against private affairs being unnecessarily required or revealed, and private communications being infringed. As seen by way of comparative American jurisprudence in the **Lawrence** and **Barbee** cases above, an Employee is entitled to the right to pursue a romantic relationship at the workplace, a right which falls within privacy rights, under our Constitution.

159. Secondly, the clause is in conflict with Article 28 of the Constitution, which confers on every person, inherent right to dignity, and which requires that right to be respected and protected. This right has long been enunciated by Philosophers such as Giovanni Pico della Mirandola [1463-1494], who argued that human beings are exceptional, in the creation, and the dignity of human beings, is founded in their freedom, in their capacity to choose

their own place in the chain of beings, stretching from God to the lowest animal. Employees must have the liberty to choose their own place, in the chain of beings.

160. Thirdly, prohibiting Employees from following their hearts, would amount to violation of their fundamental freedom from cruel, inhuman or degrading treatment, under Article 25 [a]. Nothing is more degrading than for a third party, an Employer, to intermeddle in a love relationship between two consenting adult Employees.

161. A policy that seeks to prohibit romance at the workplace, is not legally defensible. It is not the role of an Employer to police the affairs of the heart, of its Employees. Clause 14 of the Respondent's Sexual Harassment Policy, is an extreme case of an Employer, attempting to police a primordial human instinct – romantic love. It is an assault on the privacy rights, inherent dignity of Employees, and the protection against cruel, inhuman and degrading treatment.

162. Some Employers have opted for execution of consensual relationship agreements between lovers at the workplace, to augment sexual relations

rules, and limit the occurrence of sexual harassment claims. Some require that romantic liaisons between Employees are disclosed to the Employers. Others, such as the Respondent herein, have opted for the draconian policy of outlawing romance altogether, which as the Court has concluded, invariably results in violation of the lovers' rights to privacy, inherent dignity, and freedom from cruel, inhuman and degrading treatment.

163. If the relationship between the Claimant and Mukami resulted in conflict of interest, it was for the Respondent to charge the Claimant specifically with infringement of the conflict of interest policy. He was not investigated or dismissed for any conflict of interest.

164. Under clause 15 of its Sexual Harassment Policy, the Respondent compounds constitutional violations, by requiring that Employees who are already married, should disclose their marriage to the Respondent, and that if marriage occurs after November 2020, one of the spouses should exit employment.

165. Is it a coincidence that the Policy version, seems to have come into place in November 2020, and the Claimant and his former Lover dismissed in December 2020?

166. Is the Respondent aware about Articles 27 [discrimination on account of sex or marital status] and 45 [recognition and protection of the family as the natural and fundamental unit of the society, and the necessary basis of social order]?

167. The Respondent's Sexual Harassment Policy adopts the definition of sexual harassment, under Section 6 of the Employment Act. Its purpose is to provide all Employees with information and intervention strategies / mechanisms, designed to make everyone aware of conduct which could constitute sexual harassment.

168. Its purpose is not to police romantic relationships, or prohibit marriage and families, that may be built, between consenting Employees. Such prohibition contained at end of the Policy, is an anti-fraternization overreach; it is contrary to the purpose of the Policy; it is against the

Constitution; and against the very Law of Nature. It is a prohibition which cannot be sustained by any Court of Law, exercising its mind judiciously.

169. Romantic relationships at the workplace must be left to run their own natural course. It is a harebrained law or policy, that would seek to outlaw the affairs of the heart. Employers must leave the Bill and Melinda Gates within their undertakings to grow, and to find themselves in each other, while they continue to be productive to the business.

170. There was no valid reason shown by the Respondent, to justify termination of the Claimant's contract. Sections 43 and 45 of the Employment Act, were not honoured.

171. **Remedies**: ***It is declared that termination of the Claimant's contract of employment by the Respondent, was unfair for lack of valid reason.***

172. The Claimant was paid notice, salary for December 2020 and accrued annual leave of 9 days. There is no evidence showing that these items are again claimable and payable to the Claimant. The items are rejected.

173. There is no support for gratuity or service pay. There is no provision for gratuity in the Claimant's contract. He was actively subscribed to the N.S.S.F, as shown in his pay slip of November 2020. The Claimant's position was not that he left employment on account of redundancy, and severance pay claimed is irrelevant. He did not establish that any of these benefits are payable under Sections 35 [5] and 40 [1] [g] of the Employment Act, 2007.

174. He earned a monthly salary of Kshs. 270,400. He was paid terminal benefits as concluded above. he was employed by the Respondent on 3rd March 2000. His contract was terminated on 22nd December 2020. He worked for a creditable 20 years and 9 months. He was born in 1968, and was 52 years in 2020, when he left employment. Clause 15 of his contract set the mandatory retirement age, at 60 years. He had 8 years to retirement. He is not shown to have caused, or contributed to the circumstances leading to the premature termination of his contract. He was paid a net sum of Kshs. 227,882 in terminal benefits. He did not disclose to the Court, whether he secured alternative employment, after he left employment.

175. ***He is allowed the prayer for compensation for unfair termination, equivalent of 12 months' salary at Kshs. 3,244,800***.

176. ***Certificate of Service to issue.***

177. ***Costs to the Claimant.***

178. ***Interest allowed at court rate, from the date of the Judgment, till payment is made in full.***

IN SUM, IT IS ORDERED: -

a. ***It is declared that termination was unfair, for lack of valid reason.***

b. ***The Claimant is granted compensation for unfair termination, equivalent of 12 months' salary, at Kshs. 3,244,800.***

c. ***Certificate of Service to issue.***

d. Costs to the Claimant.

e. Interest allowed at court rate, from the date of Judgment, till payment is made in full.

Dated, signed and released to the Parties electronically at Nairobi, under Practice Direction 6[2] of the Electronic Case Management Practice Directions, 2020, this 20th day of September 2024.

James Rika

Judge