Employment Law

29 January 2026

Kenya

- When an employer gets it right in workplace harassment cases

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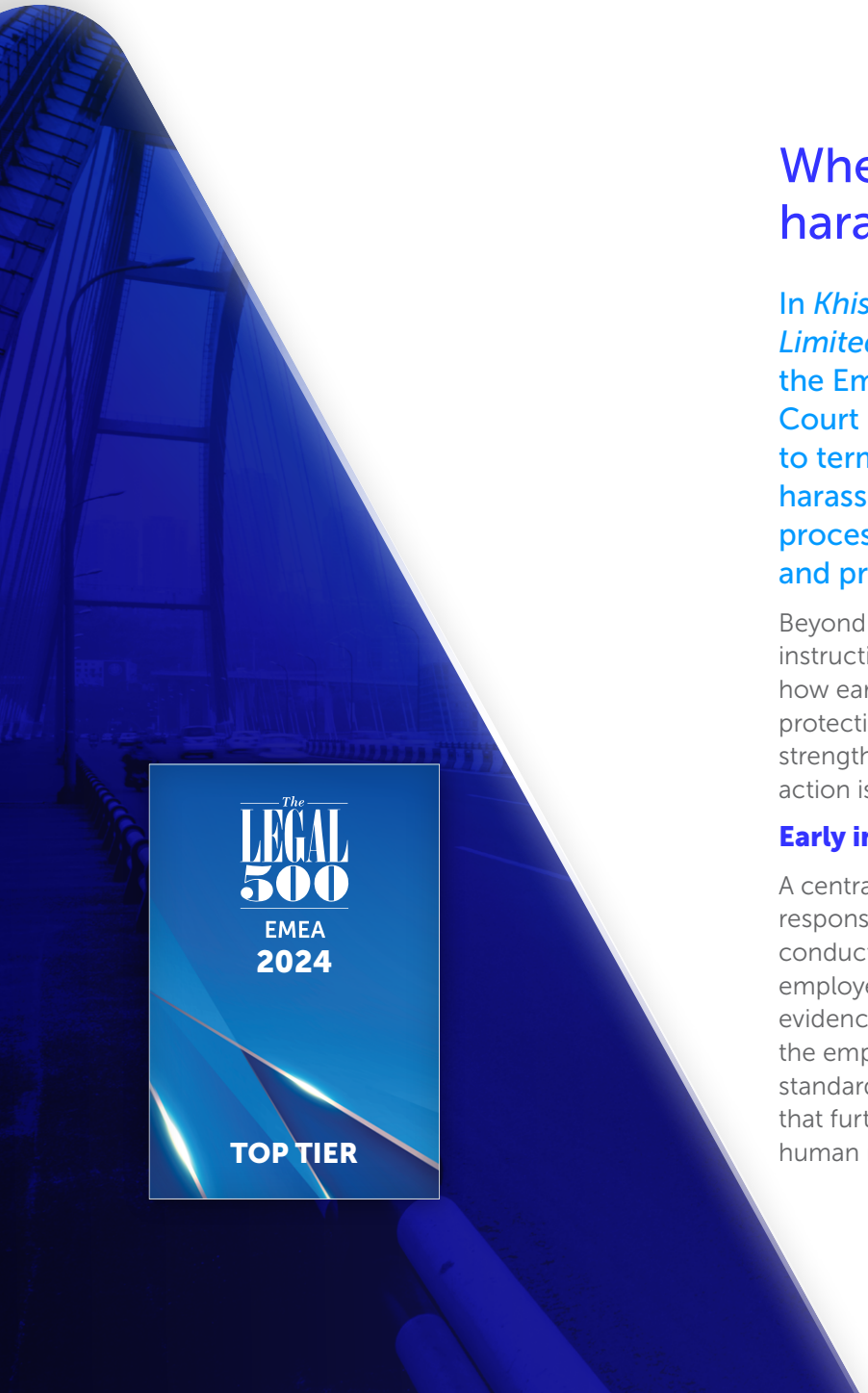

When an employer gets it right in workplace harassment cases

In *Khisa v Bureau Veritas Kenya Limited* [2025] KEELRC 3622 (KLR), the Employment and Labour Relations Court upheld an employer's decision to terminate an employee for sexual harassment, affirming that the disciplinary process was both substantively justified and procedurally fair.

Beyond the outcome, the decision is particularly instructive for employers because it demonstrates how early intervention, combined with deliberate protection of the complainant can decisively strengthen an employer's position when disciplinary action is challenged.

Early intervention

A central feature of the case was the employer's response to early complaints of inappropriate conduct. When concerns were first raised, the employer did not dismiss them simply because evidence was limited. Instead, it cautioned the employee, reminded him of expected standards of conduct and expressly warned that further complaints would be escalated to human resources (HR).

The court endorsed this approach, recognising that workplace harassment often occurs privately and may not immediately be supported by documentary evidence. Importantly, these early cautions later formed part of a clear pattern of misconduct when the employee persisted in the behaviour.

This reasoning aligns with earlier court decisions of the Employment and Labour Relations Court such as in *Kagocha v Multimedia University of Kenya and 11 Others* [2024] KEELRC 1718 (KLR) where the court affirmed that harassment and bullying are forms of gross misconduct and that employers are entitled as well as expected to intervene decisively once concerns are brought to their attention.

The key takeaway from this for employers is that early warnings, informal corrective action and documented cautions are not premature or unfair. They are a lawful and prudent way to manage risk, demonstrate responsiveness and prevent escalation. They may also later prove critical in justifying more serious disciplinary action.

Protecting the complainant during the disciplinary process

The court also placed significant weight on the employer's efforts to protect the complainant once formal disciplinary proceedings commenced. The employee was suspended to allow investigations,

issued with strict instructions not to contact the complainant or discuss the matter with colleagues and warned against any retaliatory conduct.

Crucially, the complainant was not required to attend the disciplinary hearing. Instead, the employer relied on WhatsApp messages and video evidence that clearly demonstrated unwelcome and inappropriate conduct. The court expressly approved this approach, confirming that procedural fairness does not require complainants to be exposed to direct confrontation or re-traumatisation, particularly in harassment cases where the power imbalance and physiological impact are often significant.

At the same time, the court's reasoning must be understood within the broader framework of section 41 of the Employment Act, which guarantees an employee facing harassment allegations the right to be informed of the allegations, to be provided with the evidence relied upon and to be afforded a reasonable opportunity to respond. Kenyan courts have consistently clarified that this right does not translate into an absolute entitlement to courtroom-style cross-examination or face-to-face confrontation. In *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR, the Court of Appeal emphasised that fairness lies in disclosure of the case to be met and a meaningful opportunity to answer it, rather than adherence to rigid judicial procedures. Similarly, in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR, the court affirmed that internal disciplinary processes are administrative in nature and need only meet the threshold of fairness and reasonableness in the circumstances.

Importantly, confrontation or cross-examination does not invariably mean physical face-to-face engagement with the complainant. Employers may, and in harassment cases often should, adopt alternative mechanisms that allow the accused employee to challenge the allegations while still protecting the complainant from intimidation or re-traumatisation. Such mechanisms may include reliance on documentary and digital evidence, anonymised witness statements, written questions put to the complainant through HR or an independent panel, or the use of intermediaries to relay questions and responses. Courts have accepted these approaches where they strike a fair balance between competing rights. In *Pius Machafu Isindu v Lavington Security Guards Ltd* [2017] eKLR, the court reaffirmed that the essence of procedural fairness is the opportunity to respond to allegations and not the form the process takes.

This aspect of the decision is a strong reminder that employers must actively protect complainants while ensuring that accused employees are given a genuine and reasonable opportunity to be heard. Protecting complainants is therefore not evidence of bias or procedural weakness but a legal obligation that must be carefully calibrated through alternative and flexible procedures with the principles of procedural fairness.

Clear boundaries and non-retaliation measures matter

Another decisive factor was the employee's conduct during suspension. Despite clear written instructions not to contact the complainant, he proceeded to do so. The court treated this breach seriously and relied on it as further justification for termination.

This reinforces the importance of issuing clear, written non-contact and anti-retaliation directives once a complaint is raised. Such measures serve both to protect complainants and to preserve the integrity of investigations. Where breached, they may independently justify disciplinary action.

Mutual conduct is not a defence once it becomes unwelcome

The employee argued that the messages and comments were mutual, friendly and taken out of context. The court rejected this argument outright. It confirmed that once conduct is unwelcome and the employee is asked to stop, persistence whether through messages, emojis, compliments or comments made outside working hours constitutes harassment.

Employers should take comfort in the court's clear position that harassment is assessed by impact and context not by how the perpetrator characterises their intent.

Admissions and justification may aggravate and not mitigate misconduct

A further lesson from the decision is how the employer properly assessed the employee's response once confronted with the allegations.

Although the claimant admitted sending the messages and making the comments, he sought to justify them as compliments, appreciation or mutual banter rather than acknowledging their impropriety.

The court accepted the employer's position that these explanations did not mitigate the misconduct. On the contrary, the continued justification of admitted behaviour, particularly after the employee had been cautioned and asked to stop, demonstrated a lack of accountability and respect for workplace boundaries.

For employers, this underscores that disciplinary decisions may legitimately consider the misconduct and the employee's response to it. This ensures that the substantive test has been met.

Trainings and policies as protective tools

The court's reasoning further demonstrates that employers bear a positive obligation to ensure that employees are protected from all forms of harassment in the workplace. The most practical and effective means of doing so is through the adoption of clear workplace policies, coupled with regular training to reinforce acceptable standards of conduct. In particular, employers should ensure that they have a sexual harassment policy, as required under section 6(2) of the Employment Act.

Conclusion

This decision demonstrates that courts will continue to support employers who act responsibly, fairly and decisively. Early intervention is not punitive, but is rather preventative and protecting complainants is not bias, it is compliance. Where employers document concerns, enforce boundaries, rely on credible evidence and balance procedural fairness with employee safety, disciplinary decisions including termination are likely to withstand scrutiny.

Christine Mugenyu and Elizabeth Odongo

OUR TEAM

For more information about our Employment Law practice and services in South Africa, Kenya and Namibia, please contact:

Aadil Patel
Practice Head & Director:
Employment Law
Sector Head:
Government & State-Owned Entities
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com

Anli Bezuidenhout
Director:
Employment Law
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com

Frieda Kishi
Director | Namibia
T +264 83 373 0100
E frieda.kishi@cdhlegal.com

Fiona Leppan
Director:
Employment Law
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com

Imraan Mahomed
Director:
Employment Law
T +27 (0)11 562 1459
E imraan.mahomed@cdhlegal.com

Nadeem Mahomed
Director:
Employment Law
T +27 (0)11 562 1936
E nadeem.mahomed@cdhlegal.com

Yvonne Mkefa
Director:
Employment Law
T +27 (0)21 481 6315
E yvonne.mkefa@cdhlegal.com

Phetheni Nkuna
Director:
Employment Law
T +27 (0)11 562 1478
E phetheni.nkuna@cdhlegal.com

Desmond Odhiambo
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com

Jean Ewang
Counsel:
Employment Law
T +27 (0)11 562 1499
E jean.ewang@cdhlegal.com

Thabang Rapuleng
Counsel:
Employment Law
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com

JJ van der Walt
Counsel:
Employment Law
T +27 (0)11 562 1289
E jj.vanderwalt@cdhlegal.com

Ebrahim Patelia
Legal Consultant:
Employment Law
T +27 (0)11 562 1000
E ebrahim.patelia@cdhlegal.com

Daniel Kiragu
Senior Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E daniel.kiragu@cdhlegal.com

Lee Masuku
Senior Associate:
Employment Law
T +27 (0)11 562 1213
E lee.masuku@cdhlegal.com

Leila Moosa
Senior Associate:
Employment Law
T +27 (0)21 481 6318
E leila.moosa@cdhlegal.com

Christine Mugenyu
Senior Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E christine.mugenyu@cdhlegal.com

Kgodisho Phashe
Senior Associate:
Employment Law
T +27 (0)11 562 1086
E kgodisho.phashe@cdhlegal.com

Taryn York
Senior Associate:
Employment Law
T +27 (0)11 562 1732
E taryn.york@cdhlegal.com

Chantell De Gouveia
Associate:
Employment Law
T +27 (0)11 562 1343
E chantell.degouveia@cdhlegal.com

OUR TEAM

For more information about our Employment Law practice and services in South Africa, Kenya and Namibia, please contact:

Ra'ees Ebrahim
Associate:
Employment Law
T +27 (0)11 562 1735
E raees.ebrahim@cdhlegal.com

Lynsey Foot
Associate:
Employment Law
T +27 (0)11 562 1429
E lynsey.foot@cdhlegal.com

Shemonné Isaacs
Associate:
Employment Law
T +27 (0)11 562 1831
E shemonne.lsaacs@cdhlegal.com

Thobeka Kalipa
Associate:
Employment Law
T +27 (0)11 562 1238
E thobeka.kalipa@cdhlegal.com

Ayesha Karjieker
Associate:
Employment Law
T +27 (0)11 562 1568
E ayesha.karjieker@cdhlegal.com

Kevin Kipchirchir
Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E kevin.kipchirchir@cdhlegal.com

Biron Madisa
Associate:
Employment Law
T +27 (0)11 562 1031
E biron.madisa@cdhlegal.com

Thato Makoaba
Associate:
Employment Law
T +27 (0)11 562 1659
E thato.makoaba@cdhlegal.com

Thato Maruapula
Associate:
Employment Law
T +27 (0)11 562 1774
E thato.maruapula@cdhlegal.com

Sheilla Mokaya
Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E sheilla.mokaya@cdhlegal.com

Sashin Naidoo
Associate:
Employment Law
T +27 (0)11 562 1482
E sashin.naidoo@cdhlegal.com

Billy Oloo
Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E billy.oloo@cdhlegal.com

Melisa Wekesa
Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E melisa.wekesa@cdhlegal.com

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JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.
Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI
Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114
E cdhkenya@cdhlegal.com

ONGWEDIVA
Shop No A7, Oshana Regional Mall, Ongwediva, Namibia.
T +264 (0) 81 287 8330 E cdhnamibia@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

WINDHOEK
1st Floor Maerua Office Tower, Cnr Robert Mugabe Avenue and Jan Jonker Street, Windhoek 10005, Namibia.
PO Box 97115, Maerua Mall, Windhoek, Namibia, 10020
T +264 833 730 100 E cdhnamibia@cdhlegal.com