

Balancing Workplace Attraction: Legal Insights on Workplace Relationships, Conflict of Interest and Sexual Harassment

EMPLOYMENT
INSIGHTS



In contemporary workplaces, employees spend the majority of their time with colleagues. Studies show that an average adult spends about a third of their life at work, making it natural for some of these professional relationships to evolve into romantic ones. Such workplace romances can yield both positive outcomes, like increased morale and teamwork, and negative consequences, such as conflicts of interest or allegations of sexual harassment.

On the 20th of September 2024, the Employment and Labour Court at Nairobi delivered a landmark judgement in **Mark Ngugi Mwaura v G4S Kenya Limited Cause Number E 232 of 2021** which explored the blurry lines between workplace romance and sexual harassment. The court emphasized that employers should generally refrain from interfering in consensual romantic relationships at work, provided such relationships do not create potential conflicts of interest, particularly when they involve a supervisor and a subordinate.

In this article, we analyze the outcome of this decision, discuss the advantages and disadvantages of workplace romance, examine common workplace romance policies, and offer our perspective

on the best approaches for managing workplace relationships so as to enhance compliance with the law and work productivity/ safety.

The Decision

The Claimant was accused of using his position to influence the transfer of the complainant, a subordinate to a higher paying position based on a romantic relationship.

In this case, Mark Ngugi Mwaura, a former manager at G4S Kenya, was dismissed following allegations of an inappropriate relationship with a junior employee, Mukami, which allegedly resulted in the birth of a child. Mark denied the allegations and explained that the employee's transfer had been managed by her immediate supervisor, not him. He was forced by G4S to undergo a DNA test, at his own expense, which returned negative results. Despite this, he was still dismissed on allegations of sexual harassment. In response, G4S argued that the termination was justified based on valid reasons. They accused Mark of sexual harassment, claiming he coerced the junior employee into a relationship. The dismissal stemmed from allegations of sexual misconduct, which G4S claimed violated their employee handbook. The case concerns three key issues and highlights the following key matters:

i. Distinction between sexual harassment and a consensual relationship

ii. Whether employer interference in a romantic relationship violates an employee's right to privacy?

iii. The impact of workplace relationships on conflict of interest.

Distinction between sexual harassment and a consensual relationship

Regarding the first issue, the court emphasized the need to differentiate between a consensual sexual relationship and sexual harassment. **Justice James Rika** noted that *"Not every sexual relationship at the workplace, results in sexual harassment. 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."*

Similarly, the Industrial Court of Uganda in **Magoba Editor v Tusker Mattresses (U) Ltd LDR No. 243 of 2015** identified the key distinguishing factor between workplace affection and sexual harassment as the presence of "unwelcome" conduct.

In **Mark Ngugi Mwaura v G4S Kenya Limited**, the testimony of the Complainant, Mukami, confirmed that the sexual advances were not unwelcome, and the romantic relationship was based on mutual affection.

Whether employer interference in a romantic relationship violates an employee's right to privacy?

In **Mark Ngugi Mwaura v G4S Kenya Limited**, Justice Rika cautioned employers against interfering in workplace romances, noting that *"such interference may amount to invasion of privacy rights of their Employees."* He held that employment sexual harassment policies that take a no-nonsense approach towards policing workplace relationships is unconstitutional as they violate an employee's right to privacy, dignity, and could amount to cruel, inhumane, or degrading treatment by preventing individuals from "following their hearts."

To support this conclusion, Rika J relied on US case law. In **Lawrence v. Texas** [539 U.S. 558 [2003]], the US Supreme Court ruled that held that the right of intimate association, includes the right of consenting adults, to engage in private sexual activity. The law did not justify its intrusion into personal and private lives of individuals.

The above precedent was followed by the Court of Appeal of California in **Barbee v. Household Automotive Finance Corporation**, [113 Cal. App. 4th 525 [2003]] where it was held that an employee may have a legally protected right, to pursue an intimate relationship at work.

In Uganda, **Article 27** of the 1995 Constitution guarantees the right to privacy, shielding individuals from unlawful searches and interference with communications. In contrast, the Kenyan Constitution, under **Article 31**, extends the right to privacy to protect information related to an individual's family or private affairs from being unnecessarily required or disclosed by an employer. This suggests that Uganda's privacy framework may not explicitly address the disclosure of workplace relationships, potentially leaving employees more vulnerable when such disclosure is deemed necessary to safeguard the employer's legitimate business interests.

Regarding the right to dignity, **Article 24 of the Ugandan Constitution** prohibits any form of torture or cruel, inhumane, or degrading treatment. The wording of Article 24 of the Ugandan Constitution is similar to **Article 29 (f)** of the Kenyan Constitution. Further freedom from torture, cruel or inhumane treatment is classified

as a non-derogable right and freedoms under **Article 44 (a)** of the Constitution of Uganda.

According to Rika J the right to dignity in romantic relationships is premised on freedom of humans to choose their place in the chain of beings and “[n]othing is more degrading than for a third party, an Employer, to intermeddle in a love relationship between two consenting adult Employees.”

Workplace relationships and conflict of interest

Rika J in Mark Ngugi Mwaura v G4S Kenya Limited highlighted that an employer may have legitimate concerns about workplace romance which could either result in sexual harassment claims a situation of conflict of interest. The judge was of the opinion that *“romantic and/ or sexual relationship between individuals working for the same Employer, in a supervisor–supervisee relationship, constitutes conflict of interest.”* In courts opinion, rather than for a claim of sexual harassment, the Claimant should have been called before a disciplinary committee on charges of conflict of interest rather than claims of sexual harassment. Examples of scenario that could lead to an inference of conflict of interest:

- i. Preferential treatment: Where a supervisor engages in a romantic relationship with a subordinate, it could lead to preferential treatment for the subordinate.
- ii. Coercion: Subordinates may engage in romantic relationships with supervisors to secure promotions or job security.
- iii. Distortion of professional boundaries: Romantic relationships make it difficult to maintain appropriate levels of professionalism causing resentment from other colleagues.

As highlighted by the Industrial Court of Uganda in **Magoba Editor v Tusker Mattresses (U) Ltd LDR No. 243 of 2015**, a critical element of sexual harassment is unwelcome conduct. If the conduct is not unwelcome, court may not support a claim for sexual harassment. However, if the relationship results in preferential treatment for one party, this could lead to a significant conflict of interest, impacting the employer’s business interests and workplace environment.

Workplace Romance: The good, the bad and ugly

The Good

i. Boost in morale and productivity

Employees in happy relationships may experience increased job satisfaction which may lead to an overall positive attitude towards work. This can result in lower turnover rates, as satisfied employees are less likely to pursue other job opportunities, along with stronger connections among colleagues which ultimately contributes to the growth of the employer's business. Rika J in **Mark Ngugi Mwaura v G4S Kenya Limited** used an example of Bill and Melinda Gates who met at the Microsoft workplace where Bill was the CEO and Melinda an employee.

The Bad

i. Conflict of Interest

When a workplace romance involves employees at different hierarchical levels, such as a supervisor and a subordinate, it can create a potential conflict of interest. This scenario may lead to perceptions of favoritism or bias in promotions, performance evaluations, or work assignments. Colleagues may feel that one partner is receiving an unfair advantage, which can breed resentment and discontent

within the team. Rika J in **Mark Ngugi Mwaura v G4S Kenya Limited** highlighted that workplace relationships may poison the work environment and affect productivity for the above reasons. The perceived bias has the potential to demoralize other colleagues may feel that the subordinate is consistently assigned "better work" or is less burdened by responsibilities compared to their peers, leading to feelings of frustration and unfairness within the workplace.

ii. Professional Boundaries

In a workplace environment where romantic relationships are tolerated, the boundary between professional and private lives are blurred resulting in inappropriate behavior and unnecessary distractions. Particularly workplace relationships during the conflict or break-up phase may impact the productivity of the couple and work colleagues around them.

Worse yet, a jilted lover may resort to vindictive behavior, attempting to tarnish the reputation of their former partner. Such actions not only create a toxic environment but also distract colleagues who may feel compelled to take sides or engage in the drama. While workplace romances may seem harmless or even beneficial at first, the potential for blurred professional boundaries can lead to significant challenges, including inappropriate

behavior, distractions, and deteriorating relationships among colleagues. The case of **Mark Ngugi Mwaura v G4S Kenya Limited** illustrates these dynamics, highlighting the importance of maintaining clear professional boundaries in the workplace.

iii. Confidentiality Risks

Workplace couples may unintentionally or intentionally share sensitive or confidential information related to the company. The situation can turn from bad to ugly if the employees in love gang up against an employer and use the confidential information as leverage for blackmail, favoritism, or to harm the company's reputation.

The Ugly

i. Workplace sexual harassment

If the hitherto consensual relationship between employees becomes "unwelcome" for one party, the other party's sexual advances can escalate into accusations of sexual harassment, particularly when there is a power imbalance between the two parties. Post-break up tensions at the workplace can easily create a hostile atmosphere, leading to passive-aggressive behavior, gossip, or overt workplace confrontations that affect the entire team's morale. Rika J in **Mark Ngugi Mwaura v G4S Kenya Limited** stated that *"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."

This is particularly demonstrated in the case of **Mark Ngugi Mwaura Vs G4S Kenya Limited**, which turned from being a consensual relationship to an accusation by one of the parties of sexual harassment. In the bigger scheme of things, such creates potential challenges to an employer obliged to protect and investigate allegations of sexual allegations as to effectively drawing the line between private relationship challenges/ fights and creating a safe environment free from sexual harassment, without getting into the undesirable position of becoming a romantic relationship arbiter.

ii. Damage to reputation

Work relationships including those that end poorly can affect the professional reputation of the parties involved or could damage the company's external image if the breakup leads to legal action or is leaked to the media.

iii. Disruption in workplace dynamics

Productivity at work can take a hit if workmates are forced to pick sides when the relationship between colleagues ends on bad terms. This can lead to breakdown in communication,

workplace synergy and an overall decline in productivity.

iv. Litigation

Workplace romance has the potential to evolve into sexual harassment especially if it leads to retaliation. This can open the door for potential lawsuits, financial damages and a tarnished reputation.

Is it Time to re-think your employment/sexual harassment policy on consensual romantic relationships?

Non-Fraternization Policy

Many employers outrightly prohibit workplace romantic relationships, and this stance is reflected in their employment and sexual harassment policies/manuals. A strict non-fraternization policy goes beyond prohibiting relationships between supervisors and subordinates to include co-workers who are not in supervisor-subordinate roles.

The definition of sexual harassment under **Section 7 (1) of the Employment Act, Cap 226, and Regulation 2 of the Employment (Sexual Harassment) Regulations, 2012, Statutory Instrument 15 of 2012** requires that for an action to amount to sexual harassment, the conduct in question must be firstly be unwelcome and secondly is based on a power dynamic

involving a supervisor-subordinate to encompasses either a quid-pro-quo relationship or results into retaliatory conduct from the supervisor.

There is no doubt that a non-fraternization policy at work has advantages:

i. It creates clear professional boundaries that altogether mitigate the possibility sexual relations at work that lead to favoritism, conflict of interest and perception of bias at work.

ii. By implementing a blanket ban on workplace relationships, allegations and complaints regarding sexual harassment are reduced. This encourages employees to prioritize work related tasks, maintain professionalism and decorum at work.

However, the disadvantages include:

i. A blanket prohibition on workplace relationships is difficult to enforce as relationships are a private affair. Enforcement and disclosure of relationships may feel intrusive and constant monitoring of relationships between colleagues is time consuming.

ii. The rigid work culture would potentially discourage social interactions between employees. Employees will constantly feel like they are walking on egg shells as every interaction with the opposite gender could be interpreted as a sexual

advance by the offended employee or by management.

In light of the decision in **Mark Ngugi Mwaura v G4S Kenya Limited** and the definition of sexual harassment provided for under the Employment Act - which emphasizes the existence of unwelcome conduct and a power structure - a blanket prohibition on workplace relationships is likely to be considered as unlawful and excessive. Employers are therefore likely to face legal risk in situations where an employee is dismissed or terminated from work solely for engaging in a consensual romantic relationship with a co-worker especially where there is no existence of a supervisor-subordinate relationship.

Laissez-Faire Policy

Under a laissez-faire policy towards workplace relationships, employees are allowed to engage in workplace relationships without any interference from the employer. Employees are trusted to manage their relationships in a professional manner without impeding into the employee's private life.

A laissez-faire policy has the following advantages:

i. It allows the employee greater freedom and autonomy to form workplace relationships without violating the company human resource policy.

This creates a relaxed environment for the employees leading to greater job satisfaction as employees feel at ease when creating social bonds.

ii. A lax work environment creates a greater level of trust and respect between the employees and the employers, encouraging them to handle their matters professionally.

Disadvantages include:

i. Without workplace regulations on romantic relationships, there is a potential for favoritism, conflict of interest, or allegations of unfair treatment, especially in cases that involve power dynamics. Additionally, without clear guidelines on workplace relationships, advances made by one employee towards another could give rise to situations of sexual harassment.

ii. A laissez-faire policy towards workplace relationships could negatively affect workplace productivity as workplace romance could cause distractions. Furthermore, if the relationship goes sour there is a potential for conflict.

The dangers of a laissez-faire policy could expose the employer to legal issues related to the statutory requirements under the **Employment (Sexual Harassment) Regulations, 2012, Statutory Instrument 15 of 2012** which mandates employers with more than 25 employees to have a sexual

harassment policy in place. Additionally, turning a blind eye to supervisor-subordinate relationships have a potential to open the door to sexual harassment claims and may poison the work environment through perceived bias.

Hybrid Policy

A hybrid policy takes a balanced approach, allowing workplace relationships while placing restrictions in certain situations, such as banning supervisor-subordinate relationships, prohibiting relationships between employees in the same department, or requiring disclosure of relationships between co-workers.

A hybrid policy has the following advantages:

- i. It promotes a balanced approach where relationships are tolerated in certain pre-defined circumstances while placing reasonable limits allowed for within the law to avoid potential conflict of interest or perceived bias at work.
- ii. Employees are given more flexibility in managing workplace allegations.

Looking forward: What is the best approach?

In **Mark Ngugi Mwaura v G4S Kenya Limited**, Rika J pronounced that “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.” In light of the sexual harassment laws governing the workplace and the persuasive jurisprudence from the labor courts of Kenya, we are persuaded by Rika J’s opinion that it is not the role of the employer to regulate consensual romantic relationships within the work environment, provided that the relationship does not give rise to a conflict of interest or sexual harassment.

Given the above stance, here are a few strategies and workplace policies companies can adopt to manage workplace relationships effectively and to mitigate potential risks that could arise:

- i. Create a workplace romance policy that completely discourages relationships between direct supervisors and subordinates. At the same time this policy could allow relationships between co-workers or a supervisor-subordinate relationship as long as the parties are employed in different departments or offices.

ii. Encourage disclosure of relationships to HR especially if the relationship has the potential to involve a supervisor-subordinate dynamic even though the parties work in different departments. This can help mitigate potential conflicts of interest, transparency and helps address potential sexual harassment claims before they arise.

iii. Implement continuous workplace sexual harassment training to help employees understand acceptable personal boundaries at work and to ensure that romantic advances do not lead to claims of sexual harassment.

iv. While companies are free to adopt the above measure to mitigate potential risks that may arise from workplace relationships, companies should respect the employees' constitutional rights which include the right to privacy, dignity and freedom from cruelty.

Conclusion

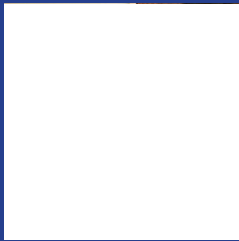
The interplay between workplace relationships and sexual harassment policies presents a complex challenge for employers and employees alike. It is important for company to respect employees engaging in consensual relationships while addressing the potential risks associated with such scenarios.

Employers should adopt workplace policies that balance the need for professional boundaries and at the same time respect the employees right to privacy and personal choices. A well-crafted policy can potentially mitigate the risks of sexual harassment and conflicts of interest while maintaining a positive work environment that encourages healthy interpersonal relationships. In turn this would allow the employer to protect their business interests and ensure the well-being of their employees.

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Caveat

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