

2026 May | Employment

EMPLOYER LIABILITY FOR SEXUAL HARASSMENT

Kinda v Aiducation International (K) & another [2026] KECA 350 (KLR)

1. Background

1.1. The Appellant was employed as a Communications Officer and Alumni Affairs Coordinator by the 1st Respondent, a non-governmental organization based in Watamu, Kilifi County. At all material times, the 2nd Respondent served as the Chief Executive Officer (CEO) of the 1st Respondent.

1.2. In November 2016, the 2nd Respondent summoned her to his office and told her he had to "let her go". He explained that the Human Resource Manager, who was also his wife, had accused him of having an affair with the Appellant and had instructed him to get rid of her.

1.3. On 28th January 2017 the Appellant received a WhatsApp text message from the 2nd Respondent injected with sexual innuendo, stating:

"I have not tasted but every day I am told that we are together. Please give me so that they can speak the truth"

1.4. On the same day, the 2nd Respondent convened an impromptu meeting during which he instructed the Appellant not to set foot at the Aiducation Offices in Watamu,

vehemently stating that, "Your life is in danger" followed by, "Mapenzi plans to kill you." He proposed that she either continue working for the 1st Respondent from a remotely, or work for the 1st Respondent as a consultant or resign from the 1st Respondent to establish a business.

1.5. On 15th April 2017, the 2nd Respondent informed the Appellant that he wished to pursue a sexual relationship with her, adding that *"the only way I am backing off is if you let me know you are in a stable relationship."*

1.6. The Appellant further stated that

1.6.1. at no time did she tolerate, condone or encourage the 2nd Respondent's sexual advances;

1.6.2. She made it clear that she was not interested in a sexual relationship or any form of an affair with the 2nd Respondent.

1.6.3. The 2nd Respondent abused his position as Chief Executive Officer of the 1st Respondent and sexually harassed and intimidated her contrary to provisions of section 6 (1) (a) (b) and (d) of the Employment Act.

1.6.4. On 29th June 2017, she was unfairly dismissed from employment without adherence to substantive and procedural requirements of Sections 41, 43, and 45 of the Employment Act, 2007

1.6.5. Her dismissal was occasioned by her refusal to submit to the 2nd Respondent's sexual advances and his improper and unprofessional conduct, which subjected her to psychological torture, ridicule and tarnished her reputation and good standing.

1.7. The Respondents denied the claim and stated that

1.7.1. The 1st Respondent is a family-run organisation, with executive board members comprising the 2nd Respondent's immediate family, and most staff also being family members, owing to its early stage of administrative development;

1.7.2. the Appellant, who is the 2nd Respondent's sister-in-law, was duly employed by the organization;

1.7.3. the complaints had been raised by the Human Resource Manager (the 2nd Respondent's wife) regarding an alleged intimate relationship between the Appellant and the 2nd Respondent; and

1.7.4. The WhatsApp messages produced by the Appellant were selective and excluded her responses, thereby distorting the context of their communication.

1.8. The Respondents further denied that the 2nd Respondent used his position as CEO to sexually harass or intimidate the Appellant, whether through promises of preferential treatment, threats of adverse consequences, or otherwise interfering with her employment.

2. Trial Court:

2.1. Upon hearing the parties, the trial court found that on 29 June 2017, the parties mutually agreed to terminate the employment relationship. The court held that the Appellant was to be paid 12 months' salary, amounting to Kshs. 696,000, pursuant to this agreement. It concluded that the parties were bound by this oral agreement, and accordingly, claims for unfair or unlawful dismissal, notice pay, or additional compensation did not arise.

2.2. On the issue of sexual harassment, the trial court held that the allegations were an afterthought after the Respondents were reluctant to pay the 12 months' salaries agreed upon on 29th June 2017 and upon her terms of payment.

2.3. The court further held that the WhatsApp messages did not satisfy the legal threshold for sexual harassment under the Employment Act as they neither promised employment-related benefits nor threatened adverse employment consequences. It characterised the messages as private communications arising from a family dispute rather than conduct amounting to workplace sexual harassment.

2.4. Aggrieved, the Appellant lodged an appeal to the Court of Appeal, challenging the dismissal of her sexual harassment claim on the grounds that:

- a) The trial court erred in law by applying wrong and failing to distinguish between *quid pro quo* sexual harassment under Section 6 (1) (a) of the Employment Act and hostile environment test under Sections 6 (1) (b), (c) and (d) of the same Act;
- b) the trial court failed to consider that the 1st Respondent did not have a sexual harassment policy or complaint mechanism contrary to Sections 6 (2), (3) and (4) of the Employment Act which rendered the 1st Respondent strictly liable for the sexual harassment that was perpetrated by its Chief Executive Officer, the 2nd Respondent
- c) the trial court erred
 - in holding that the repeated use of words of a sexual nature by the 2nd Respondent to the Appellants were justified;
 - in misapprehending the law and facts in concluding that the sexual harassment claim was an afterthought, while disregarding the Appellant's vulnerability given the 2nd Respondent's position of authority as CEO and her direct supervisor;
 - in ignoring the Appellant's evidence that the comments of a sexual nature were unwanted, unwelcome and offensive;

- in placing undue reliance on irrelevant considerations, including the familial relationship between the parties, the use of WhatsApp rather than formal communication channels, and allegations of an affair; and
- in relying on the 2nd Respondent's allegations of missing communication without proof.

3. Court of Appeal's Determination

The Court of Appeal evaluated the claim for sexual harassment and held as follows:

- - Whether the trial court misdirected itself on the distinction between quid pro quo and hostile environment tests in sexual harassment:*
- 3.1. There are various global and regional instruments which set the context for sexual harassment claims in Kenya. There is also relevant local legislation.
 - 3.1.1. The Regional Instruments include the Universal Declaration of Human Rights (1948), the United Nations General Assembly Declaration on the Elimination of Violence Against Women (20th December 1993), the Convention of Elimination of All Forms of Discrimination Against Women (CEDAW) (*Article 11*), the International Convention on Economic and Social Rights (*Article 7*) and the African Charter on Human and Peoples' Rights (*Article 5*) and the African Charter on Human and Peoples'

Rights on the Rights of Women in Africa (*Article 1(G)*)

3.1.2. The ILO's Declaration on Fundamental Principles and Rights defines sexual harassment as a sex-based behaviour that is unwelcome and offensive to its recipient. For sexual Harassment to exist, two conditions must be present:

- Quid Pro Quo, when a job benefit - such as a pay rise, a promotion, or even continued employment - is made conditional on the victim acceding to demands to engage in some form of sexual behaviour; or
- Hostile working environment in which the conduct creates conditions that are intimidating or humiliating for the victim.

3.1.3. ILO Convention 190 on Violence and Harassment Convention, 2019 sexual harassment is defined under Article 1 to include the following:

- the term "violence and harassment" in the world of work refers to a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment;

- the term "gender-based violence and harassment" means violence and harassment directed at persons because of their sex or gender, or affecting persons of a particular sex or gender disproportionately, and includes sexual harassment.

3.1.4. Kenya has signed and ratified international treaties relating to gender based violence and sexual harassment. Articles 2 (5) and 2(6) of the Constitution of Kenya, 2010 allows for the application of international and regional laws in Kenya.

3.1.5. Article 27 of the Constitution is concerned with Equality and Freedom from Discrimination. It guarantees equal protection and benefit of the law, ensuring everyone can enjoy rights without discrimination, which sexual harassment violates. Article 28 makes provision for Human Dignity, of which sexual harassment inherently infringes upon.

3.1.6. Under the Employment Act:

- Section 5(3)(a) of the prohibits discrimination on grounds of "...race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status or HIV status."

- Section 6 (1) of the Employment Act sets out the circumstances that give rise to sexual harassment. It specifies that:

“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.”*

3.1.7. Section 2 of the Sexual Offences Act of Kenya provides for the

offence of sexual harassment as an act which occurs where;

“Any person, who being in a position of authority, or holding a public office, who persistently makes any sexual advances or requests which he or she knows, or has reasonable grounds to know, are unwelcome, is guilty of the offence of sexual harassment and shall be liable to imprisonment for a term of not less than three years or to a fine of not less than one hundred thousand shillings or to both.”

3.2. Section 6 (1) (a) of the Employment Act provides for ‘quid pro quo’ sexual harassment. It arises when the employer of that employee directly or indirectly requests that employee for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express promise of preferential treatment in employment or threat of detrimental treatment in employment; or threat about the present or future employment status of the employee.

3.3. Quid pro quo harassment can occur in two situations. First, it can occur when tangible employment benefits are withheld from the victim until she succumbs to the sexual demands of the employer or supervisor. Second, it occurs when an employer or supervisor retaliates against a victim who has refused to submit to sexual advances by withholding tangible employment benefits, because quid pro quo harassment effects a victim's “compensation, terms, conditions or privileges of the employee”. (See

Henson vs City of Dundee, 682 F.2d 897 (11th Cir. 1982).

- 3.4. Sections 6(1), (b) to (d) of the Employment Act make reference to the existence of 'hostile work environment' sexual harassment where the employer of that employee uses language whether written or spoken of a sexual nature or uses visual material of a sexual nature; or 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.
- 3.5. A "hostile environment" exists when an employee is employed within a work place that is sexually offensive. Such harassment can occur in a variety of forms. In order to be actionable, the harassment "must be sufficiently severe or pervasive as 'to alter the conditions of [the victim's] employment and create an abusive working environment. Such a determination will apparently be made on a case-by-case basis by analyzing the facts and circumstances surrounding each claim of "hostile environment" and whether it amounts to sexual harassment.
- 3.6. The WhatsApp messages from the 2nd Respondent were of a sexual nature, and therefore, section 6 1 (b) and (d) of the Employment Act which addresses the existence of sexual harassment arising from written or spoken language
- 3.7. The Appellant stated that on various dates, she was subjected to sexual harassment through text messages from the 2nd Respondent who was her superior. The 2nd Respondent did not deny sending the messages. An interrogation of the text messages shows that they were indeed sexual in nature, perverse and demeaning. The Appellant's responses also demonstrated that they were unwelcome and offensive.
- 3.8. The trial court misdirected itself by strictly applying the provisions of the law that related to Section 6 (1) (a) with respect to 'quid pro quo' sexual harassment and ignored the provisions relating to a 'hostile work environment' sexual harassment under Section 6 (1) (b) (c) and (d). If the court had analysed the emails and WhatsApp messages within the context of Section 6 (1) (b) (c) and (d), it would have found that the sexual messages created a hostile work environment within the 1st Respondent where condition that could foment sexual harassment
- Whether an employer/employee relationship existed between the Appellant and the Respondents to warrant sexual harassment in a working environment:*
- 3.9. An employer/employee relationship existed between the Appellant and the 1st Respondent and the 1st Respondent and the 2nd Respondent. The 2nd Respondent was her supervisor.
- 3.10. In view of the existence of an employment relationship, the elements necessary to prove sexual harassment owing to a hostile work environment, are to be found in

Section 6 (1) (b), (c) and (d). In this regard, Subsection (b) specifies that the use of language whether written or spoken should be of a sexual nature. Subsection (c) refers to visual material of a sexual nature, while Subsection (d) provides for where the physical behaviour of a sexual nature, whether directly or indirectly, is demonstrated thereby subjecting the employee to behaviour that is unwelcome or offensive and which by its nature has a detrimental effect on the employee's employment, job performance, or job satisfaction.

- 3.11. What is essential in a case of sexual harassment, is that the words or conduct complained of must be sexual in nature, unwelcome and detrimental to the victim. The test for whether the words or conduct are unwelcome and offensive, is subjective. This means that it is for the claimant, and not the court or tribunal, to determine what constitutes unwanted or undesirable conduct and to demonstrate that they made it clear that the words or conduct was unacceptable or offensive.
- 3.12. Under Section 6 (1) (b) and (d), was that, first, both the Appellant and the 2nd Respondent were employees of the 1st Respondent. The 2nd Respondent was the Appellant's supervisor in the work place. The messages were overtly sexual in nature, offensive and unwelcome as to create a hostile work environment for the Appellant, ultimately leading to her exit from employment. It mattered not that some or all of the individuals were related, and it mattered not that the messages were transmitted through WhatsApp or via emails. The fact of the matter is

that the messages remained of a sexual nature, they were communicated within the workplace between two employees and the Appellant found them to be offensive.

- 3.13. the transmission of any offensive and unwelcome conduct or communication of a sexual nature, including pornographic material, sexually explicit images, links, or messages through any electronic medium such as email, short text messages (SMS), WhatsApp, inter alia, to a co-employee constitutes sexual harassment.
- 3.14. it is the duty of the employer to protect all employees in the work place. Where it relates to sexual harassment, the employer has the duty to have a workplace policy, to train the employees on enforcement and to implement such policy.
- 3.15. A victim of sexual harassment cannot be blamed for not reporting the incident where proper reporting channels do not exist.
- 3.16. The 1st Respondent was liable for sexual harassment for failing to ensure a safe workplace environment
- 3.17. The Court set aside the trial court's decision dismissing the sexual harassment claim and awarded the Appellant general damages of KShs. 1,000,000 for sexual harassment, payable jointly and severally by the 1st and 2nd Respondents, in addition to terminal dues of KShs. 531,000 payable by the 1st Respondent and costs of the suit in both the ELRC and the appeal.

Key Contacts



Anne Muema
Advocate / Managing Partner

Email: amutheu@mutieadvocates.com



Maureen Kubai
Associate

Email: mkubai@mutieadvocates.com

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Website: www.mutie-advocate.com

Phone: +254 768 042 180

E-mail: info@mutieadvocates.com

Address: Assi Centre, School Lane, Westlands

P O Box 211-00621, Nairobi

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