



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL CASE NO. 443 OF 2003**

**B W K .....PLAINTIFF**

**VERSUS**

**E K.....1<sup>ST</sup>DEFENDANT**

**THE CONSERVATION CORPORATION OF KENYA LIMITED**

**T/A [PARTICULARS WITHHELD].....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

**Plaintiff's Case**

1. The plaintiff, **B W K**, was employed by the 2<sup>nd</sup> Defendant (hereinafter referred to as “the Hotel”) as a [particulars withheld] Officer in the said Hotel while the 1<sup>st</sup> Defendant was employed by the same Hotel as the [particulars withheld] Manager, hence according to the plaintiff, was in authority over her.
2. It was pleaded by the plaintiff that the 1<sup>st</sup> Defendant repeatedly assaulted, battered, sexually assaulted and oppressed her on diverse dates between April and July, 2002 despite the plaintiff informing the 1<sup>st</sup> Defendant that the latter’s conduct was unwelcome. The plaintiff went ahead to set out the particulars of the said assault, battery and sexual harassment and pleaded that the said acts were odious, perverse and outrageous which acts the plaintiff termed as acts of sexual perversity unwelcome to the plaintiff, but also wilful, wanton, reckless, intentional, persistent and continuous in as much as they were unlawful and illegal.
3. It was the plaintiff’s case that the said acts amounted to discrimination on the basis of sex.
4. It was the plaintiff’s case that the Hotel was liable for the acts of the 1<sup>st</sup> Defendant as they took place in the course of the 1<sup>st</sup> Defendant’s employment and/or in his capacity as the plaintiff’s manager. The Hotel, according to the plaintiff, as her employer was under a duty and/or obligation to provide an enabling work environment for the performance of her duties including the exclusion of a situation whereby the plaintiff would be assaulted, battered, harassed, intimidated or discriminated against, which the Hotel failed to do. In particular the Hotel failed to establish a policy against sexual harassment and despite having reported the complained acts to the Hotel’s officers, the Hotel failed to investigate and deal with the said complaints but instead opted to terminate the plaintiff’s services on 23<sup>rd</sup> August, 2002.

5. The plaintiff pleaded that as a result of the foregoing, she suffered acute embarrassment, mental torture and anguish, fear, horror, shame, loss and damage.

6. In her evidence, the plaintiff who did not call any witness apart from her testimony testified that she was working as an Executive in Dubai. Before that, the 1<sup>st</sup> Defendant was her former boss as the [particulars withheld] Manager at the [particulars withheld]. According to the plaintiff, she was employed on 1<sup>st</sup> August, 1991 and her job entailed allocation of rooms, complaints, honeymoon packages and assisting at the lobby. Initially she was a trainee but was later appointed as Guest Relations Officer. As the [particulars withheld] Manager, the 1<sup>st</sup> Defendant was her immediate boss though her supervisor was one N.

7. The plaintiff testified that she was residing around the Roundabout Area in [particulars withheld] Estate about 400 to half kilometre from the 1<sup>st</sup> Defendant and used to get a lift from the 1<sup>st</sup> Defendant. The plaintiff explained that the transport provided by the Hotel used to go through Muranga Road, Mathare North, [particulars withheld] Estate and they used to leave at 11.00 pm. By the time one arrived home it would be in the morning. Accordingly, it was a welcome favour to take a ride in the 1<sup>st</sup> Defendant's vehicle. This accommodation went on for about a year according to the plaintiff.

8. The plaintiff testified that sometime in the year 2002, the 1<sup>st</sup> Defendant passed by her residence and informed her that he had gone to drop his children to school which was about 200 metres from the plaintiff's residence. According to the plaintiff she was surprised at the 1<sup>st</sup> Defendant's appearance because the 1<sup>st</sup> Defendant used to drop her outside. On that day, the plaintiff was working night shift. When the plaintiff opened the door, the 1<sup>st</sup> Defendant walked across the room and informed the plaintiff, to the plaintiff's shock, that he had always wanted to have sex with the plaintiff. The 1<sup>st</sup> Defendant then got hold of the plaintiff and tried to undress her. The plaintiff was emphatic that she did not invite the 1<sup>st</sup> Defendant to her house and in particular denied that she had invited the 1<sup>st</sup> Defendant to her house to show him a letter as was alleged by the 1<sup>st</sup> Defendant.

9. According to the plaintiff although she tried to push the 1<sup>st</sup> Defendant away, the 1<sup>st</sup> Defendant overpowered her at which point the plaintiff inquired from the 1<sup>st</sup> Defendant whether he had a condom and upon receiving a negative answer suggested that the 1<sup>st</sup> Defendant should go and buy one. The plaintiff averred that it was when the 1<sup>st</sup> Defendant left to do so that she locked the door and refused to open the same when the 1<sup>st</sup> Defendant returned.

10. After that day, the plaintiff testified that the 1<sup>st</sup> Defendant would call her on phone during and after office working hours and inform her that he could not wait to have sex with her. When the plaintiff stopped picking his calls, the 1<sup>st</sup> Defendant started concealing his number and informed her that he wanted to see her. Apart from that, for about a month, the 1<sup>st</sup> Defendant would go to her house and knock on the door but the plaintiff would decline open for him.

11. The plaintiff testified that although initially she was scared of the repercussions of reporting these incidents, she eventually, after three months, reported the matter to the Manager. Before this she had communicated the issue to a lady called S A but only managed to reduce the same into writing through a grievous form to the manager.

12. The plaintiff testified that she was so tortured and traumatised and sought some time off as her work was affected by the incident. She however denied that she was rude to the customers. Despite this, the 1<sup>st</sup> Defendant filed a disciplinary complaint against her at which hearing were the Maintenance Manager, the Union Representative and the 1<sup>st</sup> Defendant. The plaintiff however lamented that she was not accorded a fair hearing and the Defendants decided to terminate her services on the ground that she was rude vide a letter of termination received by her on 23<sup>rd</sup> August, 2002. The plaintiff testified that the termination was unfair as she had previously received compliments from customers instead of complaints.

13. The plaintiff testified that as a result she suffered physically and emotionally and prayed for the reliefs sought in the plaint which were as follows:

- a) General damages for assault and battery
- b) General damages for sexual harassment
- c) Exemplary damages
- d) Costs of the suit
- e) Interest on (a) and (b) above
- f) Any further or alternative relief this Honourable Court may deem fit to grant.

14. In cross-examination by **Mr Tiego**, learned counsel for the 1<sup>st</sup> Defendant, the plaintiff stated that according to the employment agreement, the employment would be governed by the agreement between the employer and the union of which the plaintiff was a member. She admitted that the union was their representative in disputes with the employer though she never referred her complaints to the union. She however reiterated that she mentioned the incident to the Accounts Manager, **S A**, the Resident Manager, **A B** between April and July, 2002 and no one else.

15. The plaintiff reaffirmed that prior to this she and her co-employees used to request for and get lifts from the 1<sup>st</sup> Defendant. The plaintiff stated that she used to stay in [particulars withheld] Estate and although she was not aware of where the 1<sup>st</sup> Defendant was residing, she had a general idea that where he used to drop her was on his way to his residence. He however mentioned to the plaintiff the school where his children used to go to.

16. According to the plaintiff she was staying in a flat on the 4<sup>th</sup> floor but none of her co-employees were staying in the same plot. The plaintiff testified that although she could not remember the exact date of the incident she recalled that it was a Tuesday at around 9.00 in the morning. The 1<sup>st</sup> Defendant, she stated took about 30 minutes. The plaintiff testified that the compound had its own gate but they had no watchman, though the place was secure. Whereas there was a caretaker, he was not residing within the compound. However, she could not tell how the 1<sup>st</sup> Defendant knew about her flat though there were workmates who used to visit her. She disclosed that the house was two-bedroomed house and that initially she was residing with her brother. However at the time of the incident she was staying alone.

17. The plaintiff stated that she only use to know her neighbours by appearance as most of time they were never there and she never had any contact with them. She was however unaware whether at the time of the incident any of the neighbours were around. The plaintiff testified that she moved into the flat in 2001 and by the time of the incident she had been occupying the said house for close to a year. It was her evidence that everything was fine until the 1<sup>st</sup> Defendant started making advances towards her. To the plaintiff had the 1<sup>st</sup> Defendant been a stranger to him, he would have screamed but he was someone he knew. She however felt cold and scared though she did not scream.

18. The plaintiff stated that she pretended that she had acceded to his advances and requested him that they ought to use condoms. The plaintiff stated that though she narrated this incident to her sisters they were still very young. Though the caretaker would come to the compound any time, she did not inform him about this incident. She however reiterated that the 1<sup>st</sup> Defendant used to threaten her though when he was leaving to go and buy the condoms and on his return he did not threaten her. The plaintiff however did not report this incident to the union the following day. Though the 1<sup>st</sup> Defendant went back to her residence several times, the plaintiff could not tell whether anyone else saw him since she would be tired and would prefer to sleep.

19. Three months after the incident, the 1<sup>st</sup> Defendant called the plaintiff to the training room and though they were alone, there was nothing unusual since the 1<sup>st</sup> Defendant used to call the staff there to discuss issues
20. According to the plaintiff the Hotel had no sexual harassment policy as it was not contained in the house rules and there was nothing to direct employees on matters to do with sexual harassment. The plaintiff however only became aware of the grievance form when she talked to **S**, who however requested the plaintiff to give her time since the plaintiff would be fired. Because she was scared, the plaintiff only lodged her complaint 4 months after incident after she was instructed by **Mr B** to do so.
21. Referred to the notice summoning her to attend the disciplinary meeting, the plaintiff while admitting receiving the same, said she did not sign the same. At the disciplinary meeting, the plaintiff testified that present were 2 people from the Works Committee who were her workmates. However, there was no union representative and the proceedings were chaired by **Mr W A**. The others present were the plaintiff and the 1<sup>st</sup> Defendant. She admitted that the charges levelled against her were the same ones upon which the findings were made.
22. The plaintiff stated that although she appealed against the decision, no hearing was conducted thereon as the appeal did not take off. When she started giving her version she was stopped and the charges were confirmed. The plaintiff however disclosed that she filed the case 8 months after the determination of the appeal. Asked whether there was any communication between the Hotel and the plaintiff, the plaintiff admitted that there was and that the Hotel tried sending one of the workers to her.
23. According to the plaintiff, though the 1<sup>st</sup> Defendant never physically assaulted her after the first incident, he nevertheless assaulted her emotionally in the office.
24. In cross-examination by **Miss Bonyo**, learned counsel for the Hotel, the plaintiff averred that she had another superintendent who was her immediate boss called **S N**, followed by the 1<sup>st</sup> Defendant. The plaintiff however did not discuss the matter with **S** since, according to her, she would be putting his job on the line. She confirmed that the April incident occurred in her private residence which was neither owned nor managed by the Hotel.
25. The plaintiff conceded that he did not familiarise herself with the House Rules though there was a provision for disciplinary action and she was aware that disciplinary action could be taken for physical assault. Though the 1<sup>st</sup> Defendant assaulted her, she did not report the matter because the 1<sup>st</sup> Defendant threatened her. She was however aware that the rules had provision for disciplinary action for immorality and confirmed that the actions of the 1<sup>st</sup> Defendant amounted to immorality. She however contended that the rules were not clearly elaborated though she did not seek any clarification.
26. The plaintiff however admitted that when she started working her relationship with the 1<sup>st</sup> Defendant was cordial until April, 2008. The plaintiff reiterated that it was **Mr B** who encouraged her to act and that **Mr B**, who was the face of the Hotel, was superior to the 1<sup>st</sup> Defendant. Referred to the grievous form, the plaintiff confirmed that it was dated 9<sup>th</sup> August, 2002 at 18.40 hour and was signed by **S M** when the latter called her in his office. The complaint was however filled in by **Mr K** and the plaintiff received it while she was on duty. It was the plaintiff's view that the Hotel was wrong in inviting her to the disciplinary meeting though she could not tell whether or not **Mr K** was independent.
27. The plaintiff however conceded that the Hotel was not in control of her 24 hours save for when she was on duty. According to the plaintiff she did not approach the personnel department of the Hotel on the incident. The plaintiff stated that although she was tormented, she neither sought psychological treatment nor police intervention.
28. In the plaintiff's view, the disciplinary proceedings were not procedural as she was never served with the notice. She however admitted that the working environment with the Hotel was good and that the working environment with the other employees was equally good and no other employee assaulted her.

29. In re-examination, the plaintiff stated that she did not report immediately because she was scared. According to her, the Hotel neither took her seriously nor took appropriate action on her complaint hence the suit against it.

30. In the submissions the plaintiff relied on **Black' Law Dictionary**, 9<sup>th</sup> edition which defines sexual harassment as "a type of employment discrimination consisting in verbal or physical abuse of a sexual nature" while harassment is defined as "words, conduct, or actions (repeated or persistent) that, being directed at a specific person, annoys, alarms, or causes substantial emotional distress in that person and serves no legitimate purpose".

31. In support of her case for sexual harassment the plaintiff relied on section 74 of the retired Constitution, section 6 of the **Employment Act, 2007**, section 8 of the **Occupational Safety and Health Act, No. 15 of 2007**, the **UN Declaration on the Elimination of Violence against Women**, Articles 1 3, 5 and 19 of the 2010 Constitution, sections 23 and 48 of the **Sexual Offences Act No. 3 of 2006** and submitted that victims of sexual harassment merit monetary damages to compensate for financial loss as a result of dismissal from employment, and to compensate injury to their feelings, humiliation, human dignity, and impairment and nullification of equality of opportunity or treatment in employment. It was therefore contended that the plaintiff merits an award of damages, whose measure should be commensurate with the physical, psychological and economic injury suffered.

32. In support of her case the plaintiff relied on **P O vs. Board of Trustees, A F & 2 Others [2014] eKLR, M W M vs. MFS [2013] eKLR, N M L vs. PeterPetrausch [2015] eKLR, Visaka & Ors vs. State of Rajasthan & Ors [JJ, 1997] [7] [SC 384]** and submitted that the plaintiff was able to prove her case as set out in the plaint and is entitled to the remedies claimed.

### **1<sup>st</sup> Defendants' Case**

33. According to the 1<sup>st</sup> Defendant, as the [particulars withheld] Manager, his duties included customer satisfaction and to ensure there was good staff welfare. The 1<sup>st</sup> Defendant disclosed that the Hotel had 38 staff with a chain of command. Below him was the Assistant Front Office Manager followed by 5 supervisors. Whereas the plaintiff was the Hotel's Guest Relations Officer, she was one of the staff under his overall supervision. He stated that his department had the actual interaction with the guests and the plaintiff was one of the first contacts with the guests as her station was at the lobby and met all the guests coming or leaving the Hotel.

34. According to his statement, which he adopted as part of his examination in chief, the 1<sup>st</sup> Defendant had been in employment of the Hotel from May 1994 in supervisory position and as a manager. He averred that during the period between 1999 till August 2002, the plaintiff was employed in his department as a [particulars withheld] Manager.

35. The 1<sup>st</sup> Defendant stated that the Hotel had a transport system for bringing and dropping the staff and that it was mandatory to use the transport unless they staff made their own arrangements. During the said period, the Defendant stated that the plaintiff just like the other staff was residing near the 1<sup>st</sup> Defendant's place of residence at [particulars withheld] 1 Estate, and would request to be dropped home after work, a request the 1<sup>st</sup> Defendant obliged. The 1<sup>st</sup> Defendant came to know that the Plaintiff was staying in the neighbourhood Estate known as [particulars withheld] Estate. On these occasions, the 1<sup>st</sup> Defendant disclosed that the plaintiff would inform the night manager not to include her in the night transport arrangement. The 1<sup>st</sup> Defendant however stated that no other manager resided around his estate.

36. The 1<sup>st</sup> Defendant stated that one evening the plaintiff invited him to her house for a cup of coffee with a view to showing him a letter inviting her for an interview with Emirates Airlines as a cabin crew and out of courtesy the 1<sup>st</sup> Defendant agreed though he had previously not been to the plaintiff's house. According to the 1<sup>st</sup> Defendant, the Plaintiff was excited about this offer. When asked about his opinion, the 1<sup>st</sup> Defendant averred that he encouraged the plaintiff to take up the position if that was her desire

after which he left the plaintiff's house and never went back. The 1<sup>st</sup> Defendant testified that the plaintiff's house was in a flat amongst other flats.

37. The 1<sup>st</sup> Defendant however denied the allegations made against him by the plaintiff in particular the allegations relating to sexual harassment and assaults or even threats. He averred that in his position as the [particulars withheld] Manager, his responsibilities included ensuring that hospitality is upheld at all times by the Hotel staff and to uphold hospitable work ethics. He however disclosed that as an employee the plaintiff was mostly temperamental and had on several occasions displayed rude and discourteous conduct towards her colleagues by employing the use of abusive language and sparks of uncontrollable temper to fellow staff members and by extension hotel guests. As a result several in-house counselling sessions were undertaken through the Hotel nurse but all these efforts were in vain. One of the persons with whom the 1<sup>st</sup> Defendant attempted to counsel the Plaintiff was **B M**, one of the supervisors below the 1<sup>st</sup> Defendant. Asked about **C M**, the 1<sup>st</sup> Defendant disclosed that he was the Hotel's porter stationed at the lobby though he had since been promoted to a supervisor. The 1<sup>st</sup> Defendant denied that he ever had personal altercation with the plaintiff over work related issues.

38. The 1<sup>st</sup> Defendant said that he wrote a memo to the plaintiff and copied the same to the General Manager, **P N**, and Personnel Manager concerning her rudeness and discourtesy with **C M** at the Hotel lobby. To the 1<sup>st</sup> Defendant the intention was to correct the plaintiff and to express the Hotel's displeasure.

39. The 1<sup>st</sup> Defendant stated that on 8<sup>th</sup> August, 2002, the plaintiff was particularly moody and temperamental and displayed lack of courtesy to the guests and colleagues as a result of which the 1<sup>st</sup> Defendant called her in the training room and recommended that the plaintiff attends the Hotel's corrective disciplinary hearing. However, the plaintiff insubordinately refused to sign the paper work relating to the said recommendation and instead threatened that she would claim that the 1<sup>st</sup> Defendant had made sexual advances towards her in order to damage the 1<sup>st</sup> Defendant's reputation. According to the 1<sup>st</sup> Defendant, it was later after he had raised the complaints against the plaintiff that the plaintiff made the same allegations which in the 1<sup>st</sup> Defendant's view were meant to frustrate his efforts of correcting the plaintiff's behaviour which had created negative impact on their teamwork.

40. The 1<sup>st</sup> Defendant emphasised the importance of his department to the success of the Hotel and averred that despite the fact that he had been involved in employing a lot of female staff and being surrounded by beautiful ladies he had never contemplated any sexual advances towards them or even the plaintiff. He also denied ever threatening anybody during his 18 years of service within the department or even discriminating against anyone. He also denied ever seeking sexual favours from any employee or employing vulgar language towards them. The 1<sup>st</sup> Defendant however averred that on several occasions he called the plaintiff to his office whenever there was an allegation that she had forgotten to hand over critical guests information and when issues were brought to his attention. This, according to him, could be on as many occasions and on any day as necessary in order to resolve issues.

41. According to the 1<sup>st</sup> Defendant, his department's customer surveys and internal audit ratings were very high due to the fact that he had embraced high operational/service standards hence the reason for engaging the plaintiff on corrective disciplinary hearings regarding her conduct.

42. The 1<sup>st</sup> Defendant disclosed that the Hotel had a well stipulated sexual offences policy which was at all times displayed on the staff notice boards for reference. To him the Hotel had rules on disciplinary matters referred to as "The Employment Work Book" which rules were also stipulated in the appointment letter. It was his case that the Notice was in tandem with the House Rules.

43. The said notice was served on the plaintiff but she declined to acknowledge receipt thereof though the said service was witnessed and that notice was included in the plaintiff's list of documents. The 1<sup>st</sup> Defendant averred that on 19<sup>th</sup> August, 2002, a hearing was conducted chaired by **W A** after which the

Plaintiff was found guilty and her services were subsequently terminated. The 1<sup>st</sup> Defendant asserted that he as just a witness in these proceedings.

44. It was the 1<sup>st</sup> Defendant's case that the Hotel's Sexual Harassment Policy, a copy of which was exhibited, appeared in all notice boards. In his evidence no complaint relating to sexual harassment was raised against him with the management or with the police.

45. In cross-examination by **Miss Bonyo**, learned counsel for the Hotel, the 1<sup>st</sup> Defendant reiterated that he was the head of Front Office and it was his responsibility to instil discipline on his team. He stated that he raised a disciplinary complaint in August, 2002 and that prior to that date no issue of sexual harassment had been raised against him by the plaintiff. He explained that at that time, **A B** was the Hotel's Manager and that the latter did not raise with him any issue of sexual harassment.

46. The 1<sup>st</sup> Defendant reiterated that the Hotel had a sexual harassment policy stipulating the procedure for raising issues relating thereto. This procedure, he explained is by way of filling a form from the personnel department. This policy, he averred was brought to the attention of the staff. He insisted that the incident in question did not happen and that it was alleged to have occurred outside the property.

47. The 1<sup>st</sup> Defendant confirmed that he had company cell phone while the plaintiff had none. He explained that he was obliged to report his telephone calls which phone was intended for work related issues. He reiterated that it was the disciplinary proceedings that resulted into the termination of the plaintiff.

48. In cross-examination by **Mrs Thongori**, learned counsel for the plaintiff, the 1<sup>st</sup> defendant disclosed that they met the plaintiff at their place of employment with the Hotel. Referred to several letters, the 1<sup>st</sup> Defendant admitted that they were letters from the management and customers congratulating and commending the plaintiff for good service. The 1<sup>st</sup> Defendant conceded that he was not doubting these letters.

49. While conceding that he was not the plaintiff's immediate boss, the 1<sup>st</sup> Defendant insisted that the plaintiff was difficult, temperamental and lacked courtesy. While this was not an everyday occurrence, it occurred often. This habit, according to the 1<sup>st</sup> Defendant started in 1999 from the time she got the job and it was on and off though before confirmation the Plaintiff had no problems. While the 1<sup>st</sup> defendant conceded that he never sent a memo to his bosses about these incidents, he stated that in July 2002, he sent a letter to the plaintiff and copied the same to the Personnel Manager and the General Manager. According to the 1<sup>st</sup> Defendant they had discussions with the plaintiff and when she did not change is when the action was taken.

50. Asked about the delivery of the letter the 1<sup>st</sup> Defendant stated that the notices are hand delivered while copies are kept in the file though there is no requirement for acknowledgement. While the first disciplinary notice was received by the plaintiff, the plaintiff refused to receive the second one. The 1<sup>st</sup> Defendant however denied that the disciplinary proceedings were provoked by these letters since there were other incidents that took place. He however admitted that the charges against the plaintiff related to uncontrollable temper, bad language, shouting, removal of materials from the pigeon hole and use of discourteous language to colleagues. According to the 1<sup>st</sup> Defendant, the plaintiff had many cases of rudeness and the disciplinary proceedings became necessary because the plaintiff was not changing.

51. It was admitted by the 1<sup>st</sup> Defendant that the Hotel had different levels of disciplinary actions depending on the severity such as the issuance of a memo. In this case since the plaintiff was not improving, disciplinary proceedings were commenced though the proceedings had nothing to do with the memo. The 1<sup>st</sup> Defendant disclosed that since they thought it could be a health case they had even organised with the nurse counselling sessions but the plaintiff declined to attend hence necessitating disciplinary proceedings.

52. Referred to the plaintiff's complaint, the 1<sup>st</sup> Defendant contended that this was raised after a complaint was raised against the plaintiff. He however denied that the complaint related to him since it referred to the plaintiff's immediate boss yet he was not the plaintiff's immediate boss though he admitted that he was the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant reiterated that he heard of the claims of sexual harassment after he had laid the charges against the plaintiff after the 9<sup>th</sup> August, 2002. These charges, he said he heard from **W A**, the charging officer. He however stated that he was unaware that the plaintiff had raised her complaint before. Referred to his statement, the 1<sup>st</sup> Defendant stated that he had stated that he heard from other people that the plaintiff had raised a grievance against him threatening that she would make sexual harassment charges against him if he proceeded with the disciplinary case. The 1<sup>st</sup> Defendant however denied that he only lodged complaints against the plaintiff after the plaintiff's grievances and that there was no reason to lodge the said complaints. According to the 1<sup>st</sup> Defendant, the plaintiff had no reason to bring petty issues of unfriendliness at the place of business. According to the 1<sup>st</sup> Defendant, one **F** complained that the plaintiff had told him that she was not on contract to say good morning to anyone. According to the 1<sup>st</sup> Defendant, since they are in hotel industry they are obliged to be friendly. The 1<sup>st</sup> Defendant disclosed that the employees placed their complaints against the plaintiff in writing.

53. The 1<sup>st</sup> Defendant however insisted that he was never called upon to answer to charges of sexual harassment and has never been asked to explain the said allegations. It was averred by the 1<sup>st</sup> Defendant that the plaintiff preferred an appeal against the disciplinary decision on 13<sup>th</sup> August, 2002. The 1<sup>st</sup> Defendant however stated that he did not testify against the plaintiff and that **W A** the presiding officer is the one who gave evidence and was the same person who signed the findings.

54. The 1<sup>st</sup> Defendant admitted in cross-examination that while the complaint was by him, the complaint was presided over by the Maintenance Manager who is at the same level as the 1<sup>st</sup> Defendant. However the said Manager was sitting in the proceedings as a judge while the plaintiff was the accused and the 1<sup>st</sup> Defendant was the accuser. He admitted that he did give evidence with respect to removal of materials from the pigeon holes by the plaintiff which was one of the complaints. The 1<sup>st</sup> Defendant admitted that this charge and other charges were introduced after the notice had been issued though the plaintiff was served with the amended charges.

55. The 1<sup>st</sup> Defendant testified that he could not recall how long the disciplinary proceedings took. He however called **C** and **B M**. While the latter had left, **C** was lined up to testify. He however insisted that he never got wind of the plaintiff's complaint when he commenced the disciplinary proceedings as there was nothing official that came to his attention. According to the 1<sup>st</sup> Defendant, he had never been the plaintiff's immediate boss and that his assistant was **A S**. He disclosed that the complaint by one **S** was made to the said **S** who transmitted the same to him. While denying that he copied his letter to the said **S**, the 1<sup>st</sup> Defendant averred that there are things which can be escalated and that this was what happened. It was the 1<sup>st</sup> Defendant's evidence that if the problem gets out of hand it can even be directed to the Hotel's Director. However it is only the heads of departments who deal with disciplinary issues. In this case the complaints were made by **B M**, **C** and **F**. The 1<sup>st</sup> Defendant however also received a complaint from one **C** 3 days before the disciplinary action which referred to the complaint in 2002. According to the 1<sup>st</sup> Defendant by the time of the charge he had received complaints from **F**.

56. Referred to the statement of **B M**, the 1<sup>st</sup> Defendant could not remember having received the same. According to him, **B** raised the complaint about the plaintiff's behaviour just before the 1<sup>st</sup> Defendant raised his. According to the 1<sup>st</sup> Defendant there were many complaints against the plaintiff. The 1<sup>st</sup> Defendant however denied that he trumped up charges in order to kill the plaintiff's case. Asked about **E K**, the 1<sup>st</sup> Defendant disclosed that she was a shop attendant in the lobby who was employed by a tenant within the premises but was not an employee of the Hotel. The statement, it was disclosed, indicated that the plaintiff was rude, moody and difficult to work with. She however did not appear at the disciplinary proceedings and her statement was not used at the proceedings. According to the 1<sup>st</sup> Defendant, the plaintiff's behaviour severally and the issue was the plaintiff picking newspaper and not paying for the

same. According to the 1<sup>st</sup> Defendant, the plaintiff would be emotional, cry or lose temper.

57. Asked about **B M**, the 1<sup>st</sup> Defendant disclosed that she was the [particulars withheld] Supervisor though the 1<sup>st</sup> Defendant could not recall when she became the said supervisor. According to the 1<sup>st</sup> Defendant she was a housekeeping attendant before she came to the Front Office. To the 1<sup>st</sup> Defendant most complaints from outside are made to the Manager. It was averred that **E** had complained before but nothing happened since the mere fact that a complaint is made does not necessarily lead to disciplinary proceedings. However complaints may be verbal. Where however a charge is laid, the charging officer calls witnesses and the person against whom the complaint is made is the accused. A complaint, it was averred may be dealt with in a summary form or informally. According to the decision, the 1<sup>st</sup> Defendant could have acted differently though in the 1<sup>st</sup> Defendant's view this did not excuse the plaintiff's conduct. While **E** was not a witness, the 1<sup>st</sup> Defendant admitted that they took into account her letter which was in the plaintiff's file. **E**, it was contended complained both verbally and in writing many times. The 1<sup>st</sup> Defendant revealed that he did have summary discussions with the plaintiff. To him the plaintiff had no witness to support her case and her defence attorney was the Works Representative.

58. In the 1<sup>st</sup> Defendant's view the plaintiff could have been summarily dismissed. He however denied that the disciplinary proceedings were meant to remove her as a witness against the 1<sup>st</sup> Defendant. He reiterated that the policy on sexual harassment is placed in all staff letters and was there in 2002 though he could not remember when it was formulated. Asked about harassment through telephone, he said that he used to call the plaintiff officially though he could call even when she was off duty since a lot of times there were issues and he had to call her to clarify such as handing over. He however admitted that he was not her immediate supervisor who was **S N**. To the 1<sup>st</sup> Defendant, operationally you don't have to take any issue requiring clarification to a hearing. He however admitted that when he called the plaintiff she never answered rudely.

59. According to the 1<sup>st</sup> Defendant apart from the plaintiff there were two other employees he used to give lifts such as **M W**, **M** and a lady named **O** who were staying at Innercore Umoja. He reiterated that the plaintiff invited him to her house in the evening after they had dropped **M O** and **M**. He however denied that he made sexual advances to the plaintiff and insisted that he could not use his position to harass a person into being his friend. He however stated that he was invited to offer advice sought and that he did not find her to be a dangerous person. It was his evidence that having been invited for interview, the plaintiff was leaving employment and the 1<sup>st</sup> Defendant did not stand in her way. He could not however understand why the plaintiff did not bring the letter to the office and did not find anything wrong in going to read the letter in her house. The 1<sup>st</sup> revealed that he was married and that in 2002 he was an adult as he was 34 years though he was not aware of the plaintiff's age but stated that she was an adult though much younger than him. He could remember that the plaintiff was either on the 2<sup>nd</sup> or 3<sup>rd</sup> floor but could neither remember the door nor the size of the house as he was in the sitting room. He did not know how many bedrooms it was and was not aware whether she lived with anyone.

60. According to the 1<sup>st</sup> Defendant if the plaintiff was not in the front office she would leave it to **S** who however never forget to hand over hence he never called **S** as many times as he called the Plaintiff. He however denied that he was harassing the plaintiff.

61. In re-examination by **Mr Tiego**, the 1<sup>st</sup> Defendant clarified that the plaintiff was not the only employee who received a letter of commendation and that Tech Card was a collective duty of front office staff and the letter was addressed to the said staff hence the commendation was an appreciation to the entire management. It was his evidence that the plaintiff's grievance was made on 9<sup>th</sup> August, 2002 at 18.40 hours while the notice of the disciplinary hearing was raised on the same day but 1t 10.00 am.

62. The 1<sup>st</sup> Defendant clarified that he had two witnesses at the disciplinary hearing, **B M** and **C** in addition to himself and a verdict was reached against the plaintiff who appealed but did not go for the hearing of the appeal and the decision was upheld. Asked about **A I**, he said the person was a personnel

officer and was the author of the memo and was also a signatory to the letter of termination. He was also the person who gave the commendation. He however asserted that there were several complaints though not all of them were reduced into writing.

63. Referred to the plaintiff's statement, he said the plaintiff preferred to deal with the termination first but did not progress with her claim of sexual harassment. Asked about the number attributed to the plaintiff, the 1<sup>st</sup> Defendant averred that he could not remember the plaintiff's phone number and insisted that if he made calls they were related to work issues. It was therefore the 1<sup>st</sup> Defendant's case that the allegations against him had no value.

64. DW2 was **E N K** who testified that she was a business woman owning apartments. She disclosed that between 1994 and 2003 she was working in a gift shop called [particulars withheld] Limited, a tenant, which was located at the lobby of the Hotel. He stated that the 1<sup>st</sup> Defendant herein was the Front Office Manager of the Hotel. Asked about the plaintiff, she said she came to know her during the period she worked at the Hotel at the Guest Relations Office, within the lobby hence was not far from her. According to the witness she used to interact with the plaintiff since the Hotel used to pick newspapers from the gift shop but the plaintiff would do so in a rude manner which happened over and over again.

65. According to the witness she was able to witness the plaintiff's relationship with other guests because they were separated by glass and one could hear the conversations. To her the plaintiff's relationship with her colleagues was not good and that both the employees and the guests used to complain. At one point DW2 made a complaint against the plaintiff' conduct to the 1<sup>st</sup> Defendant who tried to resolve the matter but there was no improvement on the part of the plaintiff.

66. In cross-examination by **Miss Bonyo** for the Hotel, the witness disclosed that she used to take a walk in the lobby but at no time did she recall any incident of sexual harassment. Asked about **C M**, she said that she did not share their issues within him though according to her there were other complaints. In her evidence, as tenants, they expected courteous attitude from the staff. She however admitted that she was not working for the Hotel though guests were sent to the desk where the plaintiff was stationed.

67. Cross-examined by **Miss Ngigi** for the plaintiff, DW2 stated that her official working time as from 7.00 am to 2.00pm or alternatively from 2.00pm to 9.00pm. She admitted that she was not with the plaintiff throughout and was not around the plaintiff all the time. Asked about her statement she admitted that she did not disclose the people the plaintiff was rude to but confirmed that the plaintiff was the Guest Relations Officer. She however stated that she had nothing against the plaintiff though the plaintiff interfered with her work by walking into the shop and picking the newspapers without paying for the same.

68. In re-examination, DW2 stated that she considered the plaintiff's behaviour disrespectful.

69. DW3, **C M**, testified that worked at the Hotel between 1995 and August 2010 as a concierge, a porter carrying luggage for the clients. According to him, whenever they picked he luggage they would take them to the reception. He averred that the plaintiff during that time was employed as [particulars withheld] Officer stationed at the main lobby hence he interacted with her whenever he brought the luggage. According to him the details of the client are taken down by the receptionist while the plaintiff's duty was to ensure comfort of the guests.

70. The witness disclosed that there was a gift shop at the lobby called [particulars withheld] and he knew **E K** who was the said shop attendant. According to the witness the plaintiff was hardworking and punctual but was at times moody and rude. The witness averred that most of the times he used to collide with the plaintiff and would report the matter to the Front Office Manager, the 1<sup>st</sup> Defendant herein. According to him, this made his work difficult. According to the witness, the plaintiff used to use abusive language, was confrontational I front of the guests and would embarrass them in front of the guests.

71. The witness disclosed that there was a Hotel nurse who provided counselling services at the Hotel and

that the plaintiff had sessions with her.

72. Cross-examined by **Miss Bonyo**, the witness averred that he was working in the Front Office which included the Guest Relations and that the plaintiff was superior to him. In his view, he expected professional courtesy from her as a concierge. He averred that as part of his duties he would walk around the Hotel and saw sexual policy displayed on the way to the changing room and in every department on Notice Board. According to him the 1<sup>st</sup> Defendant was the overall manager for the department so procedurally his complaints against the plaintiff would go to him. According to DW3, the altercation with the plaintiff arose from her abusive language in front of the clients.

73. In cross-examination by **Miss Ngigi**, the witness said they were 11 concierges working on different shifts though in most cases they had same shifts. Accordingly they did not interact all the times with the plaintiff. He however asserted that the plaintiff was hardworking but moody though he did not know what the plaintiff was going through.

74. Re-examined by **Mr Tiego**, the witness stated that moodiness would affect the relationship with the guests.

75. In its submissions the 1<sup>st</sup> Defendant relied on sections 107 and 109 of the **Evidence Act** Cap 80.

76. To the 1<sup>st</sup> Defendant, to enable this court make a determination in favour of the Plaintiff she has the burden to prove by all available means that the 1<sup>st</sup> Defendant sexually assaulted, battered, harassed and oppressed her on diverse dates between April and July 2002. It was submitted that it was incumbent upon the Plaintiff to prove :-

- a. the exact date that the 1<sup>st</sup> Defendant went to her house.
- b. that the 1<sup>st</sup> Defendant indeed went to her house.
- c. that she indeed told someone about the alleged occurrences in her house.
- d. that the Defendant used to call her and utter the alleged filthy and offending words which in her view amounted to sexual harassment.

77. It was submitted that the plaintiff failed to adduce any corroborative evidence to support her allegations. Further she failed to adduce any cogent evidence that the 1<sup>st</sup> Defendant used to make the alleged telephone calls through her Advocate. She even withdrew the telephone records of the 1<sup>st</sup> Defendant which would have to a minute extent corroborated here wild claims. The Plaintiff is therefore guilty of withholding material evidence from the purview of the court. It is therefore clear that if such evidence of the 1<sup>st</sup> Defendant's telephone calls was to be made it would disprove her allegations noting that the onus always rests with her.

78. It was submitted that this suit was filed by the Plaintiff for improper purposes and which was to seek to re - address her dismissal from employment. And that the totality of the above is that the Plaintiff's claims have not been proved and the suit should be dismissed with costs to the 1<sup>st</sup> Defendant.

### **2<sup>nd</sup> Defendant's Case**

79. In support of its case, the Hotel called **S J N M**, who in his statement stated that he was employed by the Hotel in March 1994 and was the Deputy General Manager of the [particulars withheld] in 2002. According to him the 2<sup>nd</sup> Defendant had appointed Southern Sun Hotels (SA) to manage [particulars withheld] on their behalf. He disclosed that [particulars withheld] was a member of Kenya Association of Hotels Keepers and Caterers (KAHC) which signs collective bargaining agreement (CBA) on behalf of the members, with the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied

Workers (KUDHEIHA) on behalf of the employees.

80. According to the witness, the Hotel had an elaborate internal disciplinary procedure and all staff were well aware of it which procedures included how to raise a grievance against another staff. He outlined these as notice to the concerned staff copied to the Works Committee; hearing at which the staff is allowed to be represented by a fellow staff member at which the staff is at liberty to call witnesses chaired by a Head of Department not within the same Department as the staff and ruling made two or three days thereafter; and upon delivery of the ruling the staff has a right of appeal to Senior Management and up to two internal appeals are permissible before the matter moves to either the JIC as per the CBA or to the Court.

81. In the case of the plaintiff, it was averred that she was charged some time in August, 2002 with being rude and displaying uncontrollable temper; using abusive language and shouting at colleagues in public; using discourteous language to colleagues; and removing documents from pigeon hole (mailbox) without permission.

82. According to the witness the 1<sup>st</sup> Defendant was the charging officer while **W A**, the Repairs and Maintenance Manager, was the Chairman. The plaintiff was found guilty of the charges and appealed which appeal was upheld. The plaintiff did not however prefer a second appeal and did not appear during the delivery of the ruling though she had attended the hearing.

83. It was however contended that when the said proceedings were ongoing the plaintiff complained against the 1<sup>st</sup> Defendant alleging that the 1<sup>st</sup> Defendant had been sexually harassing her. According to the witness as this was the first time the issue was being brought up, he was of the view that the same was timed to frustrate the ongoing disciplinary case.

84. In his oral evidence he testified that he knew the plaintiff as Guest Relations Officer at the Hotel. According to him, in 2002 he was acting as the General Manager of the Hotel while the 1<sup>st</sup> Defendant was the Front Office Manager. In his evidence between April and July 2002 the plaintiff never brought to his attention the allegations of sexual harassment to her. He disclosed that all staff working beyond 5.00pm are given contracted transport which is by way of a minibus and that the plaintiff was amongst the staff expected to use the said transport.

85. Referred to the Hotel's Policy and Procedure in use in 2002, he confirmed that clause 48 thereof dealt with provision for transport for staff. It was therefore his evidence that by choosing an alternative means of transport the plaintiff was making a private arrangement. According to him if sexual harassment happened within the premises or outside without invitation, the plaintiff would have been expected to report the same vide a sexual complaint form and submit the same to the General Manager. According to him, the first time he became aware of the allegations of sexual harassment, he could not tell whether the disciplinary proceedings were ongoing since the responsibility of discipline lies with the departmental managers. To him, he only gets involved at the appellate level.

86. The witness however was aware that there had been discussions surrounding the plaintiff's rude conduct and being uncooperative but was unaware of the disciplinary proceedings. According to him it was recommended that the plaintiff be terminated after being found guilty of the offences she was charged with. He averred that the chairman of the proceedings was **W A** who was one of the departmental heads. This recommendation, according to him was made to the General Manager since he was the one who was to sign the termination letter. He testified that he eventually terminated the plaintiff based on the said proceedings. The plaintiff however appealed which appeal was heard under his chair. However at that point the plaintiff did not raise the issue of sexual harassment and none of the grounds of appeal touched on the issue hence the decision was upheld.

87. The witness however disclosed that prior to the termination, the plaintiff raised a grievance of sexual harassment which he received on 9<sup>th</sup> August 2002 at 18.40 hours. The complaint of the disciplinary committee was however earlier than her complaint and by the time of her complaint, the disciplinary proceedings were already on. According to the witness the document of complaint did not name anyone

apart from stating that it was her “immediate boss”. According to him, given the reporting relationship, her boss would have been the Front Office Relations Manager. The plaintiff did not however provide particulars of the dates of the said harassment. From the form, the plaintiff desired that the harassment be brought to a stop with immediate effect.

88. According to the witness while he could not remember the sequence of events he recalled talking to the 1<sup>st</sup> Defendant who denied the allegations. Prior to this, he said he had not received any allegations of sexual harassment. According to his evidence during that time there was a sexual harassment policy which was displayed or hung on staff notice board and he believed there was one at the lobby. According to him, at that time there was a recognised union, KUDHEIHA, and the plaintiff was a unionisable employee. It was his evidence that had the issue been brought to the attention of the union representatives, they would have taken up the matter with the management however no such issue was raised.

89. The witness disclosed that there were two shops at the lobby at the entrance and opposite the reception. In his view the Guest Relations is a PR person to all type guests checking in at the Hotel and hence courtesy would be a key attribute to the position. It was therefore his belief that the grounds for the termination of the plaintiff were valid and the plaintiff’s complaint in his view was in August 2002. He confirmed having received the internal memo dated 24<sup>th</sup> July, 2002 from the 1<sup>st</sup> Defendant to the plaintiff dealing with the plaintiff’s unfriendly attitude

90. It was his evidence that the Hotel provides an enabling environment to the staff to carry out their duties without harassment with opportunities for discipline and for resolving grievances. He however averred that he would not have been able to control whatever took place outside the workplace. In his view the Hotel took the appropriate step in terminating the plaintiff in order to improve working environment. Accordingly the plaintiff’s claims were baseless and he urged the Court to dismiss the same

91. In cross-examination by **Mr Tiego**, the witness reaffirmed that before 2002 there were discussions surrounding the plaintiff’s rudeness though he could not pinpoint specific items but recalled the letter dated 22<sup>nd</sup> July, 2002. He however came to hear of the allegations of sexual harassment on 9<sup>th</sup> August, 2002 for the first time. He however confirmed that **C M** was a porter working at the Hotel whose services were mainly at the reception where the plaintiff was similarly rendering services. He confirmed that there was a shop called [particulars withheld] though he was not conversant with the name of the shop attendant. He however confirmed that the shops were in close proximity to the reception.

92. The witness was emphatic that the information of sexual harassment by the 1<sup>st</sup> Defendant did not reach him. To him the plaintiff would have reported if it was not with her consent.

93. Cross-examined by **Mrs Thongori**, the witness stated that to the best of his recollection he did call the 1<sup>st</sup> Defendant and asked him about the allegations and informed the 1<sup>st</sup> Defendant to stop. He however did not call a hearing on the same since in his view they could not have heard the two matters at the same time. The witness however disputed the allegations by the plaintiff since they were made months after the alleged incident hence were suspicious. The witness confirmed that the sexual harassment policy was on the staff notice board though he could not say whether the same was also in the lobby.

94. On behalf of the 2<sup>nd</sup> Defendant it was submitted that the alleged particulars of assault, battery and sexual harassment were strictly attributed to the 1<sup>st</sup> Defendant. Thus in so far as the Plaintiff failed to supply particulars of alleged assault, battery and sexual assault by the 2<sup>nd</sup> Defendant, the Plaintiff failed to set out a case for award of damages by the 2<sup>nd</sup> Defendant.

95. The 2<sup>nd</sup> Defendant contended that the Plaintiff did not plead vicarious liability on the part of the 2<sup>nd</sup> Defendant for the actions of the 1<sup>st</sup> Defendant and that the same was only belatedly raised in the submissions and ought to be disregarded.

96. In its submissions, the Hotel urged the Court to note the following:

a) Though the Plaintiff alleges assault, battery and sexual harassment by the 1<sup>st</sup> Defendant on diverse dates between April and July 2002 she failed to make a report of the same through the 2<sup>nd</sup> Defendant's established grievance procedures until 9<sup>th</sup> August 2002, a day after the 1<sup>st</sup> Defendant had raised a disciplinary issue against her. If indeed she was facing such threats why did she take so long to seek remedial action?

b) The Plaintiff admitted to breaching the 2<sup>nd</sup> Defendant's policy by requesting and receiving rides home from the 1<sup>st</sup> Defendant as opposed to using company provided transport which was intended to ensure her safe transit home. The argument that the transport provided was inconvenient is moot as there is no evidence to show the Plaintiff raised a complaint about the alleged inconvenience to enable the 2<sup>nd</sup> Defendant's Managers address their minds to her complaint. The Plaintiff failed to provide reasonable and justifiable ground for not using the same daily. If she met with harm while on a frolic of her own, then the 2<sup>nd</sup> Defendant should not be held liable for the same.

c) The Plaintiff admitted that she failed to report the issue to the Police. If indeed she was under such grave threat and as scared as she alleges then it is only logical that she should have taken such a step to try and safeguard herself and to have the situation arrested. She cannot purport to blame the 2<sup>nd</sup> Defendant for failure on her part which may have exposed her to harm. Assault and battery being torts as well as crimes she was oddly lax in taking remedial action over the alleged complaints against the 1<sup>st</sup> Defendant.

d) The Plaintiff admitted that a number of the incidents complained of occurred at her residential premises and after her working hours. The Defendant could only provide a conducive work environment during work hours and at its premises and cannot be held liable for actions extraneous to that.

e) The Plaintiff testified to having allegedly disclosed her predicament to 4 other persons who were not called as witnesses to corroborate her testimony. This further buttresses the argument that the Plaintiff raised the allegations herein as an afterthought in a bid to scuttle the disciplinary process.

f) The Plaintiff failed to cause to be produced evidence of phone records and as such her allegation that she was incessantly telephoned by the 1<sup>st</sup> Defendant remains unproved. Moreover, given the working relationship whereby the 1<sup>st</sup> Defendant was her supervisor, it is expected that the two would interact over the office extension from time to time.

g) The Plaintiff admitted that her working environment at the hotel was good thereby contradicting the assertion in her pleadings that the 2<sup>nd</sup> Defendant failed to provide a conducive work environment.

97. It was submitted that based on the evidence presented, it is clear that the 2<sup>nd</sup> Defendant was not in a position of authority over the Plaintiff and the 1<sup>st</sup> Defendant at all material times and is therefore not liable as alleged or at all. Further the plaintiff failed completely to lead evidence of battery or sexual harassment of her person by the 1<sup>st</sup> Defendant or to demonstrate instances of assault as pleaded. Finally, she failed to demonstrate how the 2<sup>nd</sup> Defendant is liable for the acts complained of. The Court was thus urged to dismiss the prayers sought under these heads.

98. In the Hotel's submissions, the alleged complaints subject of this suit allegedly occurred in the year 2002 before enactment and coming into force of the **Employment Act 2007**. The applicable legislation is therefore the then **Employment Act** Cap. 226 (now repealed). We submit that as legislation cannot have a retroactive application, the Plaintiff cannot thus rely on the **Employment Act 2007**, the **Occupational Safety and Health Act No. 15 of 2007** or the **Sexual Offences Act No. 3 of 2006** which were not in force at the time her cause of action arose.

99. To the Hotel, though the Plaintiff failed to plead any constitutional infringement of her rights in the

manner required by the law the same has been raised in her submissions. It was submitted that the same should not guide the mind of the Court in any way. She has not sought damages for alleged discrimination on the basis of sex and failed completely to lead any evidence to prove the same.

100. Similarly, the Plaintiff has not pleaded that her termination was unlawful. It means that she accepted the decision made on the basis of her misconduct at work. The 2<sup>nd</sup> Defendant's witness was therefore justified in terminating her after due process had been followed and this basis cannot be used to support the allegations raised in this suit.

101. It was submitted that the 2<sup>nd</sup> Defendant could not be held liable for any actions or omissions either by the 1<sup>st</sup> Defendant or the Plaintiff during their off duty hours independent and when they chose to direct their minds away from policies and procedures designed to maintain a conducive work environment. It was its view that the Plaintiff was the sole author of any alleged discomfort at work as she chose to disregard company policy by failing to use company transport, chose to remain mum to the relevant authority at the 2<sup>nd</sup> Defendant entity, failed to raise any alleged grievance timeously and only purported to point a finger once a disciplinary process had been instituted against her.

102. The 2<sup>nd</sup> Defendant therefore urged the Court to find that on a balance of probabilities the Plaintiff has failed to prove her case as alleged and to dismiss the suit in its entirety with costs to the 2<sup>nd</sup> Defendant.

### **Determinations**

103. Having taken into account the pleadings, the evidence adduced as well as the submissions made, the following are, in my respectful view, the issues that fall for determination in this suit:

- 1. Whether the Plaintiff was a victim of sexual harassment by the 1<sup>st</sup> Defendant.**
- 2. Whether the 2<sup>nd</sup> Defendant failed to provide an enabling work environment for the performance of the plaintiff's duties including the exclusion of a situation whereby the plaintiff would be assaulted, battered, harassed, intimidated or discriminated against.**
- 3. Whether the 2<sup>nd</sup> Defendant was liable for the actions of the 1<sup>st</sup> Defendant.**
- 4. If the answer to (1) is in the affirmative, whether the Plaintiff suffered loss as a result thereof.**
- 5. Whether the Plaintiff is entitled to damages and if so what is the award of damages.**
- 6. Who should bear the costs of this suit?**

104. I intends to deal with the said issues collectively.

105. Although the parties herein made heavy whether of the process that led to the termination of the plaintiff's employment, it is clear that the cause of action herein evolves around sexual harassment and not wrongful termination of the said employment. The issues surrounding the wrongful termination may only become relevant in determining whether exemplary damages are warranted if the said termination was meant to scuttle the plaintiff's case. The principle governing an award or otherwise of exemplary damages are that exemplary damages may be awarded where the conduct of the servant of the defendant towards the plaintiff was oppressive, arbitrary, highhanded or even unconstitutional; or the conduct of the defendant's servant was calculated by him to make profit for himself which may well exceed the compensation payable to the plaintiff; or where it is provided by law. See **Obongo vs. Municipal Council of Kisumu [1971] EA 91; KCCC vs. Nakaye [1972] EA 446; Joseph Lukwago vs. A G HCCS 1156 of 1988 (UR).**

106. In cases of this nature I agree that the starting point are sections 106 and 107 of the *Evidence Act*, Cap 80 Laws of Kenya which provides as follows:-

**107. (1) Whoever deserves any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

**109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence.**

107. The cardinal principle in civil law is that he who avers must prove if the court is to exercise its judicial mind in his favour. In civil cases this is called burden of proof and with respect to the standard of proof, that is the threshold that the plaintiff must meet if a favourable judgement is to be returned, the law is that certain deductions may arise from the evidence. It may be probable that the plaintiff was injured by actions of the defendant; it may equally be probable that there was in fact no action on the part of the defendant that could have caused injury to the plaintiff. Where the first case is not proved based on legally admissible evidence, without the advantage of divine omniscience, the court cannot know which of the probabilities coincides with the truth and it cannot decide the matter by adopting one or the other probability without supporting evidence. It can only decide the case on a balance of probability if there is evidence to enable it say that it was more probable than not that the defendant was wholly or partly responsible.

108. However in Henry Hidaya Ilanga vs. Manyema Manyoka [1961] EA 705, it was held that:

**“While the standard of proof required in a civil case is not so high as that required in a criminal case, it is not correct to say or imply that the standard of proof is the same in all civil cases – namely a mere balance of probabilities: the standard of proof varies according to the gravity of the matter to be proved and, as the allegation on the present issue was an allegation of breaking and forcibly taking possibly amounting to theft, the standard of proof required was very high – at least as high as is required in cases of civil fraud...The more serious the allegation the higher the degree of probability that is required; but it need not, in a civil case, reach the very high standard required by the criminal law.”**

109. That sexual harassment is a serious charge cannot be in doubt. Sexual harassment demeans one’s dignity and violates Article 27 of the Constitution; it may have the effect of reducing one to the status of a chattel. In my view it is not just a tort against the person but impacts upon the very person of the victim. It therefore ought not to be treated lightly. Where found to have been committed Courts ought to take serious view of the matter and the reparations ought to reflect the gravity with which the Court treats such unwelcome advances.

110. Caution must however be exercised so as not to escalate the standard of proof to a too high a pedestal. In Siraj Din vs. Ali Mohamed Khan [1957] EA 25, it was held that:

**“The quantum of proof required in civil litigation is not such as resolves all doubt whatsoever but such as establishes a preponderance of probability in favour of one party or the other. And that is the criterion, which the board should always apply to any matter in the nature of civil proceedings in which they have to decide between opposing views. To say that all doubt whatsoever must be dispelled is to invoke a test, which is even higher than the standard required by law in criminal matters.”**

111. I associate myself with the decision in H M B Kayondo vs. Somani Amirali Kampala HCCS No. 183 of 1994 [1995] IV KALR 78 that:

**“The proper way on how one should consider the evidence at the conclusion of the case is to**

**weigh the evidence given by the defendant against that given by the plaintiff and to decide the case according to the provisions of section 3 of the Indian Evidence Act which provides that “ a fact is said to be proved when after considering the matter before it the court either believes it exist or considers its existence so probable that a prudent man ought under the circumstances of the particular case to act upon the supposition that it exists”. In other words, if at the end of the case, the court considers that there is a preponderance of evidence in favour of the defendant, a decision in favour of the defendant should result and conversely if the preponderance is in favour of the plaintiff.”**

112. In this case, it is clear from the evidence that the plaintiff reported her case a couple of months after the main incident. This delay was despite the fact that the plaintiff was aware that disciplinary action could be taken for physical assault. She in fact conceded that the rules, albeit not being very well conversant with them, had provision for disciplinary action for immorality and that the actions of the 1<sup>st</sup> Defendant amounted to immorality.

113. According to her, this was due to the fact that she was traumatised by the incident and was scared of the repercussions. Although the plaintiff testified that she had communicated the occurrence of the incident to the Accounts Manager, **S A**, the plaintiff neither called this person to corroborate the fact of contemporaneous report of such serious allegations nor was the absence of this person explained. The plaintiff disclosed that there was a caretaker within the premises occupied by her. She testified that after the first incidence, the 1<sup>st</sup> defendant kept on going to her apartment. There is no evidence that she took any action to bar the 1<sup>st</sup> Defendant from accessing her premises. One may have thought that such a serious incident would invite serious steps being taken since according to the plaintiff, during the first incident, the 1<sup>st</sup> Defendant threatened to have sexual intercourse with her forcefully. In contradistinction to the case of **N M L vs. Petrausch** (supra) where there was a complaint lodged with the police and in fact the Respondent was arrested and charged with offence of sexual harassment in this case there was no such report. In that case the Court in fact found that there was no challenge at all to the evidence relating to sexual harassment. In this case the 1<sup>st</sup> Defendant expressly denied the same both in the statement of defence and in his evidence on oath.

114. Assuming that the caretaker option was not in the circumstances plausible, the plaintiff could have sought the assistance of the union. Yet she never even reported this incident to the union which she admitted was her representative in disputes with the employer. At her place of work, the plaintiff admitted that her immediate boss was one **S N**. She however never mentioned the incident to her. In fact from the record, there is no evidence that she mentioned any of the numerous harassments to any one person apart from **S A** who was regrettably not called to support her case. In her evidence, the plaintiff conceded that she neither approached the personnel department of the Hotel on the incident nor sought psychological treatment or police intervention.

115. As regards the claim against the 2<sup>nd</sup> Defendant, it is obvious that the incident occurred outside the 2<sup>nd</sup> Defendant's premises. The rule of law is that a master is not responsible for the wrongful act done by his servant unless it is done in the course of employment and it is deemed to be done if it is either (a) a wrongful act authorised by the master; or (b) a wrongful and unauthorised mode of doing some act authorised by the master. See **Salmond on Torts, 6<sup>th</sup> ed 1924 at 100**.

116. Apart from the accusation of failing to provide an enabling work environment for the performance of the plaintiff's duties including the exclusion of a situation whereby the plaintiff would be assaulted, battered, harassed, intimidated or discriminated against, there was no allegation that the 2<sup>nd</sup> defendant did something or failed to do something that led to the said sexual harassment by the 1<sup>st</sup> Defendant. In my view the mere fact that the 1<sup>st</sup> Defendant was an employee of the 2<sup>nd</sup> Defendant did not make the 2<sup>nd</sup> Defendant responsible for the actions of the 1<sup>st</sup> Defendant if the same took place outside the 2<sup>nd</sup> Defendant's premises in circumstances where the 2<sup>nd</sup> Defendant had absolute control over. In fact in this case the alleged incident took place in the plaintiff's own premises. In fact the plaintiff admitted that the working environment with the 2<sup>nd</sup> Defendant was good and that the working environment with the other

employees was equally good and no other employee assaulted her. In this case as opposed to the case of **M W M vs. M F S** (supra) where it was found that there was no mechanism put in place for reporting sexual harassment, there was evidence that the sexual harassment policy as placed on the notice boards and in the rules which were availed to the staff. The Plaintiff in fact admitted that she had not appraised herself sufficiently with the said rules.

117. In **Vincent Okello vs. Attorney General Gulu HCCS No. 4 of 1992 [1995] III KALR 129**, the High Court of Uganda held with respect to proof in cases of vicarious liability that:

**“The law places the burden of proof in civil cases on he who would fail if no evidence at all was given from either side. In the instant case, the plaintiff claimed that the defendant’s servants had seized and detained the plaintiff’s motor vehicle and that despite several demands to return it, the defendant’s said servants have not returned the plaintiff’s vehicle which claim was denied by the defendant. By that denial the defendant had turned the evidential wheel to the plaintiff who would fail if no evidence was given from either side. To succeed, the plaintiff had to adduce evidence to prove that while the plaintiff was entitled to immediate possession thereof, the defendant’s servants had seized the plaintiff’s vehicle, that they did so in the course of their employment and that the plaintiff had made demands for the return of the said motor vehicle but the defendant’s servants have not returned the same. Only then can the plaintiff hope to succeed in his claim... The third issue is whether the defendant is vicariously liable for the acts of the soldiers and in this connection it is relevant to point out that a master is only liable for the tort committed by his servant in the course of his employment. It is therefore necessary that that relationship of “master and servant” must be pleaded and established by the plaintiff by evidence on the balance of probabilities to render a master liable. He must similarly establish that the Tort in question was committed by the defendant by the defendant’s servant acting in the course of his employment...The plaint was clearly defective in that it never averred that the NRA officers were servants of the defendant nor that in confiscating the plaintiff’s motor vehicle the officers were acting in the scope of their employment. It is instructive to note that Order 7 rule (1)(e) of the Civil Procedure Rules requires that a plaint must contain “the facts constituting the cause of action and when it arose”. That rule is mandatory and the failure by the plaintiff in this case to aver in this plaint that the NRA soldier who confiscated the plaintiff’s said motor vehicle was a servant and agent of the defendant was an error in the plaint.”**

118. Having considered the evidence presented before me, I am afraid that there were several loose ends in the Plaintiff’s evidence. This case must be distinguished from **P O vs. Board of Trustees, A F & 2 Others** (supra) where there was clearly documentary evidence in form of emails and an express admission that the respondent was nudging the plaintiff. The Plaintiff failed to take steps which she was ordinarily expected to take. She did not lodge her complaint until months after the incident and after a complaint against her had been lodged. She did not call any person to corroborate her testimony or even the fact that she had narrated the incidents the subject of these proceedings.

119. In the premises, while I agree with the law as set out in the authorities relied upon by the plaintiff, I find that the Plaintiff has failed to prove her case to the required standards. In the result this suit fails and is dismissed

120. I must however express my disappointment at the fact that despite several requests made by the Court to the plaintiff’s counsel to avail soft copies of the pleadings and submissions it was not until 30<sup>th</sup> March, 2017 that the plaintiff sent only a copy of the original plaint which in fact had been amended and was therefore of no use. I wish to remind the parties and counsel of the provisions of section 1A(3) of the ***Civil Procedure Act, 2010*** which provides as follows:

***A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.***

121. Failure to comply with such directions meant for the expeditious disposal of civil matters may invite sanctions and Order 11 rule 7(3) of the *Civil Procedure Rules* provides that:

*Any party or his advocate who wilfully fails or omits to comply with the provisions of this Order shall be deemed to have violated the overriding objective as stipulated in Section 1A and 1B of the Act and the court may order costs against the defaulting party unless for reasons to be recorded, the court orders otherwise.*

122. Nevertheless as the issue of termination of the plaintiff's employment remains unresolved in these proceedings, there will be no order as to the costs of these proceedings.

123. Orders accordingly.

**Dated at Nairobi this 4<sup>th</sup> day of April, 2017**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Miss Chege for Mrs Thongori for the Plaintiff**

**CA Mwangi**