



**DK & another v Riley Services Ltd & another (Petition E061 of 2021)
[2024] KEELRC 2526 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2526 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E061 OF 2021
MA ONYANGO, J
OCTOBER 17, 2024**

**IN THE MATTER OF: ARTICLES 3(1),22,23,48,50(1),162(2)
(A),165(5),258 AND 259(1) OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF: THE ALLEGED VIOLATION OF
ARTICLES 1,2,3,4(2),10,19,20,21,22,24,27,28,29(C),41(1)
(2), 47 AND 259(1) OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF: THE ALLEGED VIOLATION OF
SECTIONS 5,6,13,15,19,41 & 43 OF THE EMPLOYMENT ACT.**

IN THE MATTER OF: THE RIGHT TO EQUALITY AND NON-DISCRIMINATION

BETWEEN

**DK 1ST PETITIONER
CENTRE FOR RIGHTS EDUCATION AND AWARENESS 2ND PETITIONER**

AND

**RILEY SERVICES LTD 1ST RESPONDENT
RENSON MWANDOE 2ND RESPONDENT**

JUDGMENT

1. The 1st Petitioner was employed by the 1st Respondent herein as a Security Guard in May 2010 as staff number 21085. She worked for the 1st Respondent on one year renewable contracts until 20th May 2018 when she handed in a resignation letter dated 19th May 2018 giving 7 days’ notice of termination of her employment contract.
2. The 2nd Respondent is described as a national feminist organization driving change for equal societies in Kenya.



3. The 1st Respondent is a limited liability company registered in Kenya carrying on business as a private security company. The 2nd Respondent was at the time of institution of this suit the Operations Director at Harambee Cooperative Sacco Plaza where the 1st Petitioner was stationed to work from May 2013 to February 2018.
4. Vide the instant Petition dated 28th April 2021, the Petitioners allege that the Respondents violated the 1st Petitioner's right to equality and freedom from discrimination as provided in Article 27 of *the Constitution*, section 5(2) of the *Employment Act*, Article 41(1),(2)(a) &(b), Article 47(1) and (2) of *the Constitution*, section 4 of Fair Administration Action Act, in the following terms;
 - i. The 2nd Respondent sexually harassed the 1st Petitioner, which is a form of violence that disproportionately affects women. He asserted his power as the acting Chief Executive Officer to demand for sexual favours with the threat of losing her job if she did not accede.
 - ii. When the 1st Respondent learned of the sexual harassment claims, they stated that she ought to have handled the matter differently, which suggested that she should deal with the issue quietly in order to protect the business of the 1st Respondent.
 - iii. 1st Respondent discriminated against the 1st Petitioner by completely failing to investigate the sexual harassment claim on the basis that it was perpetrated by a non-staff member.
 - iv. The 1st Respondent went ahead to treat the 1st Petitioner in a different manner from that which she was used to by refusing to remove her from the building where she was in proximity with the alleged perpetrator. When they eventually recalled her to the head office, she was verbally assigned a different role that was clerical in nature as opposed to the field operations she was handling before the recall, her staff number was changed and her salary reduced.
 - v. After persistent requests, she was deployed to field operations and assigned to UAP Office work station where she was assigned to be a receptionist contrary to her previous supervisory role being in charge of other security guards at Harambee Sacco. She was not accorded the necessary support to allow her to take up the assignment as was the practice in the organization.
 - vi. The 1st Petitioner was so frustrated by the different treatment accorded to her, the work environment and experience since reporting the incident, that she tendered her resignation on the 19th March 2018.
 - vii. The 1st Respondent continued to discriminate against the 1st Petitioner by declining to receive her resignation letter and instead serving her with a Notice to Show Cause.
 - viii. While the 1st Petitioner did put in a response to the Notice, indicating that she was willing to continue with her duties, she was never accorded a hearing and a few days later the Human Resource officer called her from her desk and asked her to leave the company premises.
5. The Petition is supported by the affidavit of DK, the Petitioner herein.
6. The 1st Respondent opposed the Petition vide a Replying Affidavit dated 28th July 2022. The 2nd Respondent's Replying Affidavit opposing the petition is dated 21st September 2022.

The Petitioners Case

7. It is the Petitioners case that the 1st Petitioner being employed by the 1st Respondent was instructed on 26th January 2018 to go to the 1st Respondent's office and collect a loan form for the 1st Respondent's



- Director of Operations (Mr Jonathan Nthingu Musomba) and to take it to the 2nd Respondent's office at Harambee's Sacco.
8. It is averred that the instructions from Mr Musomba were that the 2nd Respondent was to append his signature on the loan form for approval and immediately upon signature, return the loan application form to Mr Musomba.
 9. The 1st Petitioner avers that upon handing over the form to the 2nd Respondent he declined to sign it and asked the 1st Petitioner to convince him to do so by having sex with him, adding that there was no one in the office to witness the act.
 10. The 1st Petitioner states that she went to the Sacco's security office within the building to report the incident where she narrated the events to one Amos and Tom, the 1st Respondent's security manager and security officer respectively.
 11. The 1st Petitioner further states that she made a complaint to Mr Musomba, the 1st Respondent's Operation Manager who advised her to handle the matter diplomatically in order to protect the business contract between the 1st Respondent and Harambee Sacco.
 12. According to the 1st Petitioner, she reported the matter to Parliament Police Station and was issued with a case number OB CO 24/5/02/2018 but the matter was kept pending under investigations for a long time until the investigations stalled.
 13. The 1st Petitioner avers that she was recalled to work in the 1st Respondent's headquarters as a Planning and Staffing clerk but she was not issued with a letter of appointment or contract for the new assignment.
 14. It is averred that after several requests to be posted to field operations as per her designation, the 1st Petitioner was later instructed orally to report for duty in a new station at UAP offices. She states that she felt so frustrated and realized that the work condition was adversely affecting her psychological health to the extent that she decided to resign from employment.
 15. She avers that she wrote her resignation letter on 9th March 2018 citing frustrations with the change of duties assigned to her and took the same to the Human Resource Officer who declined to receive it. The Human Resource Officer only acknowledged receipt on 20th March 2018 and at the exact same time issued her with a Notice to Show Cause why she should not be dismissed from employment for defying orders. The 1st Petitioner put in her response to the Notice to Show Cause but was never accorded a hearing.
 16. The 1st Petitioner avers that she sought payment of her dues from the 1st Respondent through the Ministry of Labour offices but has not received her terminal dues to date.

The 1st Respondent's case

17. In its Replying Affidavit sworn by its former director of operations and Administration, Mr Jonathan Musomba, the 1st Respondent denied violating any of the Petitioners' constitutional, employment, contractual or any others rights. It is averred that the 1st Petitioner was employed in May 2010 as a security guard on annual fixed term contracts.
18. According to the 1st Respondent, after the 1st Petitioner's contract for 2017 expired, she was taken up by the 1st Respondent's sister company, Riley Falcon Security Services Limited. The 1st Respondent avers that the two companies are distinct entities in law although they share working models and templates as they are sister companies.



19. It is contended that Riley Falcon Security Services Limited took over the business of the 1st Respondent as per the Gazette Notice No. 11987 dated 3rd December 2019.
20. Regarding the allegations of sexual assault, the deponent avers that the 1st Petitioner mentioned to him the allegations but did not submit any document in writing. The deponent denied advising the 1st Petitioner to handle the sexual harassment issue diplomatically.
21. It is the 1st Respondent's case that in February 2018, a reshuffle of all guards at Harambee Sacco Plaza was carried out which affected all guards including the 1st Petitioner. That the 1st Petitioner was assigned duties in the Planning and Staffing Department of the 1st Respondent as an Acting Clerk up to 15th March 2018 awaiting an opportunity for another assignment where she could be placed, as the 1st Petitioner had undertaken courses in Information Technology and was fit to work in the planning office temporarily. The 1st Respondent states that owing to the 1st Petitioner's dedication to duty and commitment, it wanted to place her at a sensitive assignment to be in charge of other guards.
22. The 1st Respondent contends that an opportunity arose with UAP Insurance at its UAP Towers in Upperhill and the Operations Manager instructed the 1st Petitioner to report to UAP Towers on 19th March 2018 but she declined.
23. According to the deponent, the 1st Petitioner disobeyed lawful instructions and was adamant that she would not report to UAP but did not give any good reason for her not agreeing to be posted to UAP Towers.
24. It is averred that on 20th March 2018, the 1st Petitioner was issued with a show cause letter because of her insubordination which she acknowledged receipt of.
25. The 1st Respondent states that the 1st Petitioner submitted a resignation letter dated 19th March, 2018 on the same day after 3pm after receiving the show cause letter. That on 21st March 2018, the Respondent accepted the resignation but on 22nd March 2018, the 1st Petitioner reported to the office very early acting completely oblivious of the happenings of the previous day. That around mid-day, she handed in a response to the show cause letter at the Respondents gate and left without clearing.
26. The 1st Respondent avers that a decision was made to accord the 1st Petitioner a hearing despite her earlier resignation and she was invited to a disciplinary hearing on 16th April 2018 which she did not attend.
27. It is therefore the 1st Respondents case that the claim for constructive dismissal is not merited and further, that the 1st Respondent did not frustrate the 1st Petitioner to lead to her resignation.
28. According to the 1st Respondent, the 1st Petitioner resigned because of being posted to UAP and that there was nothing unreasonable in the 1st Respondent's deployment to UAP Towers.
29. Lastly, the 1st Respondent avers that there was nothing it did to condone any sexual harassment and that soon after the claims were made, staff were reshuffled and the 1st Petitioner left Harambee Sacco Plaza. That the claim of sexual harassment had no nexus to the exit of the 1st Petitioner from employment.
30. In a rejoinder, the 1st Petitioner by a further affidavit sworn on 26th September 2022 reiterated the contents in the petition and the averments she made in her affidavit in support of the petition.
31. The 2nd Respondent filed his Replying affidavit sworn on 21st September 2022 and denied making sexual advances at the 1st Petitioner. In response to the allegation made by the 1st Petitioner that she reported the matter to Parliament Police Station and was issued with a case no. OB CO 24/5/02/2018, the 2nd Respondent stated that he had visited the police station sometimes in 2018 to make a statement



on behalf of Harambee Sacco about an incident involving one of their Record Managers when he was informed by a police officer at the station that the 1st Petitioner had reported him for alleged attempted rape. That the police had discreetly sent an officer to Harambee Sacco to conduct further investigations but no evidence was obtained to assist with the investigations as the officer doing the investigations noted that the office where the incident allegedly took place was open and clear and that anyone passing by or in the adjacent offices could see what was happening inside.

32. In response, the 1st Petitioner filed a supplementary affidavit sworn on 11th October 2022 in which she states that the 2nd Respondent was occupying the finance manager's office and the office of the Acting Chief Executive Officer at 3rd Floor, which had translucent glass and not clear glass as alleged by the 2nd Respondent. That sexual advances made by the 2nd Respondent to her were made in a low tone and there was no way for any of the people occupying the adjacent offices to know what was going on as they were also busy going about their own business of the day; that she could not leave the 2nd Respondent's office as quickly and as easily as the 2nd Respondent prescribes because she was in a state of shock following what had transpired and it took time for her to comprehend the same; that she had witnesses whom she told of the incident. That after the incident occurred, she immediately reported to the Head of Security.
33. In summary, the 1st Petitioner averred that the 2nd Respondent's affidavit contains mere denials, wrong perceptions of how a victim of sexual harassment ought to behave and the requirement of inexistent tangible evidence in order for her case to be believable.
34. The Petition was disposed of by way of written submissions. The Petitioners' submissions are dated 16th December 2022, the 1st Respondent's submissions are dated 20th March 2023 and the 2nd Respondent's submissions are dated 11th April 2023.

Petitioners' submissions

35. In their submissions, the Petitioners framed the issues for determination to be:
 - i. Whether the 1st Respondent is liable for sexual harassment of its employees situated outside the office premises;
 - ii. Whether there is a violation of the 1st Petitioner's right to equality and non-discrimination by the 1st Respondent and how it intersects with sexual harassment;
 - iii. Whether there is a violation of the 1st Petitioner's right to human dignity by the 1st Respondent and the link between human dignity and sexual harassment;
 - iv. Whether there is a violation of the 1st Petitioner's right to fair labour practices and the correlation between sexual harassment experienced by the 1st Petitioner and constructive dismissal from employment;
 - v. Whether the 1st Petitioner is entitled to the reliefs sought.
36. On the 1st issue, the Petitioners have submitted that the crux of this petition is the sexual harassment the 1st Petitioner experienced while on duty in the 2nd Respondent's office eventually leading to her constructive dismissal.
37. In response to the denial by the 1st Respondent that the cause of action arose while the 1st Petitioner was its employee, the Petitioners submit that the transfer of business from the 1st Respondent to Riley Falcon Services Ltd occurred on 1st July 2019 while the cause of action, the subject of this petition



occurred on 26th January 2018 way before the alleged transfer of business. It is thus submitted that the 1st Petitioner was an employee of the 1st Respondent at all times materials to this petition.

38. On the second issue, the Petitioners have submitted that the 1st Respondent violated the 1st Petitioner's dignity in the manner in which it handled the sexual harassment complaint through the statement made by the Director of Operations that she ought to have handled the matter diplomatically in order to preserve business contact. The Petitioners have submitted that the 1st Respondent instead responded to the allegations by reshuffling guards working at Harambee Sacco. According to the petitioners, the reshuffle of the guards was not done to protect the 1st Petitioner but rather to protect and preserve the 1st Respondent's interests, relationship and business contact.
39. With regard to the third issue, it is the Petitioners' submission that upon making the complaint on sexual harassment, the labour practices of the 1st Respondent were not fair to the 1st Petitioner as envisaged in Article 41 of *the Constitution*, section 4 of the *Fair Administrative Action Act* and section 5 of the *Employment Act* as the 1st Respondent discriminated against the 1st Petitioner on account of the sexual harassment claim to a point of her resignation hence leading to constructive dismissal.
40. As to whether the 1st Petitioner is entitled to compensation for sexual harassment by the 2nd Respondent and the 1st Respondent's failure to protect her from sexual harassment, the 1st Petitioner submits that she has demonstrated that she was sexually harassed by the 2nd Respondent and that the 1st Respondent took no steps to redress the sexual harassment complaint and further, that the 1st Respondent proceeded to constructively dismiss the 1st Petitioner in order to maintain the business relationship with the 2nd Respondent's employer.
41. The petitioners urged the court to find that the Respondents jointly and severally liable for the violation of the 1st Petitioner's rights and grant her prayers in the petition.

The 1st Respondent's submissions

42. In its submissions, the 1st Respondent has framed the issues for determination as follows:
 - i. Was the 1st Petitioner employed by the 1st Respondent at the time the cause of action is alleged to have arisen and have the Petitioners sued the 1st Respondent wrongfully by virtue of not being the 1st Petitioner's employer at the material times?
 - ii. Did the 1st Respondent take appropriate action after the 1st Petitioner's complaint of sexual harassment albeit by a non-staff member?
 - iii. Was the claim of sexual harassment of the 1st Petitioner by the 2nd Respondent connected with her exit from the employment? In other words, was the 1st Petitioner's exit from the employment a consequence of inaction to address her sexual harassment complaints or was it due to ordinary termination circumstances?
 - iv. Was the 1st Petitioner constructively dismissed?
 - v. By extension does her termination raise any constitutional issues?
 - vi. Is the case against the 1st Respondent time barred?
43. On the first issue, it is the 1st Respondent's submission that at the time when the alleged incident of sexual harassment took place and at the time of the 1st Petitioner's exit, she was no longer an employee of the 1st Respondent and there is therefore a serious and fatal misjoinder of the 1st Respondent and non-joinder of the 1st Petitioner's true employer. The 1st Respondent has maintained that the judgement of



- this Court cannot be given against the 1st Respondent Riley Services Limited which was no longer the 1st Petitioner's employer as at March 2018 when she exited employment.
44. On the second issue, the 1st Respondent has submitted that upon being informed of the sexual harassment incident, without even being certain as to whether the allegations were true or not, it moved all the guards at Harambee Sacco in February 2018 to other stations. The 1st Respondent has therefore submitted that it took timely and decisive action to ensure the 1st Petitioner was not exposed to further sexual harassment.
 45. On the issue whether the claim of sexual harassment of the 1st Petitioner by the 2nd Respondent is connected with her exit from the employment, the 1st Respondent has submitted that the 1st Petitioner's exit from employment had no proximate relationship with the issue of sexual harassment.
 46. According to the 1st Respondent, the 1st Petitioner had enjoyed cordial relations with both her employer, the 1st Respondent and its senior staff for many years as evidenced by the several commendations and cash rewards she received. The 1st Respondent states that at the time of her exit, she had worked at Harambee Sacco offices for almost 5 years and had therefore gotten quite accustomed to working at Harambee Sacco and probably enjoyed working there, given that she did her work well and got a commendation while stationed there.
 47. The 1st Respondent therefore submits that the 1st Petitioner was opposed to working at the office as opposed to the field where she was used to. It is further submitted that the 1st Petitioner's contract at clause 2.2 provides that she could be posted to any branch or station in Kenya.
 48. It is thus submitted that the 1st Petitioner did not substantiate the reasons for not wanting to be transferred to UAP offices.
 49. On the issue whether the 1st Petitioner was constructively dismissed, the 1st Respondent submits that the 1st Petitioner exited by way of a resignation brought about by her reluctance to be redeployed and not because of frustration by the employer as contemplated in a true constructive dismissal scenario.
 50. Fifthly, on whether the 1st Petitioner's reasons and mode of exit raise any constitutional issues, it is the 1st Respondent's submission that the 1st Petitioner's exit had nothing to do with the allegations of sexual harassment. The 1st Respondent has maintained that it took adequate steps when the 1st petitioner raised the allegation of sexual harassment.
 51. Lastly on whether the case against the 1st Respondent is time barred, the 1st Respondent submits that the case against it if stripped to its bare constituent elements, is an ordinarily constructive dismissal claim with no nexus to the sexual harassment claim, and that it is time barred because such a claim ought to have been filed within 3 years from the date when termination is alleged to have taken place. The 1st Respondent avers that the 1st Petitioner contended in her petition that she was constructively dismissed on 19th March 2018. It is the 1st Respondent's submission that the 1st Petitioner had up to March 2021 to file a suit for constructive dismissal but filed the instant petition on 28th April 2021. It is therefore submitted that the cause herein is time barred.
 52. At the end, the 1st Respondent urged the court to dismiss the Petition with costs.

2nd Respondent's submission

53. The 2nd Respondent has identified the issues for determination to be:
 - i. Whether the 1st Petitioner has made out a proper case to support her allegations of sexual harassment against the 2nd Respondent



- ii. Is the 1st Petitioner entitled to the prayers sought in her petition as against the 2nd Respondent
 - iii. Who should bear the costs of this petition
54. On the first issue, it is submitted that in the present case apart from the handwritten letter attached to the Petition, there is no other evidence by the 1st Petitioner to prove the allegations of sexual harassment against the 2nd Respondent. It is the 2nd Respondent's submission that no one has corroborated her story and none of the people that she alleges she made aware of the sexual harassment allegations wrote a statement which has been annexed to the petition.
 55. The 2nd Respondent has further submitted that the 1st petitioner made no effort in her petition to point out the report she made at parliament police station or even provide the OB number of the incident report and that it is only when the 2nd Respondent brought this up in his Replying Affidavit that the 1st Petitioner vaguely responded in her supplementary affidavit on her version of events.
 56. The 2nd Respondent urged the court to find that the 1st Petitioner has not proved the allegations of sexual harassment against the 2nd Respondent and urged the court to dismiss the Petition.
 57. On the issue of costs, the 2nd Respondent prays that the Petition to be dismissed with costs. He has argued that the allegations levelled against him by the 1st Petitioner are malicious and unfounded.

Determination

58. From the pleadings on record and the submissions of the parties, the issues that fall for my determination are:
 - a. Whether there is misjoinder of the 1st Respondent to the petition;
 - b. Whether the petition is time barred;
 - c. Whether there are constitutional issues raised in the petition;
 - d. Whether the 1st Petitioner suffered sexual harassment at the workplace;
 - e. What was the duty of the 1st Respondent upon receipt of the sexual harassment complaint;
 - f. Whether there was constructive dismissal; and
 - g. Whether the Petitioners are entitled to the reliefs they are seeking
59. The 1st Respondent avers that it has been wrongly joined to this petition as it was not the employer of the 1st Petitioner at the time of her resignation.
60. In the first place, there is no letter informing the staff or anybody else of the change of ownership from Riley Security to Riley Falcon Security. Secondly, there was no mention of change of offices or staff. Thirdly the gazette notice filed by the 1st Respondent on change of ownership of the company is dated 3rd December, 2019, long after the 1st Petitioner left employment and finally, all correspondence from the 1st Respondent to the Petitioners up to the time of filing suit was on letterheads of Riley Security Limited and Not Riley Falcon Security Limited.
61. Specifically, the letter at Annex JM27 of the 1st Respondent's Replying Affidavit of Mr. Musomba is a letter dated 9th July, 2018 and is from Riley Security Limited and the title reads "Our Former Employee Doris Kwamboka". It is signed off:

"Yours faithfully,



Riley Services Limited”

62. If the 1st Respondent was not sure of its change of user and used the two names interchangeably, why would an employee know better? It is my view that this is an afterthought. I find that the 1st Petitioner and all other persons would in the circumstances be forgiven for not knowing the difference between Riley Security and Riley Falcon Security. I find no merit in the argument and dismiss it.
63. The answer to the second issue whether the suit is time barred will depend on the answer to the 3rd issue, the question whether the petition raises any constitutional issue.
64. In the pleadings, the petitioners have relied on Articles 1(c), 3(1), 4(2), 10, 22, 23, 48, 50(1), 159, 162, 165, 258 and 259 of *the constitution* as read with section 12 of the Employment and *Labour Relations Act* as the basis for the petition. The 1st issue for determination as framed by the Petitioners is whether the Respondents failed to protect and uphold the fundamental rights of the 1st Petitioner, to wit, the right to equality and freedom from discrimination, right to human dignity, right to fair labour practices and the right to fair administrative action.
65. It is my view that the manner in which the pleadings are framed justify putting to the court a constitutional question. The only issue for the court to determine therefore is whether the same is proved or not.
66. I find that the petition as framed before this court raises constitutional issues which this court is obligated to consider. The petition is therefore properly before this court.
67. The 2nd issue whether the suit is time barred therefore falls by the wayside.
68. Turning to the 4th issue, 1st Petitioner has faulted the 1st Respondent for failing to take action after she was allegedly sexually harassed while in the course of her employment.
69. Section 6(1) of the *Employment Act* is on sexual harassment and it provides that:
- (1). 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.
70. Sexual harassment is defined in Black’s Law Dictionary, Tenth Edition as “a type of employment discrimination consisting in verbal or physical abuse of a sexual nature, including lewd remarks, salacious looks and unwelcome touching”.



71. The Petitioners have in the pleadings stated that the 1st Petitioner was sexually harassed by the 2nd Respondent who is an employee of another institution and not an employee of the 1st Respondent who was her employer. She averred that she was in the course of her duties when she was sexually harassed.
72. The *Employment Act* does not provide for sexual harassment committed by a third party in the employer's or employee's workplace. The law however places a duty on the employer to ensure that an employee works in a safe environment and this would include any place where an employee is at work. (See definition of 'workplace' in the *Occupational Safety and Health Act*).
73. The 1st Petitioner was allegedly sexually harassed when on duty. She reported the incident which led to all the employees in her assignment at Harambee Sacco where she was stationed being reshuffled. The 1st Respondent stated that the reshuffle was as a consequence of the alleged sexual harassment.
74. What would be expected of an employer where the perpetrator of the alleged sexual harassment was a person who was not an employee of that employer? In my view this would fall under normal criminal offenses to be reported to the law enforcement authorities.
75. In the instant case Mr. Musomba states that he advised the 1st Petitioner to report to the police. The 1st Petitioner stated that by the time she reported to Mr. Musomba she had already reported to the police.
76. What is the duty of an employer where the alleged sexual harassment happens in premises outside the jurisdiction of the employer? In my view what the 1st Respondent did was sufficient in the circumstance. It had a sexual harassment policy in place as is evident from the Respondent's Staff Manual and Human Resource Manual both of which prohibit discrimination and harassment and provide guidelines on dealing with the same. (See pages 79 and 131 of 1st Respondent's bundle of documents). The 1st Respondent further removed the 1st Petitioner from the environment where she alleged to have been sexually harassed and advised her to report to the police. The 1st Respondent could not in the circumstance have been expected to do more.
77. Did the 1st Petitioner prove that the 2nd Respondent sexually harassed her? The 2nd Respondent has denied sexually harassing the 1st Petitioner. He states that the office of the Acting Chief Executive Officer where the sexual harassment is alleged to have happened is of clear glass, in a busy corridor adjacent to the credit control office and the Loans Section Office both of which attract a lot of activity, that the 1st Petitioner did not call any of these persons or even produce statements from any of them. That no evidence, not even the record of reporting to police, was adduced in evidence by the 1st Petitioner.
78. The 2nd Respondent relies on the decisions in the case of *JWK v (Particulars Withheld) College of Kenya & Another* [2019] eKLR
- “Sexual harassment is indeed a serious crime and should not be trivialized but court should also not jump to conclusion unless ample evidence is placed before it. This was the finding in case No. 927/2010 PO vs The Bord of Trustee, association for better land husbandry and Rodney Jim Keneally Cheatle.”
79. The 2nd Respondent further relies on the case of *Ooko & another v SRM & 2 others (Civil Appeal 195 & 197 of 2019)* (Consolidated) [2022] KECA 44 (KLR (4 February 2022)). In the Judgment the learned



judges of the Court of Appeal were able to make a finding of sexual harassment as there was evidence of emails and letter detailing her complaint. The court held thus:

“The evidence provided by S in this regard were emails and letter on her complaint. In this regard, the ELRC reproduced the letter dated January 20, 2006 written to Dominic by Mr. Philip Holi and copied to S in response to her complaints, which was as follows... in the present appeal, the allegations that were particularized in the Memorandum of Claim by S were also confirmed in the letter dated January 20, 2006 and corroborated by the evidence by Dominic that he did indeed meet with S at the Nairobi Club after work hours.

80. The 2nd Respondent also relied on the case of *Martha Wangari Kariuki v Muli Musyoka & another* [2021] eKLR where the court held as follows:

“The plain meaning of the foregoing excerpt from the resignation letter is that the reason for the claimant’s resignation was that events in her personal life had been dragged into her workplace and that her employment information in the custody of the company, including salary and her work schedule, had been shared to third parties and thereby putting her safety to jeopardy.

It follows that the reason for her resignation was not sexual harassment by the 1st respondent’s otherwise, if that was the case, nothing would have been easier than to state so in the resignation letter. Sexual harassment is traumatizing and dehumanizing to the victim however, these allegations of sexual harassment still need to be proved and it is not sufficient for the employee to only allege that she or he was sexually harassed. The claimant in her witness statement stated that the 1st respondent continually sexually harassed but she did not state when these incidences occurred except stating that it was at the changing room.

Consequently, I find and hold that, the claimant has not proved on a balance of probability that she was sexually abused by the 1st respondent. 53. In my view the alleged sexually harassed is only an afterthought because in her resignation letter, the claimant expressed her gratitude for the positive experience at Hair Hub and stated that she enjoyed working there with her colleagues.”

81. Sexual harassment is a serious offence that as was pointed out in *JWK* case above, should not be trivialised by an employer or any other person. It is a serious affront to the dignity of the victim and can have far reaching consequences if not properly addressed.
82. Being a criminal offence and one that can be very damaging on the reputation of the offender, courts must be careful not to convict except on concrete and valid evidence. Further, being an offence that is usually committed in privacy where the victim may be the only witness, it is always advisable to have some evidence to corroborate the evidence of the victim. In this case apart from her statement made at Harambee Sacco there is no other evidence to support the 1st Petitioner’s case. She did not submit evidence of the OB report to the police. She did not even submit evidence that the office where the incident allegedly happened had opaque glass. She did not call any of the people she reported to or submit statements from them. The court is left with her word against the word of the 2nd Respondent.
83. In her statement she refers to earlier incidents of sexual harassment by the same 2nd Respondent which had she reported would have demonstrated a particular tendency by the 2nd Respondent. Unfortunately, she did not.



84. Sections 107, 108 and 109 of the *Evidence Act* place the burden of proof on the 1st Petitioner. The sections provide:

107. Burden of proof

(1) Whoever desires 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. 108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

85. In the instant case the 1st Petitioner has not proved to the required standard that the 2nd Respondent is guilty of sexually harassing her.

86. On the issue whether the 1st Petitioner was constructively dismissed, courts have held that Constructive dismissal occurs when an employee is compelled to resign because the employer's behaviour has become so intolerable and the working environment become so hostile, that the employee is no longer able to discharge his contractual responsibility.

87. In this case, the 1st Petitioner stated that she decided to resign after she was transferred to work in Upper hill at UAP Towers. The 1st Respondent stated that the 1st Petitioner was identified for the position because of her dedication and commitment to work which had been demonstrated over time as confirmed by the commendations the 1st Petitioner earned. The 1st Petitioner has not explained how the said transfer would affect her work. I do not see how the 1st Respondent in exercising its prerogative of transferring the 1st Petitioner, can be said to have created a hostile work environment thereby constructively dismissing the 1st Petitioner.

88. The Petitioner's complaint appears to have been that she was not going to earn overtime in the new position which in effect reduced her income by Kshs. 5000 per month. This appears to have been the reason for her resistance to go on the transfer and decision to resign. It is instructive that no mention is made about sexual harassment in the letter of resignation which is reproduced below:

Doris Kwamboka Kabua

Riley Services Ltd

Nairobi

Staff No. 51462

Date 19th March 2018

The Human Resource Manager

Riley Serves Ltd

Box 156152 – 00200

Nairobi



Dear Madam,

Re: Resignation From The Company Due To Disturbances And
Mistreatment From Mr. Akiuabi Through Doa

I am the above named staff and of sound mind, an employee of RSI as a guardette since 2010 may to 2013 with employment no. 21085 at the university of Nairobi Chiromo Campus.

I was requested by my company to leave the assignment and open a new order on 28th May 2013 at Harambee Sacco, where I have worked since then to 2018 February as the in charge. I have worked at field of operator without any problem until last year when I was confirmed to contract where my no. was changed from 21085 to 12077 minus sign the contract but I worked on directed to work at the department of operations as a planning and staffing clerk (acting) since madam Janet of the desk will be proceeding on maternity leave of three months (3months) from 20th April. I fully denied and requested to be taken to operation fields out there but was forced to be shown what is done in the office too.

I tried my best to stop myself being deployed at the main office but I was forced by Mr. Musomba to work insisting that my only assignment counting from the first, second, third and last option I have is to relax and work, I send madam heto talk to him more than twice, and Mr. Akwabi but they said I hadn't otherwise only to see him by myself again.

After a follow up of two weeks in vain, I just relaxed as I was told and took the forced job that I never requested but took it positively at last. All in all the reception from Mr. Musomba was since they wanted my assistance your madam to go on leave.

Today on 19th March 2018, I reported on duty as always since I was deducted all my overtime pays, changed my no. from guard 12077 to staff no. 51462 and instructed to be reporting job at exactly 8.00 a.m. and leave office at 5.00 p.m. I was called by Mr. Akwabi to see on M Mr. through the HR over going to UAP as a receptionist and in-charge of ladies but I asked them not to disturb my mind again since the MD had commanded them not to take me to UAP and swap Mr. Otwani to the office instead they deploy me. They referred me to Mr. Musomba and when I went to his office the reception he gave me was demoralizing and annoying compared to the way they handled me before and I quote "I hope hujakuja kuniongelesha about UAP". I requested him had made my mind as you directed me and am working. He said no and with an immediate effect supposed to be at UAP. I tied to make him understand the mind cost but not. I felt harassed and mistreated that I can't be listened to as I did to them.

I therefore give my company a notice of seven days as per no. 51462 for any further action if any since I feel frustrated and they have known me for the last 8 years as a supervisor who loves discipline and any work assigned to me.

Thanks in advance.

Yours faithfully

Doris K. Kambuni

Tel : 0704857334

89. I find no proof of constructive dismissal.
90. Lastly, regarding the issue on whether the Petitioners are entitled to the prayers they are seeking, the Petitioners in their petition sought for the following reliefs which I will address in separate heads.



- i. A Declaration that the 1st and 2nd Respondents violated the fundamental rights of the 1st Petitioner as provided in Articles 24, 27, 28, 41 and 47 of *the Constitution*.

This prayer cannot issue as the 1st Petitioner has not demonstrated how these rights were violated.

- (ii) A Declaration that the 1st Respondent had a duty to protect the 1st Petitioner from sexual harassment of the 2nd Respondent.

The Court already found that the 1st Respondent did its part in protecting the 1st Petitioner from sexual harassment from the 2nd Respondent by removing her from the premises in the reshuffle.

- (iii) The Honourable Court do hold the 1st and 2nd Respondents jointly and severally liable for violating the 1st Petitioner's fundamental rights and freedoms.

This prayer cannot issue as the 1st Petitioner has not demonstrated how her fundamental rights and freedoms were violated.

- (iv) The Honourable Court awards the 1st Petitioner Kshs 5,000,000 being general damages for the psychological pain and suffering caused by the Respondents.

The 1st Petitioner has not demonstrated how the Respondents violated her fundamental rights and therefore I decline to make this award.

- (v) The Honorable Court awards the 1st Petitioner Kshs 3,000,000 being general damages for constructive dismissal.

91. As already established, the 1st Petitioner was not constructively dismissed as alleged.

92. In the end, the Petition herein is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 17TH DAY OF OCTOBER 2024

MAUREEN ONYANGO

JUDGE

