IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MURGOR, NYAMWEYA & NGENYE, JJ.A.)

CIVIL APPEAL NO. E047 OF 2022

BETWEEN

EMMANUELLA MEDZA KINDA.....APPELLANT

AND

AIDUCATION INTERNATIONAL (K).....1ST RESPONDENT

JEREMIAH KAMBI.....2ND RESPONDENT

(An Appeal from the Judgment of the Employment and Labour Relations Court in Mombasa (Byram Ongaya, J.) delivered on 19th November, 2021

in

ELRC No. 101 of 2018)

****

JUDGMENT OF THE COURT

The Appellant, Emmanuella Medza Kinda filed a suit in the Employment and Labour Relations Court in Mombasa (ELRC), being ***Cause No.101 of 2018***

against ***the 1st Respondent, Aiducation International (K)*** and the ***2nd Respondent, Jeremiah Kambi*** **in** which she sought the following orders:

> *a) That the 1st Respondent be ordered to pay the claimants her terminal and contractual dues amounting to Ksh.754,000.00;*
>
> *b) A declaration that termination of the claimant's employment was unfair, unjust, wrongful and in breach of the employment contract;*
>
> *c) General damages for sexual harassment by the 2nd Respondent;*
>
> *d) Costs of this claim and interest thereon at court rates;*
>
> *e) Any other relief that this Honourable court may deem just and fit to grant.*

It was the Appellant's case that she was employed as a Communications Officer and Alumni Affairs Coordinator effective 1st May 2016 at Kshs.58,000 per month by the 1st Respondent, a non-governmental organization based in Watamu, Kilifi County, and that the 2nd Respondent is the Chief Executive Officer (CEO) of the 1st Respondent.

She further stated that in November 2016, the 2nd Respondent summoned her to his office and told her he had to "let her go" because the Human Resource Manager, Bernadette

Mapenzi who is also his wife had accused him of having an affair with her and had asked him to get rid of her; and that the said Bernadette Mapenzi, her second cousin on her maternal side had suggested mediation to resolve the matter.

The Appellant claimed that on 28th January 2017 she received a WhatsApp text message from the 2nd Respondent injected with sexual innuendo, written in vernacular,

> "*Thako kuthatha bado. Ela kilacha unaangwa ninawe, Kunipa bai nikaangwa na ujeri “*
>
> which translates to:
>
> "*I have not tasted but every day I am told that we are together. Please give me so that they can speak the truth*".
>
> And that on 29th January 2017, in another WhatsApp message, he wrote, "*I need a big cooler to cool my head or a good fuck...*"

Further, that on the same day, the 2nd Respondent called for an impromptu meeting where he ordered her not to set foot at the Aiducation Offices in Watamu, vehemently stating that, "*Your life is in danger*" followed by, "*Mapenzi plans to kill you.”* He told her to either continue working for the 1st Respondent from a remote location, or work for the 1st Respondent as a consultant or resign from the 1st Respondent to establish a business.

The Appellant further claimed that on 15th April 2017, the 2nd Respondent informed her that he was interested in having a

sexual relationship with her and that, *"...he could satisfy her sexually."* The 2nd Respondent later sent her messages that: *"... the only way I am backing off if you let me know you are in a stable*

relationship," and that she should not give him lectures of, *"…you are my in-law and boss."*

She claimed that at no point did she tolerate or condone or encourage the 2nd Respondent's sexual advances and that she made it very clear that she was not interested in a sexual relationship or any form of an affair with the 2nd Respondent, yet the 2nd Respondent used his position as Chief Executive Officer of the 1st Respondent to sexually harass and intimidate her contrary to provisions of ***section 6 (1) (a) (b)*** and ***(d)*** of the ***Employment Act.***

It was her case that, on 29th June 2017, she was unfairly dismissed from employment without adherence to substantive and procedural requirements of ***Sections 41, 43, and 45*** of the ***Employment Act, 2007***, and that she was dismissed from employment for refusing to accede to the 2nd Respondent's sexual advances and his improper and unprofessional conduct which subjected her to psychological torture, ridicule and tarnished her reputation and good standing.

The Respondents on their part denied the claim and stated that the 1st Respondent is a family run organization with the

executive board members being the 2nd Respondent’s immediate family and that most of the staff are family members, since the organization is still at start up stage in terms of

administrative functions. The Respondents admitted employing the Appellant who was a sister in-law of the 2nd Respondent.

They denied her allegations of sexual harassment by the 2nd Respondent, but contended that there were complaints raised by the Human Resources Manager, the 2nd Respondent's wife, regarding an alleged intimate relationship the Appellant was having with the 2nd Respondent; they claimed that the message evidence adduced was selective and that the Appellant had omitted her messages responding to the 2nd Respondent's messages thereby distorting the context in which they were communicating. The Respondents denied that the 2nd Respondent used his position as Chief Executive Officer to sexually harass or intimidate the Appellant with or without any promise of preferential treatment, threat of detrimental treatment or in any way interfere with her employment.

The Respondents also filed a counterclaim where they alleged that during her employment, they had lent the Appellant Kshs.200,000 which she had not fully repaid, leaving an outstanding balance of Kshs.125,000. Further, they claimed to have allocated the Appellant a new computer worth Kshs.40,000.

They therefore counterclaimed for Kshs. 165, 000.00, being the outstanding loan balance and value of the computer. As a consequence, the Respondents prayed

that the claim be dismissed with costs and that the Appellant pays the Respondents Kshs. 165, 000.

After hearing the parties, the trial Judge held that on 29th June 2017 parties met and after discussions it was agreed that they separate. The court further held that the contract of employment was terminated by agreement on 29th June 2017 upon terms that the Respondents would pay the Appellant 12 months' salaries which amounted to an award of Kshs.696, 000; that the parties were bound by the oral agreement to separate and the issue of unfair or unlawful dismissal would not arise nor would the related claims of notice pay or 12 months' salary in compensation.

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

The court proceeded to allow the Appellant's claim in part and awarded her Kshs. 531,000 less the amount claimed in the Respondents' counterclaim.

Aggrieved, the Appellant has filed an appeal to this Court challenging the part of the judgment by the trial Court that dismissed her claim for sexual harassment, on the grounds that: a)The trial court was in error in applying wrong principles in dismissing the Appellant's claim for sexual harassment having

failed to distinguish the test for *quid pro quo* sexual harassment provided in ***Section 6 (1) (a)*** of the ***Employment Act*** from the hostile environment test under ***Sections 6 (1) (b), (c)*** and ***(d)*** of the same Act; b) in ignoring the fact that the 1st Respondent did not have a sexual harassment policy or complaint mechanism contrary to ***Sections 6 (2), (3)*** and ***(4)*** of the ***Employment Act*** which rendered the 1st Respondent strictly liable for the sexual harassment that was perpetrated by its Chief Executive Officer, the 2nd Respondent c) in holding that the repeated use of words of a sexual nature by the 2nd Respondent to the Appellants were justified; d) in misapprehending the law and facts by finding that the sexual harassment claim was an afterthought thereby ignoring the vulnerability of the Appellant in the face of the powerful position the 2nd Respondent held as Chief Executive Officer, the Appellant's supervisor and representative of the 1st Respondent; and the perpetrator of the sexual harassment; e) in ignoring the Appellant's evidence that the comments of a sexual nature were unwanted, unwelcome and offensive; f) in giving undue weight to extraneous factors such as the familial relationship between the Appellant and 2nd Respondent, that the

offensive messages were sent through a WhatsApp message and not emails, ongoing discussions on the false allegations of an affair, amongst others as defences to sexual harassment; and g) in relying on the 2nd Respondent's allegations of missing communication without proof.

When the appeal came up for hearing on a virtual platform, the parties filed written submissions which they relied upon and briefly highlighted. Submitting for the Appellant, learned counsel ***Ms. Katisya*** stated that the trial court conflated and confused two distinct types of sexual harassment, namely *'quid pro quo'* and *'a hostile environment'*; that the trial court misapprehended ***Section 6 (1) (b)*** and ***(c)*** of ***the Employment Act*** which provides that the use of language whether written or spoken or physical material of a sexual nature *per se* amounts to sexual harassment, without delving into the consequential effects; that the court misdirected itself by substituting the Appellant's level of acceptance or a subjective view with his own view; that the court ought to have applied the subjective view of the Appellant; that the Appellant clearly expressed her rejection of the sexual messages and behaviour as inappropriate and unwelcome; that furthermore, the trial Judge also failed to appreciate that the Appellant as a junior employee would have been too intimidated to make a report against the Chief Executive Officer for fear of losing her job.

Regarding the trial court's finding that the complaint was an

afterthought, it was submitted that there was no reporting structure, and that it would have been impossible to report to the Human Resources Manager who was the Chief Executive Officer’s wife and the person falsely accusing her of having an affair with her husband.

On their part, learned counsel ***Mr. Lisanza*** for the Respondent submitted that the Appellant never complained that the words transmitted by the 2nd Respondent were unacceptable and unwanted. The ongoing allegations of an affair between the Appellant and the 2nd Respondent at the work place had spiraled to their private conversation; that the Appellant failed to bring the allegations of sexual harassment to light at the earliest opportunity, but had awaited to raise it in the presence of her advocate after she was dismissed from employment.

It was also submitted that the Appellant embarked on a calculated strategy, to delete parts of her responses sent to the 2nd Respondent in their conversations leaving only the 2nd Respondent's messages; that the Appellant disclosed the allegations of sexual harassment on 10th July 2017 through an email after her employment termination; that as a consequence, she failed to meet the required threshold stipulated under ***Section 6 (1)*** of the ***Employment Act*** and also failed to discharge the burden of proving the claim for sexual harassment.

The mandate of this Court as a first appellate court was stated in in the case of ***Kenya Ports Authority vs Kuston***

***(Kenya) Limited* [2009] 2 EA 212** as follows:

> *"**On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.**"*

Given the foregoing, and having regard to the record of appeal, the submissions of the parties and the law, the issues that arise for consideration are:

> ***i)*** *Whether the trial Judge properly applied the law on sexual harassment under* ***section 6*** *of the* ***Employment Act, 2007****, particularly in distinguishing between 'quid pro quo' sexual harassment under* ***Section 6(1) (a)*** *and 'hostile work environment' sexual harassment under* ***Sections 6(1), (b) to (d).***
>
> *ii) Whether the trial Judge properly evaluated the evidence and rightly concluded that sexual harassment was not established;*
>
> *iii) Whether the 1st Respondent was liable for sexual harassment against the Appellant**;** and*
>
> *iv) Whether the trial Judge was in error in relying on unproven allegations of missing communication by the 2nd Respondent to the prejudice of the Appellant.*

Before addressing the issues identified, we consider it important to set out the context within which sexual harassment is founded.

The first global instrument the ***Universal Declaration of Human Rights (UDHR) 1948*** recognised the rights and fundamental freedoms that required protection. It specifies that all human beings are born free and equal; that men

and women have equal rights; and that all persons are entitled without distinction of any kind such as race, colour, sex language, religion, political, or other opinion; no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. That all are equal before the law and entitled without any discrimination to equal protection of the law against discrimination. The UDHR further set the standard that all rights are universal, interdependent and indivisible.

Declaration on the elimination of Violence against Women

The declaration was adopted by the United Nations General Assembly by its resolution of 20th December 1993. It provides for the elimination of all forms of violence against women. In particular ***Article 2 (b)*** specifies that violence shall not be limited to *"…physical, sexual, and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment, and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution."*

Convention of Elimination of All Forms of Discrimination Against Women (CEDAW)

The Convention is founded on three principles: non-

discrimination, state obligation and substantive equality. It requires countries to eliminate

discrimination against women and girls in all areas and promotes women's and girls' equal rights.

Article 11 of the Convention provides that State Parties shall take appropriate measures to eliminate discrimination against women in the field of employment to ensure on the basis of equality of men and women the same rights and in particular a) the right to work is an inalienable right of all human beings.

International Convention on Economic Social and Cultural Rights

This convention provides for the rights of women in the work place. ***Article 7*** requires recognition of a women's right to fair conditions of work and specifically provides that women shall not be subjected to sexual harassment at the work place which may vitiate the working environment.

There are also regional instruments relating to sexual harassment.

The African Charter on Human and Peoples' Rights makes provision for a human rights regime for Africa and its peoples. ***Article 5*** imposes the right for respect of human dignity and prohibits slavery, and all forms of exploitation and

degradation of man particularly slavery, slave trade, torture, cruel, inhuman, or degrading punishment and treatment.

Article 1(G) of the ***African Charter on Human and Peoples' Rights on the Rights of Women in Africa*** defines discrimination against women thus:

> ***"Discrimination against women" means any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life;"***
>
> ***Under the Declaration on Fundamental Principles and Rights at Work, the ILO defines sexual harassment as a sex-based behaviour that is unwelcome and offensive to its recipient. For sexual harassment to exist these two conditions must be present;***
>
> ***1) Quid Pro Quo, when a job benefit - such as a pay rise, a promotion, or even continued employment - is made conditional on the victim acceding to demands to engage in some form of sexual behaviour; or;***
>
> ***2) Hostile working environment in which the conduct creates conditions that are intimidating or humiliating for the victim.***
>
> ***ILO Convention 190 on Violence and Harassment Convention, 2019 sexual harassment is defined under Article 1 to include the following;***
>
> ***(a) the term "violence and harassment" in the world of work refers to a range of unacceptable behaviours and practices, or threats thereof,***

whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment;

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

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

Against this backdrop, the Kenyan Constitution of 2010 guarantees all the basic and fundamental human rights as specified in the Universal Declaration of Human Rights 1948. Within the context of sexual harassment, ***Article 27*** of ***the Constitution*** is concerned with Equality and Freedom from Discrimination. It guarantees equal protection and benefit of the law, ensuring everyone can enjoy rights without discrimination, which sexual harassment violates. ***Article 28*** makes provision for Human Dignity, of which sexual harassment inherently infringes upon.

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

Section 6 (1) of the ***Employment Act*** sets out the

circumstances that give rise to sexual harassment. It specifies that:

"An employee is sexually harassed if the employer of that employee or a representative of that employer or a co-worker—

a. directly or indirectly requests that employee for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express—

i. promise of preferential treatment in employment;

ii. threat of detrimental treatment in employment; or

iii. threat about the present or future employment status of the employee;

b. uses language whether written or spoken of a sexual nature;

c. uses visual material of a sexual nature; or

d. shows physical behaviour of a sexual nature which directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee and that by its nature has a detrimental effect on that employee's employment, job performance, or job satisfaction."

Under ***section 2*** of ***the Sexual Offences Act*** of Kenya provides for the offence of sexual harassment as an act which occurs where;

"Any person, who being in a position of authority, or holding a public office, who

persistently makes any sexual advances or requests which he or she knows, or has reasonable grounds to know, are unwelcome, is guilty of the offence of sexual harassment and shall be liable to imprisonment for a term of not less than three years or to a fine of not less than one hundred thousand shillings or to both."

This Court in the case of ***Ooko & another vs SRM & 2 others*** ***[2022] KECA 44 (KLR),*** interrogated the interlink between sexual harassment and discrimination and held thus:

> ***"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". It is therefore a genre of discrimination…"***

In the case of ***St. Leonard's Maternity & Nursing Home vs LMM (Civil Appeal 59 of 2019) [2023] KECA 1148 (KLR)*** held:

> ***"From the foregoing, there is no doubt in our minds that sexual harassment is a genre of discrimination. If that be the case, then the applicable burden of proof is that which is prescribed under section 5(7) of the Employment Act. The manner in which the said burden of proof applies was explained by the Supreme Court in Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] eKLR thus:***
>
> ***"(51)In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands***

of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary...

(52)…

(53) In spite of the commonplace that proof of "indirect discrimination" is difficult, the petitioners ought to have provided sufficient evidence before the Court, to enable it to make a determination. The 1st respondent, by a more positive scheme, went ahead to counter the bare

allegations. The petitioners failed, in this regard, to discharge their initial burden of proof."

Against the extensive international, regional and local legislation, we can now turn to consider whether in determining the dispute, the trial court properly applied the law on sexual harassment as specified under the ***Employment Act, 2007***.

Under the ILO Declaration on Fundamental Principles and Rights at Work, sexual harassment is defined as a sex-based behaviour that is unwelcome and offensive to its recipient. It is specified that for sexual harassment to exist these two conditions must be present; 1) *Quid Pro Quo*, when a job benefit - such as a pay rise, a promotion, or even continued employment - is made conditional on the victim acceding to demands to engage in some form of sexual behaviour; or; 2) Hostile working environment in which the conduct creates conditions that are intimidating or humiliating for the victim. Recent jurisprudence is also supportive of the development of the two distinct forms of sexual harassment. See ***Mbugua vs Resort [2024] KEELRC 1950 (KLR).***

Upon an analysis of ***Section 6*** of the ***Employment Act***, it is evident that the provision makes a distinction between *'quid pro*

quo' sexual harassment under ***Section 6(1) (a)*** where sexual harassment will arise when the employer of that employee directly or indirectly requests that employee for sexual intercourse,

sexual contact or any other form of sexual activity that contains an implied or express promise of preferential treatment in employment or threat of detrimental treatment in employment; or threat about the present or future employment status of the employ.

Quid pro quo harassment can occur in two situations. First, it can occur when tangible employment benefits are withheld from the victim until she succumbs to the sexual demands of the employer or supervisor. Second, it occurs when an employer or supervisor retaliates against a victim who has refused to submit to sexual advances by withholding tangible employment benefits, because *quid pro quo* harassment effects a victim's "*compensation, terms, conditions or privileges of the employee*". See ***Henson vs City of Dundee, 682 F.2d 897 (11th Cir. 1982).***

On the other hand, ***Sections 6(1), (b) to (d)*** are with reference to the existence of *'hostile work environment'* sexual harassment where the employer of that employee uses language whether written or spoken of a sexual nature or uses visual material of a sexual nature; or shows physical behaviour of a

sexual nature which directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee, and that by its nature has a

detrimental effect on that employee's employment, job performance, or job satisfaction.

A *"hostile environment"* on the other hand exists when an employee is employed within a work place that is sexually offensive. Such harassment can occur in a variety of forms. In order to be actionable, the harassment "must be sufficiently severe or pervasive as 'to alter the conditions of [the victim's] employment and create an abusive working environment. Such a determination will apparently be made on a case-by-case basis by analyzing the facts and circumstances surrounding each claim of "hostile environment" and whether it amounts to sexual harassment. See ***Meritor Savings Bank vs Vinson*** **| 477 U.S. 57 (1986)** and ***Katz vs Dole, 709 F.2d 251 (4th Cir. 1983)*** where sexual slurs, insults, and innuendos addressed to and employed about an air traffic controller amounted to a sexually offensive work environment. And in ***Henson vs City of Dundee, 682 F.2d 897 (11th Cir. 1982)*** where numerous harangues of demeaning

sexual inquiries, vulgarities and repeated requests for sexual favors addressed to police department dispatcher amounted to a sexually hostile environment. Also in ***Bundy vs Jackson, 641***

F.2d 934 (D.C. Cir. 1981) where requests for sexual favors and inquiries into the sexual proclivities of an employee amounted to a sexually hostile environment.

As to whether the trial court wrongly conflated and confused the two distinct types of sexual harassment namely, *quid pro quo* and *hostile environment*, and in so doing misapprehended the fact of sexual harassment under the Act, it becomes evident upon considering the judgment that the trial Judge applied ***Section 6 (1) (a)*** on whether any benefits or advantages accrued to the Appellant without due regard to ***Section 6 (1) (b) to (d)***. The learned Judge held:

> ***"Yet further initiatives entailed the exchange of the emails and WhatsApp messages the claimant has pleaded about and exhibited. The court finds that the emails did not amount to sexual harassment because they were not calculated to confer the claimant a benefit or when declined, a disadvantage at work as employed by the respondents. By her own testimony the claimant stated thus, "the messages do not promise promotion or threaten dismissal" and the court finds that the messages fell short of the test in Section 6 of the Act. Further, even if the words were sexual, the court finds that the claimant and the second respondent were in a mixed relationship of employment and or family relationship."***

The record clearly shows that the WhatsApp messages from the 2nd Respondent were sexual in nature, and therefore ***Section 6 (1) (b)*** and ***(d)*** of the ***Employment Act*** which addresses the

existence of sexual harassment arising from language whether written or spoken of a sexual nature was applicable to the circumstances of this case.

The Appellant stated that on various dates, she was subjected to sexual harassment through text messages from the 2nd Respondent who was her

superior. The 2nd Respondent did not deny sending the messages. An interrogation of the text messages shows that they were indeed sexual in nature, perverse and demeaning. The Appellant's responses also demonstrated that they were unwelcome and offensive. It is also instructive that the trial Judge found the messages to be sexual in nature, and the work environment to be so toxic that different ways of working were introduced to resolve the tension, including attempts at family meetings, arrangements for the Appellant to work from home, and the exchange of emails and WhatsApp messages. It cannot therefore be in any way discounted that the 2nd Respondent's overtures and messages made for the creation of a hostile work environment for the Appellant, so that what followed was her exit from employment.

Given the foregoing, it is evident that the learned Judge misdirected himself when he strictly applied the provisions of the law that related to ***Section 6 (1) (a)*** with respect to '*quid pro quo'* sexual harassment, and ignored the provisions relating to a '*hostile work environment'* sexual harassment under ***Section 6 (1) (b) (c)*** and ***(d).*** It is our view that had the learned Judge analysed the emails and WhatsApp messages within the context

of ***Section 6 (1) (b) (c)*** and ***(d),*** he would have found that the sexual messages created a hostile work environment within the 1st Respondent where condition that were capable of fomenting

sexual harassment and, by so finding, the Judge would have reached a different conclusion.

Having so found, we turn next to consider whether the trial court properly evaluated the evidence, and rightly found that the Appellant failed to prove sexual harassment by the 2nd Respondent beyond reasonable doubt.

In the instant case, the trial court began by observing that in November 2016, the 2nd Respondent informed the Appellant that his wife, who was also employed as the Human Resource Manager of the 1st Respondent had raised concerns about an alleged affair between the two of them, and allegations of insubordination on the part of the Appellant. It was from that point until the end of the employment relationship in June 2017, that the court analysed the communications exchanged between the parties. The court concluded that the communications between the Appellant and the 2nd Respondent were largely attempts to address the grievances raised by the Human Resource Manager, and emphasized that the situation was complicated by the fact that the employment relationship was intertwined with family ties.

The Judge accepted the 2nd Respondent's explanation that he

related to the Appellant not as her Chief Executive Officer, but as her brother-in-law, and

that the messages reflected this personal dynamic rather than sexual harassment in the workplace.

The court also found that the Appellant's testimony suggested that discussions between the parties centered on severance pay and termination rather than on sexual harassment; that given the gaps in the evidence, the personal nature of the communications, and the broader context of family tensions, the court concluded that the "...*mere use of sexual words*" in the private WhatsApp messages did not satisfy the legal threshold for sexual harassment.

In the court's view, the allegation of sexual harassment appeared to have been raised belatedly, after the Respondents became reluctant to pay twelve months' salaries that had earlier been agreed upon. Consequently, the trial court dismissed the claim for general damages for the reason that the claim of sexual harassment was unsubstantiated.

And in holding that sexual harassment was not established, the trial Judge had this to say:

> ***"...in the opinion of the Court, the bigger context was an anxious exploration in the private space***

between the claimant and the second respondent on how to deal with the allegations. In the circumstances the court finds that considering the context, the mere use of sexual words did not amount to sexual harassment under section 6 of the Act. It is noted that in fact, the words complained about were made on WhatsApp messages suggesting a deliberate private and personal communication as

opposed to emails when parties decide to communicate business in the employment relationship".

Section 6 clearly provides that an employee is sexually harassed if the employer of that employee or a representative of that employer or a co-worker is responsible for such harassment.

At the outset, when the relationship between the Appellant and the Respondents is examined, there is no doubt and it was not disputed that an employer/employee relationship existed between the Appellant and the 1st Respondent and the 1st Respondent and the 2nd Respondent. The 2nd Respondent was the 1st Respondent's Chief Executive Officer, and the Appellant was an employee of the 1st Respondent having been employed as a Communications Officer and Alumini Affairs Coordinator. The 2nd Respondent was her supervisor.

In view of the existence of an employment relationship, the elements necessary to prove sexual harassment owing to a hostile work environment, are to be found in ***Section 6 (1) (b), (c)*** and ***(d).*** In this regard, ***Subsection (b)*** specifies that the use of language whether written or spoken should be of a sexual nature. ***Subsection (c)*** refers to visual material of a sexual

nature, while ***Subsection (d)*** provides for where the physical behaviour of a sexual nature, whether directly or indirectly, is demonstrated thereby subjecting the employee to behaviour that

is unwelcome or offensive and which by its nature has a detrimental effect on the employee's employment, job performance, or job satisfaction. Notably, the specifications set out in the provision are disjunctive and therefore each case will turn on its own set of facts.

In this case, it was alleged that the 2nd Respondent's sexual advances and his improper and unprofessional conduct subjected the Appellant to psychological torture, ridicule and tarnished her reputation and good standing. In other words, the Appellant claimed that the 2nd Respondent's overtures involved written language that was sexual in nature, offensive and unwelcome; that further she was subjected to physical behaviour of a sexual nature that was unwelcome and offensive and detrimental to her employment.

In the case of ***Reed vs Stedman [1999] IRLR 299,*** the ***United Kingdom Employment Appeal Tribunal*** provided a basis upon which sexual harassment could be held to arise thus:

> ***"…… a characteristic of sexual harassment is that it undermines the victim's dignity at work and constitutes a detriment on the grounds of sex, and that the lack of intent is not a defence.***

It was further held in that case that the words or conduct complained of must be unwelcome to the victim, and it is for her or him to decide what is acceptable and offensive. Therefore, the question as to what constitutes unwanted conduct is not what the court or tribunal would or would not find offensive. But whether the individual victim has made it clear that he or she finds the conduct unacceptable.

What is essential in a case of sexual harassment, is that the words or conduct complained of must be sexual in nature, unwelcome and detrimental to the victim. It is also clear that the test for whether the words or conduct are unwelcome and offensive, is subjective. This means that it is for the claimant, and not the court or tribunal, to determine what constitutes unwanted or undesirable conduct and to demonstrate that they made it clear that the words or conduct was unacceptable or offensive.

The Appellant's claim is anchored on several WhatsApp text messages from the 2nd Respondent and an alleged physical touch.

The messages read;

1. "...28/01/2017 '*I have not tasted but every day I am told we are together. Please give me so that they can speak the truth.*"

.....

2. "...29/01/2017 *1 need a big cooler to cool my head or a good fuck or coffee, where are you.*"

.....

3. "...15/04/2017 '*Consider that small outing*.' `*The only way I am backing off is if you let me know you are in a stable relationship. I will not dare ask anymore.*"

....

The Appellant declined the requests severally including this message:

"You're my mulamu, my friend and my boss. I am not interested in a sexual relationship and I thought I made myself clear about this over the years and even now I respect you, kindly keep it that way."

The 2nd Respondent replied:

"And continue suffering... I have only been bold now, over the years nakula to kwa macho' was not seeing your beauty beyond the corner, but now am psyched to go far and further"'

"Not any big lectures of you are my boss, mulamu bla, bla, bla. But if I am not your choice of a man completely, that will not have a turn in your life am only proud I asked you my queen out and I am very proud of that."

It was her contention that as a result of the messages from the 2nd Respondent she suffered embarrassment, humiliation, emotional distress and mental anguish and that she made it plainly clear on several occasions that the subject messages were unwelcome, inappropriate and unwanted.

The Labour Court of Appeal of South Africa in the case of ***Motsamai vs***

Everite Building Products (Pty) Ltd (JA21/08) [2010] ZALAC 11 held that:

"Sexual harassment is the most heinous misconduct that plagues a workplace, not only is it demeaning to the victim, it undermines the dignity, integrity and self-worth of the employee

harassed. The harshness of the wrong is compounded when the victim suffers it at the hands of his/her supervisor. Sexual harassment goes to the root of ones being and must therefore be viewed from the point of view of a victim: how does he/she perceive it, and whether or not the perception is reasonable."

A reanalysis of the text messages sent by the 2nd Respondent to the Appellant clearly show that they were sexually driven, a fact which was also appreciated by the trial Judge. And as was held in the authorities cited above, whether or not they amounted to sexual harassment is dependent on the manner in which they were perceived by the Appellant, and not the perpetrator or the court or tribunal. The Appellant's evidence was that she suffered embarrassment, humiliation, emotional distress and mental anguish, and her message in response makes it patently clear that the subject messages were unwelcome, inappropriate and unwanted.

As can be discerned from the record, there is no question that the sexual overtures were committed in the workplace and that there was an employee relationship that existed between the Appellant and the 2nd Respondent. Further, the Appellant sufficiently demonstrated that the words communicated were sexual in nature, and that she did not appreciate the 2nd Respondent's sexual overtures. Yet, the evidence and facts notwithstanding, clearly, the learned Judge misconstrued the sexual discourse, when he downgraded it to a family dispute. So

that, instead of applying the subjective test to find that the Appellant considered the messages to be offensive, the court went on to accept the 2nd Respondent's explanation that he was related to the Appellant, not as her Chief Executive Officer, but as her brother-in-law, and that the messages reflected this

personal dynamic. More disconcerting was the learned Judge's finding that the messages were, "...*mere use of sexual words"*, and that the WhatsApp messages were private and personal communications as opposed to the emails that were the official business medium between the parties, and therefore the messages did not satisfy the legal threshold for sexual harassment in the work place.

When the messages, that were sexual in nature, are considered within the context of the employer/ employee relationship, we find that the learned Judge failed to take into account matters that he ought to have taken into account and as a result arrived at the wrong conclusion that the Appellant had not established that she had been subjected to sexual harassment in the work place. We say this because, what was crucial to appreciate under ***Section 6 (1) (b)*** and ***(d)***, was that, first, both the Appellant and the 2nd Respondent were employees of the 1st Respondent, with the 2nd Respondent being the Appellant's supervisor in the work place, second, that the messages were overtly sexual in nature, and third that the messages were offensive and unwelcome as to create a hostile

work environment for the Appellant, ultimately leading to her exit from employment. It mattered not that some or all of the individuals were related, and it mattered not that the messages were transmitted through WhatsApp or via emails. The fact of the matter is that the messages remained of a sexual nature, they were

communicated within the workplace between two employees and the Appellant found them to be offensive.

The observations of the court in the case of ***P O vs Board of Trustees A, F & 2 others [2014] eKLR*** are poignant. It was stated that:

> ***"The 2nd Respondent was way of the mark, when he characterized in his affidavit, the events in South Africa as 'personal in nature', and not open to the interrogation of the Industrial Court of Kenya. His conduct towards the Claimant, whether in his house in Nairobi or a hotel room in Cape, or at the sea near Greece, would amount to Gender- Based Violence against an Employee."***

We adopt this viewpoint and would add that, the transmission of any offensive and unwelcome conduct or communication of a sexual nature— including pornographic material, sexually explicit images, links, or messages— through any electronic medium such as email, short text messages (SMS), WhatsApp, *inter alia,* to a co-employee constitutes sexual harassment. See ***RAO vs O L & another [2025] KEELRC 2485*** where the court found a CEO liable for sexual harassment after he sent a junior coworker a link via WhatsApp to an article titled, *"What happens when you stop having sex."*

Without doubt, and contrary to the conclusions reached by the learned Judge, we are satisfied that the threshold for sexual harassment was met, and

that the Appellant discharged the burden of proving that she was subjected to sexual harassment, and we so find.

As concerns the allegations that there were emails and other communications that were deleted, we find that nothing turns on this as the 2nd Respondent was at liberty to produce other evidence to controvert the Appellant's case, if such evidence existed. This ground fails.

Next, we consider whether the 1st Respondent was liable to the Appellant, ***Section 6(2)*** of the ***Employment Act*** requires employers who employ 20 or more employees, to have a policy statement on sexual harassment. ***Section 6(3)*** requires that such policy statement, shall include, *inter alia*, a statement that the employer will not disclose the name of the complainant, or the circumstances related to the complaint to any person, except where necessary for the purpose of investigating the complaint or taking disciplinary measure in relation thereto.

In the India Supreme Court case of ***Vishaka & Others vs the State of Rajasthan & Ors, [JJ, 1997] [7] [SC 384],*** it was held that it is the duty of the

employer or other responsible persons in the workplace, to

prevent or deter the commission of acts of sexual harassment and to provide the procedure for resolution, settlement or prosecution of acts of sexual harassment by taking all steps required. For this purpose, sexual harassment includes such unwelcome

determined behaviour, whether directly or indirectly, such as: *"... physical contact and advances; sexual favours; sexually coloured remarks; and showing of pornography and other verbal and non-verbal conduct of a sexual nature that is unwelcome or humiliating to the woman."*

From the foregoing, it is clear that it is the duty of the employer to protect all employees in the work place. Where it relates to sexual harassment, the employer has the duty to have a workplace policy, to train the employees on enforcement and to implementation such policy.

Further, in the case of ***St. Leonard's Maternity & Nursing Home vs LMM*** ***[2023] KECA 1148 (KLR)***, it was held that a victim of sexual harassment cannot be blamed for not reporting the incident where proper reporting channels do not exist. The Court stated:

> ***"Just like other sexual offences, more often than not, incidences of sexual harassment take place in private spaces pitting the perpetrator against complainant. They generally do not occur in the presence of any witness. In the present case, DW1 was the appellant's manager and in the absence of a sexual harassment policy as envisaged under Section 6(2) of the Employment***

Act, it would be difficult to ascertain whether the appellant had modalities of dealing with such cases. In that case, it would not be proper to blame the victim of such acts for not following the proper reporting channels which channels do not exist. In the end, we find that indeed, the respondent discharged the burden of proof that was initially placed upon her."

From the evidence, the acts complained of were committed during the course of the Appellant's employment with the 1st Respondent by the 2nd Respondent, its Chief Executive Officer. Contrary to the trial Judge's finding that this was a family issue and that damages were not warranted, it is undeniable that the 2nd Respondent's actions amounted to sexual harassment in the work place, and therefore could not be treated as a private matter between two individuals, but was an issue connected to the employment relationship. For this reason, the 1st Respondent having failed to ensure a safe workplace environment for the Appellant, unlike the trial Judge, we find that, the 1st Respondent was liable.

The Appellant in her pleadings sought for general damages for sexual harassment. In assessing damages for sexual harassment, we begin from the standpoint that it is rooted in the genre of sex discrimination. Since sexual harassment relates to injury to feelings, distress humiliation and disruption of interpersonal relationships ascertaining damages is complex.

However, this Court in the case of ***Ol Pejeta Ranching Limited vs David***

***Wanjau Muhoro* [2017] KECA 329 (KLR)** held that:

> ***"…in our jurisdiction however, the question of assessment of damages will have to be guided by amongst others, common law and decided cases. Assessment of quantum of damages is a matter for the discretion of the trial judge, which must be exercised judicially and with regard to***

the general conditions prevailing in the country, such as inflation, and also prior relevant decisions."

In the case of ***CMK vs Chandarana Supermarket Limited [2024] KEELRC 388 (KLR),*** the court awarded the Appellant general damages of Kshs. 500,000 for sexual harassment, and in the case of ***SWM vs Hardware Trading Store Ltd & Anor [2021] eKLR,*** the court awarded the claimant damages

of Kshs. 500,000 after finding that the 2nd Respondent had sexually harassed her. Based on the awards issued from the persuasive authorities cited, and given the pervasive and insidious nature of sexual harassment in the work place, we are of the view that an amount of Kshs. 1,000,000 would adequately compensate the Appellant.

In sum, the Appeal is merited to the extent that we set aside the findings and holding by the trial Judge dismissing the appellant's claim and prayer for general damages on the ground that they were not justified. We accordingly set aside the orders made by the Employment and Labour Relations Court (***B. Ongaya, J.***) on 19th November, 2021 and substitute therefor the following orders in favour of the Appellant;

1. *Payment by the 1st Respondent of terminal dues of Kshs. 531, 000.00:*

2. *Payment of general damages of Kshs. 1,000,000/= by the 1st and 2nd Respondents jointly and severally.*

3. Interest on the payments in orders (1) and (2) hereinabove at Court rates from the date of this judgment until payment in full.

4. The costs of the suit in the ELRC and of this appeal are awarded to the Appellant.

It is so ordered.

Dated and delivered at Mombasa this 27th day of February, 2026.

A.K. MURGOR

.....
JUDGE OF APPEAL

P. NYAMWEYA

.....
JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

.....
JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR