Ooko & another v SRM & 2 others (Civil Appeal 195 & 197 of 2019 (Consolidated)) [2022] KECA 44 (KLR) (4 February 2022) (Judgment)

Neutral citation: [2022] KECA 44 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 195 & 197 OF 2019 (CONSOLIDATED)

W KARANJA, M NGUGI & P NYAMWEYA, JJA

FEBRUARY 4, 2022

BETWEEN

DOMINIC OOKO ..... APPELLANT

AND

SRM ..... 1ST RESPONDENT

G4S SECURITY SERVICES (K) LTD ..... 2ND RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL 197 OF 2019

BETWEEN

G4S SECURITY SERVICES (K) LTD ..... APPELLANT

AND

SRM ..... 1ST RESPONDENT

DOMINIC OOKO ..... 2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of the Employment and Labour Relations Court at Nairobi (Abuodha J.) delivered on 28th April 2017 in ELRC No. 220 of 2014)

Actions to be undertaken by an employer upon receipt of a sexual harassment complaint.

The claim was about wrongful termination of an employment contract following an employee's complaint of sexual harassment. The elements of the sexual harssmanet included unwanted verbal, non-verbal or physical conduct of a sexual nature. The Court of Appeal considered whether the threshold and standard of proof of sexual harassment had been met. There was evidence of persistent probing about the claimant's usage of a driver by the 2nd respondent, despite the fact that the claimant had obtained the necessary approval. The claimant's letter

and formal complaint set out details on sexual harassment. The court held that unwanted conduct was not what the court or tribunal would find offensive but conduct which the victim found unacceptable. The court further held that the employer had an obligation to follow through a complaint of sexual harassment and to ensure that the harassment was eradicated and did not occur again. A formal warning issued in the first instance would be followed by disciplinary action should the unwanted conduct persist. In the circumstances of the case, the court made the finding that the employer failed in its duty to ensure that the sexual harassment was investigated and stopped, thereby breaching the claimant's rights. The court's finding was also that the claimant had her contract of employment unfairly terminated after making the sexual harassment complaints.

Reported by John Ribia

Employment Law *– sexual harassment in the workplace – unwanted conduct – duties of an employer upon receipt of complaints of sexual harassment in the workplace – what was the duty of an employer after receipt of a complaint of sexual harassment – what did the court consider in determining what constituted unwanted conduct?*

Constitutional Law *– fundamental rights and freedom – equality and freedom from discrimination – claim of sexual harassment in the workplace – whether sexual harassment in the workplace amounted to discrimination – whether a discriminatory motive or intention was not necessary for a finding of unlawful discrimination - Constitution of Kenya, Act No. 5 of 1969 (repealed), section 82.*

Employment Law *– wrongful dismissal – reliefs for wrongful dismissal – what was the appropriate remedy for wrongful dismissal – whether a dismissed employee was required to take reasonable steps to mitigate their loss by taking up other employment.*

Words and Phrases *– definition – sexual harassment – discrimination consisting in verbal or physical abuse of a sexual nature, including lewd remarks, salacious looks, and unwelcome touching – Black's Law Dictionary, Tenth Edition.*

Brief facts

The two consolidated appeals were against the judgment and decree of the Employment and Labour Relations Court (ELRC) delivered on April 28, 2017. The 1st and 2nd appellants were both sued by the 1st respondent at the ELRC for, *inter alia,* unlawful termination of employment, discrimination, and sexual harassment in the workplace.

The ELRC delivered judgment in favour of the 1st respondent for Kshs. 5,928,000.00 as damages for unlawful dismissal against the 1st and 2nd appellants jointly and severally, and also ordered them to pay the costs of the suit.

Aggrieved by the ELRC judgment, the two appellants lodged the instant appeal on the grounds that the findings by the ELRC were not supported by sufficient and cogent evidence, that the claim by the 1st respondent of sexual harassment was not proved to the required standard, and that the award of damages was manifestly excessive and contrary to decisions of the instant court on the appropriate measure of damages.

The 1st respondent filed a cross-appeal seeking review and enhancement of the quantum of damages.

Issues

i. What were the meaning and elements of sexual harassment in a place of employment?
ii. Whether sexual harassment in a workplace amounted to discrimination.
iii. What was the duty of an employer after receipt of a complaint of sexual harassment?
iv. What did the court consider in determining what constituted unwanted conduct?
v. Whether a discriminatory motive or intention was not necessary for finding unlawful discrimination.
vi. Whether an unfairly dismissed employee was required to take reasonable steps to mitigate their loss by taking up other employment.

Held

1. The first appellate court was mandated to consider the issues raised in the appeal by re-evaluating the evidence in order to arrive at its own conclusions of fact and law. In that regard, the instant court would only depart from the findings of the ELRC if they were not based on the evidence on record, or where

the court was shown to have acted on wrong principles of law. The claim that was before the ELRC, was that the 2nd appellant maliciously and unlawfully terminated the 1st respondent's employment to conceal the complaints of sexual discrimination, exploitation and harassment by the 1st appellant. The claim was therefore specific to termination of employment arising from sexual harassment.

2. Sexual harassment was defined as a type of employment discrimination consisting of verbal or physical abuse of a sexual nature, including lewd remarks, salacious looks and unwelcome touching. It was, therefore, a genre of discrimination, and at the time of the alleged acts, even though not provided for in the Employment Act, were expressly prohibited under section 82 of the repealed Constitution which provided that no law should make any provision that was discriminatory either of itself or in its effect and that no person should be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority.

3. Section 82(3) of the repealed Constitution defined the term discriminatory to mean affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description were subjected to disabilities or restrictions to which persons of another such description were not made subject or were accorded privileges or advantages which were not accorded to persons of another such description.

4. The 2nd appellant provided evidence of its statement of ethics, of which statement 12 defined harassment as unwanted behaviour which a person found intimidating, upsetting, embarrassing, humiliating or offensive. The statement further provided that conduct involving the harassment (racial, sexual or of any kind) of any employee was unacceptable, and should an employee believe that he or she had been harassed, the matter was to be raised with the relevant HR Manager who would arrange for it to be investigated without delay, impartially and confidentially.

5. The main elements of sexual harassment that applied in the instant case were unwanted verbal, non-verbal or physical conduct of a sexual nature. In that respect, there was no need to show that the conduct was related to the victim's sex, only that it was sexual in nature. Secondly, the purpose or effect of the conduct was to violate the victim's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him or her. In addition, sexual harassment also arose if there was less favourable treatment or detriment that arose as a result of the rejection or submission to the unwanted conduct.

6. The reliance by the ELRC in that respect on the definition of sexual harassment in section 6 of the Employment Act was not fatal. An employee was sexually harassed if the employer or a co-worker directly or indirectly requested that employee for sexual intercourse, sexual contact or any other form of sexual activity that contained or implied promise of preferential treatment in employment or threat of detrimental treatment. Further, an employee was sexually harassed if the employer, his representative or co-worker showed physical behaviour of a sexual nature which directly or indirectly subjected the employee to behaviour that was unwelcome or offensive to that employee. That definition was consistent with the definitions applicable at the time of the alleged acts of sexual harassment of the 1st respondent.

7. On the applicable threshold and standard of proof of sexual harassment, it was enough that the victims considered reasonably that they had been treated less favourably, and there had to be a reasonable ground for that perception. The objective severity of the harassment was to be judged from the perspective of the reasonable person in the plaintiff's position, considering all the circumstances.

8. The ELRC found that the 2nd respondent's persistent probing of the claimant's use of the 1st respondent's driver, yet there was evidence of approval by the relevant department, could only have been motivated by hurt and disappointment over something. That something, considering the claimant's allegations vis-à-vis the 2nd respondent's reaction and failure to escalate such a serious allegation against him to the managing director, could only be reasonably deduced to be a refusal by

the claimant to accede to his advances. The evidence provided by the 1st respondent in that regard were emails and letters on her complaint. The letter and the formal complaint made by the 1st respondent were sufficient evidence to illustrate the unwanted nature of the 1st appellant's conduct, and that the same was communicated to both the 1st and the 2nd appellant.

9. The question as to what constituted unwanted conduct was not what the court or tribunal would or would not find offensive, but whether the individual victim had made it clear that he or she found the conduct unacceptable. The evidence of unwanted conduct was proved by the letter of January 20, 2006. The innocence or otherwise of 1st appellant's actions were immaterial. A discriminatory motive or intention was not necessary for finding unlawful discrimination.

10. Upon receipt of a sexual harassment complaint, a positive obligation fell on the employer to follow through with the complaint and ensure that sexual harassment was eradicated, redressed and did occur again. If harassment continued even after a formal warning had been given to the harasser, the employer had to follow up that warning with further disciplinary action. In the instant matter, the evidence produced did not support the assertions by the 2nd appellant that it followed through with the 1st respondent's complaint. The evidence demonstrated that the 2nd appellant failed in its duty to ensure that the sexual harassment was investigated and stopped, which resulted in a breach of the 1st respondent's rights.

11. The 2nd appellant identified four work-related reasons for terminating the 1st appellant's employment, namely; time keeping and punctuality; unauthorized leave; management of the 2nd appellant's software licences; and, her service levels. The 2nd appellant referred to various isolated and disparate emails of complaints and warning letters, which it stated ultimately led to the termination letter of August 18, 2006, even though the reasons were not specifically indicated in the letter. An analysis of the evidence showed that all the emails raising the issues of non-performance were dated from March 2006, two months after the 1st appellant made her complaint of sexual harassment in January 2006, and after her formal demand by her lawyers on May 15, 2006, through to August 2006.

12. No evidence was brought of the 1st respondent's poor performance prior to her complaint being made, and the authenticity and relevance of some of the documents relied upon were also disputed by the 1st appellant. It would therefore be proper for a reasonable and objective observer to make the inference and reach the conclusion, as the ELRC did, that all the circumstances pointed to a hounding of the 1st appellant from her employment, arising from her formal demand and complaint of sexual harassment.

13. Under the common law, the appropriate remedy for loss of earnings following wrongful dismissal was damages, and the normal measure was what the employee would have earned under the contract for the period until the employer could lawfully have terminated it, less the amount he or she could reasonably earn in other employment. Therefore, just like any other innocent party where there had been a breach of contract, the employee had to take reasonable steps to mitigate their loss by taking up other employment.

14. The ELRC held that money could not adequately compensate wounded feelings, but it could reasonably provide a convenient mechanism to assist the person affected in picking up the pieces and moving on with his or her life. The ELRC further held that considering that the claimant's services could have been ended for any valid reason by both parties, an award of two years' salary would reasonably compensate the claimant. Finding that at the time of dismissal, the claimant's basic pay was Kshs. 247,000.00, the ELRC therefore entered judgment against the respondent's jointly and severally for Kshs 5,928,000.00.

15. The award for Kshs 5,928,000.00 was not supported by the applicable principles derived from previous jurisprudence. A period of one year would have been sufficient for the claimant to secure other employment. An award of Kshs 2,964,000/=, being the equivalent of her salary for one year, was

therefore adequate and reasonable in the circumstances. Therefore, the 1st respondent's cross-appeal failed.

Appeal partly allowed.

Orders

i. *The judgment dated April 28, 2017 delivered in ELRC Cause Number 220 of 2014 that judgment be entered against the respondent's jointly and severally for Kshs 5,928,000.00 was substituted with an order that judgment be entered in favour of the claimant against the respondent's jointly and severally for Kshs 2,964,000.00.*

ii. *The cross-appeal was dismissed.*

iii. *All other findings of the ELRC and orders in the judgment of the trial Court dated April 28, 2017 in ELRC Cause Number 220 of 2014 were affirmed and upheld, save to the extent that they could have been modified or qualified by the findings made in the instant judgment.*

iv. *Each party ordered to bear own costs of the appeal and cross appeal.*

Citations

Cases

Kenya

1. *Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank* Civil Appeal 5 & 48 of 2002; [2004] KECA 166 (KLR) - (Applied)
2. *BWK v EK & another* Civil Case 443 of 2003; [2017] eKLR - (Applied)
3. *EDK v KU* Cause 1715 of 2011; [2014] eKLR - (Applied)
4. *GMV v Bank of Africa Kenya Limited* Cause 1227 of 2011; [2013] eKLR - (Applied)
5. *Independent Electoral and Boundaries Commission & another v Mule & 3 others* Civil Appeal 219 of 2013; [2014] KECA 890 (KLR) - (Applied)
6. *Jabane v Olenja* Civil Appeal 2 of 1986; [1986] KECA 71 (KLR); [1986] KLR 661 - (Applied)
7. *Kamau, Jennifer Nyambura v Humphrey Mbaka Nandi* Civil Appeal 342 of 2010; [2013] KECA 423 (KLR) - (Applied)
8. *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] EA 212 - (Applied)
9. *Mbogo & another v Shah* [1968] EA 93 - (Applied)
10. *Muia, Koki v Samsung Electronics East Africa Limited* Cause 1583 of 2013; [2015] KEELRC 699 (KLR) - (Applied)
11. *Mutegi, Mercy Kiritov Beatrice Nkatha Nyaga & 2 others* Civil Appeal 48 of 2013; [2014] KECA 697 (KLR) - (Applied)
12. *Mwangi v Wambugu* [1984] KLR 453 - (Applied)
13. *Odinga & another v Independent Electoral and Boundaries Commission & 2 others* Election Petition 1 of 2017; [2017] KESC 32 (KLR) - (Applied)
14. *Ogoye, Dalmas B v Kenya National Trading Corporation (KNTC)* Civil Case 125 of 1996; [1996] KECA 109 (KLR) - (Applied)
15. *Ol Pejeta Ranching Limited v David Wanjau Muhoro* Civil Appeal 42 of 2015; [2017] KECA 329 (KLR) - (Applied)
16. *Ombanya v Gailey & Roberts* [1974] EA 522 - (Explained)
17. *PO v Board of Trustees, AF & 2 others* Cause 927 of 2010; [2014] KEELRC 623 (KLR) - (Applied)
18. *Samsung Electronics East Africa Ltd v K M* Civil Appeal 57 of 2016; [2017] KECA 267 (KLR) - (Applied)
19. *United States International University v Eric Rading Outa* Civil Appeal 146 of 2013; [2016] KECA 78 (KLR) - (Applied)

Zanzibar

Selle & another v Associated Motor Boat Co Ltd & others [1968] EA 123 - (Explained)

United Kingdom

R v Birmingham City Council ex parte Equal Opportunities Commission [1989] AC 1155 - (Followed)

India

Vishaka & others v State of Rajasthan & others AIR 1997 SC 3011 - (Applied)

United States

Oncale v Sundowner Offshore Services 523 US 75 (1998) - (Explained)

Ireland

1. *Bracebridge Engineering Ltd vs Darby* (1990) IRLR 3 - (Explained)
2. *Enterprise Glass Co Ltd v Miles* [1990] ICR 787 - (Explained)
3. *James v Eastleigh Borough Council* (1990) IRLR 288 - (Explained)
4. *Reed & Bull Information Systems v Stedman* (1999) IRLR 299 - (Explained)

Texts

1. Garner, BA., (Ed) (2014) *Black's Law Dictionary,* London: Thomson West 10th Edn
2. Beale, H., (Ed) (1998) *Chitty on Contracts,* London: Sweet & Maxwell Volume II at paras 40 -200

Statutes

Kenya

1. Constitution of Kenya (Repealed) sections 74, 82(3) - (Interpreted)
2. Employment Act (cap 226) section 6- (Interpreted)
3. Evidence Act (cap 80) sections 12, 107, 109- (Interpreted)

Instruments

1. Declaration on the Elimination of Violence against Women, 1993
   In general
2. Universal Declaration of Human Rights (UDHR), 1948
   articles 1, 3, 5

Advocates

Mr Chacha Odera for the appellant

Mr Cyprian Onyony for the 1st respondent

Mr Ezra Makori for the 2nd respondents

JUDGMENT

1. The two consolidated appeals which are the subject of this judgment emanate from the same judgment of the Employment and Labour Relations Court (hereinafter "ELRC'). On June 30, 2021, the two appeals were consolidated for purposes of being heard and determined together upon an oral application made by the appellants' learned counsel, Messrs Chacha Odera, and with the learned counsels for the 1st and 2nd respondents, Messrs Cyprian Onyonyi and Messrs Ezra Makori respectively, not objecting. There is also a Notice of Cross Appeal dated October 29, 2019 filed by the 1st respondent in both appeals.

2. The facts giving rise to the appeals and cross appeal are as follows. Dominic Ooko (hereinafter "Dominic"), who is the appellant in Civil Appeal No 195 of 2019, and G4S Security Services (K) Ltd (hereinafter "G4S Security"), the appellant in Civil Appeal No 197 of 2019, were both sued by SRM (hereinafter "S"), the 1st respondent in the consolidated appeals, who was the claimant in the suit in the ELRC. Dominic and S were at the material times employed by G4S Security as the Human Resource Director and Information Technology Manager respectively.

3. S initially filed her case in the High Court of Kenya at Nairobi in Civil Suit No 359 of 2007, and following a court order made therein on February 13, 2014, she filed a Memorandum of Claim in the ELRC dated October 22, 2014. In the claim, she stated that she was employed by G4S Security in 1985, and as at August 18, 2006 when she was unlawfully terminated, she had risen to the rank of Information Technology Manager, earning a monthly salary of Kshs 247,200/- together with allowances.

   Further, that in addition to the written terms of her employment, there were terms implied by law that G4S Security Service Limited would not discriminate against her, and that it would provide her with a conducive working environment free from sexual discrimination, exploitation and harassment.

4. Her claim in the ELRC was that on diverse dates between 2005 and 2006, Dominic, in his capacity as the Human Resource Director of G4S Security, was in blatant breach of her right to work in an environment free from gender discrimination, sexual exploitation and harassment, and made unwelcome sexual advances at her. S accordingly reported Dominic's action to her immediate supervisor, Mr Philip Holi, who directed that the issue be resolved by the Managing Director of G4S Security. That on receipt of the complaint, the said Managing Director, in the presence of the legal advisor, dismissed the same as trivial, indicating that Dominic Ooko was free to act against her as he deemed fit, and directed her to drop the claim.

5. On May 15, 2006, S proceeded to make a formal claim through her advocate, which was neither responded to nor acted upon by G4S Security. On the contrary that G4S Security proceeded to make malicious, untrue and unsubstantiated claims of misconduct against her, and to issue her several warning letters. Further, that it initiated and commenced audit investigations against her, and on August 18, 2006, unlawfully terminated her employment. S contended that the termination of her services was actuated by malice by the management of G4S Security and was an attempt to conceal the complaints of sexual discrimination, exploitation and harassment by Dominic.

6. S therefore prayed for judgment against G4S Security and Dominic jointly and severally for a declaration that the termination of her services was discriminatory, malicious, unlawful void and null ab initio; for maximum compensation for unlawful termination of employment totalling to Kshs 6,779,520/-; and general damages for malicious termination of employment.

7. G4S Security and Dominic filed defences both dated May 29, 2007, wherein they, other than admitting that S was at the material times in the employment of G4S Security, denied all other averments in her claim and particularly that any terms were implied by law into the S's contract, that she was entitled to a driver, that any report was made to Mr Philip Holi in the terms set out in the claim, that S's complaint was trivialised or failed to take steps to prevent her sexual harassment, or that sexual advances or comments about her personal appearance were made to her. Further, they averred that the concerns about S's work were raised as far back as October 2004 and were based on well documented facts and had continued, and that her termination was therefore not malicious unlawful or an attempt to conceal the complaints made against Dominic.

8. The ELRC delivered judgment in favour of S for Kshs 5,928,000/= as damages for unlawful dismissal against G4S Security and Dominic jointly and severally, and also ordered them to pay the costs of the suit.

9. Dominic and G4S Security being aggrieved, have lodged an appeal against the said decision in this court. Dominic filed a Memorandum of Appeal dated May 13, 2019 citing four grounds of appeal. Likewise, G4S Security set out nine grounds of appeal in their Memorandum of Appeal dated May

13, 2019. S subsequently filed the Notice of Cross Appeal dated October 29, 2019and sought a review and enhancement of the quantum of damages.

10. The appeal was canvassed during a hearing held on June 30, 2021 by Mr Chacha Odera, learned counsel for the appellant, Mr Cyprian Onyony, learned counsel for the 1st respondent, and Mr Ezra Makori, learned counsel for the 2nd respondents who relied on written submissions dated May 19, 2020, February 3, 2021 and December 18, 2019 respectively.

11. Our mandate as the first appellate court was stated in *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA 123 as follows:

> "…..An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must 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 this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally"

12. We shall therefore proceed to consider the issues in this appeal by re-evaluating the evidence adduced in the ELRC and arrive at our own conclusions of fact and law. In this regard we will only depart from the findings by the said court if they are not based on the evidence on record, or where the court is shown to have acted on wrong principles of law, as held in *Jabane vs Olenja* [1986] KLR 661.

13. Dominic and G4S Security have raised three common issues in their appeals, namely, that the findings by the ELRC were not supported by sufficient and cogent evidence; the claim by S of sexual harassment was not proved to the required standard; and that the award of damages was manifestly excessive and contrary to decisions of this court on the appropriate measure of damages. The adequacy of the award of damages is also the main issue raised in the cross appeal by S, wherein she claims that the trial Judge erred in awarding her very low damages, given the overwhelming evidence on record.

14. On the issue of the findings not being supported by the evidence adduced in the trial court, Dominic's submissions were along two trajectories. Firstly, that the decision of the ELRC went against the weight of the evidence and failed to take into account the inconsistency of S's evidence in terms of the departure in the evidence adduced in court from the material averments in the Memorandum of Claim and the content of her demand letters before filing suit.

15. In addition, that S never raised the particulars of sexual harassment listed in her Memorandum of Claim either in the complaint she lodged with the 2nd respondent or the demand letters by her lawyers. Further, that she raised more unknown particulars in her testimony. Reference was made to the purpose of oral testimony in court, which is to support the averment made in the pleadings, and the principle that parties to a suit are bound by their pleadings, and that any deviation from the pleadings should be expunged from the record. Reliance was in this regard placed on the decision by this court in *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others*[2014] eKLR, and by the Supreme Court of Kenya in *Raila Amolo Odinga & another v IEBC and 2 others*[2017] eKLR. Therefore, that the trial judge had no jurisdiction to determine a matter which had not been pleaded, as held by this court in the case of *Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank*[2004] eKLR and erred in considering testimony on facts that were never pleaded.

16. Secondly, that the trial judgefailed and neglected to take into account the evidence adduced on Dominic's behalf that S was dismissed on account of poor performance and the details were well documented, and failed to provide any reason why he did not consider the said evidence. Dominic placed reliance on the case of *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] EA 212. in requesting that this court re-evaluates and re-analyses the evidence adduced before the trial court.

17. G4S Security also faulted the evaluation of the evidence by the trial court and in finding that the appellant did not investigate S's complaint of sexual harassment expeditiously and impartially. According to G4S Security, the evidence tendered demonstrated that S was satisfied with the management of her complaint against Dominic, and that Philip Holi did respond and follow up on her complaint. In addition, that G4S Security's Statement of Business Ethics required a complaint of harassment to be raised with the Human Resources Manager, who in this case was Dominic, and was the one accused of the harassment, and hence the appellant's departure from the Statement of Business Ethics was necessitated by the circumstances and its commitment to investigate S's complaint impartially. Further, that the Statement of Business Ethics did not require the Managing Director's involvement or action in relation to complaints of sexual harassment, and the trial court erred in finding that his lack of involvement was indicative of a failure to investigate the complaint.

18. On her part, S detailed the correspondence on her complaint about sexual harassment between Dominic, Mr Holi and herself, and submitted that after she responded with details of the incidents of Dominic's unwelcome advances, there was no further communication from the management of G4S Security, prompting her to write the formal demand letter to the Managing Director, on which there was still no response. Therefore, the fact that Dominic was the Human Resources Manager should not be used as an excuse by G4S Security to depart from the Statement of Business Ethics to ensure expeditious and impartial investigations upon receiving the complaint.

19. We shall briefly dispose of this issue as follows. The ELRC exhaustively and comprehensively summarized the pleadings, evidence by S, GS Security and Dominic and their witnesses as well as their counsel's submissions in its judgment, 28 pages of it to be exact, from pages 1 to 28 thereof, and identified the issues before it to include whether there was sexual harassment of the claimant as alleged or not, and whether the 1st respondent (G4S Security) adequately and conclusively addressed the claimant's complaint over sexual harassment by the 2nd respondent (Dominic). The court then observed as follows on the allegations put forward by G4S Security and Dominic:

> " 58. Whereas the respondent's position was that the claimant's services were terminated for four reasons namely lateness to work, proceeding on leave before approval, permitting use of unlicensed software by the respondent and fourth was low service level. That is to say, there were complaints regarding service level in the IT department which was headed by the claimant; the claimant on her part averred that her termination was triggered by her complaint over sexual harassment."

20. The trial judge then proceeded to find as follows as regards the said allegations:

> " 70. The second question is whether the 1st respondent adequately and conclusively dealt with the claimant's complaint of sexual harassment. From the record, the claimant first informally discussed the issue of sexual harassment with Mr JD, who took it up with the 2nd respondent. The 2nd respondent wrote an email dated January 11, 2006 to Mr H who on the January 20, 2006 responded with copies to the claimant and Mr D. This response attracted a lengthy written

response from the claimant in which she detailed incidents of the alleged sexual harassment by the 2nd respondent.

71. Apart from subsequent email from the 2nd respondent on the issue, there seemed to be no further communication on the issue from the claimant. Attention shifted to the claimant's work related issues and her eventual dismissal..."

21. The trial judgetherefore considered the evidence provided by G4S Security and Dominic in the context of whether they paid due regard to the complaint she made of sexual harassment, which was the issue before it, and found that they did not, and instead sought to focus on her work performance instead. The ELRC therefore gave minimal weight to the evidence by G4S Security and Dominic for this reason, in addition to finding that no attention was thereby given to S's complaint. We find that the findings by the ELRC in this respect were supported by the evidence, given that the claim before it was whether G4S Security maliciously and unlawfully terminated S's employment to conceal the complaints of sexual discrimination, exploitation and harassment by Dominic. The findings in this respect were specifically informed by G4S Security and Dominic's evidence that S's employment was terminated not due to the sexual harassment complaint but her poor work performance. We will however further analyse the evidence by G4S Security and Dominic in this regard in our consideration of the next issue.

22. On the second issue on proof of sexual harassment, Dominic submitted that S failed to discharge her burden of proof on a balance of probabilities, as her allegations of sexual harassment were all predicated upon purported phone calls and invitations by the appellant for drinks in social places, yet no evidence or record was produced to corroborate these allegations. He placed reliance on sections 107, 109 and 12 of the *Evidence Act*, and the decision of the Court of Appeal case of *Jennifer Nyambura Kamau vs Humphrey Mbaka Nandi* [2013] eKLR for the position that the evidential burden is cast upon the party who desired the court to believe in the existence of a particular fact, and the decision in *EDK v KU* [2014] eKLR that sexual harassment must be proved by evidence of the individuals, times and places specified in the claim.

23. G4S Security likewise submitted that the trial judge erred in finding that S proved her claim of sexual harassment on a balance of probabilities, and failed to take into account that her evidence was uncorroborated, and the evidence tendered in relation to her delay in making the complaint and the circumstances that motivated the complaint. In particular, that S stated that on various dates between 2005 and 2006, Dominic made unwelcome sexual advances towards her including commenting on her mode of dressing and offering to buy her drinks, which evidence was uncorroborated and not presented in her letter dated May 15, 2006to G4S Security.

24. Therefore, that S failed to prove sexual harassment to the required standard as held in the case of *BWK v EK & another* [2017] eKLR, where similar circumstances obtained. The decisions in *Mercy Kirito Mugeti v Beatrice Nkatha Nyaga & 2 Others* [2013] eKLR and *Mwangi v Wambugu* [1984] KLR 453 were cited for the holding and submission that an appellate court is not bound to accept the trial judge's finding, if it appears that he has clearly failed on some material point to take into account particular circumstances.

25. G4S Security also submitted that the trial Judge erred in finding that it violated S's right not to be discriminated against on the basis of her gender, since the denial of any privileges on this basis was not proved, and on the contrary the evidence tendered demonstrated that S received preferential treatment on the basis of her gender and as a senior member of its staff. In addition, that the witnesses proved

that the arrangement for S to be dropped by the company driver for her studies at the university was a private arrangement and not an entitlement under her contract and terms of service.

26. Lastly, that its witness testified that the termination of S's employment was purely as a result of her poor performance, the particulars of which were given, and the contract had a termination clause which was observed, and S was paid her terminal dues. G4S Security therefore submitted that it proved that it terminated S's contract in accordance with the applicable law and the terms of her contract.

27. S submitted that the trial judgedid not err in finding that the she proved her claim of sexual harassment on a balance of probabilities, and while relying on the definition of sexual harassment in section 6 of the *Employment Act*, by the Committee of Experts of the ILO and in the decision by the Supreme Court of India in *Vishaka & others v State of Rajasthan & others* [JJ, 1997] [7] [SC 384], she reiterated the particulars of her sexual harassment. Further reference was made to *BWK vs EK & another* [2017] eKLR that the quantum of proof required in civil litigation is not such as resolves all doubt but establishes a preponderance of probability. She pointed out that Dominic made an apology for sexually harassing her; took it upon himself to question her use of the G4S Security drivers even though it was a private arrangement; and she made her complaints and demand on her sexual harassment before any of the complaints raised against her by G4S Security.

28. On the finding that her rights not to be discriminated against on the basis of her gender was violated, S referred to various instruments including article 1, 3 and 5 of the 1948 United Nations *Universal Declaration of Human Rights*; the 1993 UN *Declaration on the Elimination of Violence against Women*; sections 74 and 82 of the previous *Constitution of Kenya*; the decision in the case of *PO vs Board of Trustees, A F & 2 others*[2014] eKLR; and the 1988 General Survey of the Committee of Experts of the ILO to urge that sexual harassment is a form of discrimination. She submitted that she was falsely accused of the various allegations of poor performance by G4S Security, and that her employment was terminated on trumped up charges meant to punish her for complaining against sexual discrimination.

29. Before we commence our determination on this issue, it is necessary that we reiterate that the claim that was before the ELRC, was that G4S Security maliciously and unlawfully terminated S's employment to conceal the complaints of sexual discrimination, exploitation and harassment by Dominic. The claim was therefore specific to termination of employment arising from sexual harassment. S in this respect raised the following particulars of sexual harassment in her Memorandum of Claim:

    a. The 2nd respondent persistently commented on the claimants bodily appearance and dressing style despite the claimant's warning to refrain.

    b. The 2nd respondent persistently sought the claimant's company for reasons other than in her course of employment despite the claimant's warning to refrain.

    c. The 2nd respondent denied the claimant an office driver on account of the claimant's refusal to succumb to the 2nd respondent's sexual advances.

    d. The 2nd respondent invited the claimant to the 1st respondent's designated club (Nairobi Club) to address the issue of P H's employment but did not say anything about the same when the Claimant turned up at the meeting venue in the company of an office driver.

e. The 2nd respondent instructed the 1st respondent Transport Manager to withdraw the claimant's office driver on account of the claimant's refusal to succumb to the 2nd respondent's sexual advances.

30. 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, and at the time of the alleged acts, even though not provided for in the *Employment Act* was expressly prohibited by section 82 of the repealed Constitution which provided that no law shall make any provision that is discriminatory either of itself or in its effect, and that no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority. Section 82(3) defined the expression "discriminatory" to mean affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

31. More importantly, though, G4S Security provided evidence of its Statement of Ethics, of which statement 12 defined harassment as "unwanted behaviour which a person finds intimidating, upsetting, embarrassing, humiliating or offensive". The statement further provided that conduct involving the harassment (racial, sexual or of any kind) of any employee is unacceptable, and should an employee believe that he or she has been harassed, the matter should be raised with the relevant HR Manager who will arrange for it to be investigated without delay, impartially and confidentially.

32. Therefore, the main elements of sexual harassment that applied in this case were firstly, unwanted verbal, non-verbal or physical conduct of a sexual nature. In this respect there was no need to show that the conduct was related to the victim's sex, only that it was sexual in nature. Secondly, the purpose or effect of the conduct was to violate the victim's dignity or create an intimidating, hostile, degrading humiliating, or offensive environment for him or her. In addition, sexual harassment also arises if there is less favourable treatment or detriment that arises as a result of the rejection or submission to the unwanted conduct.

33. The reliance by the ELRC in this respect on the definition of sexual harassment in section 6 of the *Employment Act* was not fatal. The ELRC, while relying on the section, stated that "an employee is sexually harassed if the employer or a co-worker directly or indirectly requests that employee for sexual intercourse, sexual contract or any other form of sexual activity that contains or implies promise of preferential treatment in employment or threat of detrimental treatment. Further, an employee is sexually harassed if the employer, his representative or co-worker shows physical behavior of a sexual nature which directly or indirectly subjects the employee to behavior that is unwelcome or offensive to that employee". This definition is consistent with the definitions applicable at the time of the alleged acts of sexual harassment of S.

34. On whether the ELRC erred in holding and finding that the claim for sexual harassment has been proved on a balance of probabilities, the applicable threshold and standard was set in *R v Birmingham City Council ex parte EOC* [1989] AC 1155 that it is enough that the victims considered reasonably that they had been treated less favourably, and there must be a reasonable ground for this perception. Likewise, the US Supreme Court held in *Oncale v Sundowner Offshore Services* 523 US 75 (1998) that the objective severity of the harassment should be judged from the perspective of the reasonable person

in the plaintiff's position, considering all the circumstances. The ELRC in this respect reproduced the correspondence on the complaint of sexual harassment made by S, which it summarised as follows:

> " From the record, it would seem the issue of sexual harassment was raised initially around January 11, 2006via an email written by the 2nd respondent to Mr H in which he referred to a complaint of sexual harassment made to Mr JD by the claimant. Mr H in his response email dated January 20, 2006 referred to earlier in this judgement stated that while he was not in the full picture of the circumstances around the 2nd respondent's interactions with the claimant, he was obliged to request the 2nd respondent to respect the claimant's wishes that any interactions between the 2nd respondent and the claimant be limited to the formal office environment.
>
> 60. Concerning use of company's driver Mr H informed the 2nd respondent that he had written to J D as Head of Transport requesting that the claimant be allowed to arrange with the company driver to drop and pick her up from the University on condition that the arrangement does not affect the company's business. According to H, J indicated this was acceptable to him. The letter informed the 2nd respondent that it was hoped the issue had been resolved and should the 2nd respondent wish to take up the matter further he ought to involve the Managing Director as the final arbitrator. Incidentally, on the same day January 11, 2006 the 2nd respondent wrote to the claimant an email on the issue of using the company's driver and complaint of sexual harassment by her.

35. The ELRC then held as follows on the issue:

> The court therefore takes the view and finds on the first issue as framed that the 2nd respondent's persistent probing of the claimant's use of the 1st respondent's driver yet there was evidence of approval by relevant department could only have been motivated by hurt and disappointment over something. This something, taking into account the claimant's allegations vis-a-vis the 2nd respondent's reaction and failure to escalate such a serious allegation against him to the Managing director could only be reasonably deduced to be refusal by the claimant to accede to his advances.

36. The evidence provided by S in this regard were emails and letters 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:

> " Dominic Ooko
>
> This letter is in response to your email of 11/10/2006 in which you indicated that Ms S M has accused you of sexual harassment to J D who then communicated the same to you. Though J has indicated that the accusation of sexual harassment may have been taken out of context, I have received a written complaint from S in which she has indicated that she is extremely uncomfortable with your requesting her to meet after working hours. She also feels that her refusal has led to your making enquiries into her arrangement with a company driver to drop her at her University and may lead to further conflict in future. While I am not in the full picture of the circumstances around your interactions with S and you have indicated that J had said to you that S felt that you were too aloof, as her immediate manager, I am obliged to request that her wishes be respected and any such interaction between you and her is limited to the formal office environment. With regards to S's informal

arrangement with the company driver, and in the absence of a policy guideline regarding such arrangements outside working hours, I have written to J in his capacity as Head of the Transport Department, requesting on S's behalf that he allow her to arrange with a company driver to drop her and pick her up from her university classes on condition that this arrangement does not affect company business, only occurs outside working hours and is mutually agreed between both parties. J has indicated that this is acceptable with him. I trust that the above has resolved the issue to some extent, however, should you wish to take this up further, I suggest that we involve the MD as the final arbitrator.

CCC: SM – Please note that in my discussions with Dominic regarding the above he has indicated that his actions were purely innocent, he regret that they were taken in this context and apologizes for the distress that this may have caused you".

37. In our view, the letter and the formal complaint thereupon made by S were sufficient evidence to illustrate the unwanted nature of Dominic's conduct, and that the same was communicated to both G4S Security and Dominic. We are in this regard in agreement with the pronouncements made by Morrison J in *Reed v Stedman* (1999) IRLR 299 that 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. The evidence of unwanted conduct was clearly proved by the letter of January 20, 2006. The innocence or otherwise of Dominic's actions are immaterial, as the applicable principle as also reiterated by the House of Lords in *James vs Eastleigh Borough Council* (1990) IRLR 288 is that a discriminatory motive or intention is not necessary for finding unlawful discrimination.

38. As regards, the argument that the evidence by S was not corroborated, we are persuaded by the holding by the Employment Appeal Tribunals in *Bracebridge Engineering Ltd vs Darby* (1990) IRLR 3, that a single incident of sexual harassment can amount to an act of unlawful sex discrimination as long as it is serious enough to cause a detriment. In the present appeal, the allegations that were particularised 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. In addition, S did demonstrate that she suffered detriment after the letter of January 20, 2006, firstly by the withdrawal of the private arrangements she had with the official driver to drop her at the university, as shown by the email dated June 2, 2006 to this effect by Phillip Holi.

39. Secondly, S also claimed that as a result of her complaint, her employment was terminated. In this respect, before analysing G4S Security's conduct and evidence, it is necessary to first clarify the duty of an employer after receipt of a complaint on sexual harassment. Comparative case law point to a positive obligation on the part of the employer to follow through with the complaint and ensure that the sexual harassment is eradicated, redressed and does not occur again. For example, in Enterprise Glass Co Ltd vs Miles (1990) ICR 787 it was held that if harassment continues even after a formal warning has been given to the harasser, the employer must follow up that warning with further disciplinary action.

40. G4S Security claims that Mr Philip Holi in this regard adequately followed up on the complaint presumably by his letter of January 20, 2006, and emails on the driver to drive S after hours. Upon cross- examination Philip Holi testified as follows:

"I wrote the letter. I made inquiries to establish the allegations of sexual harassment. I believe the issue was resolved as I did not receive any further complaint. I am not aware of the final

decision on the complaint of sexual harassment. Dominic verbally apologised to me. The allegation of sexual harassment had nothing to do with the claimant's termination. I cannot comment on the claimant's performance before I joined the respondent."

41. This evidence clearly does not support the submissions by G4S Security that it did follow through with S's complaint, and also demonstrates that G4S Security failed in its duty to ensure that the sexual harassment was investigated and stopped, and breached S's rights.

42. Further, Philip Holi identified four work related reasons for terminating S employment in his evidence, namely time keeping and punctuality, unauthorised leave, management of G4S Security's software licenses and her service levels. He referred to various isolated and disparate emails of complaints and warning letters, which he stated ultimately led to the termination letter of August 18, 2006, even though the said reasons were not specifically indicated in the said letter. An analysis of the evidence shows that all the said emails raising the issues of non-performance are dated from March 2006, two months after S made her complaint of sexual harassment in January 2006, and after her formal demand by her lawyers on May 15, 2006, through to August 2006.

43. No evidence was brought of S's poor performance prior to her complaint being made, and the authenticity and relevance of some of the documents relied upon was also disputed by S. It would therefore be proper for a reasonable and objective observer to make the inference and reach the conclusion, as the ELRC did, that all the circumstances pointed to a hounding of S from her employment, arising from her formal demand and complaint of sexual harassment.

44. We shall now turn to the issue urged on the adequacy and reasonableness of the award of damages. Dominic's counsel in this regard submitted that the trial Judge based the damages on unknown law and misapprehended the law by pegging damages for sexual harassment on the 1st Respondent's salary, because a sexual harassment claim is distinguishable from a claim for unfair termination which is pegged on an employee's salary. Reliance was placed on this Court's decisions in *United States International University vs Eric Rading Outa* [2016]eKLR and *Samsung Electronics East Africa Limited vs KM* [2017] eKLR. Therefore, that the trial Judge wrongfully exercised his discretion which entitles this court to intervene as held in *Mbogo & another v Shah* [1968] EA 93.

45. G4S Security also submitted that the award of damages was manifestly excessive and contrary to decisions of this court on the appropriate measure of damages where there is summary dismissal as in this case. Reference was made to the decisions in *Ombanya v Gailey & Roberts* [1974] EA 522 at 524 for the proposition that 'the damages suffered are the wages for the period for which a normal notice would have been current, and in *Dalmas B. Ogoye v KNTC* [1996] eKLR that since the appellant's appointment was unlawfully terminated, the only damages she is entitled to in law is the amount stipulated in her contract of service and no more. They distinguished the case of *GMV v Bank of Africa* [2013] eKLR relied on by the trial judge on the ground that the discrimination therein was on the basis of pregnancy, which is far more serious than the 1st respondent's claim. According to G4S Security, S's employment was properly terminated, and she was paid all her dues and was not entitled to any of the reliefs granted.

46. S submitted that in the case of *GMV vs The Bank of Africa* [2013] eKLR it was held that gender violence could not be adequately addressed by redress through the ceiling of 12 months' salary given for unfair termination under the *Employment Act*, and similarly, that termination arising from sexual harassment is not merely unfair termination, but also violates multiple rights of an individual. A comparable award cited was that in *Koki Muia v Samsung Electronics East Africa Limited* [2013] eKLR in which the claimant was awarded Kshs 7,152,000/- as damages for sexual harassment.

The case of *Ol Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR was also cited for the proposition that the appellate court should only interfere with such an award where the trial judge in assessing the damages took into account irrelevant factors or left out of account relevant ones.

47. The Court of Appeal while seated in Nairobi in *Ol Pejeta Ranching Limited vs David Wanjau Muhoro*[2017] eKLR stated as follows:

> "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. An appellate court should only interfere with such an award where the trial Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or where the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage... High earning individuals may unwittingly be awarded more compensation than those that earn less, yet the effect of discrimination is the same. These damages, ought therefore to be at large. A composite or global figure of damages is appropriate to award for discrimination as opposed to calculation on the back pay adopted by the learned judge".

48. Under the common law, the appropriate remedy for loss of earnings following wrongful dismissal was damages, and the normal measure was what the employee would have earned under the contract for the period until the employer could lawfully have terminated it, less the amount he or she could reasonably earn in other employment. Therefore, just like any other innocent party where there has been a breach of contract, the employee must take reasonable steps to mitigate their loss by taking up other employment. See in this regard *Chitty on Contracts*,Volume II at paragraph 40 -200.

49. The ELRC in this regard held as follows:

> "Money cannot adequately compensate wounded feeling but it can reasonably provide a convenient mechanism to assist the person affected pick up the pieces and move on with his or her life. The claimant saw a connection between her dismissal and her complaint over sexual harassment. The respondent failed to investigate her complaint in accordance with its laid down procedures to allay her fears. Considering that the claimant's services could have been brought to an end for any valid reason by both parties an award of two years salary would reasonably compensate the claimant. At the time of dismissal, the claimant's basic pay was Kshs 247,000. The court therefore enters judgment against the respondent's jointly and severally for Kshs 5,928,000/=. The claimant shall further have costs of the suit"

50. In our view, the award for Kshs 5,928,000/=. was not supported by the applicable principles we have identified hereinabove. Our finding in this regard is that a period of one year would have been sufficient for the claimant to secure other employment. An award of Kshs 2,964,000/=, being the equivalent of her one year's salary, was therefore adequate and reasonable in the circumstances.

51. S's cross-appeal therefore fails, and the appeals by Dominic and G4S Security accordingly partially succeed to the extent of the following orders:

    1. We set aside the trial judge's order in the judgment dated April 28, 2017 delivered in ELRC Cause Number 220 of 2014 that "judgment be entered against the respondent's jointly and severally for Kshs 5,928,000/=", and

substitute it with an order that "judgment entered in favour of the claimant against the respondent's jointly and severally for Kshs 2,964,000/= ".

2. The Cross-Appeal herein is hereby dismissed

2. All the other findings and orders in the judgment of the trial court dated April 28, 2017in ELRC Cause Number 220 of 2014 are hereby affirmed and upheld, save to the extent that they may have been modified or qualified by the findings made in this judgment.

4. Each party shall bear its own costs of the appeal and cross appeal.

52. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

W. KARANJA

.....

JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

Signed

DEPUTY REGISTRAR