



**CMK v Chandarana Supermarket Limited (Cause 13 of 2018)
[2024] KEELRC 388 (KLR) (26 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 388 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 13 OF 2018
NZIOKI WA MAKAU, J
FEBRUARY 26, 2024**

BETWEEN

CMK CLAIMANT

AND

CHANDARANA SUPERMARKET LIMITED RESPONDENT

JUDGMENT

1. In her Memorandum of Claim and Witness Statement both filed in this Court on 10th January 2018, the Claimant averred that the Respondent contacted her with a job proposal and after she met all the requisite requirements, employed her as a Cashier on full and permanent basis around January 2017. That as indicated in the Letter of Appointment, her remuneration package included a basic salary of Kshs. 24,832/- plus 17% house allowance and in May 2017, her salary was reviewed to Kshs. 29,832/- per month. The Claimant’s case was that on or about June 2017, she started experiencing issues at her workplace occasioned by the Respondent’s Branch Manager, Mr. Bhavesh Davda. She asserted that she received sexual advances from the said Branch Manager which she declined on several occasions brewing animosity from him. The particulars of the said sexual harassment included: sexual advances via WhatsApp texts late in the night; constant invitations for dinner and lunch; assignment of duties closer to the Manager’s office; being offered alcohol on various occasions; being offered free yoghurt from the supermarket, which was never offered to others; and being given preferential treatment compared to other employees. The Claimant averred that the animosity led to the said Branch Manager maliciously implicating her in the disappearance of Kshs. 1,000/- and she was suspended for one (1) week pending investigations. She was then summoned to a disciplinary meeting in which the issue was solved and that it was later established that she was never involved in the loss of the said money.

2. The Claimant averred that when she raised concerns about the sexual harassment to the Respondent’s General Manager, she was summoned to a disciplinary meeting where the issue was addressed and an apology issued, in a clear indication of admissibility of liability. Additionally, she received a letter from



the Respondent on 24th August 2017 informing her of her transfer to ABC Place Branch in Westlands due to the said sexual harassment. That however, when she reported to her new branch on 31st August 2017, she was met with a lot of hostility as her colleagues openly discussed the issue of her sexual harassment that led her to involuntarily resign under undue influence. The Claimant fronted that the unconducive work environment was a clear violation of her constitutional rights to dignity, reasonable working conditions and fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. She argued that she had legitimate expectation she would work until her retirement and asserted that she had since suffered both financially and psychologically from the situation. She also notified the Court that she was not aware of any disciplinary action that was taken against the Branch Manager who subjected her to the sexual harassment. The Claimant further averred that her employment prospects are severely damaged because of the circumstances that led to her resignation. She therefore prayed for compensation at 12 months' pay, interest at court rates from the date of termination, payment for accrued leave, and general and aggravated damages for sexual harassment. She further sought cost of the suit and interest thereon and a certificate of service.

3. The Respondent's reply in its Memorandum of Response dated 11th May 2018 was that the Claimant was employed on 5th January 2017 and that in May 2017, her basic salary was increased from Kshs. 24,832/- to Kshs. 29,288/-. The Respondent averred that on or about 15th August 2017, the Claimant picked a Kshs. 1,000/- note together with money she had dropped yet the said money had been dropped by the Branch Manager while giving out salary advance. That unknown to the Claimant, CCTV cameras in the Manager's office captured her taking the 1,000/- note from the Assistant Manager, Ms. Dhvani Khetia, after claiming that the same was part of the money she had dropped. According to the Respondent, the Claimant's conduct amounted to gross misconduct, a ground for summary dismissal under section 44 of the *Employment Act*. It further averred that through a letter dated 15th August 2017, the Claimant was asked to show cause why disciplinary action should not be taken against her for denying that she had taken Kshs. 1,000/- that had been dropped by the Manager and which did not belong to her. The Claimant responded to the show cause in an undated handwritten letter and maintained that she did not pick any extra money but was willing to pay the money for the matter to be brought to rest. That since it was not satisfied with the Claimant's said response, she was invited to a disciplinary hearing on 22nd August 2017 vide a letter dated 19th August 2017. The Respondent's case was that it was during the disciplinary hearing on 22nd August 2017 that the Claimant brought up the allegations of sexual harassment by Mr. Bhavesh Davda. That notwithstanding there were grounds for it to summarily dismiss the Claimant, it opted to give the Claimant another chance and transferred her to the Respondent's ABC Branch. The Claimant worked at the said Branch until 20th September 2017 when she tendered her resignation via email.
4. The Respondent denied the assertion that Mr. Bhavesh Davda made sexual advances to the Claimant in any way. Without prejudice, it averred that if at all there was any communication between the two, the same cannot pass the test of sexual harassment and that the allegation was the Claimant's aim to extort money from the Respondent. The Respondent's position was that the particulars of sexual harassment set out in the Claim are generalised and wanting in particularity. It asserted that the Claimant was misleading the Court for alleging that the Respondent issued an apology or that it admitted liability for the alleged sexual harassment. The Respondent argued that the Claimant was aware of the elaborate sexual harassment policy it had in place but never complained and or reported the alleged sexual harassment using the laid down procedure. According to the Respondent, the Claimant's resignation was voluntary and prayed that the Claimant's Claim be dismissed with costs.
5. Evidence



Under cross-examination, the Claimant testified that she used to report to Mr. Bhavesh Davda who sat in an open place beside the first cashier till at the Respondent's Diamond Plaza Parklands Branch. She confirmed having received and responded to a show cause for the alleged loss of Kshs. 1,000/- and having signed the Minutes of the disciplinary hearing held on 22nd August 2017. In reference to the WhatsApp messages between her and Mr. Bhavesh Davda of 26th June 2017 produced in evidence, the Claimant testified that she declined his invitations for a drink. Further, that they initially had normal friendly conversations until the point he suggested that she moves to Ngara and he would pay the rent, when she realised that the advances were getting sexual. She also noted that on 15th June 2017, Mr. Bhavesh Davda had told her not to share their conversations with anyone. The Claimant further testified that she was required to report the sexual harassment pursuant to the Respondent's Sexual Harassment Policy at clause 5 of the Code of Conduct and Policies. That she resigned and wrote an email to Ms. Jane Mwangi notifying her of the same. It was the Claimant's testimony that upon reporting to the ABC Branch, there was someone always watching her at her till and men would avoid her when they went for lunch and that she was put in a place of emotional distress when her colleagues later started asking her about the transfer from Diamond Plaza. She stated that she had hoped that the Respondent would keep the issue confidential.

6. The Respondent's witness, Ms. Jane Njambi Mwangi (RW1), testified that the conversation between the Claimant and Mr. Bhavesh Davda started in March 2017 and went on to August 2017 and that there was no sexual harassment. Further, that the conversations were friendly and there had been no report of sexual harassment until during the Claimant's disciplinary hearing of the Kshs. 1,000/- loss. RW1 stated that the Claimant had not been reporting to work prior to the resignation and communicated that the resignation would be effective 16th September 2017. She also notified the Court that the Claimant was paid her final dues according to the CBA in place, including leave at Kshs. 23,846/-. Under cross-examination, RW1 stated that they transferred the Claimant because she had indicated she was not feeling safe in her previous Branch. She explained that a report on sexual harassment was to be made to the management or the HR or the Directors. Whereas she asserted that Mr. Bhavesh was reprimanded and disciplinary action taken against him, RW1 denied that the same indicated admission. She further stated that Mr. Bhavesh had later fallen ill, broken down mentally and returned to India. RW1 questioned why the Claimant would offer to pay for something she had not taken and noted that the Claimant came to court over one year after the incident.
7. Mr. Timclerk Mukambi Nandi (RW2) testified that when Kshs. 1,000/- went missing on 15th August 2017, he together with Miss. Khetia and the Claimant had told the Manager they had not seen the said money. That they and the Branch Manager then checked the CCTV and found out that the Claimant had picked the money on the floor, at which point the Claimant also claimed she had been missing a Kshs. 1,000/- note. RW2 asserted during cross-examination that he did not testify at the Claimant's disciplinary hearing and confirmed having not produced the CCTV footage in court.
8. Claimant's Submissions
According to the Claimant, the following were the issues for determination by this Court:
 - a. Whether the termination of the Claimant's employment amounted to constructive dismissal.
 - b. Whether the Claimant is entitled to the remedies sought.
 - c. Who should bear the costs of this suit?
9. The Claimant submitted that section 6(1) of the *Employment Act* provides that:



- (1) An employee is sexually harassed if the employer of that employee or a representative of that employer or a co-worker—
 - (a) directly or indirectly requests that employee for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express—
 - (i) promise of preferential treatment in employment;
 - (ii) threat of detrimental treatment in employment; or
 - (iii) threat about the present or future employment status of the employee;
 - (b) uses language whether written or spoken of a sexual nature;
 - (c) uses visual material of a sexual nature; or
 - (d) shows physical behaviour of a sexual nature which directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee and that by its nature has a detrimental effect on that employee’s employment, job performance, or job satisfaction.
10. That in the case of CNR; FITM & another (Respondent) (Cause E204 of 2021) [2022] KEELRC 82 (KLR) (26 April 2022) (Judgment), this Court held as follows in regard to sexual harassment:
- “Section 6 of the *Employment Act* 2007 behoves the 1st Respondent to have measures to prevent sexual harassment at the work place. In addition, it was required to take disciplinary action against the 2nd Respondent. As such the 1st Respondent having failed the Claimant since there was no policy against sexual harassment in place to safeguard against such a scenario as occurred in the matter before the Court. The failure amounted to unfair labour practice in contravention of Article 41(1) of *the Constitution*. The conduct of the Respondents resulted in the contravention of the Claimant’s inherent human dignity and the right to have that dignity respected and protected. The Claimant ought not have had to choose to resign due to the harassment by the Respondent. In claims where an employee is forced to resign, the employee is deemed to have been constructively dismissed. The Claimant is therefore entitled to recover damages for the sexual harassment as well as compensation for the constructive dismissal.”
11. It was the Claimant’s submission that to show that she was not interested in a relationship with her superior, by a text sent on 24th June 2017 at 9.54p.m, she informed Mr. Bhavesh that she was not looking for anyone at the moment. That it is also noteworthy that most of their conversations were one-sided on Mr. Bhavesh’s part as she was an unwilling participant and only responded to feign interest and avoid losing her job. That on various occasions, she had to beg Mr. Bhavesh to allow her to sleep as he kept texting late into the night. The Claimant argued that the Branch Manager’s sexual advances had a detrimental effect on her employment, job performance and job satisfaction as per section 6(1)(d) of the *Employment Act*. Further, that despite existence of a sexual harassment policy at the work place, the Respondent failed to take any measures to protect her or to address her complaints satisfactorily.
12. Moreover, the Claimant urged this Court to find that the burden rests upon the Respondent to prove that there was no sexual harassment, as was affirmed in the case of SWM v Hardware Trading Store Limited & another [2021] eKLR. She submitted that Article 41 of *the Constitution* of Kenya guarantees her enjoyment of the right to fair labour relations, which includes the right to fair remuneration, to reasonable working conditions and to have the contract of employment respected and adhered to. That the right to fair labour relations forbids an employer from exposing an employee to uncondusive work



environment including sexual harassment. The Claimant argued that the Respondent failed to avail to her an effective grievance management procedure in violation of her rights to fair labour practices as held by the Court in the case of *Grace Gacheri Muriithi v Kenya Literature Bureau* [2012] eKLR.

13. The Claimant submitted that in view of the foregoing, termination of her employment was by way of constructive dismissal. She relied on the case of *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR in which the Court laid out the test to determine constructive dismissal and further held that the employee must be able to show that he left in response to the employer's conduct, that is, causal link. The Claimant argued that the sexual harassment she was subjected to, together with the Respondent's failure to take steps to provide a suitable work environment for her constituted a repudiatory breach of the contract of employment on the Respondent's part. That the Respondent never communicated to her the particular action that had been taken following her complaints of sexual harassment, including any outcome of investigations or disciplinary proceedings against Mr. Bhavesh. That since the Respondent had also not produced before this Court any records of the alleged disciplinary proceedings against Mr. Bhavesh, the assertion remains unsubstantiated and contrary to clause 5 of the Respondent's Code of Conduct and Policies. The Claimant further submitted that she had demonstrated to this Court that the Respondent was fully aware of her resignation as a result of the sexual harassment and urged this Court to hold so. That she had sufficiently proved occurrence of unfair termination of her employment as required under section 47(5) of the *Employment Act* and by way of constructive dismissal.
14. As regards the remedies sought, the Claimant submitted that having demonstrated that her employment was unfairly terminated, she is entitled to compensation for unfair termination as per section 50 of the *Employment Act* as read with section 49(1) of the Act. She urged the Court to award her the maximum 12 months' salary despite the fact that she had worked with the Respondent for about 8½ months, in view of the aggravating circumstances in her case occasioned by the violation of her constitutional rights. In this regard, she referred the Court to the case of *CNR; FITM & another (supra)*, in which the Court awarded the claimant the equivalent of twelve (12) months' salary as compensation for the constructive dismissal upon proof of allegations of sexual harassment. For the claim on payment of accrued leave, the Claimant relied on the provisions of section 28(1)(b) of the *Employment Act* that, where employment is terminated after the completion of two or more consecutive months of service during any twelve months' leave-earning period, to not less than one and three-quarter days of leave with full pay, in respect of each completed month of service in that period, to be taken consecutively. She thus sought her leave entitlement at the rate of 1.75 days per month for the 8½ months she served the Respondent and further because the Respondent had also not produced any evidence to prove that she proceeded on and exhausted her lawful leave days during the said period. She relied on the case of *Trevar Marambe v For You Chinese Restaurant* [2021] eKLR in which the Court found that the claimant was entitled to payment of accrued leave not taken and was not otherwise compensated. The Claimant further submitted that she is entitled to general and aggravated damages for sexual harassment at Kshs. 2,000,000/- as she had sufficiently proved the sexual harassment allegations against the Respondent. She relied on the case of *CNR; FITM & another (supra)* wherein the Court having found that the claimant was constructively dismissed after resigning due to sexual harassment from the respondent, awarded the said claimant a sum of Kshs. 1,000,000/- as damages for contravention of her rights. The Claimant asserted that is entitled to a certificate of service under section 51(1) of the *Employment Act* and lastly claimed costs of the suit pursuant to Rule 29 of the Employment and Labour Relations Court (Procedure) Rules 2016.
15. Respondent's Submissions

The Respondent submitted on the following as the issues for determination by this Court:



- a. Whether the Claimant suffered sexual harassment at the workplace;
 - b. What was the duty of the Respondent upon receipt of the sexual harassment complaint;
 - c. Whether there was constructive dismissal; and
 - d. Whether the Claimant is entitled to the reliefs sought.
16. According to the Respondent, the onus was upon the Claimant to prove she was discriminated against and show existence of sexual harassment and/or conduct amounting to sexual harassment. That however in this case, the Claimant's allegations of sexual harassment are unsubstantiated as they do not meet the threshold set out under section 6 of the *Employment Act*. The Respondent cited the case of *Hawkins Ouma v Microfinance Bank Ltd* [2023] eKLR (Bungoma ELRC No. E015/2022) wherein the Court found that allegations of sexual harassment need to be proved and that it is not sufficient for an employee to only allege that she was sexually harassed. The said Court further held that the right to employment must be protected and should only be taken away for valid reasons consistent with sections 43 and 45(2) of the *Employment Act*. It was the Respondent's submission that no formal or verbal complaint of sexual harassment had been made to it prior to the disciplinary hearing of 22nd August 2017 relating to the loss of Kshs. 1,000/-. That it nevertheless followed through with the complaint upon receipt of the same and issued the letter dated 24th August 2017 addressing the sexual harassment, including transferring the Claimant one (1) day later to a branch with a female supervisor.
17. As to whether there was constructive dismissal, the Respondent submitted that the Claimant's resignation letter described the company as a wonderful organization with her tenure having been of happy innings. That the said letter notably never mentioned the stressful and disheartening things alluded to by the Claimant. According to the Respondent, termination of the Claimant's employment was not constructive dismissal because she failed to adduce evidence confirming that the sexual harassment was disclosed to her colleagues at the ABC Branch. Secondly, that the Claimant failed to demonstrate that the Respondent's conduct was so intolerable that it was considerably difficult for her to continue working. The Respondent surmised that the logical conclusion is that the Claimant resigned voluntarily without undue influence and/or coercion and the same cannot translate to constructive dismissal. In support of its submissions on constructive dismissal, the Respondent was guided by the decision of the Court in the case of *Sophie Muthoni Njagi v Rift Valley Railways Kenya Limited* [2020] eKLR.
18. The Respondent submitted that it had made out a case that there was no form of sexual harassment as against the Claimant and that constructive dismissal is non-existent. That however, if this Court were to reach a different conclusion, the Claimant is entitled to one month's salary and no more. On this submission, the Respondent relied on the case of *CMC Aviation Limited v Mohammed Noor* [2015] eKLR wherein the Court of Appeal set aside an award of 12 months' gross salary as compensation for wrongful dismissal after considering that there was a provision for termination by one month's notice or salary in lieu of notice. The Respondent's stance on the claim for payment of accrued leave was that no evidence was led to prove accrued leave and that the said claim cannot be awarded as it was vague in nature. The Respondent further submitted that the claim for aggravated damages is inconsequential in the suit herein as guided by the case of *Girinyamwaya v Nairobi City Commission* [1985] eKLR (Nairobi 1805/1984) in which the Court affirmed the position that when damages are at large and a court is making a general award, it may consider factors such as malice or arrogance on the part of the defendant, which is deemed as increasing the injury suffered by the plaintiff e.g. by causing him humiliation or distress. It was the Respondent's submission that in the event this Court arrives at a different conclusion other than that the Claimant is not entitled to general damages, its opinion is that Kshs. 500,000/- would be adequate and reasonable in the circumstances; as similarly awarded in the



case of *M W M v M F S* [2014] eKLR (Mombasa Industrial Court Cause No. 268 of 2013). It was the Respondent's conclusion that the case should be found to be without merit and accordingly dismissed with costs to the Respondent.

19. The Respondent was sued for compensation for the unlawful termination of the Claimant. The Claimant alleged she was sexually harassed by the Respondent's manager Mr. Bhavesh who took to late texting the Claimant. In the series of whatsapp messages annexed to the claim, there is plenty to show there was some degree of harassment. In any event, the Claimant did raise the matter in June 2017 leading to her transfer. The Respondent upon transferring her however, made her work at the branch she was transferred to rather difficult by revealing the cause of the transfer to the ABC Place Branch Westlands in August 2017. This created an environment where the Claimant could not work as a result she resigned. There was the allegation of theft of Kshs. 1,000/- yet the Respondent did not avail any CCTV footage to corroborate the same. This is despite the Respondent asserting that the CCTV footage is what led to the Claimant offering to pay the money back despite asserting she did not take the cash. Having not discharged the lingering doubts regarding the accusation, I would find in favour of the Claimant on that score.
20. Constructive dismissal is said to occur when an employee is made so uncomfortable at the workplace by the employer. The employee herein, had a situation she sought to have addressed and the same led to her resignation. She is therefore entitled to recover to some degree being the sum due for the sexual harassment and some compensation for the termination. Damages for the said sexual harassment are at the discretion of the court and in my considered view, the sum of Kshs. 500,000/- would suffice as compensation. The Claimant is entitled to receive 3 month's compensation for the termination as well as costs of the suit. In the final analysis, I enter judgment for the Claimant against the Respondent for:-
 - a. Kshs. 89,200.32 (Kshs. 29,733.44*3 months)
 - b. Kshs. 500,000/- as damages for sexual harassment.
 - c. Costs of the suit.
 - d. Interest at court rates on (a) and (b) above from date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF FEBRUARY 2024

NZIOKI WA MAKAU

JUDGE

