Kinja v Kenya Red Cross Society (Cause 1297 of 2018) [2023] KEELRC 2362 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2362 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1297 OF 2018

J RIKA, J

OCTOBER 6, 2023

BETWEEN

SARAH MUKIRI KINJA .... CLAIMANT

AND

KENYA RED CROSS SOCIETY .... RESPONDENT

JUDGMENT

1. The Claimant filed her Statement of Claim, on 9th August 2018.
2. She avers that she was initially employed by the Respondent, on a 4-month contract, on or around 13th September 2017, as a Project Officer.
3. She was based at Kakuma Refugee camp, in Turkana County.
4. Her contract was renewed, on 18th December 2017 for a period of 2 years, beginning 1st January 2018, expiring 31st December 2019.
5. She earned a monthly gross salary of Kshs. 100,000, throughout her employment.
6. On 11th January 2018, the local community at Kalobeyei, Turkana County, took the Respondent's staff, including the Claimant, hostage for 3 days.
7. The Claimant avers that she was seriously shaken by the incident, and suffered mental anguish, trauma, agony, anxiety, inconvenience and discomfort. Hostage-taking took place in the course of employment, and the Claimant holds the Respondent liable for the damage she suffered. She expected that the Respondent would assist her in recovering from her trauma.
8. Instead of assisting the Claimant, the Respondent kept her incommunicado for a long time; put the Claimant on the spot over the hostage incident; and asked the Claimant to show cause why she should not be dismissed, over matters that had no connection with the incident.

9. She was taken through a stage-managed disciplinary process, which was aimed at ensuring that she was dismissed by all means. She was not furnished with the complaints against her. She was not given the opportunity to question her accusers.

10. She suffered sexual harassment in the line of duty. No action was taken by the Respondent against those who sexually harassed her. She was dismissed on 16th April 2018, on vague grounds.

11. She avers that the letter to show cause issued on her, did not indicate the nature of the intended disciplinary process, or whether disciplinary action was contemplated; notice was inadequate; proceedings were aimed at fault-finding against the Claimant; matters that occurred prior to renew of the contract were considered; and allegations against the Claimant were false.

12. She prays for Judgment against the Respondent for: -

    a. 20 months' salary for the remaining period in her contract, at Kshs. 2 million.

    b. 8 days of annual leave at Kshs. 26,400.

    Total...Kshs. 2,026,400.

    c. General damages.

    d. Costs and interest.

13. The Claimant filed submissions dated 18th May 2022, before evidence was taken, and hearing closed. In the submissions, she claims salary for the remainder of her contract at Kshs. 2 million, annual leave at Kshs. 26,400, damages for abduction at Kshs. 3 million and damages for sexual harassment at Kshs. 3 million, total Kshs. 8,026,400.

14. The Respondent filed its Statement of Response on 9th April 2019. It is conceded that the Claimant was employed by the Respondent, as pleaded in the Statement of Claim.

15. The Claimant was involved in acts of insubordination. She was disrespectful to her Supervisor. The acts were reported by the Community Health Coordinator.

16. The allegations concerning the Claimant's mental health were raised in afterthought, after termination of her contract. The Respondent maintained a medical insurance cover for staff, catering for medical conditions, including mental health. The Claimant did not approach any of the mental health specialists, retained by the Respondent under the medical policy.

17. The Respondent did not keep the Claimant incommunicado at any time. She engaged in acts, likely to cause the Respondent reputational damage. The letter to show cause, issued after the Respondent conducted investigations, with findings that justified the letter to show cause.

18. The disciplinary process was not stage-managed. It was fair and transparent. It was in conformity with the *Employment Act* and the Respondent's policy and procedures.

19. The Claimant never reported any incident of sexual harassment against her. She instead engaged in verbal abuse against her colleague, causing interruptions at the camp. She attempted to jump out of the Respondent's moving vehicle, posing safety risk to herself. The driver reported the incident to the Respondent. The incident was investigated and it was established by the Respondent, that the Claimant was drunk and disorderly.

20. The nature of the disciplinary exercise was disclosed to the Claimant. It was made clear in the letter to show cause. The issues were disclosed, and the Claimant was required to respond. She was invited

to attend the hearing and bring along a representative of her choice. Issues had been conclusively investigated, leading to the disciplinary hearing.

21. Dismissal was based on fair and lawful reasons, and fairly executed. The prayer for salaries for the remainder of the contract period, is extortionist. She was paid all her pending annual leave for 2017 and 2018. The Respondent prays that the Claim is dismissed with costs.

22. The Claimant gave evidence and rested her case, on 22nd September 2022. Senior Human Resource Business Partner, Sandra Mukhana, gave evidence for the Respondent on 22nd September 2022 and on 22nd February 2023, when the Respondent rested its case.

23. The Claim was last mentioned on 11th July 2023, when the Parties confirmed filing and exchange of their submissions.

24. The Claimant told the Court that she is a Public Health Professional. She is presently unemployed. She adopted her witness statement dated 8th August 2018, and documents [1-6] as her evidence-in-chief.

25. She denied that she was at any time, engaged in acts of insubordination. Lucy Ndombi was a Community Health Coordinator. She wrote a report, alleging that the Claimant was disrespectful and not ready to work with colleagues.

26. Ndombi was not senior to the Claimant, and the Claimant could not be insubordinate to Ndombi. The Claimant was the Project Officer, TB/HIV programme. She had assisted the Respondent earlier, as a volunteer. The Claimant had not seen this report from Ndombi, before it was filed in Court. She did not know which persons, Ndombi alleged the Claimant was not willing to work with.

27. A local Employee's contract expired, and was not renewed by the Respondent. He incited his kinsmen against the Respondent. He threatened all staff. He wrote an angry letter articulating his grievance. On 11th January 2018, the staff were blockaded by the locals. The staff houses were made of porous tin [mabati]. Staff were held hostage for 3 days.

28. The Claimant was traumatised. After 3 days, staff were evacuated to Nairobi. The Respondent did not offer staff any form of counselling.

29. 5 of the Employees were taken through disciplinary proceedings. They were summoned one after the other by the Respondent, and enquiries made about the hostage situation. The Claimant was summoned on 15th January 2018. She explained her position. She was bombarded by Senior Managers with all sort of questions, like who she drunk with etc. She was confused.

30. She was then issued a letter to show cause why, she should not be disciplined. She was accused of abusing a driver; jumping out of a moving vehicle; abusing her supervisor; and failing to account. She called for details. None was supplied. She insisted that the driver and the finance officer attends disciplinary hearing. She was not shown the minutes of the disciplinary hearing. Termination letter did not confirm any accusation, but stated broadly, that the Claimant breached her contract of employment.

31. The Claimant was paid half-month salary and notice of 1 month. Termination was on 16th March 2018. The letter issued on 16th April 2018.

32. She was sexually harassed. She reported harassment to Head of Nutrition. The driver Peter, was going to Kakuma town. He was accompanied by the Claimant, the Finance Manager and the Operations Manager. The driver opted to drop the Operations Manager back to the camp first. He returned for the Finance Manager and the Claimant.

33. The driver was drunk. The Claimant sat at the back seat. As they drove back to the camp, the driver was vulgar. He said that he visualized himself holding a woman against a pole, and f****g [vulgarity] her, until she passed out. The Claimant was offended, and kept telling the driver to stop the car, so that she could get out. He instead accelerated. The Finance Manager sat, smiling sardonically at the driver's vulgarities. The Claimant was humiliated, offended and angry, and told them she would escalate their behaviour to the Respondent.

34. This is what the Respondent turned around and referred to, as the Claimant's fight with the driver, attempt by her to jump out of the moving vehicle, and creation of a raucous at the camp.

35. The Claimant told the Court that she was unfairly dismissed. Her last contract was to lapse in 2019. She was not able to secure another job after dismissal, due to adverse reference from the Respondent.

36. Cross-examined, she told the Court that the camp was about 40-minute drive from Kakuma Town. The camp was built on approximately, 1 acre of land. It had about 20 houses, all made of tin. Staff pooled money and cooked in a common kitchen. The camp was surrounded by a bush, and was not secure. The Claimant could not go to the toilet alone, at night.

37. The Local Government intervened to end the hostage incident. Staff were evacuated to Nairobi. They were advised to carry their bare essentials, in small bags.

38. The Claimant received letter to show cause. The allegations were that the Claimant abused a driver and got involved in a fight with a colleague, causing interruption at the camp; she attempted to jump out of a moving vehicle posing safety risk to herself; she was disrespectful and undermined her supervisor in line of duty; purchases were made without evidence of tender documents, and labour costs were exorbitant, without justification; and community participation list under IGAD 20/9/2017 support group, was signed by one person.

39. The Respondent alleged that the Claimant contravened its procedures and standards, and that the Claimant failed to perform her duty carefully and properly. Allegations were made against the Claimant regarding her conduct and professionalism, following the hostage incident.

40. The letter to show cause is dated 9th March 2018, and invited the Claimant to disciplinary hearing scheduled for 14th March 2018. She was to respond to the letter to show cause, by closure of business on 12th March 2018.

41. She replied on 12th March 2018. She refuted the allegation that she lacked professionalism in the hostage incident. Her position was that the local community blockaded staff, because of unfulfilled promises made by the Respondent to them. She did not insult the driver, but admitted she was engaged in a heated exchange with the driver, over his deviant sexual talk. The driver said, while driving back to the camp, that he was looking forward to having sexual intercourse with a lady, while the lady's arms and legs were tied to a pole. She had asked the driver to stop the vehicle to enable her escape the vulgarity. He instead accelerated. She opened and shut her door, to make him stop the car. He slowed down and stopped the dirty talk. The heated exchange spilled over, back at the camp. The Claimant reported sexual harassment to Management. Peter approached her some days later, asking her to forget the incident and move on. He sent her a WhatsApp message to this effect, which she stated she was ready to supply to the Respondent, on request. She was the victim of sexual harassment, and felt she was being put on the spot unfairly. She felt vulnerable, and felt that her rights were being violated. She did not engage in any fight with a colleague. She was not summoned by the Human Resource Manager at the camp over her alleged disorderly conduct, and neither Peter the driver and the Finance Manager

were availed for discussion over the incident. She denied responsibility for exorbitant labour costs and IGAD participant lists.

42. She was taken through a disciplinary hearing. She was allowed the opportunity to go with a witness at the hearing. She was advised of her right of appeal. She did not appeal. She cleared with the Respondent.

43. She was to report sexual harassment to the Respondent. It was related to her dismissal. She mentioned it on investigations carried out by the Respondent.

44. The sexual harassment took place between 6.30 p.m. and 7.15 p.m. The Respondent did not have a printer at the camp, and used to source printing services at Kakuma Town. The Claimant reported to Dr. Sei, her supervisor. The Claimant conceded that she did not have a witness to sexual harassment. Redirected, she told the Court that she disclosed details of sexual harassment in her response to the letter to show cause.

45. Sandra Mukhana told the Court that the Claimant's dismissal was fair. She relied on her witness statement, and the initial and supplementary documents, filed by the Respondent, in her evidence-in-chief. There was a hostage situation at Kakuma. The locals barricaded Respondent's staff. The situation was resolved after the area MCA, the DCI and the Regional Manager, engaged the locals.

46. The Respondent had a staff medical cover, which offered counselling services, for mental wellness. Mukhana was not aware of any sexual harassment suffered by the Claimant. The Respondent has a sexual harassment policy. The incident is to be reported to Management immediately it occurs. Unless it was reported, there was nothing the Respondent could do.

47. The Respondent issued letter to show cause to the Claimant. Disciplinary hearing ensued. The process was conducted in accordance with the Respondent's policies and procedures.

48. The Claimant was dismissed. She cleared and was paid her terminal dues and pension. Her prayer for salary for the remainder of her contract period, has no foundation. She was paid salary for days worked, notice, and annual leave of 7 days. Respondent's exhibit 17, shows the money was channelled through her bank account. Hostage-taking and sexual harassment did not have anything to do with her dismissal.

49. The incident alleged to comprise sexual harassment, took place between 6.30 p.m. 7.30 p.m. The Respondent's vehicles stopped operating at 6.00 p.m. The Claimant and her colleagues were coming from an eatery.

50. Cross-examined, Mukhana told the Court that she was employed by the Respondent on 1st August 2017. She did not recall, if she interacted with the Claimant, before the disciplinary hearing. Mukhana never visited Kakuma. She based her evidence on the employment records.

51. The Claimant was involved in acts of insubordination. The Respondent relied on a statement made by Lucy Ndombi. There were no other records, to establish insubordination. Ndombi's statement has no date. Investigation was done in January 2018. Ndombi worked at Kakuma also. Mukhana did not know when she wrote her statement.

52. The Claimant's first contract was on 13th September 2017. She reported to the Regional Manager. She was not a Public Health Officer. Ndombi did not give details of the drivers whom she alleged, the Claimant was disrespectful to, and not ready to work with. The complaints in her statement, were not put to the Claimant in writing.

53. There was nothing on record, to show that the Claimant's conduct, led to hostage-taking. The audit and risk department, carried out investigations. Mukhana was not involved with the investigations. The investigation report did not relate to the reasons why the Claimant was dismissed. The letter to show cause was based on the investigations, but the outcome was not the reason for termination. The letter to show cause was not accompanied by any supportive documents.

54. Mukhana was not sure if the minutes of the disciplinary hearing were exhibited before the Court. The policies and procedures in place, required that the Employee is involved in all investigations, prior to the disciplinary hearing. Written evidence was required. Report on hostage-taking was not availed to the Claimant.

55. Mukhana told the Court that the Claimant contributed to hostage-taking. There were statements gathered from the locals. General Service Unit [GSU] was called in. Mukhana was not aware that GSU was unable to handle the situation, because the locals themselves were armed.

56. Employees were evacuated. Counselling was provided for those who requested it. They were given leave to debrief. Disciplinary process followed, as part of the process. Mukhana did not know who sat in the disciplinary panel. Redirected, she told the Court that details of the complaints by Ndombi, were contained in her statement. The Claimant had all the necessary information, prior to the disciplinary hearing. She was allowed to call witnesses. She was advised about her right of appeal, which she did not exercise.

57. The Parties both submit, and the Court endorses their common submission, that the issues in dispute are: -

    a. Whether the Claimant was subjected to sexual harassment.

    b. Whether the Claimant's contract was terminated fairly and lawfully.

    c. Whether she is entitled to the remedies sought.

58. The Claimant submits that she was subjected to unfair labour practice, citing the case of Elizabeth Washeke v. Airtel [K]Limited & Another, E&LRC Cause No. 1972 of 2012. The Employer must establish valid reason to justify termination, as held in the Court of Appeal decision Janet Nyandiko v. Kenya Commercial Bank [2017] e-KLR. Termination must satisfy the procedural test and substantive test under Sections 41,43 and 45 of the *Employment Act*, to be deemed fair. The right to be heard fairly, is a constitutional imperative, as held by the Court of Appeal in Civil Appeal Numbers 17 & 18 of 2015, County Assembly of Kisumu v. Kisumu County Assembly Service Board and Others.

59. On the prayer for damages for having been taken hostage, the Claimant urges the Court to find persuasion in the High Court decision Sonia Kwamboka Rasugu v. Sandalwood Hotel & Resort Limited t/a Paradise Beach Resort & Leon Muriithi Ndubia [2013] e-KLR, where the Claimant was detained by the hotel, over non-payment of a hotel bill and was awarded damages of Kshs. 1 million for illegal detention. In Emmah Muthoni Njeri v Nairobi Women's Hospital [2021] the Petitioner was a patient, who was detained by the hospital for unpaid hospital bill. She was awarded damages at Kshs. 3 million for being subjected to inhuman and degrading treatment.

60. On sexual harassment, the Claimant submits that the Respondent has a sexual harassment policy which defines the vice, under clause 3.3. of the Human Resource Policy & Procedures Manual. It includes verbal sexual harassment, which the driver engaged in, in his sexual talk. The Claimant expounds the definition, citing the seminal decision on the subject from India Supreme Court, Vishaka & Others v. The State of Rajasthan & Others AIR 1997 SC 3011. The universally acclaimed definition in this decision, includes unwelcome determined behaviour, whether direct or indirect, such as physical

contact and advances, sexual favour, sexually coloured remarks, showing of pornography, and other verbal and non-verbal conduct of a sexual nature that is unwelcome or humiliating to a woman. This definition is adopted in Section 6[1] of our *Employment Act*, 2007.

61. The Claimant urges the Court to award damages for sexual harassment, at Kshs. 3 million, citing decisions of this Court in G.M.V v. Bank of Africa [2013] e-KLR; O.S. v. CWRL & 4 Others [2021] e-KLR: and P.O. v. Board of Trustees, A.F & 2 Others [2014] e-KLR.

62. The Respondent submits, putting reliance on the case of Gilbert Michael Maigacho v. Coast Development Authority [2021] e-KLR, that its treatment of the Claimant fell within the band of reasonable response test, where the Court is not required to ask what action it would have taken, had it been in the shoes of the Employer, but rather, whether in the circumstances, the Employer acted reasonably. The Claimant acted in breach of her contract and was engaged in conduct that exposed herself to safety and security risk. In Thomas Sila Nzivo v. Bamburi Cement Limited [2014] e-KLR, the Court held that the Employer is not required to have conclusive proof of reason to justify termination, but is only required to show reasonable and sufficient ground. It is submitted further for the Respondent that the Claimant did not discharge her evidential burden to show that termination was unfair, under Section 47 [5] of the *Employment Act*, as held in George Okello Munyolo v. Unilever Kenya Limited [2019] e-KLR.

63. The Respondent submits that it does not condone sexual harassment and has sexual harassment policy under clause 3.3 of its Human Resource Manual and in adherence to Section 6[2] of the *Employment Act*. Employees are required to report sexual harassment to Management. The Claimant did not make such a report. Allegations of sexual harassment were made by the Claimant in afterthought. Damages for sexual harassment and abduction have not been established. Damages based on the remainder period in the contract are not justified, and would amount to unjust enrichment, as concluded in D.K. Njagi Marete v Teachers Service Commission [2020] e-KLR.

The Court Finds

64. The Claimant was employed by the Respondent around 13th September 2017, as a Project Officer. Her contract was renewed on 18th December 2017 for 2 years, to end on 31st December 2019.

65. She did not serve to the end of her contract. It was terminated on 13th March 2018, for reasons the Respondent states, were detailed in the letter to show cause dated 9th March 2018, issued upon the Claimant by the Respondent.

66. She claims that she was sexually harassed, she was the victim of hostage-taking, and that her contract was unfairly terminated. She claims damages for these violations.

Sexual harassment

67. The claim on sexual harassment was first pleaded at paragraph 16 of the Statement of Claim, after all other pleadings. It does not seem to the Court to be a prayer which the Claimant gave prominence to, in her Statement of Claim as would be expected. Sexual harassment is similarly first mentioned in the Claimant's witness statement, at paragraph 18. The person who is alleged to have sexually harassed the Claimant remained undisclosed in the Statement of Claim. Details of sexual harassment were not pleaded. The witness statement mentioned in passing, that Peter, a driver working for the Respondent, sexually harassed the Claimant.

68. The pursuit of damages against the Respondent for sexual harassment, does not seem to the Court well- grounded. The Claimant is asking the Court to find the Respondent vicariously liable, for sexual harassment attributed to her Co-Employee, Peter the driver.

69. Courts, where properly moved, are permitted to find Employers vicariously liable for sexual harassment committed by their Employees, against other Employees, under the doctrine of respondeat superior, which is Latin for '' let the master answer.'' Vicarious liability under this doctrine applies in hostile environment sexual harassment cases.

70. In Teachers Service Commission v. W.J. & 5 Others [2020] e-KLR, the Court of Appeal found the Employer Commission, vicariously liable for sexual assault by a Deputy Head Teacher, visited upon 2 minors who were under his care.

71. The Court of Appeal examined previous decisions from other jurisdictions. In Lister v. Hesley Hall Limited [2001] UKHL 22, it was held that the Employer is vicariously liable, where the Employee's acts are closely connected with his employment.

72. The Respondent herein, would be vicariously liable for the acts of Peter the driver, if the Claimant had properly pleaded, and led evidence to show, that the driver sexually harassed her, in the course of his duty as a driver, and within the scope of his employment.

73. In Fearing v. Butcher,977 P.2d, 1163 [1999], the Supreme Court of Oregon found the Archdiocese whose priest sexually molested a child under his spiritual guidance, vicariously liable for the acts of its wayward man of the cloth. Vicarious liability was imposed on the Employer on two grounds - that the Archdiocese offered the priest the opportunity to be alone with the assaulted child; and, that the priest used and manipulated his fiduciary position to gain access to the victim. Sexual assault was found to be a direct outgrowth of, and engendered by, conduct within the scope of employment.

74. In Faragher v. City of Boca Raton U.S. 775 [1998], again the US Supreme Court affirmed vicarious liability of Employers in cases of sexual harassment by Employees against fellow Employees, even where sexual harassment is not based on deprivation of a tangible benefit, such as promotion or employment retention, the type of sexual harassment characterized as quid pro quo. It is recognized, that it is the responsibility of Employers, to ensure the work environment is safe for all Employees, and Employers must therefore get rid of sexual degenerates, from their workplaces.

75. In all the decisions above, it was established that there are two prerequisites in establishing vicarious liability against Employers, for sexual misconduct by their Employees, happening at their workplace- there must be an employer – employee relationship; and the Employee must be acting in the course of employment, or in a different language, within the scope of employment. It must be underscored that sexual harassment by an Employee against another Employee at the workplace, is no longer regarded as a personal issue between two adults, outside the employer-employee relationship. It is important for the trier of facts, to determine if the act, or acts, fall within the scope of employment.

76. The Claimant, while not pleading in clear terms details of sexual harassment by her colleague, told the Court that she had accompanied the driver, the Operations Manager and the Finance Manager to Kakuma Town.

77. According to her, she had gone to Kakuma Town in search of printing services, which were not available at the Kakuma camp. The Operations Manager was dropped back earlier, while the Claimant and the Finance Manager were dropped by the driver later.

78. Sexual harassment took place while the Claimant and the Finance Manager were being driven back to camp by Peter, between 6.30 and 7.30 p.m. The driver appears to have engaged in severely dirty

talk, which would make any lady or even gentleman, cringe. He stated that he wished to have sexual intercourse [the Claimant used the 4-letter obscenity, in describing what exactly was uttered by the driver], while the lady in his mind, was tied to a post, legs and arms. He visualized himself engaged in this macabre and obscene act, until his victim fainted. The Claimant felt offended, humiliated and vulnerable. If the evidence of the Claimant is to be solely relied upon, Peter the driver appears to have had a sexual fantasy of the deranged kind, which in relation to his passenger the Claimant herein, would fit on all fours, within the legal description of the term sexual harassment.

79. The Claimant took offence and urged the driver to stop, so that she could get out of the car. The driver did not stop but accelerated. The Finance Manager, who would have been expected to do, or say something, to nip sexual harassment in the bud, sat smiling.

80. It was only when the Claimant opened and shut the door of the car, that the driver shut up. The Employees drove to the camp where heated confrontation continued to play out, between the Claimant and the offending driver.

81. The acts attributed to Peter the driver, through the evidence of the Claimant, would in the view of the Court amount to sexual harassment within the meaning ascribed to the term, under Section 6 [1] of the *Employment Act*, and the Indian Supreme Court decision in Vishaka & Others v. The State of Rajasthan & Others AIR [1997] SC 3011.

82. Section 6 [1] of the *Employment Act* names 3 parties, capable of perpetrating sexual harassment at the workplace - The Employer, a Representative of that Employer, and a Co-Worker. Peter the driver was the Claimant's Co-Worker.

83. Properly moved, the Court would have concluded that Peter the driver, was acting within the scope of his employment. He was driving the Claimant to Kakuma Town. He was discharging his role as a driver. The Claimant was in search of printing services. The Court would not find persuasion in the evidence by Sandra Mukhana, that the driver was acting outside the official driving hours, or that the Employees were coming from an eatery. The driver was acting within the scope of his employment, and the hour when sexual harassment unfolded, would be, in the respectful view of the Court, immaterial to holding the Respondent vicariously liable.

84. The camp where the Employees resided and worked, was at all material times their workplace, and the car driven by Peter similarly was a workplace, while used for official business.

85. The Respondent's position, that the Claimant did not report sexual harassment, in accordance with the sexual harassment policy in place at the workplace, is not persuasive. The Claimant brought the incident to the attention of the Respondent at the very least, in her response to the letter to show cause. She offered to avail messages from the driver to her, in which the driver appeared to have acknowledged his perversion, and offered an apology to the Claimant. The Respondent told the Court that a report was made by the driver, concerning the so–called drunken and disorderly conduct by the Claimant, as she was driven back by Peter from Kakuma town to the camp. Information concerning the incident, was known to the Respondent. Should the Respondent not have taken steps to investigate sexual harassment?

86. Vicarious liability is imposed on an Employer in sexual harassment by Co-Employees, but it is always a strong defence for an Employer against such imposition, if the Employer can show that it took immediate and appropriate action against a report of sexual harassment. The Respondent appears to have done nothing when the allegations became known to it, through the Claimant's response to the letter to show cause. Like Peter the driver, the Respondent's attitude seems to have been, forgive, forget and move on.

87. Is the Respondent to be held vicariously liable for sexual harassment? The evidence as told by the Claimant, would suggest that the answer to this question, must be affirmative.

88. The Claimant, as observed elsewhere in this Judgment however, pleaded sexual harassment stutteringly, as a secondary grievance, and damages for sexual harassment, as an afterthought.

89. Peter the driver, was not given an opportunity in this Claim, to tell his own story. He remained a peripheral and shadowy character, looming in the background, in a dark story narrated solely by the Claimant, in which Peter the driver is alleged to have been the villainous protagonist. His own voice was never heard in the proceedings. It would be imprudent for the Court to impose vicarious liability on the Respondent, under the doctrine of respondeat superior, or let the master answer, in the absence of the actual perpetrator of sexual harassment, from these proceedings.

90. The Claimant would have done her prayer for damages, for sexual harassment a world of good, if she had joined the master and the servant to her Claim, to allow the Court determine the veracity of her allegations against the servant, and consider whether the master should be held vicariously liable.

91. The danger and folly of leaving out Peter the driver, is amplified in the Court of Appeal of Kenya decision JMK v. MWM & Another [2015] e-KLR. The Appellant JMK, was Chief Executive Officer of the 2nd Respondent MFS. The 1st Respondent MWN brought a claim for sexual harassment in Industrial Court at Mombasa, Cause Number 268 of 2013, naming the Employer MFS as the sole Respondent. The alleged perpetrator of sexual harassment, the Chief Executive Officer was not a party to, or witness in the Industrial Court Cause, and alleged to have come to know that he had been condemned by the Court as a sexual miscreant, through the press.

92. The Industrial Court found the Employer vicariously liable for sexual harassment committed by its Chief Executive Officer, against the lady Employee MWM. She was awarded Kshs. 500,000 against the Employer.

93. The Chief Executive Officer applied for review of Judgment, arguing that he was condemned as a purveyor of sexual perversion, without being heard. He sought to be allowed to re-open the proceedings, and to be given a chance to defend himself, and clear his name. The Industrial Court declined the application, opening the way for the Chief Executive Officer to move to the Court of Appeal.

94. In allowing the Appeal, the Court of Appeal stated that it was letting William Shakespeare speak from the grave, in Othello, Act III, Scene 3, through Lago, stating that:

> ''Good name in man and woman, dear my lord, Is the immediate jewel of their souls: Who steals my purse steals trash; 'tis something, nothing; Twas mine, 'tis his, and has been slave to thousands: But he that filches from me my good name Robs me of that which not enriches him And makes me poor indeed.''

95. The Court held that the value of a person's reputation is not a concern of poets and playwrights alone; Courts too have underscored the value of reputation. The Court of Appeal underscored the value of a person's reputation, and the right to be heard, concluding that the Appellant should have been granted an opportunity to be heard, before being condemned as a perpetrator of sexual harassment.

96. The evidence by the Claimant, convincing as it appears, cannot be upheld by the Court, and damages granted to her vicariously, without hearing the alleged perpetrator, Peter the driver. She ought to have joined him as a necessary party, or at the very least, sought compelling orders from the Court for his attendance before the Court as a witness. Without his evidence, in one form or another, the Court

would be condemning him for sexual harassment, unheard, and condemning the master to answer, without hearing the position of the servant. The doctrine of respondeat superior, would have been unfairly invoked against the Respondent.

97. The claim for sexual harassment is declined.

98. Damages for hostage-taking. There is no evidence that hostage-taking of the Respondent's staff at Kakuma camp, was an event over which the Respondent can be held liable.

99. The Claimant did not establish what triggered the incident, or show that the incident was reasonably foreseeable. She told the Court that a colleague from the local community who worked for the Respondent, and who failed to have his contract renewed by the Respondent, agitated his local colleagues against the Respondent, as a way of retaliation. The Respondent cannot be punished if failure to renew an Employee's contract, triggered communal violence. It was entitled to exercise its managerial prerogative to renew or not renew any of its Employee's contract, without being held to ransom by misguided communal sentiments.

100. The Claimant also alluded to some unfulfilled promises made by the Respondent to the locals, as being the trigger for hostage-taking. It was not made clear to the Court if renewal of the local Employee's contract, was part of the promises made to the community, and not fulfilled by the Respondent. No details of these promises were given to the Court by the Claimant. It was not shown how the Respondent failed to deliver on its promises, leading to hostage-taking.

101. The Respondent acted as any reasonable Employer would do. It negotiated a safe passage out of Turkana to Nairobi. Employees were afforded some days off to come to terms with the horrors of Turkana. Counselling and necessary medical services were available through the insurance cover taken out by the Respondent.

102. The judicial authorities cited by the Claimant in urging the Court to grant damages for hostage-taking are distinguishable. In one decision a hotel guest was detained for not paying her hotel bill. In another, a patient was detained by the hospital for failing to pay her bill. In the current dispute, the Claimant was not detained by the Respondent for any reason, but held hostage by some disgruntled tribesmen. The Respondent cannot be held liable for subjecting the Claimant to inhuman and degrading treatment. She was never a hostage of the Respondent.

103. The last issue is whether termination was fair. This involves Section 41, 43 and 45 of the *Employment Act*, the test being whether fair procedure was followed, and whether valid reason in justifying termination, was established. This test has widely been discussed in every other case concerning termination of employment. Most decisions cited by Parties as judicial authorities on the subject, add no new reasoning, to support underlying proposition. They do not bolster legal argument. They have the effect of making the record of the Court bulky and unwieldy, and do not assist in expeditious disposal of the dispute. Judicial authorities are best cited in arguing recondite matters of the law, not trite issues such as what constitutes fair termination.

104. The Respondent issued the Claimant a letter to show cause dated 9th March 2018. The letter took the Claimant back to the events of 11th January 2018 at Kakuma camp. The Respondent told the Claimant that there were issues that emerged on this date, where a group of youth from Kalobeyei host community, blocked the road accessing the base camp, and by extension access to the main medical facility at Kalobeyei Refugee Settlement, where staff were held hostage for 3 days.

105. The Respondent wrote that allegations were made regarding the Claimant's conduct and professionalism, and investigation on the matter would be conducted exhaustively.

106. The Claimant was advised that investigations had just been concluded, and a meeting held with the Claimant on 8th February 2018, had raised 5 areas of concern against the Claimant. These were: -

I. The Claimant abused a driver and got involved in a fight with a colleague, causing interruptions at the camp.

II. The Claimant attempted to jump out of a moving vehicle, posing safety risk to herself.

III. She was disrespectful and undermined her supervisor in line of duty.

IV. Purchases were made without evidence of tender documents and no certificate of completion. Labour cost was Kshs. 380,000 and materials cost was Kshs. 700,000. The labour cost was exorbitant and could not be justified.

V. Community participation lists under IGAD 20/9/2017 support group was signed by one person.

107. There were no other charges communicated to the Claimant prior to disciplinary hearing, which is said by the Respondent, to have taken place on 14th March 2018 and 21st March 2018.

108. The Claimant was required to respond to the letter to show cause, by 12th March 2018.

109. In the same letter asking her to show cause, she was notified of disciplinary hearing, scheduled to take place on 14th March 2018.

110. This procedure on notice to show cause, was fundamentally flawed. What purpose was served by the notice to show cause, and by requiring the Claimant to respond to the notice, if the Respondent had already determined that the Claimant would face a disciplinary hearing?

111. A notice to show cause is not a disciplinary hearing. It is not a notice of disciplinary hearing. It is issued to an Employee, to provide an Employee with an opportunity to explain himself, or otherwise face disciplinary action as a consequence of failure to give a satisfactory explanation. It offers procedural fairness to an Employee who is facing employment offences. It also offers the Employer a preliminary view of the offences alleged against the Employee, and whether further explanation by way of full throttle disciplinary hearing, should ensue.

112. The Respondent issued the Claimant the notice to show cause with a closed mind. It had already predetermined that the Claimant would face disciplinary hearing, no matter what her explanation on the 5 allegations was.

113. Even after the Claimant responded to the flawed notice to show cause, there is no record of a disciplinary hearing, which is said to have taken place, on 14th March 2018 and 21st March 2018. Mukhana told the Court on cross-examination, '' I am not sure if we have minutes of the disciplinary hearing…'' The Court has not seen such minutes in its record.

114. The evidence by Mukhana was confounding. While the notice to show cause gave the hostage-taking incident as part of the reasons the Claimant was charged, this witness told the Court in her evidence-in-chief that, ''hostage-taking and allegations of sexual harassment had nothing to do with termination.'' On cross-examination, she told the Court that the Claimant, '' contributed to the hostage situation…'' Hostage-taking and sexual harassment in the view of the Court, had everything to do with the Claimant's dismissal.

115. Mukhana conceded that the Respondent's Disciplinary Procedure, requires that an Employee under charge, is supplied with the investigation report and written evidence, before the disciplinary hearing.

No such report or written evidence was supplied to the Claimant. The report generated on hostage-taking, was not availed to the Claimant.

116. Mukhana told the Court intriguingly, that the Employees were debriefed after the hostage-taking, and that the disciplinary process followed as part of the process. How would counselling be part of the disciplinary process?

117. There is no evidence placed before the Court, to show that fair procedure under Section 41 and 45 of the *Employment Act*, was followed.

118. Valid reason[s]. None of the 5 grounds outlined in the letter to show cause as eventual justification for dismissal of the Claimant, was established.

119. The driver alleged to have been abused by the Claimant under count 1, was never given a name, or called to give evidence against the Claimant at any disciplinary platform.

120. The allegation that the Claimant got involved in a fight with a colleague at the camp, again was an empty statement. Details of the fight were not disclosed and the colleague who was involved in a fight with the Claimant, remained unnamed.

121. It is difficult to see how the Claimant's attempt to jump out of a moving vehicle under count 2, in light of her evidence and explanation to the Respondent that she was running away from that vehicle driver's lewd talk, would amount to an employment offence.

122. The Respondent failed to investigate the Claimant's sexual harassment complaint, communicated by the Claimant to the Respondent in plain language, through her response to the letter to show cause. Instead of acting on that complaint, the Respondent converted the self-help measures the Claimant took, in protecting herself from sexual perversion, into actionable employment offences against her. Although the Respondent's witness attempted to sever sexual harassment from the reasons given by the Respondent in justifying termination, the letter to show cause shows that the sexual harassment incident was in the mind of the Respondent, when the decision to dismiss the Claimant was made. The Claimant told the Court on cross-examination that sexual harassment, related to her dismissal. The Court agrees with her entirely.

123. The offence of insubordination under count 3, was not established. The count was based on an undated report of one Lucy Ndombi, a Community Health Coordinator. She states that there was cholera outbreak at Kalobeyei Refugee Settlement, and that the Respondent sent 2 Public Health Officers to assist. The Claimant states that she did not work as a Public Health Officer; she was a Project Officer.

124. Ndombi alleged that the Claimant was not ready to work with drivers. The drivers were not identified. She was said by Ndombi to have refused to work with the other Public Health Officer. The Officer was not identified.

125. The Claimant was not under the supervision of Ndombi. Her Supervisor was Dr. Sei. The charge on insubordination was misplaced, because Ndombi was not the Claimant's Employer, or a person shown to have been placed in authority over the Claimant by the Respondent. The offence of insubordination under Section 44[4][d] of the *Employment Act*, and as enunciated in Dede Esi Annie Amanor-Wilks v. Action Aid International [2014] e-KLR, can only be committed by an Employee against an Employer, or against a person placed in authority over an Employee by the Employer. Ndombi was not shown to be in any such relationship with the Claimant.

126. Counts 4 and 5 were completely unsupported by evidence. Mukhana did not mention purchases, tender documents, labour costs, and community participations lists under IGAD, or show how

these related to the Claimant. These complaints were not shown to fall within the Claimant's responsibilities.

127. In the end there was not a single ground in justifying termination, which was established by the Respondent.

128. Termination was unfair on procedure and substance.

129. Remedies: The Claimant was employed on 13th September 2017. She was confirmed on 18th December 2017. She expected to work for a full 2 years, ending on 31st December 2019.

130. Termination was effective from 13th April 2018 [letter of termination mentions 13th March 2018, which appears to be an error].

131. She worked for 7 months, and expected to work for another 20 months to the end of her contract. In assessing the quantum of compensation for unfair termination, the Court looks holistically at any, or all the factors, listed under Section 49 of the *Employment Act*. The period worked is not the sole determinant, in assessing the level of compensation.

132. She did not contribute to the circumstances leading to termination of her contract. The Respondent did not follow a fair procedure and establish valid reason, to justify termination.

133. The Claimant made a complaint in responding to the letter to show cause, concerning sexual harassment. Instead of launching proper investigations on that complaint, the Respondent charged the Claimant with offences she allegedly committed, in resisting sexual harassment.

134. Section 45 [4] of the *Employment Act* states that termination of employment shall be unfair, where it is found that in all circumstances of the case, the Employer did not act in accordance with justice and equity in terminating the employment of an Employee. Justice and equity required the Respondent to investigate sexual harassment complaint communicated by the Claimant in full, and seek an explanation from Peter the driver. The Claimant was ready to supply evidence, but the Respondent instead got rid of the Claimant through dismissal. It is noted that the Respondent alleges that the Claimant was drunk, and that her misconduct was reported to the Respondent by Peter the driver. Peter the driver was essentially giving his own version of the events that took place, as he drove the Claimant and the Finance Manager back to base, while the Claimant's own version of events was that she was sexually harassed by Peter the driver. At the point Peter the driver made his report, it would be expected that the Respondent called for an explanation from the Claimant, and that she gave her own account of the events. It is unlikely that sexual harassment was never brought to the attention of the Respondent, as the Respondent wishes the Court to believe. The Claimant was ready to supply evidence of sexual harassment, including WhatsApp messages from Peter the driver, expressing his mea culpa.

135. A complaint of sexual harassment made by an Employee, as was made by the Claimant, amounts to initiation, or proposed initiation of legal proceedings against the Employer, the Employer's Representative or a Co-Employee. Except where the complaint is shown to be irresponsible and without foundation, it does not to constitute fair reason for dismissal, or imposition of a disciplinary penalty by the Employer, under Section 46 [h] of the *Employment Act*.

136. By charging that the Claimant created a scene at the camp, fought a colleague and attempted to jump out of a moving vehicle, and by choosing to casually ignore why she probably did so, the Respondent was laying the ground for dismissing the Claimant on account of her complaint against sexual harassment. It is not surprising that the Respondent did not consider the Claimant's response

to the notice to show cause, but opted to hurriedly issue disciplinary hearing notice, contemporaneous with the notice to show cause.

137. In determining the amount of compensation payable, the Court has considered the period worked, and the period the Claimant expected to go on working, as well as the procedure adopted by the Respondent in reaching its decision to dismiss the Claimant. It has taken into account the roles played the parties, in the period leading to termination, and the Claimant's inability to secure an alternative job after termination. Termination was not just and equitable.

138. An award of compensation based on the salary due in the remaining period of the contract would not be a fair and equitable remedy. It would fall within the description of unjust enrichment, and would be contrary to the principle of proportionate redress of an economic injury, as established in the Court of Appeal decision, Elizabeth Wakanyi Kibe v. Telkom Kenya Limited [2014] e-KLR. In granting compensation, the Court factors in the Employee's period of service and expected period of service, to come up with a reasonable balance, between employment reality and anticipation.

139. The Claimant earned a monthly gross salary of Kshs. 100,000. She is granted equivalent of 12 months' salary in compensation for unfair termination at Kshs. 1.2 million.

140. The last pay slip issued to the Claimant shows that she was paid pending annual leave, through her bank account.

141. The Respondent shall pay costs to the Claimant. Interest granted at court rate, from the date of Judgment till payment is made in full.

In Sum, It Is Ordered: -

a. The prayers for damages for sexual harassment and being held hostage, are declined.

b. It is declared that termination of the Claimant's contract was unfair.

c. The Respondent shall pay to the Claimant equivalent of 12 months' salary in compensation for unfair termination at Kshs. 1.2 million.

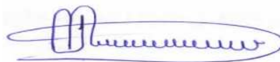
d. Costs to the Claimant.

e. Interest allowed at court rate from the date of Judgment till payment is made in full.

Dated, signed and released to the Parties electronically at Nairobi, under Practice Direction 6[2] of the Electronic Case Management Practice Directions, this 6th day of October 2023.

James Rika

Judge



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