



**CNR; FITM & another (Respondent) (Cause E204 of 2021)
[2022] KEELRC 82 (KLR) (26 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 82 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E204 OF 2021
NZIOKI WA MAKAU, J
APRIL 26, 2022**

IN THE MATTER OF

CNR CLAIMANT

AND

FITM RESPONDENT

JT RESPONDENT

JUDGMENT

1. The Court has redacted the name of the Claimant and that of the 2nd Respondent so as to keep their names concealed to a casual observer on account of the allegations made in the suit.
2. The Claimant herein instituted this claim against the Respondents by a Statement of Claim filed on 18th March 2021. She avers that the 1st Respondent offered her employment to the position of Customer Service Officer on or about 16th January 2016 which she accepted and later rose through the ranks to become Customer Service Manager earning a gross salary of Kshs. 95,400/- all inclusive. It is the Claimant's averment that between 20th December 2020 and 1st January 2021, the 2nd Respondent, who is the 1st Respondent's UPS Country Manager, sent her several offensive text messages that had a detrimental sexual connotation effect on her employment, job performance and job satisfaction. She avers that the 2nd Respondent started seducing her in an offensive and abusive manner and thus undermined her dignity standing at the 1st Respondent work place and that clearly the aforesaid messages and actions by the 2nd Respondent amounted to sexual harassment. She particularises in her Statement of Claim the sexual harassment by the 2nd Respondent and avers that despite reporting the matter to the 1st Respondent's Managing Director, no action was taken and she was pushed to resign after the 2nd Respondent became more hostile to her.
3. The Claimant subsequently enumerates the particulars of malice on the part of the 1st Respondent including: failing to call for investigations on the sexual harassment matter; failing to take action



against the 2nd Respondent; threatening to declare the Claimant redundant and promoting another employee to take over her position; demanding that the Claimant gets a recommendation from the 2nd Respondent if she was to continue working in other positions for the 1st Respondent; and exposing the Claimant to ridicule and embarrassment at work. The Claimant further enumerates the particulars for malice on the part of the 2nd Respondent as follows: using inappropriate language in the company's whatsapp group in reference to the Claimant; creating a hostile environment for the Claimant; shouting at her when addressing her; and indicating to her not to look at him among others. It is the Claimant's averment that the 1st Respondent discriminated against her by forcing her through their actions to resign and she also gives the particulars of discrimination as averred hereinabove.

4. The Claimant avers that she has suffered great mental stress, anxiety, embarrassment, injury to her feelings, humiliation and financial loss and damages. She thus seeks 22 months' salary of up to retirement age (October 2022), one month notice pay, accrued 18 leave days, 12 months' salary compensation, and damages. She prays for judgment against the Respondents for declaratory orders that she suffered constructive termination of employment and sexual harassment at the hands of both Respondents. The Claimant further prays for aggravated damages and costs and interests of the suit.
5. In response, the Respondents filed a Statement of Reply dated 27th July 2021 denying that the 2nd Respondent sent several offending text messages to the Claimant as pleaded by the Claimant. They subsequently deny all her averments to effect that the action connoted sexual harassment but admit that the Claimant did report the matter to one of the Directors who requested her to do a formal complaint. The Respondents aver that the Director further scheduled a meeting on 14th January 2021 where the Claimant was present and a decision made to move her to a different department but she did not comment or reject. They aver that instead, the Claimant did not report to work from 15th January 2021 stating through a text message that she was unwell. The Respondents aver that there existed no hostilities between them and the Claimant and that the alleged text messages were neither offensive nor discriminatory as alleged. The 1st Respondent contends that the Claimant was unhappy that another employee had taken over her position owing to her non-performance and was further displeased that she would be reporting to a new manager. The 2nd Respondent denies the particulars of malice and avers that there was nothing in the alleged communications and/or text messages that breached the Claimant's legitimate expectation to continue in her employment with the 1st Respondent. The Respondents further aver that the Claimant is not entitled to compensatory damages since she is the one who decided to opt out of the employment by tendering her resignation. They pray that the Claimant's claim be dismissed with costs to the Respondents and for any other relief that the Honourable Court may deem fit to grant.
6. In a witness statement made by the 2nd Respondent Mr. Jesse Thuo on 27th July 2021, he asserts that he was called by one of the company's directors and informed that the Claimant had accused him of sexual harassment and that he was further advised not to work with the Claimant pending investigations. The 2nd Respondent states that he sat in a meeting together with the Claimant, the HR Manager and the Country Manager and when the Claimant was asked whether she would work with the Country Manager, she asked for time to think about it and revert the next day but has never reported to work since then.
7. The Claimant submits that it is not in dispute that she had a clean record of employment while working for the Respondents until the time the 2nd Respondent started harassing her and she was forced to resign. She submits that the actions of the 2nd Respondent towards her amounted to acts of sexual harassment within the meaning of Section 6 of the Employment Act, 2007 which provides that:



- (1) An employee is sexually harassed if the employer of that employee or a representative of that employer or a co-worker-.....
 - (b) uses language whether written or spoken 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.”
8. She further submits that she suffered constructive termination of employment and that her lawful expectation to work to the retirement age of 60 years was cut short by the shortfall of 22 months. She urges this Court to find merit in her case and award her as prayed and proposes Kshs. 5 Million as damages for violation of her constitutional rights of lawful expectation and fair labour practices. The Claimant relies on the following authorities: *Maureen Wanjiru Mwangi v Blue Sea Energy Limited* [2020] eKLR wherein the Court affirmed that written or spoken language of a sexual nature amounts to sexual harassment; ELRC Cause No. 26 of 2019, *SWM v Hardware Trading Store Ltd & Anor* [2021] eKLR wherein the Court awarded the claimant damages of Kshs. 500,000/- after finding that the respondent had sexually harassed her through acts of commission and omission; and ELRC Cause No 147 of 2014, *Kenya Union of Commercial Food & Allied Workers v Meru Central Dairy Co-operative Union Limited* [2015] eKLR wherein the Court found the respondent culpable for failing to have in place a Sexual Harassment Policy leading to harassment of a female employee and further ordered the employer (respondent) to issue a policy statement on sexual harassment.
9. The Respondents did not file any submissions and the decision thus is made without input on their part regarding the legal positions taken by the Claimant.
10. The Claimant asserts sexual harassment and the same emanates from the conduct of the 2nd Respondent. The text messages adduced as evidence herein show a pattern of inappropriate conduct by the 2nd Respondent. For instance on 20th December 2020 he wrote : Hi, that's a great profile picture. She replied: Thank you. He wrote on 21st December 2020 : Are you going out of town for Christmas. She replied : No. He wrote : We should have met for a glass of wine before that but seems ngumu. She wrote: Kwani? Where is everyone? She then followed it up with a question a minute later : You sound lonely what's going on? He wrote : Yani I cant want to meet you, I must be lonely, mbona unajichukia. He wrote : One day you will understand me better...but not from a distance. She deleted the reply or the message she had written after this and then wrote : I do understand you since 2016. He wrote : why do you keep deleting messages...you are afraid of saying things straight out...I will definitely look you up kesho. Which wine do you prefer I will drop a bottle. He replied to her message on her understanding him from 2016 as follows: From a distance. This clearly was not official or work related conversation. These messages continue and there is no need to reproduce the entire corpus of screenshots here. As the Claimant expressed her displeasure in the conduct of the 2nd Respondent to the 1st Respondent's Director on 5th January 2021 thus : My department head JT has been trying to have a date with me and my No response is getting him very worked up to the point he's threatening to demote me. She went on : He even knows I get nervous when I see his calls, which is true because I don't know if they are the torture or professional calls. She went on : Sir, I work hard, and I need my job and I have my old mother at 86 that I am supporting as a first born in a family of 8 I have a lot of responsibility.... She went on in another text : Please help me by talking to him to let me work. The Director replied : Good morning. Will handle.



11. 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.
12. In the final analysis I enter judgment for the Claimant as against the 1st and 2nd Respondent jointly and severally as follows:-
 - i. Kshs. 1,000,000/- as damages for the contravention of her rights.
 - ii. 12 months salary as compensation for the constructive dismissal – Kshs. 1,144,800/-.
 - iii. Costs of the suit.
 - iv. iv. Interest on the sums in i) and ii) above at Court rates from the date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL 2022

Nzioki wa Makau

JUDGE

