



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 101 OF 2018

EMMANUELLA MEDZA KINDA.....CLAIMANT

VERSUS

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

JEREMIAH KAMBI.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 19th November, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 02.03.2018 through M/S Otieno Asewe & Company Advocates. The claimant claimed for:

- a) Salary in lieu of notice Kshs.58, 000.00.
- b) General damages for sexual harassment Kshs.699, 000.00
- c) Total Kshs.754.000.00.

The claimant's case is as follows. The 1st respondent is a non-governmental organisation. The 2nd respondent is the Chief Executive Officer (CEO) of the 1st respondent. They are based in Watamu, Kilifi County. The claimant was employed by the 1st respondent as a Communications Officer and Alumni Affairs Co-ordinator effective 01.05.2016 at Kshs.58, 000.00 per month. In November 2016 the 2nd respondent summoned the claimant to his office and told her he had to **"let her go"** because his wife who was the 1st respondent's Human Resource Manager had accused the 2nd respondent of having an affair with her. Further, on 28.01.2017 the 2nd respondent sent to the claimant a WhatsApp message thus, **"thako kuthatha bado. Ela kilacha unaangwa ninawe kunipa bai nikaangwa na ujeri."** Translated thus, **"I have not tasted but every day I am told we are together. Please give me so that they can speak the truth."** The claimant's further case is that on 29.01.2017 the 2nd respondent sent her another WhatsApp message injected with explicit sexual language stating, **"I need a big cooler to cool my head or a good fuck."**

The claimant's further case is that on 15.04.2017 the 2nd respondent informed her that he was interested in having a sexual relationship with her and told her that, **"he could satisfy her sexually."** The 2nd respondent send her messages later thus, **"the only way I am backing off if you let me know you are in a stable relationship,"** and the claimant should not give him lectures of, **"you are my in-law and boss."** (and the evidence was that the Human Resource Manager also the 2nd respondent's wife one Bernadette Mapenzi and the claimant are second cousins on the claimant's maternal side.) The claimant's further case was that at no point did she tolerate or condone or encourage the 2nd respondent's sexual advances and that she made it very clear that she was not interested in sexual relationship or any form of an affair with the 2nd respondent and the 2nd respondent used his position as CEO of the 1st respondent to sexually harass and intimidate her contrary to provisions of section 6(1) (a) (b) and (d) of the Employment Act, 2007.

The claimant's case is that on 29.06.2017 she was unfairly dismissed from employment without adherence to substantive and procedural requirements of sections 41, 43, and 45 of the Employment Act, 2007. It is her case that she was dismissed from employment for refusing to accede to the 2nd respondent's sexual advances and improper and unprofessional conduct which subjected the claimant to psychological torture, ridicule and tarnishing her reputation and good standing. She prayed for judgment against the respondents for:

- a) Payment of Kshs. 754, 000.00.
- b) A declaration that the termination of the claimant's employment was unfair, unjust, wrongful, and in breach of the employment contract.

c) General damages for sexual harassment by the 2nd respondent.

d) Costs of the claim and interest thereon at court rates.

e) Any other relief that this Honourable Court may deem just and fit to grant.

The respondents filed on 21.05.2018 the response to the claim and counterclaim through Marende Necheza & Company Advocates. The respondents pleaded as follows. The 1st respondent is a family run organization with the executing board members being the 2nd respondent's immediate family and most of staff are family members since the organisation is still at start up stage in terms of administrative functions. The respondents admitted employing the claimant as pleaded for the claimant and further pleaded that the claimant was the sister in-law of the 2nd respondent. The respondents denied that in November 2016 the 2nd respondent summoned the claimant to his office and told her that he had to let her go because the 2nd respondent's wife had accused the 2nd respondent of having an affair with the claimant. The respondents denied the claimant's allegations of sexual harassment by the 2nd respondent but stated that the claimant and the 2nd respondent had been engaging in discussions over how to resolve complaints raised by the Human Resource Manager who was the 2nd respondent's wife concerning the claimant. Further the complaints included claims of an affair between the claimant and the 2nd respondent and insubordination by the claimant. Further, the emails and WhatsApp messages exhibited for the claimant were selective and the claimant had omitted her messages in response to the 2nd respondent thereby distorting the context the claimant and the 2nd respondent were communicating. The respondents denied that the 2nd respondent used his position as CEO to sexually harass or intimidate the claimant with or without any promise of preferential treatment, threat of detrimental treatment or in any way interfere with the claimant's employment.

The respondents' further case was that the work relationship between the claimant and the respondents had severely deteriorated due to the allegations of an affair between the claimant and the 2nd respondent which had in turn spilled over to the family set up and the 1st respondent being family based, was affected adversely. Further the claimant was aware of all the issues surrounding her work relationship with the respondents and took advantage of the situation to make exaggerated demands from respondents and frustrating efforts at an amicable solution. The respondents' case is that the claimant was not dismissed for refusing to concede to the 2nd respondent's sexual advances. The respondents deny that at no time did the 2nd respondent sexually harass or intimidate the claimant and he never dismissed the claimant from employment for refusing to accede to his advances as no such advances or threats were made to the claimant.

The respondents counterclaimed that during her employment with the respondents the respondents lent her Kshs.200, 000.00 and the claimant has not paid the outstanding Kshs. 125, 000.00 which the respondents counterclaimed. Further, the respondents allocated the claimant a new computer being the respondents' property worth Kshs. 40, 000.00 which the claimant is yet to return to the respondents and the respondents counterclaimed the value of the computer at Kshs.40, 000.00. The respondents counterclaimed a sum of Kshs. 165, 000.00 being the outstanding loan balance and value of the computer.

The respondent prayed for:

a) The claim be dismissed with costs.

b) The claimant to pay the respondents the sum of Kshs. 165, 000.00.

The claimant testified to support her case and the 2nd respondent testified to support the respondents' case. Final, submissions were filed for the parties. The Court has considered all the material on record.

To answer the 1st **issue** for determination the Court finds that there is no dispute that parties were in a contract of service in the position and pay as pleaded for the parties.

The 2nd **issue** for determination is whether the claimant was dismissed and whether the dismissal was unfair. The respondents deny that they ever dismissed the claimant. The claimant pleaded that on 29.06.2017 she was unfairly dismissed from employment without adherence to substantive and requirements of sections 41, 43, and 45 of the Employment Act, 2007. At paragraph 14 of the witness statement, the claimant states that the 2nd respondent summoned her on 29.06.2017 and told her that her employment had been terminated with immediate effect. Further, the 2nd respondent stated that the decision was what his wife and the Human Resource Manager, Mapenzi, wanted. The claimant states that in the process of the meeting Mapenzi called the 2nd respondent who conveyed to her that he was with the claimant, "**doing what she had sent him to do.**" The claimant states that she then made two requests:

a) More time to secure another job before leaving the 1st respondent.

b) Assistance in securing another job.

She further states that the 2nd respondent declined both requests and further, she then requested for 12 months' salary, a request the 2nd claimant accepted and said that the claimant would receive 6 months' pay and the balance in January 2018. The claimant further states that she requested for a written agreement to which the 2nd respondent did not agree with and that the claimant would get the money only if paperwork was not involved at all and that the claimant should trust him.

At paragraph 15 of her witness statement the claimant stated that she had a final meeting with the 2nd respondent on 30.06.2017 when the 2nd respondent informed the claimant that she would be paid only three months' salary and the rest be paid in January 2018. The claimant states that she protested that the money was not enough but the 2nd respondent told her she had to learn how to survive. Further, she has exhibited

emails between herself and the 2nd respondent for 3rd to 5th July wherein parties were to meet in the weekend of 5th and 6th July 2017 but the 2nd respondent failed to honour the appointment for further negotiations. The claimant then demanded for a written letter on reasons for her termination and subsequently filed the present suit. In her oral testimony the claimant stated, **“I was dismissed by word of mouth. There were conversations between me and the respondents after June 2017. It included my exit plan. There were emails. We were discussing how I could be paid severance pay.... I was not summoned for misconduct or performance.”**

For the respondents it was urged that the respondents denied that at no time did the 2nd respondent sexually harass or intimidate the claimant and they never dismissed the claimant from employment for refusing to accede to his advances as no such advances or threats were made to the claimant. In the oral testimony, the 2nd respondent stated that there was no termination letter but the claimant was offered a resignation by email of 26.03.2017 and later he asked her to resume work. He further testified that the work environment was hostile following the allegations of an affair between himself and the claimant and parties discussed exit plans.

The Court has considered the evidence. Parties are in agreement that they discussed the exit plans. The 2nd respondent has not offered the evidence on the exact discussions the parties held last. On a balance of probability, the Court finds that there is no reason to doubt the account by the claimant. The Court finds that on 29.06.2017 parties met and after discussing the issues it was agreed that they separate upon the terms that the claimant be paid 12 months' salaries. However, the parties did not agree on the mode of liquidation of that payment and the evidence is that the parties failed to agree on the mode of payment. If they would have agreed on the mode of payment, then this suit would not have been in Court. The Court finds that the contract of employment was terminated by agreement on 29.06.2017 upon terms that the respondents pay the claimant 12 months' salaries and which is awarded at **Kshs.696, 000.00**. The Court further finds that in the circumstances, the parties were bound with the oral agreement to separate and the issue of unfair or unlawful dismissal does not arise together with the related claims of notice pay and 12 months' salary in compensation. The Court finds accordingly.

The 3rd issue is whether the claimant was sexually harassed and intimidated by the respondents and particularly the 2nd respondent. Section 6 of the Employment Act, 2007 on sexual harassment states: **“(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.”**

The Court has considered the evidence. There is no dispute that in November 2016, the 2nd respondent summoned the claimant and informed her that his wife, also the Human Resource Manager had raised some complaints over the claimant and the 2nd respondent being in an affair and further, insubordination on the part of the claimant. The Court has considered all the evidence from that November 2016 to the time the parties separated on 30.06.2017 and finds that the communication between the parties were aimed at resolving the emerging grievance as advanced by the Human Resource Manager against the 2nd respondent and the claimant. The employment relationship was undisputedly blended with the family relationships. Thus, the initiatives to resolve the grievance involved the claimant arranging the meeting between the claimant's parents and uncle on the one part and the 2nd respondent on the other – but which meeting was not attended by the 2nd respondent. Other initiatives included remedial arrangements under which the claimant would work from home but which did not go down well with the claimant as she was seriously curtailed because she did not have effective resources to work from home such as internet connectivity. Yet further initiatives entailed the exchange of the emails and WhatsApp messages the claimant has pleaded about and exhibited. The Court finds that the emails did not amount to sexual harassment because they were not calculated to confer the claimant a benefit or when declined, a disadvantage at work as employed by the respondents. By her own testimony the claimant stated thus, **“The messages do not promise promotion or threaten dismissal”** and the Court finds that the messages fell short of the test in section 6 of the Act. Further, even if the words were sexual, the Court finds that the claimant and the 2nd respondent were in a mixed relationship, of employment and of family relationship. Thus the 2nd respondent testified, **“I see page 52 of claim bundle. She says she was not interested in sexual relationship and boundaries kept. I responded am tired. I related to claimant as sister in-law and formally my employee. The Communication does not show I had intimate relationship. Some other messages not exhibited in Court. I have not filed missing messages. The read correspondence does not amount to sexual harassment. At the time I was not the CEO. I was writing as a brother in-law not CEO.”** And later and further, **“.... I was dealing with a complex compromise. She was a good worker. I wished to retain her. The work environment was hostile. So I was confused as CEO.”** The claimant had also testified thus, **“.... We were discussing how I could be paid severance pay. I was not aware that termination was coming. There were attempts at solving sexual harassment. The 2nd respondent did not say we were having an affair. I have exhibited emails to 2nd respondent, not from him.”**

The Court has considered that evidence and finds that there being a gap in the exhibited communications and in view of the family relationship, things were actually tense and the claimant and the 2nd respondent were exploring solutions particularly in their private spaces. It could be that as it appears from the private WhatsApp messages, the parties were exploring what would happen if they made the allegations of their affair real or actual and at the same time they were warning and advising themselves, especially on the part of the claimant, that it would be wrong to actuate the allegations while the 2nd respondent was saying, the allegations were tiring and frustrating. The subject of the allegations appears to have been an alleged sexual relationship and the communication could not escape but simply use the sexual words – and in the opinion of the Court, the bigger context was an anxious exploration in the private space between the claimant and the 2nd respondent on how to deal with the allegations. In the circumstances the Court finds that considering the context, the mere use of sexual words did not amount to sexual harassment under section 6 of the Act. It is noted that in fact, the words complained about were made on WhatsApp messages suggesting a deliberate private and personal communication as opposed to emails when parties desired to communicate business in the employment relationship. Further, the Court finds that when it came to separation negotiation and conversations, it was clear to the claimant that the alleged affair had strained and poisoned the work environment and at no stage was the claimant making a case for sexual harassment. The Court considers that alleged sexual harassment appears to have been an afterthought after the respondents became reluctant to pay the 12 months' salaries agreed upon on 29.06.2017 and upon the claimant's terms of payment.

The claim and prayer for general damages on account of sexual harassment will therefore collapse as unjustified.

To answer the **4th issue** the Court finds that there is no dispute that the claimant is liable to pay the respondents Kshs. 165, 000.00 as counterclaimed and consented to at the hearing. That amount is applied to set off part of the respondents' due payment to the claimant leaving the claimant with a net of **Kshs. 531, 000.00**.

To answer the **5th issue**, the Court has considered the parties' margins of success, the involved family relationships, and all circumstances of the case and returns that the respondents will pay only 50% of the claimant's costs of the suit. While making that finding the Court has also considered that the claimant conceded the counterclaim and did not oppose it at all.

In conclusion judgment is hereby entered for the claimant against the respondents for:

- 1) Payment of **Kshs. 531, 000.00** by 01.12.2021 failing interest to be payable thereon at Court rates from the date of filing the suit till full payment.
- 2) The respondents to pay the claimant **50%** of the costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 19TH NOVEMBER, 2021.

BYRAM ONGAYA

JUDGE