



JWK v Multimedia University College of Kenya & another (Cause 2041 of 2012) [2019] KEELRC 3 (KLR) (4 December 2019) (Judgment)

JWK v [Particulars Withheld] College of Kenya & another [2019] eKLR

Neutral citation: [2019] KEELRC 3 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 2041 OF 2012

HS WASILWA, J

DECEMBER 4, 2019

BETWEEN

JWK APPLICANT

AND

MULTIMEDIA UNIVERSITY COLLEGE OF KENYA 1ST RESPONDENT

WOO 2ND RESPONDENT

JUDGMENT

1. The claimant herein filed a memorandum of claim dated and filed on October 9, 2012 through the firm of Kamau Kuria & Kiraitu Advocates in which she seeks for the following reliefs:-
 1. A declaration that the respondents have sexually harassed the claimant.
 2. A declaration that the respondents have contravened the claimant's rights under articles 26, 27, 28, 30, 31, 41, 42, 43 and 47 of the Constitution.
 3. A declaration that the claimant was first sexually harassed by the 1st respondent's security guards on December 16, 2011.
 4. An order that the 1st respondent investigates the claimant's complaint in respect of sexual harassment of December 16, 2011.
 5. A declaration that 2nd respondent has sexually harassed the claimant since January, 2012.
 6. An Order that the 1st respondent do require the 2nd respondent to show cause why he should not be removed from office because of sexually harassing the claimant since January, 2012.



7. A declaration that the 1st respondent is vicariously liable for sexual harassment which the claimant suffered from its security guards and the 2nd respondent.
 8. A declaration that the 1st respondent has contravened sections 3 and 6 of the Employment Act.
 9. A declaration that the respondents have discriminated against the claimant.
 10. A mandatory injunction requiring the 1st respondent to put in place measures to eliminate sexual harassment at the work place.
 11. A mandatory injunction requiring the 1st respondent to comply with sections 5 and 6 of the Employment Act, 2007.
 12. An order that the 1st respondent pays the claimant general damages.
 13. An order that the 1st respondent the claimant is entitled to exemplary damages.
 14. An order that the 1st respondent do pay forthwith to the claimant the outstanding responsibility and entertainment allowances amounting to Kshs 320,000/- plus interest at commercial/compound rate.
 15. An order that the 1st respondent do forthwith upgrade the claimant's starting salary to the highest end of the scale.
 16. An order that the 1st respondent do pay the claimant of Kshs 249,051 being outstanding salary arrears, pegged at Kshs 92,481 less Kshs 69,840 per month, for 11 months.
 17. An order that the 1st respondent pays interest at commercial/compound rates on the said Kshs 249,051/=.
 18. An order that the 1st respondent do correct discriminatory practices meted out to the claimant since October 1, 2011.
 19. An order that the 1st respondent do upgrade the claimant's position to the grade N15 in line with other deans/directors and in line with other public universities.
 20. An order compelling the respondent to institute a sexual harassment policy in compliance with the Employment Act, 2007.
 21. A permanent injunction restraining the respondents from victimizing the claimant in any way because of filing this suit.
 22. Any other or further relief that this honourable court may deem fit to grant.
2. The claimant contended that she was an employee of the 1st respondent as from July 27, 2011 in the position of Director Corporate Affairs and that her terms and conditions of service were set out in her appointment letter dated July 27, 2011. The claimant further averred that the 2nd respondent was her supervisor and principal of the 1st respondent herein.
 3. The claimant averred that upon commencement of her employment she was entitled to a monthly salary. She further contended that her rights as guaranteed by articles 26, 27, 28, 30, 31, 41, 42 and 43 of the Constitution of Kenya, 2010 have been violated by the respondents herein through damage to her bodily integrity through sexual or other harassment.
 4. The claimant averred that she was a victim of sexual harassment on December 16, 2011 in the following manner:-



- a) She was ordered to stop by male security guards using the swahili words “wewe mrembo simama” meaning you beautiful girl stop, they then commenced a physical search on her instead of fetching a female guard to undertake the search.
 - b) During the search, one of the guards fondled her breasts and other parts of her body under the guise of checking whether she had any stolen property. She further contended that this was done despite protests from her.
 - c) She further contended that the said guard proceeded to put his hand into her blouse and pulled out her breast which he fondled with another guard touching her buttocks and chest.
5. The claimant contended that this acts amounted to sexual harassment contrary to the provisions of section 5 of the Employment Act, 2007.
 6. The claimant further averred that the 1st respondent was by law obligated to provide the following:-
 - a) To put in place a policy and machinery to protect women from sexual harassment by its male employees.
 - b) To provide all its employees with a safe working environment.
 - c) To have machinery for investigating complaints of sexual harassment and disciplining male employees who sexually harass the female employees.
 - d) To remove from its employment male members of staff who sexual harass female staff.
 - e) Not to discriminate against any employees on grounds of his or her gender.
 7. The claimant contended that on diverse dated from mid-January 2012, February 20, 2012, March 28, 2012, April 11, 2012, April 13, 2012, May 11, 2012, May 15, 2012 and June 4, 2012 the 2nd respondent had been harassing her sexually and urged this honourable court to find the 1st respondent vicariously liable for these acts to the 2nd respondent as well as those of its security guards.
 8. She further contended that this acts were in contravention of her rights as guaranteed under articles 26, 27, 28, 30, 31, 41, 42 and 43 of the Constitution.
 9. The claimant further contended that as a result of the sexual harassment as pleaded in her memorandum of claim she has suffered great pain, agony and suffering and had on many occasions found herself crying after receiving intimidations from the respondents.
 10. She further averred that she has been a victim of discrimination as the 2nd respondent hires less qualified employees than her on better terms of employment as she rejected the proposal from the 2nd respondent to grant him sexual favours.
 11. She further contended that she suffered from depression as a result of the sexual harassment and even had to be admitted at the Aga Khan Hospital between 15th and August 17, 2012.
 12. She therefore urged this honourable court to allow her claim as drawn.
 13. The 1st respondent filed its reply to the claimant’s memorandum of claim on January 19, 2015 through the firm of Achach & Company Advocates in which they admit having engaged the claimant on July 27, 2011 as Director of Corporate Affairs and that her terms and conditions of engagement were as provided under her employment letter dated July 27, 2011.



14. The 1st respondent further averred that the claimant did accept to the set terms of engagement as set out in her appointment letter and reported to work. It is further contended that she was therefore bound by the terms as set out in her appointment letter and her entitlements are as contained in the said appointment letter.
15. The 1st respondent further contends that it met all its statutory and constitutional obligations including having a draft sexual harassment policy that only awaits approval by its council and that the claimant even participated in the inception of the said policy document.
16. It is the 1st respondent's contention that it provides a safe working environment to all its employees through its service charter and reporting structures.
17. It is further contended that no formal complaint of any sexual harassment was lodged by the claimant to it against any of the security guards at the university. The 1st respondent further contended that it was not aware of any sexual advancements made by the 2nd respondent to the claimant herein as alleged by the claimant.
18. The 1st respondent further averred that during the subsistence of her employment with it the claimant secured an appointment with [particulars withheld], which appointment she duly accepted on September 6, 2012 and as such her employment which at the time was probationary was terminated as the 1st respondent did not wish to retain her following her appointment at [particulars withheld].
19. The 1st respondent contended that this honourable court proceeds to dismiss the instant claim with costs to the 1st respondent as the same is void of merit.
20. The 2nd respondent filed his memorandum of reply dated January 7, 2015 through the firm of Liko & Anam Advocates in which he denies all allegations of sexual harassment levelled against him by the claimant herein. He further avers that he is a victim of persecution and discrimination based on his ethnic origin.
21. The 2nd respondent further avers that he left the university's employment in the year 2013 and that all allegations levelled against him are fabricated by the claimant herein. The 2nd respondent urged this honourable court to dismiss the claim against him with costs.

Evidence

22. The claimant, CW1 in her evidence in chief reiterated the averments made in her memorandum of claim. She further contended that she was a victim of sexual harassment as highlighted in her memorandum of claim and urged this honourable court to allow the same as prayed.
23. On cross-examination, CW1 confirmed having reported for duty with the 1st respondent on October 1, 2011. She further confirmed that as per her letter of appointment she was to report to the Deputy Principal Finance & Administration.
24. On further cross-examination, CW1 confirmed that the 1st respondent had a disciplinary committee.
25. CW1 further testified that her employment was confirmed by operation of law as the 1st respondent did not extend her probation period.
26. She further confirmed having received her salary for October, November and December 2012. She however contended having not received her January, 2013 salary and that her termination letter was received in January, 2013.



27. On further cross-examination, CW1 confirmed having received her appointment letter from [particulars withheld]. She however contended that the work done for [particulars withheld] was consultancy work and that she was paid based on specific consultancies and according to her, she needed not to resign from her current employment with the 1st respondent.
28. She further insisted that as at November 8, 2012 she was still under the 1st respondent's employment and that it was not true that she rushed to court after being terminated by both [particulars withheld] and the 1st respondent.
29. On the issue of sexual harassment, CW1 stated in cross-examination that she reported the same on August 8, 2012 at Langata police Station. She contended that the report was made after her report with the 1st respondent was not handled properly.
30. She further averred that following her report at Lang'ata Police Station she was issued with an OB number [xxxx] and that she additionally delivered a written complaint to the OCPD and recorded a statement at the said station.
31. On further cross examination CW1 confirmed having reported the incident with the security guards to the chief of security one Mr Mugambi. She further confirmed that the said security firm, Hatari Security Services was an outsourced firm and were not part of the University's internal security team.
32. On further cross-examination by Mr Anam on behalf of the 2nd respondent CW1 confirmed that her allowances could only be determined by the council and that no other officer could interfere with the allowances as it was the responsibility of the council. She however contended that at the time of her joining of the 1st respondent there were no proper structures within the 1st respondent.
33. CW1 further testified that the delay in reporting the incident with the security guards was due to the 2 weeks break and further that the chief of security requested her to put her complaint in writing based on the gravity of the allegations.
34. On further cross-examination CW1 stated that her email of March 24, 2014 to the 2nd respondent was made at the time he allegedly sexually harassed her. She further contended that the 2nd respondent had promised her that he would push the council to approve her allowances, which was later not done.
35. CW1 confirmed that her letter to the OCPD did not have a date of receipt but insisted the same was delivered on the same day she lodged her complaint and her complaint recorded in the occurrence book.
36. CW1 stated that she did not report the harassment from the 2nd respondent as she feared losing her job as the 2nd respondent was her boss only choosing to confide in one Jane Ireri who accompanied her to the police station.
37. On re-examination, CW1 confirmed that her engagement with [particulars withheld] was on consultancy basis and that the terms of engagement with the 1st respondent allowed her to do consultancies.
38. She further confirmed that her termination letter at paragraph 4 indicated that she had on several occasions absented herself from duty. She however stated that her absence was explained as she was unwell and produced a doctor's report to confirm the same.
39. She further contended that the terms of her contract were varied orally and the principal (the 2nd respondent) directed that she reports to him. She further averred that the instructions were issued after she was sexually assaulted by him.



40. She further contended that she did complain of the sexual harassment from the security guards *vide* her letter dated January 3, 2012. She however insisted that there was no prompt response to the same from the 1st respondent.
41. She further averred that her absence from duty had been clearly explained and that her illness was occasioned by the ordeal she had with both the security guards and the 2nd respondent herein and that her absence was not deliberate.
42. The claimant urged this honourable court to allow her claim as drawn.
43. CW2, Francis Mugambi, in charge security at the 1st respondent university testified that the claimant did write a memo on January 5, 2012 to him in relation to the complaints of sexual harassment by the security guards.
44. He further confirmed having written to the said firm of security guards, Hatari Security Services to follow up on the matter and was informed that the said guards that had assaulted the claimant had in fact been terminated.
45. CW2 confirmed that the Security firm, Hatari Security Services was outsourced. He however contended that they were still answerable to the internal security system of the 1st respondent. He also confirmed that internal guards of the 1st respondent were not involved in the assault against the claimant herein.
46. On cross-examination, CW2 stated that he only learnt of the alleged sexual harassment against the claimant on December 16, 2011 when he received a call from the project manager who informed him that he had received a complaint from a lady of sexual harassment from the security guards.
47. CW2 confirmed that this was the first time he received such a complaint and that he went on to investigate the same and interviewed the said security guards who denied having harassed the claimant in any way. Despite contending that he recorded statements from the said guards none were produced as evidence in this matter.
48. On further cross-examination, CW2 stated that he did not record any statement from the claimant choosing to rely on her letter as well as her verbal account of what transpired.
49. He further testified that despite the seriousness of the offence committed by the guards of Hatari their contract with the 1st respondent was never terminated. He further confirmed having been invited by the DCIO Langata Police Station to record a statement on the sexual harassment claims.
50. CW2 insisted that the guards were guilty of breaching security by searching the claimant despite the fact that she was of the opposite gender.
51. CW3 Prof Joseph Gitile Niatule, an Assistant Professor of Business Management and Deputy Principal Finance and Administration with the 1st respondent as from february 2011 stated that he was in charge of the university finances and staff management.
52. CW3 further confirmed that the 2nd respondent was recruited and became principal and that the change did not affect the disciplinary process that was already in place.
53. He further testified that the claimant was summarily dismissed and that he was not involved in the process.



54. On cross-examination, CW3 confirmed that he held the position of principal in 2011 in an acting capacity for 6 months until the 2nd respondent was appointed. He further confirmed that the claimant on her appointment reported to him and that he (CW3) reported to the 2nd respondent.
55. On further cross-examination, CW3 confirmed that he was not aware why the claimant's services were terminated as she was not taken through the disciplinary process. He however admitted having not been aware if she (the claimant) was invited for any disciplinary hearing.
56. CW3 also confirmed that the claimant did not make any report on sexual harassment and that he had not been called in any case to testify on the same. He further contended that the claimant was not reporting to him but to the 2nd respondent herein.
57. CW4 Dr Patrick Kimiti, Clinical Officer and Psychologist at the 1st respondent testified having examined the claimant and prepared a report.
58. He further testified that the claimant had sought his assistance and complained of depression, mood swings, insomnia and forgetfulness. After examining her on August 13, 2012 he prepared a report dated October 4, 2012 which he produced as evidence in this matter.
59. On cross-examination, CW4 confirmed that he first examined the claimant on August 13, 2012. He insisted that the said report prepared was his professional opinion on the claimant's condition.
60. On re-examination CW4 stated that the report he prepared was his professional assessment of the claimant and that the same was not influenced in any way.

Respondent's Case

61. The 2nd respondent, WOO testified as RW1. He averred that the allegations of sexual harassment levelled against him by the claimant herein were untrue and that he was equally not aware of any incident between the claimant and the security guards from Hatari Security Services.
62. RW1 further confirmed that he did not receive any formal complaint from the claimant on the sexual harassment claims. He further testified that his office had 4 members of staff comprising of 2 secretaries, a driver and a messenger and that his office was always manned.
63. RW1 further averred that his office was not tasked with processing allowances, allocation of houses, transport issues as well as leave and therefore the claimant's allegations are untrue as his office had no control on how issues within the said departments were handled.
64. He further contended that the claimant on invitation attended several meetings as evidenced by the minutes attached to her claim and during the said meetings the claimant failed to raise any issue of sexual harassment. He further testified that no report of the same was made to the council.
65. On the issue of part time employment RW1 stated that the university allowed employment of lecturers on part time basis. He however contended that in the claimant's case she was on probation and as such could not take up employment on a full time basis without terminating her engagement with the 1st respondent. He contended that his office was not involved in this process and that the same was handled by the Legal Department and Human Resources.
66. RW1 confirmed that in the inception, the 1st respondent did not have a sexual harassment policy but the same was later formulated and adopted. He further stated that no report was made to Langata Police Station as stated by the claimant, as he has never been summoned over the same.



67. RW1 contended that the instant case has been brought in bad faith and that the facts as stated are not true. He further contended that he is a victim of set up and discrimination against him on tribal grounds. He urged the court to dismiss the claim with costs.
68. On cross-examination, RW1 contended that the claimant's admission at Aga Khan Hospital was not caused by him. He further contended that he did not take advantage of the claimant as alleged.
69. He further confirmed having not received any complaint of any sexual harassment from the claimant herein and further that the claimant's services were not terminated by him.

Submissions by the Parties

70. It is the Claimant's submission that she was sexually harassed by the 2nd Respondent and that the 1st Respondent being his employer did little to come to her aid.
71. She urged the Court to find the 1st Respondent liable for the acts of the 2nd Respondent as it did not have in place a proper sexual harassment policy as required under the Employment Act. To buttress this argument the Claimant cited the case of Patel Vs Yafesi and Others 1972 (EA) 28.
72. She further contended that the acts of sexual harassment that were meted on her by both the 2nd Respondent as well as the guards of the 1st Respondent were done in the course of their employment and as such urged the Court to find the 1st Respondent vicariously liable. For emphasis she cited the case of P.O Vs Board of Trustees, A.F & 2 Others (2014) eKLR in which Justice Rika made reference to the Indian Supreme Court Case of Vishaka & Others Vs The State of Rajasthan & Others(JJ, 1997) (7) (SC 384) where it was held:-

“...it is the duty of the Employer or other responsible person in the workplace, to prevent or deter the commission of acts of sexual harassment and to provide the procedure for resolution, settlement or prosecution of acts of sexual harassment by taking steps required.”
73. The Claimant urged this Court to award her a sum of Kshs. 9,000,000 as damages for sexual harassment.
74. She contended that the 1st Respondent failed to ensure the safety of her dignity and even supported the 2nd Respondent's acts by terminating her contract yet she was a victim of sexual harassment.
75. She further contended that the 1st Respondent acted unreasonably and/or unfairly and/or unlawfully and that she is therefore entitled to maximum compensation of 12 months' salary as provided under Section 49 (1) (c) of the Employment Act, 2007.
76. The Claimant further submitted that the actions of the 2nd Respondent contained all the elements of Sexual harassment as provided under Section 6 of the Employment Act, 2007.
77. She further contended that the said actions of the 2nd Respondent drove her into depression a result of which she was admitted at the Aga Khan Hospital and was diagnosed with depression.
78. On violation of her rights as protected under the constitution, the Claimant submitted that the actions by the Respondents violated her rights as provided under Article 27 of the Constitution. For emphasis the Claimant relied on the case of Meritor Savings Bank Vs Vinson (1986).
79. She further submitted that her rights to fair labour practice as provided under Article 41 of the Constitution have been violated as the Respondents failed to accord her reasonable working conditions



instead exposing her to sexual harassment. To buttress this argument the Claimant cited and relied on the case of *N M L vs Peter Petrausch* (2015) eKLR.

80. She further contended that the Claims of Sexual harassment have never been controverted by the 1st and 2nd Respondents herein.
81. She contended that the defence put up by the Respondents was a mere denial and is void of merit and the same amounts to an abuse of the Court process. To fortify her argument the Claimant relied on the Court findings in the case of *Magunga General Stores Vs Pepco Distributors Limited* (1986-89) E.A 334.
82. The Claimant further submitted that her right to fair labour practice as provided under Article 41 of the Constitution has been violated and cited the cases of *Kiama Wangai Vs Egerton University* (2016) eKLR, *S. Severine Luyali Vs Ministry of Foreign Affairs & International Trade and 3 Others* (2014) eKLR and *Peter Wambugu Kariuki and 16 Others Vs Kenya Agricultural Research Inelied on the Authority of Stephen Nendela Vs County Assembly of Bungoma & 4 Others* (2014) eKLR. *stitute* (2013) eKLR. She therefore contended that she is entitled to damages under this head.
83. The Claimant contended that her right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair as provided under Article 47 of the Constitution and Section 4 (3) of the Fair Administrative Actions Act has been violated as the 1st Respondent failed in both its pleadings and evidence shown an awareness of the existence of sexual harassment despite notification from the Claimant. To fortify her submissions the Claimant cited and relied on the Authority of *Stephen Nendela Vs County Assembly of Bungoma & 4 Others* (2014) eKLR.
84. The Claimant further urged this Honourable Court to award her a global sum for breaches of her Constitutional rights and freedoms as provided under Articles 26, 27, 31, 42, 43 and 47 of the Constitution of Kenya.
85. The Claimant urged this Honourable Court to be guided by the findings of the Court in awarding this from the cases of *Otieno Mak'Onyango Vs Attorney General & Another HCCC No. 845 of 2003*, *Njoya And 6 Others Vs Attorney General and 3 Others* (2004) KLR 261, *David Gitau Njau and 9 others Vs Attorney General* (2013) eKLR and *Gilbert Njuguna Vs Attorney General* (2012) eKLR.
86. The Claimant on the basis of the aforementioned case law submitted that she was entitled to Kshs 20 Million for contravention of her fundamental rights irrespective of what other compensation she gets under other heads of her Claim.
87. The Claimant further submitted that she is entitled to both vindicatory and exemplary damages. She contended that the two damages are distinct as discussed in the case of *Horace Fraser Vs Judicial and Legal Services Commission and the Attorney General* (2008) UKPC 25.
88. She further contended that she was entitled to both awards and relied on the cases of *Odongo Vs Municipal Council of Kisumu* (1971) EA 90, *Patrick Njuguna Kariuki Vs Del Monte (K) Limited* (2012) eKLR and *Kenny Kinako Vs Ringier Kenya Limited* (2016) eKLR.
89. On the issue of costs and interest the Claimant submitted that she was entitled to the same and urged this Honourable Court to award the same and relied on the case of *Republic Vs Communication Authority of Kenya & Another ex-parte Legal Advice Centre aka Kituo cha Sheria* (2015) eKLR for emphasis.
90. In conclusion, the Claimant urged this Honourable Court to allow her Claim as drawn.



1st Respondent's Submissions

91. The 1st Respondent on the other hand submitted that the Claimant has failed to discharge the burden of proof for sexual harassment as provided under Section 107, 108 and 109 of the Evidence Act.
92. The 1st Respondent further relied on the decision in *BWK Vs EK & Another* (2017) eKLR for emphasis. The 1st Respondent further contended that given the gravity of the allegations pleaded by the Claimant, the standard of proof must be higher than a balance of probability. To buttress its argument the 1st Respondent relied on the Authority of *Henry Hidayat Ilanga Vs Manyema Manyoka* (1961) EA 705.
93. It is further submitted that the Claimant did not challenge the legality or otherwise of her termination by the 1st Respondent as it is clear from the prayers sought in the Memorandum of Claim. Further that the Claimant's Counsel attempted to orally introduce the prayer in Court on 20th April, 2015, a request that was declined by this Court. It is on this basis that the 1st Respondent contends that the following facts remain uncontested:-
 1. That the Claimant had double employment at the time of her termination.
 2. That the Claimant was given sufficient warnings and opportunity to show cause before her termination.
 3. That the 1st Respondent had a valid reason to terminate the Claimant and did terminate her lawfully.
94. The 1st Respondent urged this Honourable Court to find that the Claimant was in double employment both with the 1st Respondent and [particulars withheld] and that this dents her demeanour as a truthful witness.
95. On the issue of sexual harassment, the 1st Respondent further submitted that the Claimant failed to avail evidence to support her assertion. It is further the 1st Respondent's contention that the Claimant in cross examination admitted that the gate where she was allegedly harassed by the security guards was busy yet she failed to call any witness to confirm her claims. Further, the fact that she failed to file any criminal complaint for the alleged harassment only meant that it was fabricated.
96. The 1st Respondent further submitted that the Claimant failed to avail evidence on the alleged sexual advances by the 2nd Respondent. It is on this basis that the 1st Respondent urged this Honourable Court to dismiss the Claim in its entirety. To fortify this argument the 1st Respondent relied on the case of *BWK vs EK & Another* (2017) eKLR where the Claim was dismissed the Plaintiff having failed to prove her case to the required standards.
97. With regards to the reliefs sought the 1st Respondent submitted that the Claimant is not entitled to the same and therefore urged this Honourable Court to dismiss the same with costs to the 1st Respondent.

2nd Respondent's Submissions

98. It is submitted by the 2nd Respondent that the Claimant's terms of engagement being a non-teaching staff of the 1st Respondent did not allow her under clause 5.3.1 to take up any other employment and that it was on this basis that the 1st Respondent chose not to continue after the expiry of probation period opting to terminate her services.



99. The 2nd Respondent nonetheless contended that this was a decision taken by the 1st Respondent's Human Resource and not by his office. He further contended that the termination was lawful and was due to the Claimant's breach of contract terms.
100. On the issue of sexual harassment, the 2nd Respondent submitted that the Claimant has not proved her case against him as required under Section 107 and 109 of the Evidence Act. He further submitted that there is no evidence adduced by the Claimant that she reported this to the 1st Respondent prior to the filing of this suit.
101. The 2nd Respondent further contended the Claimant never reported the incident at Langata Police Station as alleged and all her allegations against him are cooked.
102. The 2nd Respondent urged this Honourable to dismiss the Claim in its entirety with costs. For emphasis he cited and relied on the Authority of *BWK vs EK & Another* (2017) eKLR.

Rejoinder Submissions by the Claimant to the 2nd Respondent's Submissions

103. In her brief rejoinder the Claimant submitted that the 2nd Respondent masterminded her illegal termination as the Human Resource Department was under him.
104. She further contended that her services were terminated in contempt of the Orders made on 9th October, 2012. To fortify her argument the Claimant relied on the case of *Spoke Vs Banbury Board of Health, Wood V.C.*
105. On the submissions on sexual harassment, the Claimant contends the Court prefer her submissions as well as evaluates her evidence on the same. She further contended that she did make a complaint in writing to the Registrar of the university and copied the 2nd Respondent.
106. She further urged the Court not to allow the 2nd Respondent benefit from his own wrong as he was the one who failed to communicate the complaint to the council and secondly he was the one who actually harassed the Claimant herein. For emphasis the Claimant cited the case of *Nabro Properties Limited Vs Sky Structures and 2 Others* (2002) 2 KLR 299.
107. The Claimant further contended that the medical report as produced is clear evidence that she suffered harassment. The Claimant further submitted that the totality of the evidence adduced in this matter is that the tort of sexual harassment was committed against her.
108. The Claimant sought to distinguish the authorities cited by the 2nd Respondent by stating that they are inapplicable to the facts pending for determination in particular the Claimant cited the case of *Hidaya Hanga Vs Manyema Manyoka* (1961) EA 705 and *BWK Vs EK & Another*, Nairobi High Court Civil Case No. 443 of 2004.
109. In conclusion, the Claimant urged this Honourable Court to allow her Claim as drawn.
110. I have examined the above evidence and submissions of the Parties. The issues for this Court's determination are as follows:-
 1. What was the nature of the employment relationship between the Claimant and the 1st Respondent.
 2. Whether the Claimant was sexually harassed by the 1st Respondent security guards and the 2nd Respondent.
 3. Whether the 1st Respondent has a Sexual Harassment Policy in place.



4. Whether the Claimant was discriminated against by the 1st Respondent by being paid less than less qualified staff.
 5. Whether the Claimant's rights were infringed upon by the 1st Respondent.
 6. Whether the Claimant is entitled to the reliefs sought.
111. On the 1st issue, the Claimant was employed by the 1st Respondent vide a letter dated 27th July 2011 as a Director Corporate Affairs.
 112. The appointment was to be on probationary terms for 1 year and thereafter the contract could terminate after issuance of 1 month notice or salary in lieu thereof.
 113. The probation period was therefore to end on 11th July 2012 but according to the contract, it could be extended by a further period if the report of the superior recommended so.
 114. In the case of the Claimant, there is no indication that the probation period was extended and there is also no communication on her confirmation in employment.
 115. Under Section 42(2) of employment Act 2007:-

“A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee”.

Issue No. 1.

116. And therefore it is assumed that after 11th July 2012, the Claimant ceased to serve on probationary period and assumed a permanent and pensionable position. That one answers Issue No. 1.

Issue No. 2,

117. The Claimant avers that she was sexually harassed by the 1st Respondent's security guards on 16/12/2011 and by the 2nd Respondent on diverse dates between mid-January 2012 to 4th June 2012.
118. As concerns the guards, she averred she reported to Langata Police Station on 8/8/2012 under OB No. 47/8/2012. She also indicated that she reported to one Mugambi who told her to wait and make a written complaint on the same as they were closing for holiday.
119. Mr. Mugambi gave evidence as CW2 and told Court that he received the sexual harassment report from the Project Manager on 16/12/2012. This contradicts CW1's statement that she had reported to Mugambi.
120. Mr. Mugambi also confirmed that the Security Firm which had hired the guards Hatari Security Guards had been outsourced by the 1st Respondent.
121. Mr. Mugambi informed Court that he investigated the incident and interrogated the guards who denied having harassed the Claimant. He however did not avail any statements from the said guards and therefore the matter remained largely unproved or established.
122. It is not clear why the Claimant decided to report to Langata Police Station 8 months later when she should have escalated this matter to her superior after Mr. Mugambi failed to assist her.
123. The issue therefore of the Claimant being sexually harassed by security guards remains unproved.



124. As for the 2nd Respondent, the Claimant avers that he harassed severally from mid January 2012 to 4th June 2012 on several dates i.e. 20th February 2012, 28th March 2012, 11th April 2012, 13th April 2012, 11th May 2012, 15th May 2012 and 4th June 2012.
125. There is no any evidence that the Claimant reported this incident to anybody. The claimant averred that she was afraid to report because the 2nd Respondent was her boss. However, Claimant's immediate boss was the Deputy Principle finance and Administration.
126. Even her appointment letter is explicit that she was reporting to the Deputy Principle Finance and Administration and this letter is signed by CW3 who was Acting Principal then and even in cross-examination he indicated that the Claimant on her appointment reported to him.
127. He also confirmed to Court in cross-examination that the Claimant did not report any report of sexual harassment to him and he in return was not called in any case to testify over the same.
128. He however told that he was aware of the allegations made by Claimant against the 2nd Respondent on sexual harassment. He also told the Court that the Claimant was a senior officer at the University but never reported the incident anywhere except to the police after this case was filed.
129. CW4 was a doctor who examined the Claimant and he told the Court that he examined the Claimant on 13/8/2012 when she presented with complaints of Insomnia, depression mood swings and forgetfulness. He did not mention anything about sexual harassment, which would have been a good forum for the Claimant to report after these incidences.
130. The 2nd Respondent denied all these allegations and indicated that he was a victim of tribal animosity.
131. Given the above allegations where the Claimant avers that she was sexually harassed but never reported anywhere until after this case was filed, doubt is created in this Court's mind that these serious happenings never really occurred.
132. Sexual harassment is indeed a serious crime and should not be trivialised but Courts should also not jump to conclusion unless ample evidence is placed before it. This was the finding in Case No. 927/2010 PO vs The Board of Trustee, Association for Better Land Husbandry and Rodney Jim Keneally Cheatele.
133. In High Court Civil Case No. 443 of 2003 B W K vs E K & Another (Odunga J) held that in the absence of evidence a Court cannot:-
- 118 "Having considered the evidence presented before me, I am afraid that there were several loose ends in the Plaintiff's evidence. This case must be distinguished from P O vs. Board of Trustees, A F & 2 Others (supra) where there was clearly documentary evidence in form of emails and an express admission that the respondent was nudging the plaintiff. The Plaintiff failed to take steps which she was ordinarily expected to take. She did not lodge her complaint until months after the incident and after a complaint against her had been lodged. She did not call any person to corroborate her testimony or even the fact that she had narrated the incidents the subject of these proceedings.
119. In the premises, while I agree with the law as set out in the authorities relied upon by the plaintiff, I find that the Plaintiff has failed to prove her case to the required standards. In the result, this suit fails and is dismissed".
134. I would like to adopt the words of Odunga J above. In the case of the Claimant herein, she stood in a place of superiority as a Director of Communication of the 1st Respondent, she is an educated person,



she had many opportunities to complain about these incidents of Sexual Harassment. Unfortunately, she told no one and only brought out these issues after she was dismissed by the 1st Respondent in this case and even reported to the police after filing this case.

135. The issue of sexual harassment by the 1st Respondent's security guards and by the 2nd Respondent are therefore unfortunately not proved and I find that the allegations of sexual harassment by the Claimant are not proved and are therefore dismissed.

3rd issue

136. On the 3rd issue, the Claimant has also faulted the 1st Respondent for not having a Sexual Harassment Policy. From the Claimant's list and bundle of documents at page 58 is an email from the Claimant to the 2nd Respondent on the Sexual Harassment Policy. It is dated 24th March 2012 where she attached to the letter a draft Sexual Harassment Policy and the Employment Act. She correctly cited the law at Section 6(2) of Employment Act 2007, which indicate that an employer who has staff of more than 20 or more employees must have a Sexual Harassment Policy.
137. It is clear that the Claimant was aware that the 1st Respondent did not have a Sexual Harassment Policy then and she seemed to be in charge of the docket to prepare it.
138. Whereas the 1st Respondent admits not having a Sexual Harassment Policy then, they aver that they went ahead and developed one under the Employment Act, 2007. The same policy was not exhibited before this Court.
139. It is an offence for an organization not to have a Sexual Harassment Policy. Under Section 88 of Employment Act:-
- 1) "A person, other than a child, who commits an offence under this Act, or contravenes or fails to comply with any of the provisions of this Act for which no penalty is specifically provided shall be liable to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding three months or to both".
140. The Respondent having conceded that they did not have a Sexual Harassment Policy then and through averring that they now have such a policy, they did not exhibit their policy before Court. They are therefore liable to punishment as provided for under the law.

Issue No. 4

141. The Claimant has averred that she was discriminated against by the 1st Respondent in that she was being paid less than employees who were less qualified than her.
142. The Claimant failed to demonstrate who the said employees were or what their salary was. The claim by Claimant remained an allegation which I find not proved and I therefore dismiss this allegation.

Issue No. 5

143. The Claimant also claimed that her rights under the Constitution were infringed upon and that she was unfairly dismissed.
144. The Claimant averred that the Articles infringed upon were 26, 27, 28, 30, 31, 41, 42 and 43. The Claimant has not been able to demonstrate how her rights were infringed upon under the said articles of the constitution.
145. As to her dismissal, the Claimant's position is that she was unfairly dismissed.



146. From issue No. 1 above, this Court established that the Claimant was a permanent and pensionable employee of the 1st Respondent.
147. She was however terminated on 8/1/2013 under a probationary clause. The 1st Respondent would not exercise their discretion to terminate the Claimant under this clause after not extending the probationary period.
148. However, the letter also makes reference to her employment with another organization [particulars withheld] from 6th September 2012 when her employment with the 1st Respondent was subsisting. This was indeed contrary to Clause 5.3 of the Terms of Service with the 1st Respondent which states as follows:-

“ 5.3 Part-time appointment

5.3.1 Except in the case of part-time appointments explicitly so designated, members appointed under these terms shall regard their services to the University as full-time employment and shall not undertake other work which might encroach upon the time expected to be devoted to the University duties without prior permission of the principal.

5.3.2 Such permission shall not be granted where the activity proposed might create a conflict between the duty of the member of staff and his private interests. The Principal may at his/her discretion lay down conditions as he/she may think necessary in granting any permission to a member of staff to undertake outside work. The Principal may also at his/her discretion withdraw permission”

149. The employment with [particulars withheld] is established as per the Claimant’s own documents at page 200 which show that she was employed by [particulars withheld] and accepted the employment.
150. Even under [particulars withheld] letter of appointment, she was employed for a 3 year contract, was salaried and was not required to take up another job in another organisation.
151. In essence, the Claimant breached the 1st Respondent’s terms of employment by taking up another job with [particulars withheld]. There was therefore a valid reason to terminate her.
152. The Claimant has not sought any remedy however on an unfair termination and so I will let the matter rest there.

Remedies

153. Considering my findings above, I find that the Claimant was not able to establish her case against the 2nd Respondent on sexual harassment. I therefore dismiss her case against the 2nd Respondent with costs.
154. As for the 1st Respondent, the Claimant established that the 1st Respondent did not have a sexual harassment policy as expected by law at the time. Because of this omission, I issue an order compelling the 1st Respondent to institute a Sexual Harassment Policy in compliance with the Employment Act 2007 within 3 months from the date of this judgement.
155. In addition, I fine the 1st Respondent a fine of 50,000/=.
156. The 1st Respondent will pay costs of the Claimant in this case.

DATED AND DELIVERED IN OPEN COURT THIS 4TH DAY OF DECEMBER, 2019.



HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Chege for Claimant – Present

Anam for 2nd Respondent and holding brief Achach for 1st Respondent

