



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 189 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 25th October, 2018)

A S L.....CLAIMANT/APPLICANT

-VERSUS-

NATIONAL BANK OF KENYA LIMITED.....1ST RESPONDENT

WILFRED MUSAU.....2nd RESPONDENT

RULING

1. The Claimant/Applicant herein filed this Application on 19/2/2018 under Certificate of Urgency and through a Notice of Motion filed under Section 6, of the Employment Act 2007, Section 12 and 20 of the ELRC Act No.20 of 2011, Section 5 of the Sexual Offence Act, No. 3 of 2006, Articles 27, 28 41, 47, 48 and 159 of the Constitution of Kenya 2010.

2. The Applicant sought orders that:-

1. Pending hearing and determination of this application inter-partes there be an order of injunction restraining the respondents either directly or through their agents from dismissing or terminating the applicant, harassing-sexually or otherwise, intimidating, threatening, physically or sexually assaulting, victimizing or demanding sex from her.

2. Upon hearing the application inter-partes but pending hearing and determination of the Claim filed herewith, there be an order of injunction restraining the respondents either directly or through their agents from dismissing or terminating the applicant, harassing-sexually or otherwise, intimidating, threatening, physically or sexually assaulting, victimizing or demanding sex from her.

3. Any other or further orders as this Court may deem fit to serve the ends of justice.

4. Costs of the application.

3. The Application was supported by the Affidavit of the Applicant herein based on the following grounds the :-

1. "The 2nd Respondent has subjected the applicant to prolonged exposure to a stressful situation at the applicant's work place by sexually harassing and physically assaulting the applicant and persistently demanding sex from the applicant as a condition precedent to the applicant's job being protected and the applicant getting promoted and or appointed to the position of Business Development Manager, Mortgages a position that was internally advertised and the applicant is qualified for and for which the applicant applied was shortlisted and interviewed.

2. When the applicant finally gathered the courage and said no to the 2nd Respondent's persistent and unlawful demands for sex in exchange for promotion and job protection, the 2nd respondent physically and sexually assaulted the applicant on 26.10.2017 in a public place with kicks and blows targeting, among other body parts, the applicant's private parts thereby occasioning the applicant grievous bodily harm and subjecting her to degrading and inhuman treatment and the applicant has not recovered from the attendant emotional stress, trauma, humiliation, distress, mental anguish and low self-esteem.

3. The 1st respondent has no policy on how to report and deal with cases of sexual harassment at the work place and despite the fact that the applicant lodged a complaint against the 2nd respondent with the 1st Respondent the 1st respondent has failed to take

any action or at all against the 2nd Respondent. The 1st Respondent has failed to protect me against the 2nd respondent and both of them are now threatening to take stern action against the applicant unless the applicant withdraws her complaint against the 2nd Respondent.

4. Unless this Honourable Court intervenes urgently to restrain the respondents, the applicant will suffer irreparable loss which may include but not limited to continued emotional stress, trauma, mental anguish, low self-esteem, reduced productivity in life and as an employee and loss of career and or employment”.

4. In her affidavit, the Applicant has contended that she was initially employed by the 1st Respondent as a Direct Sales Representative as a temporary commission staff and the contract was to run for one year with effect from 3/2/2014 until 31/10/2015. That this contract was later terminated and she was appointed to the position of mortgage specialist on 5/12/2014 on a 2 year contract effective from 2.1.2015 till 31.12.2016.
5. She contends that her performance was exemplary and that is why she was promoted.
6. She avers that on 5/5/2017 the 1st Respondent placed an internal advert and invited applications for the position of Business Development Manager, Mortgages Job Ref. HR/028/2017, a position senior to the one she was holding. She applied, was shortlisted and interviewed for this job.
7. She contends that the 2nd Respondent started making sexual advances towards her whenever he called her to his office. The worst turn happened after she was interviewed for the job and the 2nd Respondent called her to his office and informed her that she had emerged top in the interview and had been recommended for employment by the panel. He however informed her that the letter of appointment was on his desk awaiting his signature without which she could not get the letter. He therefore wanted her to have sex with him so that he could sign the appointment letter.
8. The Claimant has averred that she did not fall into this trap and never got the job in question. She felt traumatized, stressed and vulnerable.
9. She avers that the 2nd Respondent continued harassing her inside and outside the office. She narrated an incident on 26/10/2017 when the 2nd Respondent wrestled her to the ground and kicked her private parts punching her severally before she managed to escape.
10. She reported this incident at Hardy police station and recorded a statement.
11. She avers that she also proceeded to Nairobi Hospital where she was diagnosed and treated. The diagnosis revealed that she had injuries in her private parts and was even bleeding. She also had injuries on her breasts and other parts of her body.
12. The Claimant has averred that she continued to receive threats from the 2nd Respondent including the threats of losing her job and continued demanding that she should have sex with him. She also avers that the 1st Respondent has no sexual harassment policy and she lodged a complaint against the 2nd Respondent to the 1st Respondent's Director of Human Resource. She avers that she was later forced to withdraw this complaint and she came to Court seeking the Court's protection.
13. The Respondents opposed this application. They contend that this application is devoid of merit and premature and should be dismissed accordingly.
14. It turned out that during the substance of this application, the Claimant was placed on suspension.
15. The Respondents submitted that the Applicant was running to Court to try and get **orders immunizing** her from the Respondent's Human Resource Manual due to leaking of bank documents to 3rd parties. They aver that if indeed the sexual harassment occurred, why was it reported 3 months later. The Respondents aver that the Court cannot interfere with parties own internal disciplinary mechanisms.
16. I have considered the averments of both parties. Indeed the issues being raised by the Applicant relate to the 1st Respondent's prerogative to discipline her for whatever reason. She avers that the intended discipline is actuated by various issues in this case the harassment targeted at her by the 2nd Respondent.
17. Whether this is true or not, this Court has over and over again pronounced itself on such issues relating to the employer's internal disciplinary processes.
18. This Court has taken the position that the Court should not interfere with internal disciplinary processes of an employer, as this is tantamount to descending into the arena of the employer's prerogative duties.
19. The Courts will only interfere if the process is flawed and only by putting the process back on the right course.
20. The Applicant has sought orders to stop the Respondents from suspending her or harassing, intimidating, dismissing or terminating her etc. The orders sought also seeks to have the Respondents injuncted from victimizing her and or demanding sex from her.
21. Indeed the orders are wide. Some of them have already been overtaken by events. This Court cannot stop the Respondents from

suspending her because the suspension has already been effected.

22. On other allegations of sexual harassment, it is my position that the same should be followed up through the laid down mechanisms in the law. The Claimant reported the matter to police and the same should still be pursued with the police if need be. Indeed this Court cannot condone any sexual harassment against the Applicant and if this position exists or did exist, the same should stop.

23. It is my position that this Court can only make conclusive orders after the hearing of the main claim and upon hearing the parties herein. I therefore decline to make any orders at this stage and direct that this case proceeds to full hearing.

24. Costs in the cause.

Dated and delivered in open Court this 25th day of October, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Otieno Mudanyi holding brief for Wambola for Claimant

Makori holding brief for Chacha for 1st Respondent – Present

No appearance for 2nd Respondent