



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NUMBER 220 OF 2014**

**S R M.....CLAIMANT**

**VERSUS**

**G S S (K) LIMITED.....1ST RESPONDENT**

**DOMINIC OOKO.....2ND RESPONDENT**

**JUDGEMENT**

1. This claim was initially commenced at the High Court under HCCC No. 359 of 2007. The original Plaintiff underwent several amendments and the one in respect of which this suit proceeded to trial was the one filed on 22<sup>nd</sup> October, 2014.

2. The Respondent correspondingly amended their pleadings and filed the same on 7<sup>th</sup> August, 2014 and 5<sup>th</sup> December, 2014.

3. The claimant pleaded among others that:

i. Between 1985 to 1994 and thereafter from February, 1996 the plaintiff was employed by the 1<sup>st</sup> defendant in its Information Technology Department and at the time of the unlawful termination of the plaintiff's services with the 2<sup>nd</sup> defendant on 18<sup>th</sup> August, 2006 the plaintiff had risen to the rank of Information Technology Manager earning a monthly salary of Kshs 247,200/= together with allowances as shown on the payslip.

ii. In addition to the written terms of the Claimant's employment with the 1<sup>st</sup> Respondent there were express terms implied by law that:-

a. The 1<sup>st</sup> Respondent would not discriminate and/or condone the discrimination of the Claimant at her place of employment on account of her gender.

b. The 1<sup>st</sup> Respondent would provide the Claimant with a conducive working environment free from sexual discrimination, exploitation and harassment by her immediate superiors.

c. The Claimant's employment and/or advancement in career with the 1<sup>st</sup> Respondent would not be influenced by and/or affected by the claimants' refusal to succumb to sexual advances and exploitation by her immediate superiors.

d. The Claimants entitlement to working facilities with the 1<sup>st</sup> Respondent would not be influenced by and/or affected by the Claimant's refusal to succumb to sexual advances and exploitation by her immediate superiors.

iii. In the year 2003, the 1<sup>st</sup> Respondent advertised the post of Information Technology Manager which was then held by the Claimant and invited applications for the same.

iv. Pursuant to the advertisement the 1<sup>st</sup> Respondent recruited Mr P H as the Systems and Change manager but assured the Claimant that her office would not be abolished or her services terminated.

v. Mr P was later elevated to the rank of Director of Audit and Systems with the 1<sup>st</sup> Respondent thereby becoming the Claimants immediate boss.

vi. On diverse dates between 2005 and 2006, the 2<sup>nd</sup> Respondent in his capacity as the Human Resource Director and in blatant breach of the Claimant's right to work in an environment free from gender discrimination, sexual exploitation and harassment made unwelcome sexual advances to the Claimant.

### **PARTICULARS OF HARASSMENT BY THE 2<sup>ND</sup> RESPONDENT**

a. The 2<sup>nd</sup> Respondent persistently commented on the Claimants bodily appearance and dressing style despite the Claimant's warning to refrain.

b. The 2<sup>nd</sup> Respondent persistently sought the Claimant's company for reasons other than in her course of employment despite the Claimant's warning to refrain.

c. The 2<sup>nd</sup> Respondent denied the Claimant an office driver on account of the Claimant's refusal to succumb to the 2<sup>nd</sup> Respondt's sexual advances.

d. The 2<sup>nd</sup> Respondent invited the Claimant to the 1<sup>st</sup> Respondent's designated club (Nairobi Club) to address the issue of P H's employment but did not say anything about the same when the Claimant turned up at the meeting venue in the company of an office driver.

e. The 2<sup>nd</sup> Respondent instructed the 1<sup>st</sup> Respondent Transport Manager to withdraw the Claimant's office driver on account of the Claimant's refusal to succumb to the 2<sup>nd</sup> Respondent's sexual advances.

vii. The Claimant reported the 2<sup>nd</sup> Respondent's actions aforesaid to her immediate superior, Mr P H who directed that the issue be resolved by the 1<sup>st</sup> Respondent's Managing Director, Mr K W.

viii. On receipt of the Claimant's complaint against the 2<sup>nd</sup> Respondent the 1<sup>st</sup> Respondnt's Managing Director dismissed the same as trivial, indicated that the 2<sup>nd</sup> Respondent was free to act against the Claimant as he deemed fit and in the presence and with the sanction of the 1<sup>st</sup> Respondent's Legal Adviser Ms Betty Oluoch and Mr P H, directed the Claimant to drop the complaint altogether.

ix. The Claimant pleads that by reason of the matters pleaded hereinabove the 1<sup>st</sup> Respondent in blatant breach of the Claimant's right to work in an environment free from gender discrimination, sexual exploitation and harassment condoned the acts of the 2<sup>nd</sup> Respondent and/or is vicariously liable to the Claimant for the acts of the said 2<sup>nd</sup> Respondent.

### **PARTICULARS OF BREACH BY THE 1<sup>ST</sup> RESPONDENT**

- a. The 1<sup>st</sup> Respondent failed and/or neglected to take any or any sufficient steps to prevent the sexual harassment and exploitation of the Claimant by the 2<sup>nd</sup> Respondent notwithstanding the complaints by the Claimant.
  - b. The 1<sup>st</sup> Respondent ignored and/or neglected to initiate any investigations into the Claimant's complaints.
  - c. The 1<sup>st</sup> Respondent unduly attempted to prevail upon the Claimant to abandon the complaint notwithstanding the admission of impropriety and request for apology by the 2<sup>nd</sup> Respondent.
  - d. The 1<sup>st</sup> Respondent showed open bias and discrimination against the Claimant by abetting and condoning the 2<sup>nd</sup> Respondent's unlawful and illegal actions.
- x. On 15<sup>th</sup> May, 2006 the Claimant through her Advocates made a formal demand to the Respondents which demand was neither responded to nor acted upon. Instead, the 1<sup>st</sup> Respondent proceeded to make malicious, untrue and unsubstantiated claims of misconduct against the Claimant and purported to issue her several warning letters.
- xi. On 2<sup>nd</sup> June 2006, the 1<sup>st</sup> Respondent falsely accused the Claimant laxity, neglect of duty and failure to carry out instructions.
- xii. On 10<sup>th</sup> July 2006, the 1<sup>st</sup> Respondent falsely accused the Claimant of failing to comply with software security, piracy and copyright regulations despite evidence to the contrary from Microsoft International Limited and their partner (Computer Revolutions Africa).
- xiii. On 28<sup>th</sup> July 2006, the 1<sup>st</sup> Respondent falsely accused the Claimant of deleting a folder in the finance reports knowing very well that the Claimant had no knowledge of the folder.
- xiv. The 1<sup>st</sup> Respondent initiated and commenced audit investigations with a view to falsely accusing the Claimant and on 15<sup>th</sup> August 2006, falsely accused the Claimant of taking leave without permission notwithstanding the fact that all leave taken by the Claimant had been so taken in accordance with the 1<sup>st</sup> Respondent's rules.
- xv. On 15<sup>th</sup> August 2006, the 1<sup>st</sup> Respondent falsely accused the Claimant of reporting to work late in the morning knowing very well that there had been an earlier agreement whereby staff working late the previous day were allowed to come in the late the following day.
- xvi. The Claimant pleads that the allegations referred to in paragraph 14 herein were engineered by the 1<sup>st</sup> Respondent's management at the behest of the Managing Director, the Audit and Systems Director and the 2<sup>nd</sup> Respondent to pave way for a justification to terminate the Claimant's services with the 1<sup>st</sup> Respondent and were intended to punish the Claimant for complaining about the sexual discrimination, exploitation and harassment by the 2<sup>nd</sup> Respondent and to deter other victims of the 2<sup>nd</sup> Respondent sexual discrimination and advances from making similar complaints.
- xvii. On 18<sup>th</sup> August, 2006 the 1<sup>st</sup> Respondent in furtherance of the discriminatory acts pleaded hereinabove maliciously and unlawfully terminated the Claimant's employment.
- xviii. The Claimant pleads that the termination of her services were actuated by malice of the management of the 1<sup>st</sup> Respondent and an attempt at concealing the complaints of sexual discrimination, exploitation and harassment by the 2<sup>nd</sup> Respondent.

xix. By reason of the foregoing breaches, the claimant was exposed and subjected to untold misery, psychological torture, mental anguish and emotional distress and thereby suffered legal injury and damages.

4. The 1<sup>st</sup> respondent denied the claimant's allegations and averred in the main that:

i. The first respondent admits paragraph 4.1 but denies that the termination of the plaintiff's employment was unlawful as alleged.

ii. It does not admit that any terms were implied by law into the claimant's contract as alleged in paragraph 5 or at all, and it does not admit allegations in sub-paragraphs (a) (b) (c) and (d).

iii. It denies that the second respondent instructed it to withdraw the claimant's driver for the reasons given in paragraph 10 € or at all.

iv. The contract of employment of the claimant did not entitle her to a driver.

v. It denies any report was made to Mr H in the terms set out in the memorandum of claim.

vi. It denies every allegation in paragraph 12 and states:

a. It denies that it trivialized the complaint by the claimant.

b. It denies that it authorized the second respondent to act against the claimant in any manner he deemed fit.

c. It states that the matter was fully investigated and the claimant consulted on the proposed action to be taken to which she found acceptable.

vii. It does not admit that there is any legal obligation binding on it as alleged in paragraph 13 or at all and does not admit that vicarious liability attaches for any acts of the second respondent.

viii. It denies all allegations of fact in paragraph 13 and states:

a. It denies it failed or neglected to take sufficient steps to prevent secular harassment and exploitation of the claimant.

b. It took the complaints raised by the plaintiff claimant extremely seriously and conducted a proper and thorough investigation into the matter, in which the claimant was fully involved and consulted on the proposed action to be taken.

c. It denies that it ever attempted to prevail upon the claimant to abandon her complaint.

d. It denies all allegations of abetting and condoning any illegal actions of the second respondent.

ix. It denies all allegations of fact in paragraph 14 and states:

a. That concerns about the plaintiff's claimant's work were raised in a far back as October 2004 and have continued.

b. The facts alleged against the claimant were investigated and found to be correct.

x. In response to the particulars of the breach and malice averred by the plaintiff claimant at paragraphs 14 a to e the first respondent states that, all complaints raised against the claimant were based on well documented facts.

xi. It denies that the termination of the claimant's employment was malicious or unlawful or an attempt to conceal the complaints made against the second respondent as alleged at paragraphs 17 and 18 of the memorandum of claim or at all.

xii. It denies paragraph 17. The claimant's employment was terminated by payment in accordance with her contract.

5. The 2<sup>nd</sup> Respondent on his part denied that he made any sexual advances as alleged by the claimant. The 2<sup>nd</sup> Respondent further denied that he made any comment on the claimant's bodily appearance or her dressing style. He further denied that he sought the claimant's company except for work related reasons. The 2<sup>nd</sup> Respondent refuted the accusation that he withdrew the claimant's driver on account of her refusal to succumb to his sexual advances. The 2<sup>nd</sup> Respondent further denied that the meeting at Nairobi Club was to address P H's employment. According to him, the purpose of the meeting was to discuss personal issues the claimant had against him.

6. In her oral testimony in Court the claimant stated that she was employed by 1<sup>st</sup> respondent in 1985 and worked until 1994 when she left and joined [particulars withheld]. She was re-engaged again in 1996 as a Computer Manager. The respondent was looking for a Computer Manager and having worked for them; she was approached by the Managing Director and asked if she could rejoin them. She was hired and made in charge of information systems, ICT training and liaison person with management and suppliers. Her services according to her were terminated on 15<sup>th</sup> August, 2006. She was earning 247,200/= together with allowances by the time of termination.

7. It was the claimant's testimony that in 2005 she started to have strained relationship with her employer. According to her she felt discriminated yet her terms of service shielded her from discrimination and sexual harassment. In support of this she made reference to page 6, paragraph 12 of Statement of Business Ethics in the 1<sup>st</sup> Respondent's Bundle of Documents filed on 18.3.2015. According to the claimant on different dates between 2005 and 2006, 2<sup>nd</sup> respondent made various sexual advances to her which were unwelcome. He sought her company after official hours. The 2<sup>nd</sup> respondent would seek his assistance on personal issues and offer to thank her by buying her drinks.

8. It was her testimony that while working for the respondent a post was advertised which was similar to one she held and when she raised concern she was told not to worry if she was performing her duties well. One P H was hired but was described as Systems Manager. The claimant further stated that the 2<sup>nd</sup> respondent asked her to meet him at Nairobi Club to discuss the hiring of P. When she was dropped by the driver the second respondent did not seem pleased and told her she shouldn't be involving drivers to avoid rumours.

9. According to her, the session with the 2<sup>nd</sup> respondent turned out not to be official as they talked more of personal and social issues. She further stated that on 22<sup>nd</sup> December, 2005 the 2<sup>nd</sup> respondent called her and said he had seen off his wife and kids and wanted to see her. At this point she decided to lodge the complaint against the 2<sup>nd</sup> respondent but before she could make the complaint, she received an email from H asking her about her complaint over sexual harassment by 2<sup>nd</sup> respondent. She eventually made a complaint which was produced as "annex 5" in her bundle of documents.

10. After the complaint she spoke to her boss and he told her the 2<sup>nd</sup> respondent had apologized about the allegations. This was produced as annex 6 in the Claimant's Bundle of Documents. According to her, her employment thereafter was not smooth as the 2<sup>nd</sup> respondent started omitting to charge her mortgage rebates and excluded her from trainings. She was further denied using the company driver as was the case before. She complained to H and told him things were getting out of hand they needed to talk to the Managing Director. The Managing Director instead sent the legal advisor, one E, who told her, she should not be complaining about sexual harassment since 2<sup>nd</sup> respondent never physically attacked her and should just ignore him.

11. It was her view that she never felt fairly treated. She subsequently sought legal advice and a letter was written to 2<sup>nd</sup> respondent. Thereafter she started receiving letters of complaint about her work performance, for instance annexure 11 of her bundle of documents. This letter was not addressed to me but was copied to with comments to me. She also produced as annexure 14, a letter accusing her of failure to comply with copyright laws. She subsequently received a third warning letter and eventually terminated by a letter dated 18<sup>th</sup> August, 2006.

12. The termination according to her was malicious. She worked for almost 20 years prior to that and never during this time receive any warning letter. Concerning the good practice guide it was her evidence that the guide was important. It was meant to guard information system of any user. Any folder or file created had to be done with the knowledge of the IT head. The folder referred to at page 28 of Respondent's Bundle of Documents was not in order because the folder was created by an unknown individual. They were not informed of who created the folder and that she had no idea about the contents of the folder.

13. In Cross Examination by Mr. Kiragu for the 1<sup>st</sup> Respondent, the Claimant stated that her immediate Boss was Mr R and later she was reporting to KW the Managing Director until end of 2006. Thereafter to P H who was the new IT Director. It was further her response that after her complaint of sexual harassment, she felt Mr H did not handle the complaint well. There were various warnings and unjustified complaints about her work. The 1<sup>st</sup> respondent blamed her for making the complaint. She felt the warnings were as a result of her complaint over sexual harassment.

14. On the issue of laxity in IT department, she discussed the issue with the Managing Director. She challenged the accusation of laxity. Regarding the 2<sup>nd</sup> respondent's advances, the requests were ostensibly for work yet they were not. They started around mid 2005. At one point the respondent wanted to pass by her house.

15. Concerning complaint over sexual harassment it was her response that she handed her complaint to Mr H. Regarding use of the Company's driver, the Claimant stated that Mr H informed her that the 2<sup>nd</sup> respondent had complained that she was using a company driver to drive a personal car. However, according to her the driver was authorized by the Managing Director to drive her car. She had requested to use the driver until August 2006 when she was to complete her studies. She however admitted that the use of the driver was not an entitlement under her contract.

16. Regarding Software Licenses, she conceded that the complaint arose when she was in charge of IT and denied there was any violation of software licensing policy. On cross examination by Mr. Odera, it was her evidence that the demand letter at page 17 of her bundle came six months after the alleged sexual harassment. The letter made no reference to unwelcome remarks and calls. It only made reference to a meeting at Nairobi Club. She further stated that the 2<sup>nd</sup> respondent was not party to warnings and correspondence leading to her termination.

17. The claimant further conceded that the invitation to visit the 2<sup>nd</sup> respondent at home since his family had travelled upcountry was never captured in the two demand letters. In reaction to the 1<sup>st</sup> respondent's additional list of documents the claimant stated that the letter at page 5 on punctuality came almost a month before the problem quoted therein. Regarding her schedule of leave found at pages 14 to 15 of the additional bundle of documents, it was her testimony that these were not original leave forms. They were dated but not signed by her and the personnel officer. She recognized the summary of her leave days contained at pages 34 and 35 and stated that the same was requested for by Mr. H and further that the list was used for computation of her final dues.

18. Regarding the issue of software licenses at page 48 of the additional documents the claimant stated that the issue of use of unlicensed software had been accepted by Microsoft partner. According to her the respondent was allowed to use the software because the respondent was about to upgrade hence there was no need to buy the licenses. Concerning the issue of Flash Budget at page 36 – 41, it was her testimony that the Flash budget was to be generated by all Heads of Department. She was asked to produce a budget

for vehicles for security department yet was not conversant with the procurement of security vehicles therefore she sought time to get clarification. She eventually gave the budget.

19. In further cross-examination by Mr. Kiragu Kimani, the claimant stated that she was surprised that Mr. H never knew she was going on leave. She stated that no leave would be in the schedule unless approved and that the schedule was generated a few days before termination of her services. She was aware of reasons for her termination which was that at one time she accused of going on leave without approval. It was the claimant's evidence that Mr. G's email at page 36 was not copied to her. The email was for HoDs and Mr H was her HoD. According to her Mr H had until 11<sup>th</sup> while hers was 10<sup>th</sup>. She handed her report on 11<sup>th</sup> and conceded that she did not meet the deadline as set by HoD. It was her defence that she did not have all the information which was why she did not deliver on time.

20. The Claimants witness Mr. M M informed the Court that he used to drive the claimant to USIU. He used to take her between 4:30 p.m. and 7.00 p.m. and that the overtime was paid for by the 1<sup>st</sup> Respondent. Before, he used to serve Finance Department where he had strained relationship with his two colleagues namely K and S M over driving the claimant to school. K told him the HR had said he should not be driving the claimant to school.

21. In cross-examination by Mr Kiragu Kimani he stated that he started driving claimant to USIU as soon as he was hired. He was told to do so by Deputy Credit Manager a Mr. V. It was further his evidence that Mr H wanted to know if the claimant was misusing the company's vehicle. V therefore asked him to stop dropping the claimant to school. Later he was given verbal instructions to continue dropping the claimant. This was in May, 2006. V told him the claimant would pay him separately for dropping her.

22. The respondent's first witness Mr. P H informed the Court that he received an email from Dominic over the claimant. He investigated the matter and made a report to the Managing Director He stated that he was familiar with circumstances leading to termination of claimant. One reason was time keeping. According to him the claimant used to come in late. He met her in May and raised issues with her punctuality but there were no changes.

23. The second issue was with regard to leave and company policy on leave. It was his evidence that approval must be sought at least two weeks in advance before proceeding on leave. Between January and July, the claimant took leave and proceeded without approval. She submitted her leave forms upon return for approval. In August, there were specific assignments which he assigned the claimant to report by 10<sup>th</sup> August but on the same day the claimant was out on leave without approval. He asked for the claimant's leave schedule because he suspected there were leave days taken without authorization.

24. The third reason for the claimant's dismissal was the management of the respondent's software licenses. According to H he asked to be briefed if respondent was compliant with G software policy. He did so through the email found at page 23 of the Claimant's bundle of documents. The email confirmed that the respondent was using unauthorized software. It was his evidence that the licensing of software was claimant's responsibility. The other reason for termination was claimant's service level. He set strategies for all departments and one of them was service level. According to him, he received complaints regarding service level in the IT Department.

25. It was his testimony that the claimant was terminated for the four reasons given but the main issue was leave. He stated that he did not take any specific action on the unauthorized leave but the claimant was finally terminated on account thereof. The issue of leave was not indicated in the termination letter. The issue of punctuality was also not indicated in the termination letter. In fact it was his evidence that the four issues were not captured in the termination letter but they were subject of warning letters. The letter found at page 22 of the Claimant's bundle of documents was a letter to W K and copied to the claimant.

26. Mr. H further testified that the Company's policy was that reporting time was 8.00 O'clock. He further stated that he asked the security guard to record what times the claimant reported to work and this was at his own initiative and that it was not the company's policy to do so. On the issue of sexual

harassment, he made enquiries to establish the allegations and believed the issue was resolved as he did not receive any further complaint. It was his evidence that he was not aware of the final decision on the complaint. According to him the 2<sup>nd</sup> respondent verbally apologized on the issue. He stated that the allegation of sexual harassment had nothing to do with claimant's termination.

27. The respondent's second witness Ms. J K stated that she was in charge of drivers and used to allocate them duties. According to her there was a problem in allocating a driver to the claimant. She was not aware the claimant would be taken to school every afternoon and that the driver dropping the claimant to school started disappearing during the day. He reported the driver (M) to her boss and also took up the issue with the driver. The reporting was verbal.

28. The 2<sup>nd</sup> respondent in his defence testified that he joined the 1<sup>st</sup> respondent in October 2001 and left December 2008. At point of exit he was Director of Human Resource. According to the 2<sup>nd</sup> Respondent, the claimant was his peer, she was not subordinate to him. It was his evidence that the claimant's terms of employment did not provide for entitlement to drivers. He denied sexually harassing the claimant and ever commenting on her style of dressing. He further denied making any comments on her bodily appearance. He acknowledged receiving demand letter from claimant's lawyer on the issue of sexual harassment. According to him the letter did not allege any comments over the claimant's dressing and bodily appearance.

29. He admitted that he once asked the claimant to help him file admission forms to Moi University for his MBA. She did not complain about the request. It was a simple exercise. He denied ever calling the claimant at 8:30 pm when on a trip to Western Kenya. He further denied ever asking to visit the claimant in her house. He denied knowledge of where the claimant lives. Regarding the meeting at Nairobi Club, he stated that the same was around 7.00 p.m. in the main lounge. This according to him was a public area. The purpose of the meeting was to iron out accusations against him of mistreatment by the claimant. He stated that they initially talked about the issue in his office and agreed to continue the discussion outside of the office. The meeting, according to him was mutually agreed and was cordial. Eventually they agreed that such meetings should be more often to allow bonding.

30. At Nairobi Club meeting the claimant was dropped by 1<sup>st</sup> respondent's driver. The same driver dropped her to work the next morning and he raised the issue because as he thought it was not right to use company vehicle for personal errands. It was further his evidence that he was not involved in matters leading to claimant's termination. According to him the issues leading to the claimant's termination came from her department but he did not handle the matter although normally he would. He did not handle the issue because the claimant had allegedly accused him of sexual harassment through demand letters from lawyers.

31. He saw the warning letter at page 22 of the Claimant's bundle of documents. It was copied to him. It was by the time allegations of sexual harassment had been made against him. It was further his evidence that the use of the drivers was under his docket since it was under staff benefits. He however denied discussing with J the use of the respondent's driver by the Claimant. He further stated that Mr. D told him that the claimant was associating his questioning of the use of drivers by her was as a result of her refusing to go out with him.

32. Mr Onyony for the claimant submitted that the employment terms of the Claimant was provided by the Employment letter effective from the 1<sup>st</sup> February 1996 and several documents filed as supplementary list of documents issued during the employment period key to mention is the statement of non negotiable standards executed on the 9<sup>th</sup> April 2003 by the claimant filed the 1<sup>st</sup> Respondent. It is the claimant's submission that it was implied to her when she entered employment that she was going to work in a conducive environment free from discrimination and harassment of any sort.

33. Through the annual performance reviews, the claimant was assured continued employment and was assigned the responsibility of the changeover and overhaul of the Information systems running at the company. The claimant in 2004 prepared and delivered a nine (9) year strategic plan for the Information

Systems which was approved by the Regional Office. The claimant never received any warning letter or any other notification to show that the 1<sup>st</sup> respondent was in any way dissatisfied by the claimant's work since the date she got employed to 10<sup>th</sup> July, 2006.

34. The 1<sup>st</sup> respondent's Managing Director in a number of cases, acted unfairly and unjustly towards the Claimant leading to breach of a duty of good faith and fair dealing. The 1<sup>st</sup> Respondent acted unfairly towards the claimant by;

a. Formally advertising the post of the claimant, interviewing and employing another person for the post held by the claimant while she was still working for the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent also asked the claimant to induct the new employee who was to take her job. This was very insensitive on the part of the 1<sup>st</sup> respondent. How does one induct a person who is to take your job from them.

b. Using the new employee, P H, to frustrate the claimant with the aim of upsetting her so that she would leave employment.

35. The 1<sup>st</sup> respondent claimed that the claimant violated the 1<sup>st</sup> respondent Software Licensing Policy and Copy Right Act, averments that were totally untruthful. The claimant in her submissions during the oral hearing presented all facts that these averments and accusations were not true. She produced copies of the correspondence between the vendors of the software (Microsoft), the Microsoft Authorized Distributors, (Computer Revolution) and the company, which authorized the company to continue using the additional software until the overall changeover of the information systems.

36. At no time did the 1<sup>st</sup> respondent show that there was any negative consequence resulting from the usage of the software, in fact the claimant saved the company millions of shillings from the purchase of redundant software. The averments made by the 1<sup>st</sup> respondent that the claimant did not avail support to the Finance Director when some files were deleted from the system was incorrect too as was seen in her statement and testimony. The claimant was not aware of the file created by the Finance Director, she was not the owner, the recipient nor the custodian of the files. When she requested to be given the format of the files, to recreate them, both the Finance Director and P H refused to do so, insisting on getting the actual files and since the claimant had no idea of the files and their contents, she could not assist them.

37. On the allegations that the claimant was not filling the register since she was reporting late to the office counsel submitted that this was untrue because the claimant, being one of the executive members, was not required to report in as the usual employees just the same way the other executive members were. In fact the arrangement goes back to 1998 when it was established by the Human Resources Department that executive members worked off hours, for instance, sometimes the claimant would work until 0300 a.m. in the morning. With such records of working hours the Human Resources Director deleted the names of all the executive members from the registers since it was agreed there were no requirements for them to sign the register. This was even agreed by Mr Dominic Ooko, the Human Resource Director during the oral evidence.

38. The register displayed and produced by the 1<sup>st</sup> respondent as evidence was a fake register which was not signed by the claimant and the allegation that it was signed by a guard does not hold water. If the 1<sup>st</sup> respondent wanted the executive members to resume the signing of the register he would just have reversed the initial instruction and not use a guard in a clandestine manner. The claim made by the 1<sup>st</sup> respondent that the claimant was incompetent and lacked customer service is not correct. The 1<sup>st</sup> respondent operations revolved around the information technology systems. The company would not operate properly with the absence of information systems support. Neither is there any letter to the effect of the incompetence nor was the termination based on incompetence. The termination letter bore no particular issue of violation of the terms of the contract.

39. No documented evidence was listed by the 1<sup>st</sup> respondent that any of the information systems' users

were unsatisfied with the operations of the information systems & Technology Department. The 1<sup>st</sup> respondent alleged that the claimant had gone on leave without following the proper procedure of requesting for leave days, allegations that the claimant was able to prove that were all lies and meant to injure the reputation of the claimant. All the days taken by the claimant were accounted and approved for as reflected in the form of Discharge and Receipt. The leave forms presented by the 1<sup>st</sup> respondent witness at pages 15,17,20,42 are not genuine leave forms, they were not properly filed and not signed by the claimant nor endorsed by any official Human Resource Personnel.

40. When the claimant complained about sexual harassment by the Human Resource Director, no formal investigations were conducted but instead the 1<sup>st</sup> respondent managing Director tried to force the claimant to withdraw her claim, calling her “prikly” and stating that the Human Resource Director had his own right to act the way he wanted. No formal investigations were conducted, investigations which would have brought to light who, between the claimant and the Human Resource Director was telling the truth.

41. Mr Dominic Ooko confirmed that he apologized over the accusations of sexual harassment but made feeble attempts to qualify apology which he had made through P H. The letter dated 20<sup>th</sup> January, 2006 by Mr P H contain Mr D’s unqualified apology. Mr M M was candid and truthful and his evidence was unrebutted and laid solid evidence over the arrangement he had with S relating to being driven to college, his payment of salary, overtime and work station. It is also critical to note that this arrangement was in place for 3 years and it was not possible to have been in place for this long if there were concerns from the company.

42. The email dated 11<sup>th</sup> January 2006 from P H, the director Quality and Audit of the 1<sup>st</sup> Respondent, clearly indicated that allowing the driver to take the claimant to school did not in any way incur and financial obligation to the company.

43. Mr Kiragu for 1<sup>st</sup> respondent submitted that the claimant’s contract of employment was terminated on 18<sup>th</sup> August 2006. The claim was filed in the high court on 20<sup>th</sup> April, 2007 long before the Employment Act 2007 and the other Labour Laws become laws. The applicable substantive law in determining the claim is the repealed Employment Act, Cap 226 Laws of Kenya. The Employment Act, 2007 came into force on 2<sup>nd</sup> June 2008.

44. He further submitted that respondent had demonstrated that the claimant was terminated for poor performance. The details of her poor performance were well documented and proved at the trial. She was also found to be a persistent late comer to work. She was in fundamental breach of her contract of employment that warranted the termination thereof. The respondent has also demonstrated that the termination was done according to the law and to terms of her contract of employment. The contract of employment had a termination clause allowing either party to terminate by one months’ notice or payment in lieu thereof which was followed. She was paid her terminal dues which she acknowledged receipt of and had no further claims to make against the first respondent.

45. Mr Odera for the 2<sup>nd</sup> respondent submitted that the claimant’s claim for compensation for unlawful termination of employment is misconceived. The claimant’s employment was terminated before the coming into force of the Employment Act, 2007. The termination was lawful as per the contract and under section 16 of the Employment Act, Cap 226 (repealed). The claim for compensation for unlawful termination is therefore not available to the claimant. The first respondent has proved that the allegation of sexual harassment was raised in January 2006 and resolved in the month of January 2006. This was approximately 8 months before the claimant was terminated for cause. The allegations of sexual harassment did not form part of the grounds for termination. They were not proved at the trial.

46. The claimant acknowledged that when she made the report on alleged sexual harassment, the first respondent’s top management including Mr P H, the Managing Director and the Legal Services manager followed up and ensured there was some discussion on an amicable settlement. Having established that the allegations of sexual harassment were duly addressed and had no bearing on the termination of the claimants contract of employment, all the claims of sexual harassment, discrimination and damages

arising therefrom must fail.

47. It was also proved that Mr P H was not employed to take up the claimant's position. Mr H was employed to the position of Director and his competencies were very different from those of claimant. He was in charge of four departments which were headed by managers. The claimant was one do the managers reporting to him.

48. The claimant's formal complaint lodged with the 1<sup>st</sup> respondent revolves around the allegations that the 2<sup>nd</sup> respondent would make numerous phone calls to her inviting her for drinks in social gatherings. It is noteworthy that the claimant failed to adduce any evidence of her phone records to prove that indeed the 2<sup>nd</sup> respondent called and invited her for drinks as she alleged. Secondly, the letter dated 15<sup>th</sup> May 2006 from the claimant's lawyers to the 2<sup>nd</sup> respondent is quite telling. The only issue raised in the lawyers' letter is the alleged unwelcomed invitations for drinks. This is in consonance with the formal complaint filed by the claimant with the 1<sup>st</sup> respondent.

49. The said letter never made mention of the 2<sup>nd</sup> respondent commenting on the claimant's bodily appearance, no mention of the claimant's discomfort in assisting the 2<sup>nd</sup> respondent fill his MBA application forms, no mention of the 2<sup>nd</sup> respondent calling her while she was on a visit of Western Kenya, no mention of the 2<sup>nd</sup> respondent calling her when he was purportedly close to her neighbourhood, no mention that the 2<sup>nd</sup> respondent invited her to join him at his home as his wife was away and no mention that the 2<sup>nd</sup> respondent purportedly invited her for drinks. The 2<sup>nd</sup> respondent submits that the fresh particulars of sexual harassment raised by the claimant in paragraph 10 of her memorandum of claim and during her testimony in court are anything but a fabrication and afterthought.

50. The 2<sup>nd</sup> respondent was more than emphatic that he was never involved in the matters regarding the claimant's termination. The complaints leading to the claimant's termination emanated from her own department. The 2<sup>nd</sup> respondent testified that he was not involved in this process for two reasons, namely: first, the claimant through her lawyers had advised him to desist contacting her and he wanted to respect this. Secondly, they were peers at their workplace. His evidence remained unshaken even during cross-examination.

51. The claimant did clarify in his testimony that the apology intimated by P H was for writing to the claimant directly expressing his disappointment regarding her false accusations which she never raised with him first. The 2<sup>nd</sup> respondent in his said explanation and testimony before this honourable court explained in a coherent and comprehensive manner that his meeting with the claimant at Nairobi Club was conceived with the innocent intentions of reaching out to the claimant in a bid to allay the claimant's fears that he was generally hostile towards her. It was the 2<sup>nd</sup> respondent's evidence that the selection of Nairobi club as venue for meeting the claimant was deliberate as this was a public place which no one could select for a clandestine rendezvous.

52. It is the respondent's submission that the allegations of sexual harassment were amicably resolved and the matter was closed after his comprehensive explanation in which he regretted that his innocent and well intentioned actions had been misinterpreted by the claimant. The issue of sexual harassment could not by any stretch of imagination been related with the proceedings leading to the termination of the claimant's employment as her termination happened more than 6 months after the complaint on sexual harassment was resolved. The 2<sup>nd</sup> respondent humbly submits that having failed to prove the allegations of sexual harassment, there is no legal basis for awarding the claimant any damages in respect of the alleged sexual harassment. In any event and without prejudice to the foregoing, there is no law that existed then (in 2006) permitting the court to award damages for sexual harassment.

53. Having summarized the evidence and submission by counsel, four issues appear to emerge for determination by the court. First, was whether there was sexual harassment of the claimant as alleged or not. Second whether the 1<sup>st</sup> respondent adequately and conclusively addressed the claimant's complaint

over sexual harassment by the 2<sup>nd</sup> respondent. Thirdly, whether both respondents are jointly or separately liable to compensate the claimant if the allegation of sexual harassment is proved. Fourth and finally, what is the measure of damages if any that the claimant should be awarded. The court will not delve into the issue of terminal benefits and compensation for unfair dismissal because first of all the cause of action accrued before the enactment of the current Employment Act and second, the claimant conceded that her terminal benefits were paid upon termination.

54. By an email dated 11<sup>th</sup> January, 2006 Mr H wrote to Mr J D as follows:

“Further to our discussions of this afternoon regarding the above, this is to formally request that if possible S be allowed to continue using a company driver to take her to University and back on a regular basis between not and August of this year. The driver will be required from 4:30 pm till about 9.00 p.m. about 3 or 4 times a week.

This arrangement has been in place for the last 3 years and as previously this will be a personal arrangement between S and the driver and other than releasing the driver at 4:30 pm there will be no other financial obligations for Securicor. S will be responsible for compensating the driver for his overtime and any other expenses and will ensure that the arrangement does not interfere with the driver’s work responsibilities.

In making this request I am assuming that there is no company policy that forbids such an arrangement between two members of staff.

Cc: S – with regards to the driver picking you up in the morning, again this should be purely a personal arrangement between you and the driver and should not in any way interfere with his duties as assigned by the Transport department”.

55. This email was responded to by the claimant as follows:

“As we have resolved this issue of the usage of the company driver, which I believed was used by Dominic to intimidate me, I will go straight to explaining why I view his e-mail and constant queries about my usage of the driver as intimidation.

For a while now Dominic has been calling me to ask for a date for a drink. I never used to take these invites seriously and often told him I was unavailable. The only time I accepted to meet him outside the office was when he called me and insinuated that he wanted to discuss with me about your appointment. I agreed to meet him at Nairobi Club. I remember the first thing he asked was whether I managed to drive without problems as it was raining heavily that night. I told him that I had asked the driver to drop me so I was fine. He reply to this was that I should not be asking drivers to drop me at such events since they are likely to spread rumours. I remember telling him I always use a driver when I attend official functions, wasn’t going to stop and I believed that he wouldn’t start spreading rumours just by dropping me at the Nairobi Club once.

During the whole evening the only issue, which arose about your appointment, was when he asked me if the MD had spoken to me about your appointment. I told him that the MD had and also that he had reassured me that for as long as I performed my work well I should in any way be anxious. The rest of the evening, which was long, was taken by us having general talks. When I realized there wasn’t much he had to tell me about my work I told him I needed to go back home. I left for home with a feeling that I had wanted my evening and would not repeat such a thing again.

All this while I have been informing J of what has been happening, informing him as a colleague and also as a friend. It was after these failed attempts that I was informed by the driver who drops me to college, that he had been assigned some official duties by V and that he would not be able to drop me. I called V and he confirmed, saying the instruction came from Dominic. This was later re-iterated to the driver by J, the supervisor, after she resumed from leave.

I do not know what transpired but I later received an email from Dominic, copied to you, saying that I have accused him of sexual harassment. It later came to light that even after settling everything with J, Dominic still called J again and re-accused of misusing a driver. I believe this incident is what exasperated J.

P, for as much as I have tried to convince myself that Dominic's propositions were innocent I still made it very clear to him that I was not going to have any non-official drinks, or anything else for that matter. As hindsight I note that whenever Dominic would make these offers, and I refuse, that's when he would start revisit the issue of the driver. I can't remember the countless number of times that he has been reminded of the arrangement by the previous Finance Director, an arrangement which was communicated not only to him but also the then Managing Director. If I was involved in an inappropriate behavior then Dominic should have picked it three years ago, after all he was and still is, the one heading HR. The question ask myself is, why now?

But after various consultations, some including yourself, I have decided to make a formal complaint to you. With this complaint I believe that the management would take upon itself to resolve this problem, ensuring that Dominic does not use his position in the company to harass me further, in the future".

56. Mr H further by a letter dated 20<sup>th</sup> January, 2006 wrote to the 2<sup>nd</sup> respondent as follows:

"Dominic Ooko

This letter is in response to your email of 11/10/2006 in which you indicated that Ms S M has accused you of sexual harassment to J D who then communicated the same to you. Though J has indicated that the accusation of sexual harassment may have been taken out of context, I have received a written complaint from S in which she has indicated that she is extremely uncomfortable with your requesting her to meet after working hours. She also feels that her refusal has led to your making enquiries into her arrangement with a company driver to drop her at her University and may lead to further conflict in future.

While I am not in the full picture of the circumstances around your interactions with S and you have indicated that J had said to you that S felt that you were too aloof, as her immediate manager, I am obliged to request that her wishes be respected and any such interaction between you and her is limited to the formal office environment.

With regards to S's informal arrangement with the company driver, and in the absence of a policy guideline regarding such arrangements outside working hours, I have written to J in his capacity as Head of the Transport Department, requesting on S's behalf that he allow her to arrange with a company driver to drop her and pick her up from her university classes on condition that this arrangement does not affect company business, only occurs outside working hours and is mutually agreed between both parties. J has indicated that this is acceptable with him.

I trust that the above has resolved the issue to some extent, however, should you wish to take this up further, I suggest that we involve the MD as the final arbitrator.

CC: S M – Please note that in my discussions with Dominic regarding the above he has indicated that his actions were purely innocent, he regret that they were taken in this context and apologizes for the distress that this may have caused you".

57. This letter was copied to Mr J D and the claimant. On the copy to the claimants, Mr H requested her to note that in his discussion with the 2<sup>nd</sup> respondent, the 2<sup>nd</sup> respondent had indicated that his actions were purely innocent and that he regretted that they were taken in that context and that he apologized for the distress that the actions may have caused her. The claimant's services were terminated on 18<sup>th</sup> April, 2006. The reason for her termination was failure to perform her duties according to expectation. The respondent particularly pointed to an incident which occurred in the office of the Director Audit and

Systems on 18<sup>th</sup> August, 2006 particulars of which it was claimed was within the claimant's knowledge. The court could not find on record any document talking of such incident from the documents filed.

58. Whereas the respondent's position was that the claimant's services were terminated for four reasons namely lateness to work, proceeding on leave before approval, permitting use of unlicensed software by the respondent and fourth was low service level. That is to say, there were complaints regarding service level in the IT department which was headed by the claimant; the claimant on her part averred that her termination was triggered by her complaint over sexual harassment.

59. From the record, it would seem the issue of sexual harassment was raised initially around 11<sup>th</sup> January, 2006 via an email written by the 2<sup>nd</sup> respondent to Mr H in which he referred to a complaint of sexual harassment made to Mr JD by the claimant. Mr H in his response email dated 20<sup>th</sup> January, 2006 referred to earlier in this judgement stated that while he was not in the full picture of the circumstances around the 2<sup>nd</sup> respondent's interactions with the claimant, he was obliged to request the 2<sup>nd</sup> respondent to respect the claimant's wishes that any interactions between the 2<sup>nd</sup> respondent and the claimant be limited to the formal office environment.

60. Concerning use of company's driver Mr H informed the 2<sup>nd</sup> respondent that he had written to J D as Head of Transport requesting that the claimant be allowed to arrange with the company driver to drop and pick her up from the University on condition that the arrangement does not affect the company's business. According to H, J indicated this was acceptable to him. The letter informed the 2<sup>nd</sup> respondent that it was hoped the issue had been resolved and should the 2<sup>nd</sup> respondent wish to take up the matter further he ought to involve the Managing Director as the final arbitrator. Incidentally, on the same day 11<sup>th</sup> January, 2006 the 2<sup>nd</sup> respondent wrote to the claimant an email on the issue of using the company's driver and complaint of sexual harassment by her.

61. According to the 2<sup>nd</sup> respondent, Joe advised him that the driver was used by the claimant outside normal working hours and that she was paying him privately. The 2<sup>nd</sup> respondent however noted that was not the case as there were complaints from transport that the arrangement was infringing on the company's time. He asked J D again to clarify but Joe instead told him that he was complaining over the arrangement because the claimant has refused to go out with him and that amounted to sexual harassment. In the email, the 2<sup>nd</sup> respondent went further to indicate that the complaint of sexual harassment was a serious allegation particularly coming from a senior member of staff and that he liked the matter be discussed in the presence of a third party. The 2<sup>nd</sup> respondent went further to propose that the claimant and himself in the presence of P H discuss the issue to put the record straight.

62. On 20<sup>th</sup> January, 2006 the respondent yet on the same subject wrote to Mr H stating he was embarrassed by the whole issue as it had been manipulated by a "very cunning personality" for reasons best known to herself. According to the 2<sup>nd</sup> respondent, he met the claimant in his office to discuss her concerns because she felt the 2<sup>nd</sup> respondent was out to terminate her services. In the course of the meeting they both agreed that the discussion be extended to outside of the office. He therefore invited the claimant to Nairobi club. It is not clear when the meeting at Nairobi club took place but it must have been sometime in the previous year going by the claimant's chronology of events.

63. In another email again dated 20<sup>th</sup> January, 2006 the 2<sup>nd</sup> respondent once more wrote to Mr H retorting that the claimant must be feeling victorious now that she successfully smeared his name and allowed official use of the driver as well.

64. Considering the email communication between the 2<sup>nd</sup> respondent and Mr H and the 2<sup>nd</sup> respondent and the claimant one notices the 2<sup>nd</sup> respondent's concern continued being around the claimant's use of the 1<sup>st</sup> respondent's driver for private errands. This arrangement however appears to have gone on for some previous three years to the time the 2<sup>nd</sup> respondent picked an issued with it. An email from J D

dated 19<sup>th</sup> January, 2006 to Mr H states as follows:

“I have told J K to make arrangements to have S (sic) take college, its been going on for the best part of 3 years ...We should let it continue until she finishes her course”.

65. By an email dated 24<sup>th</sup> January, 2006 the 2<sup>nd</sup> respondent wrote to Mr H stating that he had previously indicated to Mr H that he only inquired about the issue of the claimant's transport from a Mr M, the Transport Manager and J D. The 2<sup>nd</sup> respondent in the said email further states that he obviously could not issue instructions to either of them regarding the driver. If as stated by the 2<sup>nd</sup> respondent he had no authority to issue instructions to Mr M or J D concerning drivers then it becomes curious that the 2<sup>nd</sup> respondent was questioning the claimant's use of the 1<sup>st</sup> respondent's driver. The 2<sup>nd</sup> respondent was of course the Head of Human Resource at the material time hence entitled to question any matter concerning human resource use and allocation however as the apex person, he ought to have been in normal cases be moved by the relevant department on the issue of human resource use and abuse.

66. The 2<sup>nd</sup> respondent herein took it upon himself to rigorously question the claimant's use of the 1<sup>st</sup> respondent's drivers without being moved by the Transport Department. Apart from his allegations that the operations of the Transport Department were disrupted by claimant's use of the 1<sup>st</sup> respondent's driver no evidence of any formal complaint was presented to the court on the issue. Further, if as at 11<sup>th</sup> January, 2006 Mr H had confirmed to the 2<sup>nd</sup> respondent that J D Head Transport had assured him he had no problem with the claimants using the 1<sup>st</sup> respondent's driver to take her to school and that Mr H felt the issue had been resolved but if the 2<sup>nd</sup> respondent was not satisfied he could take up the same with the MD as the final arbitrator, one wonders what the 2<sup>nd</sup> respondent's motive was in exchanging further with Mr H and the claimant, email of the nature referred to earlier in this judgement.

67. The claimant in her own right had lodged a complaint over sexual harassment against the 2<sup>nd</sup> respondent and he had been advised by Mr H that if he was not satisfied he should escalate the matter to the Managing director for arbitration. He never did so. What the court sees is an attempt by the 2<sup>nd</sup> respondent to sway Mr H to his side by sending a string of emails in some of which he describes the claimant as a very cunning person.

68. The court therefore takes the view and finds on the first issue as framed that the 2<sup>nd</sup> respondent's persistent probing of the claimant's use of the 1<sup>st</sup> respondent's driver yet there was evidence of approval by relevant department could only have been motivated by hurt and disappointment over something. This something, taking into account the claimant's allegations vis-a-vis the 2<sup>nd</sup> respondent's reaction and failure to escalate such a serious allegation against him to the Managing director could only be reasonably deduced to be refusal by the claimant to accede to his advances.

69. Section 6 of the Employment Act provides in paraphrase that an employee is sexually harassed if the employer or a co-worker directly or indirectly requests that employee for sexual intercourse, sexual contract or any other form of sexual activity that contains or implies promise of preferential treatment in employment or threat of detrimental treatment. Further, an employee is sexually harassed if the employer, his representative or co-worker shows physical behavior of a sexual nature which directly or indirectly subjects the employee to behavior that is unwelcome or offensive to that employee. The court therefore hold and finds that the claim for sexual harassment has been proved on a balance of probabilities.

70. The second question is whether the 1<sup>st</sup> respondent adequately and conclusively dealt with the claimant's complaint of sexual harassment. From the record, the claimant first informally discussed the issue of sexual harassment with Mr. J D, who took it up with the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent wrote an email dated 11<sup>th</sup> January, 2006 to Mr H who on the 20<sup>th</sup> January, 2006 responded with copies to the claimant and Mr D. This response attracted a lengthy written response from the claimant in which she detailed incidents of the alleged sexual harassment by the 2<sup>nd</sup> respondent.

71. Apart from subsequent email from the 2<sup>nd</sup> respondent on the issue, there seemed to be no further communication on the issue from the claimant. Attention shifted to the claimant's work related issues and her eventual dismissal. The statement of the 1<sup>st</sup> respondent's business ethics provides concerning harassment that:

“Harassment can be defined as unwanted behavior which a person finds intimidating, upsetting, embarrassing, humiliating or offensive. Conduct involving the harassment (racial, sexual or of any other kind) of any employee is unacceptable. Should an employee believe that he or she has been harassed, the matter should be raised with the relevant HR Manager who will arrange for it to be investigated without delay, impartially and confidentially”.

72. For this particular case, the 2<sup>nd</sup> respondent who was the 1<sup>st</sup> respondent's HR Manager was the one accused by the claimant of sexual harassment. He was in fact the one who raised the issue with Mr H after he was informed by Mr D that the claimant had verbally complained to Mr D that he (the 2<sup>nd</sup> respondent) was sexually harassing her. Mr H then vide his letter dated 20<sup>th</sup> January, 2006 wrote back to the 2<sup>nd</sup> respondent and copied the same to the claimant and Mr D. This letter attracted a lengthy response from the claimant detailing incidents which the claimant felt the 2<sup>nd</sup> respondent made unwelcome advances and or requests to her.

73. On 15<sup>th</sup> May, 2006 the 2<sup>nd</sup> respondent was sent a demand letter by the claimant's counsel on the same issue of sexual harassment. The letter was copied to the 1<sup>st</sup> respondent's Regional President Southern & East Africa based in Pretoria and Mr K W the 1<sup>st</sup> respondent's Managing Director. The fact of issuance of a demand letter by the claimant's counsel to 2<sup>nd</sup> respondent with a copy to the top echelons of the 1<sup>st</sup> respondent, showed the claimant was not satisfied by the soft intervention approach taken by Mr H over this matter. There is nothing on record that the respondent's Managing Director made any reaction to this serious allegation affecting senior management staff.

74. The statement of Business Ethics referred to earlier requires that where there is an allegation of sexual harassment, the same should be raised with the relevant Human Resource Manager who will arrange for it to be investigated without delay, impartially and confidentially. From the foregoing the court is of the view and holds that the 1<sup>st</sup> respondent failed or ignored to investigate expeditiously and impartially the claimant's complaint over sexual harassment by the 2<sup>nd</sup> respondent.

75. On the third issue on who bears responsibility the court will not delve much on this because the 2<sup>nd</sup> respondent was an employee of the 1<sup>st</sup> respondent when these events took place hence the law of principal and agency applies. Besides omission on the part of the 1<sup>st</sup> respondent to deal with the claimant's complaint in accordance with its statements of Business Ethics violated the claimant's right not to be discriminated on account of sex which entitles her to compensation by both respondents jointly and severally.

76. On the quantum of damages payable, there are very few local cases on the issue. In the case of **G.M.V.V Bank of Africa [2013] eKLR** it was held that gender violence cannot be adequately redressed through ceiling of 12 months salary given for unfair termination under the Employment Act. The court must therefore be careful not to see sexual harassment as just another unfair termination. The conduct violates the human rights of the person affected.

77. Money cannot adequately compensate wounded feeling but it can reasonably provide a convenient mechanism to assist the person affected pick up the pieces and move on with his or her life. The claimant saw a connection between her dismissal and her complaint over sexual harassment. The respondent failed to investigate her complaint in accordance with its laid down procedures to allay her fears. Considering that the claimant's services could have been brought to an end for any valid reason by both parties an award of two years salary would reasonably compensate the claimant. At the time of dismissal, the claimant's basic pay was Kshs 247,000. The court therefore enters judgment against the respondent's jointly and severally for Kshs 5,928,000/=. The claimant shall further have costs of the suit.

78. It is so ordered.

Dated at Nairobi this day of 2017

**Abuodha J. N.**

**Judge**

Delivered this 28<sup>th</sup> day of April 2017

**Abuodha J. N.**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

**Abuodha J. N.**

**Judge**