



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**  
**CAUSE NUMBER 648 OF 2015**

**BETWEEN**

**LMM .....CLAIMANT**

**VERSUS**

**1. D I T LIMITED**

**2.. SV.....RESPONDENTS**

*Rika J*

***Court Assistant: Benjamin Kombe***

***Matete Mwelese & Company Advocates for the Claimant***

***Katee & Associates, Advocates for the Respondents***

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**JUDGMENT**

1. The Claimant filed her Statement of Claim on 31<sup>st</sup> August 2015. The Statement was subsequently amended, and filed on 16<sup>th</sup> June 2016. She states the 2<sup>nd</sup> Respondent, is the Managing Director of the 1<sup>st</sup> Respondent. She was employed by the 1<sup>st</sup> Respondent in February 2011 as a Helper, earning Kshs. 1,000 weekly. She was transferred to work for the 2<sup>nd</sup> Respondent as a House Help in February 2012, earning Kshs. 8,000 on exit. She was sexually harassed by the 2<sup>nd</sup> Respondent, starting on 8<sup>th</sup> June 2015, when the 2<sup>nd</sup> Respondent's Wife went to India. The 2<sup>nd</sup> Respondent demanded that the Claimant massages him, even though she had no expertise in massaging. He demanded she has sexual intercourse with him. She declined. He summarily dismissed her on 10<sup>th</sup> July 2015. She prays for:-

- a) 1 month salary in lieu of notice at Kshs. 8,000.
- b) Accrued annual leave from February 2011 to July 2015 at Kshs. 32,000.
- c) 12 months' salary in compensation for unfair termination at Kshs. 96,000

- d) Service pay at 15 days' salary for every completed year of service at Kshs. 16,000.
- e) Unpaid salary for June and July 2015 at Kshs. 10,666.
- f) House allowance for the period worked at 15% of the basic salary at Kshs. 57,600.
- g) Certificate of Service to issue.
- h) Other services i.e. massage at Kshs. 7,000.
- i) Damages for sexual harassment.
- j) Underpayment of salary at Kshs. 4,597 for 41 months, at Kshs. 188,513.
- k) Costs

The amount claimed adds up at **Kshs. 461, 859.90**

2. The Respondents filed a joint Statement of Response on the 15<sup>th</sup> September 2015. They also filed a Witness Statement of NK, 2<sup>nd</sup> Respondent's Driver, which was adopted consensually as part of Respondents' evidence. The Respondents state the Claimant worked as a House Help for the 2<sup>nd</sup> Respondent, from around November 2012. She earned a salary of Kshs. 8,000 per month, as of the date she left employment. She left duty without the leave of the 2<sup>nd</sup> Respondent on various occasions. She had been cautioned against this behaviour. The 2<sup>nd</sup> Respondent did not sexually harass the Claimant. He did not ask to have sexual intercourse with the Claimant. She was found to be having sexual relations with Houseboys at the workplace. She was at one time found having an abortion at the Houseboys' servant quarters. She was fairly dismissed. There was just cause and due process was observed. She was offered upon dismissal:-

- a) Service pay for 2013 at Kshs. 2,500.
- b) Service pay for 2014 at Kshs. 3,500
- c) Service pay for 2015 at Kshs. 4,000
- d) Salary for June 2015 at Kshs. 8,000; less advance of Kshs. 4,000, add medical treatment at Kshs. 2,000, total salary at Kshs. 6,000.
- e) Total offered at Kshs. 16,000; add salary for 7 days worked in July 2015 = Kshs. 17,806 – loan refrigerator owed to the 2<sup>nd</sup> Respondent by the Claimant of Kshs. 12,000 = total offered at Kshs. 5,806. She declined the offer and left employment. The Respondents urge the Court to find the Claimant is entitled only to the sum of Kshs. 5,806 as terminal benefits. The Claim should otherwise be dismissed, with costs to the Respondent.

3. The Claimant and the 2<sup>nd</sup> Respondent gave evidence in support of, and closed, their respective cases, on 27<sup>th</sup> July 2016. They confirmed the filing and exchange of their Closing Submissions, on the 6<sup>th</sup> September 2016.

***The Claim:-***

4. The Claimant adopted her Witness Statement filed with the Statement of Claim. She testified she was employed by the 2<sup>nd</sup> Respondent. Initially she worked as a Helper for the 2<sup>nd</sup> Respondent's Company, the 1<sup>st</sup> Respondent herein, at Changamwe, Mombasa County. The 2<sup>nd</sup> Respondent is Managing Director of the 1<sup>st</sup> Respondent. She used to peel cashew nuts. She was transferred to work for the 2<sup>nd</sup> Respondent in

his residence at Nyali, Mombasa, as a House Help, earning Kshs. 8,000 as of the date of termination.

5. Her dismissal followed the 2<sup>nd</sup> Respondent's Wife travel to India. 2<sup>nd</sup> Respondent's Wife travelled on 8<sup>th</sup> June 2015. The 2<sup>nd</sup> Respondent developed a habit of telling the Claimant to have sexual intercourse with him. She declined to have sex, informed the 2<sup>nd</sup> Respondent's Wife about her Husband's demands, and was consequently summarily dismissed on 10<sup>th</sup> July 2015.

6. She did not report for duty late. She would normally wait to arrive at the same time with her workmates. If she arrived earlier, the 2<sup>nd</sup> Respondent would ask her to brush and wash her body thoroughly, before demanding for sex. He provided her with a bar of soap, and toothpaste. He kept pursuing the Claimant. He asked the Claimant to massage his feet and back. Eventually he removed all his clothes and asked the Claimant to massage him. He offered to pay her Kshs. 500 per massage session. There was no time the Respondents asked the Claimant to show cause why she should not be disciplined for lateness or absenteeism. She was dismissed by word of mouth, after she refused to have sex with the 2<sup>nd</sup> Respondent.

7. She pretended to have a toothache on 8<sup>th</sup> July 2015, to avoid the amorous attention of the 2<sup>nd</sup> Respondent. He called her and she reported to work on the 10<sup>th</sup> July 2015. He informed her because she was not willing to give in, he would find another girl. She was compelled to call his Wife in India, and report the problem she was having with the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent admonished the Claimant, telling her she had communicated garbage to his Wife.

8. The Claimant reported the matter to the Police on the 13<sup>th</sup> July 2015. She reported to the Federation of Women Lawyers, the County Labour Office, and Kituo Cha Sheria, before filing Claim in Court. She testified she lost employment because she rebuffed the 2<sup>nd</sup> Respondent. She did not breach the terms of her employment. She had no warning. She has never been involved in illicit sex. She is a married woman.

9. On cross-examination, she testified she was initially employed by the 1<sup>st</sup> Respondent. 2<sup>nd</sup> Respondent has a Wife. The Claimant knew the 2<sup>nd</sup> Respondent's family for 4 years. The 2<sup>nd</sup> Respondent made sexual demands upon the Claimant, in the year 2015. He did not do so before. The Claimant did not abort, and was not found fallen down on a toilet floor at the workplace. She miscarried; she did not abort. She did not have an affair with a Gardner who was sacked by the 2<sup>nd</sup> Respondent. She was not accommodated at the 2<sup>nd</sup> Respondent's residence. She was not offered servant quarters. She did not report sexual harassment to the Police, at the time the 2<sup>nd</sup> Respondent made demands on her. It was just her and the 2<sup>nd</sup> Respondent in the house, when the 2<sup>nd</sup> Respondent attempted to impose himself on her. She went to the workplace on the Monday following 10<sup>th</sup> July 2015 to demand for her terminal dues. She found the 2<sup>nd</sup> Respondent had engaged another House Help. Redirected, she told the Court she did not report to work on 9<sup>th</sup> July 2015, because the 2<sup>nd</sup> Respondent harassed her the previous day. He preferred she reports to work early, so as to find him alone at the residence. She considered her contract to have been terminated, because the 2<sup>nd</sup> Respondent had indicated he would terminate the Claimant's contract if she persisted in denying him sex. She found he had employed another girl when she went to the workplace.

***The Response:-***

10. S testified he was a commodity exporter. He closed down the export business in the year 2009. The Claimant did not work for the company. She worked for the 2<sup>nd</sup> Respondent.

The Claimant enjoyed her annual leave days, whenever Samuel and his Wife travelled to their native India. She did not work when the couple was away.

11. She was offered housing accommodation at the workplace. She declined the offer. She cleaned the residence, reporting at 8.00 a.m. and leaving at between 2.00 p.m. and 4.00 p.m. The 2<sup>nd</sup> Respondent's family did not want the Claimant overstaying, because she was misbehaving with Garden Boys. She was

nonetheless an honest girl who did not steal from the residence like other girls, previously employed by the family. For this, she was retained. Even when the 2<sup>nd</sup> Respondent's Wife travelled to the USA, the 2<sup>nd</sup> Respondent suggested to his Wife, and to the Claimant, that there was no need for the Claimant to continue working in the absence of the matriarch; the Claimant refused to take a break and insisted on working.

12. The 2<sup>nd</sup> Respondent had a car accident in 2013. He was not able to climb stairs, and was assisted by his Driver to do so. The Claimant would assist him, in removing his shoes. The 2<sup>nd</sup> Respondent did not have an accident in 2015. He prepared tea for himself, given that the Claimant came to work late. He did not ask for sex or massage from the Claimant. He did not touch her.

13. He gave her personal loans. She purchased a refrigerator at Kshs. 18,000 from the 2<sup>nd</sup> Respondent. She left employment voluntarily. He owes the Claimant Kshs. 5,806.

14. Cross-examined, Samuel testified he is not a Kenyan Citizen, and is here in Kenya on a work permit. The Claimant was only a 'housemaid and not entitled to pay slips.' The computation of her terminal dues is shown in the Statement of Response.

15. The 2<sup>nd</sup> Respondent did not terminate Claimant's employment. He told her if she could not report on time, she should make a choice whether to go on working, or leave. He requested her to allow him appoint somebody else in her place. She did not sign any agreement on purchasing the fridge. The 2<sup>nd</sup> Respondent offered to accommodate the Claimant. She declined and opted to spend money paying for rent elsewhere. She would spend time with the Houseboys. The 2<sup>nd</sup> Respondent sacked the Houseboys and warned the Claimant. It is not true that he sacked the Houseboys, so that he could have more time with the Claimant. S denied that the short messaging text at the tail end of his Statement of Response was fabricated. He was not aware the Claimant is married. He did not ask her to massage him. She attended to his legs when he was injured in a car accident. It is not true that the 2<sup>nd</sup> Respondent and his family overworked the Claimant resulting in her miscarriage. It is totally false to say the 2<sup>nd</sup> Respondent sexually assaulted the Claimant, and unfairly terminated her contract. The 2<sup>nd</sup> Respondent emphasized on redirection that he never asked for sex or massage from the Claimant.

16. His Driver N, states he worked for the 2<sup>nd</sup> Respondent from 2012. He normally worked from 7.30 a.m. to 5.00 p.m. or later. He knew the Claimant as 2<sup>nd</sup> Respondent's House Help. He found her in employment. She used to work from 8.00 a.m. Later on she started reporting to work late. On 8<sup>th</sup> July 2015, she had not reported by 9.30 a.m. S instructed N to call the Claimant. She told N she was on the way. She arrived at 10.30 a.m. On 9<sup>th</sup> July 2015, she did not report. She reported on 10<sup>th</sup> July 2015 at 10.30 a.m. She was asked by S why she came late. She did not respond. She took her bag, left, never to return.

### ***Closing Submissions:-***

17. **Claimant:** She submits there was no warning, cause or notice before termination. The 2<sup>nd</sup> Respondent developed sexual interest in the Claimant and demanded she sleeps with him, and massages his whole body. The 2<sup>nd</sup> Respondent agreed the Claimant massaged his legs. It was agreed this was a therapeutic exercise as the 2<sup>nd</sup> Respondent had suffered injuries through a car accident. It was beyond the scope of the Claimant's duties, but she accepted to massage her Employer out of humanity. The 2<sup>nd</sup> Respondent's wife was away in India. The 2<sup>nd</sup> Respondent went beyond requesting massage for his feet. He demanded for massage for the whole body. The Claimant felt she was working in an unsafe environment. 2<sup>nd</sup> Respondent would send all other Employees on various errands in order to create ample time with the Claimant.

18. She submits the situation escalated. On 8<sup>th</sup> July 2015, the 2<sup>nd</sup> Respondent attempted to lock her in the house to further his sexual demands. She managed to free herself and flee. She was shocked and could not

report to work the following day. On 10<sup>th</sup> July 2015 she reported and found the 2<sup>nd</sup> Respondent had already engaged another girl. He confirmed he no longer required her services. She reported the 2<sup>nd</sup> Respondent's actions at Nyali Police Station. She submits N was compelled to make a false Witness Statement by the Respondents, so that he can retain his job. He did not know what transpired in the residence between the Claimant and the 2<sup>nd</sup> Respondent.

19. Termination was unfair. It did not meet the requirements of procedural fairness under Section 41 of the Employment Act. The Claimant was not heard. Reasons for termination were not shown under Section 43 and 45 of the Act. Reasons for termination must be matters which the Employer genuinely believes to exist at the time of termination as concluded in ***John Wanjala Wanyama v. Wanandege Co-operative Savings and Credit Society [2016] e-KLR***.

20. It was not true the Claimant deserted. It is incumbent upon an Employer who alleges an Employee has deserted, to make attempts to reach the Employee and seek explanation for the absence as held in ***Richard Kiplimo Koech v. Yako Supermarket Limited [2015] e-KLR***. The Respondent would not be offering to pay salary in lieu of notice to the Claimant, if true she deserted.

21. Section 6 of the Employment Act 2007 outlaws sexual harassment. ILO Domestic Workers Convention 189 calls for the protection of Domestic Workers. The Court upheld the protection and guarantees offered under these laws, in this Court's decision in ***P.O. v. Board of Trustees, A.F. & 2 others [2014] e-KLR*** and ***NML v. Peter Petrausch [2015] e-KLR***. The Court should adopt the principles in these decisions, find the Claimant was sexually harassed, and grant her damages. The Claimant submits she merits the other prayers outlined in her Claim.

22. **Respondents:** The Respondents submit the Claimant developed a habit of reporting to work late, alleging she was caught up in heavy traffic. On 8<sup>th</sup> July 2015 she reported to work at around 10.00 a.m. She was advised by the 2<sup>nd</sup> Respondent this was unacceptable. She left and did not return except on 15<sup>th</sup> July 2015 when she went to deliver demand letter from Kituo Cha Sheria.

23. It is submitted that the Claimant left employment voluntarily and the Respondents acted reasonably throughout. Relying on the case of ***Katueve Mulei v. Maria Sermmlin [2016] e-KLR***, and ***Linet Akasa Shikoli v. Lilian Otundo [2014] e-KLR***, the Respondents submit they acted reasonably; and the Claimant closed the opportunity for a fair hearing when she decided not to return to work.

24. It is wrong for the Claimant to come to Court and characterize therapeutic massage, as an act of sexual harassment. She massaged the 2<sup>nd</sup> Respondent's feet, when he was injured. He could hardly walk. She did not explain to the Court if the request for massage continued, even after the 2<sup>nd</sup> Respondent's feet had mended. She played the sexual harassment card in an attempt to have an upper hand against the 2<sup>nd</sup> Respondent, considering he is a foreigner and virtuous family man. She does not merit damages for sexual harassment.

25. The Respondents concede in their Closing Submissions the prayers for service pay based on 4 years worked, and on a monthly salary of Kshs. 8,000. They concede she merits her Certificate of Service and salary for 10 days worked in July 2015.

26. She did not give evidence on annual leave, and the prayer cannot be sustained. She left employment voluntarily and is not entitled to notice pay. She was offered housing accommodation at the workplace but refused to move in. If there was underpayment of salary; it would be for 3 months from May to July 2015 at Kshs. 8,865. The Respondents submit the Claimant has not established her Claim and the same should be dismissed with costs to the Respondents.

#### ***The Court Finds:-***

27. There is sufficient evidence to conclude the Claimant was initially employed by the 2<sup>nd</sup> Respondent's

commodity export business at Changamwe, in the year 2011. The 2<sup>nd</sup> Respondent testified he was a commodity exporter, and the Claimant testified she was peeling cashew nuts for the Respondents. The presumption in the view of the Court would be that the 2<sup>nd</sup> Respondent and his business vehicle, was involved in export of cashew nuts, and the Claimant peeled those cashew nuts in readiness for the market.

28. It is undisputed that the Claimant worked for the 2<sup>nd</sup> Respondent later on from February 2012, at the Respondent's residence at Nyali, Mombasa. She joined the residence as a Cleaner. Parties also agree that the 2<sup>nd</sup> Respondent suffered a car accident sometime when the Claimant was at the residence. She was requested by the 2<sup>nd</sup> Respondent to massage his feet. She could also assist with his shoes. This does not seem unusual as the 2<sup>nd</sup> Respondent similarly sought the assistance of his Driver, in climbing up the stairs.

29. It is not clear how long the 2<sup>nd</sup> Respondent was limited in his mobility. According to the Claimant however, in the year 2015, the 2<sup>nd</sup> Respondent still craved for her massage. On 8<sup>th</sup> June 2015, 2<sup>nd</sup> Respondent's Wife flew to India. The 2<sup>nd</sup> Respondent started to request the Claimant to massage him with greater frequency. He offered to pay her Kshs. 500 for the massage. He bought her a bar of soap and toothpaste. He would find reason to send other Employees away from the residence, so as to have the Claimant to himself. He removed all his clothes and demanded the Claimant massages his entire body. The Claimant submits on 8<sup>th</sup> July 2015, the 2<sup>nd</sup> Respondent went beyond asking for a massage, and demanded for sexual intercourse. She managed to avoid the 2<sup>nd</sup> Respondent and stayed home on 9<sup>th</sup> July 2015, pretending to have a toothache. When she went back on 10<sup>th</sup> July 2015, he told her if she was unwilling to submit, he would employ another girl in her place.

30. She later found he had indeed employed another girl. She communicated the occurrence of sexual harassment to the 2<sup>nd</sup> Respondent's Wife. The 2<sup>nd</sup> Respondent called the Claimant admonishing her for communicating garbage to his Wife. She reported sexual harassment to the Police, Fida, Kituo, and Labour Office before filing the Claim. According to her she lost employment because she rebuffed the 2<sup>nd</sup> Respondent. She did not desert. She merits damages, compensation and terminal dues as claimed.

31. The 2<sup>nd</sup> Respondent does not admit he sexually harassed the Claimant. She had worked for 4 years, and only complained of harassment in the year 2015.

32. The Court is not satisfied that the Claimant gave sufficient evidence requiring the 2<sup>nd</sup> Respondent to disprove that he did not sexually harass her.

33. She had worked for 4 years. The 2<sup>nd</sup> Respondent was an injured man for part of these years, limited in mobility, requiring the assistance of both the Claimant and the 2<sup>nd</sup> Respondent's Driver, at the residence.

34. The Claimant was requested to massage the 2<sup>nd</sup> Respondent's feet and assist him remove and wear his shoes during this period of limited mobility. She agreed to massage the 2<sup>nd</sup> Respondent. She massaged the 2<sup>nd</sup> Respondent voluntarily, and does not seem to have reported to the 2<sup>nd</sup> Respondent's Wife, that she had been asked to massage the 2<sup>nd</sup> Respondent against her will. She testified she was to be paid Kshs. 500 per session. She only reported when she was alleged to have been asked for sexual intercourse. Why would she go along with the 2<sup>nd</sup> Respondent, massage his feet without complaint or without even discussing the issue with the 2<sup>nd</sup> Respondent's Wife?

35. There are certain portions of the Claimant's evidence, which tend to raise doubt on her version of events. The 2<sup>nd</sup> Respondent gave evidence with a certain degree of forthrightness making his case more convincing. Some of these aspects of evidence are discussed here-below:

- i. The Claimant submits that the 2<sup>nd</sup> Respondent tried to lock her up in his house on 8<sup>th</sup> July 2015

to further his sexual demands. She however managed to free herself and escape. This aspect of attempted rape, locking up, and flight to freedom, was not in the Claimant's Pleadings, Witness Statement and Evidence in Court.

ii. In the demand letter issued before action by Kituo Cha Sheria, the allegation about being sexually harassed does not take the centre stage; it is on the periphery of the claim for unfair dismissal. In main the complaint is that termination was not based on valid reason. There is no separate demand for damages for sexual harassment in this letter. The demand is for 12 months' salary in compensation for unfair termination. One would expect serious allegations of attempted rape to take the centre stage from the inception of the Claimant's complaints against the 2<sup>nd</sup> Respondent.

iii. Her evidence is that she reported sexual harassment to the Police, Labour Office, Fida and Kituo. Why would a report of attempted rape not have a follow-up at the Police Station and the Labour Office? Is it likely that a genuine report of attempted rape and persistent sexual harassment, would fail to be acted upon by the foremost women human rights Advocacy Group Fida? At paragraph 10 of her Statement of Claim, she states that she reported the 2<sup>nd</sup> Respondent to the Police because the 2<sup>nd</sup> Respondent had used abusive words against her. She does not say what the abusive words were, and in what way if any, those words amounted to sexual harassment. She did not report that 2<sup>nd</sup> Respondent had attempted to lock her up, and impose himself on her. The report to the Police seems to have been made on 13<sup>th</sup> July 2015, days after the alleged lock-in and attempted rape, and after the 2<sup>nd</sup> Respondent had employed a new girl.

iv. The Claimant lost her child through what she states was miscarriage. The 2<sup>nd</sup> Respondent states it was an abortion. In cross-examining the 2<sup>nd</sup> Respondent, Claimant's Advocate suggested the Claimant was overworked resulting in miscarriage. There was no suggestion in the Claimant's Pleadings that she was overworked leading to miscarriage. This was again an unsubstantiated claim made as the litigation progressed, aimed at creating dark clouds over the 2<sup>nd</sup> Respondent.

v. The 2<sup>nd</sup> Respondent volunteered evidence on the Claimant being an honest girl who did not steal from her Employer. It did not appear likely to the Court that the 2<sup>nd</sup> Respondent would candidly compliment the Claimant, and tell untruths about her sexual harassment claims.

vi. The Claimant expressed her wish to continue working, even when the 2<sup>nd</sup> Respondent suggested she takes a break, while his Wife had travelled abroad. Her desire to continue working, does not suggest she was caught up in a work environment of ceaseless sexual harassment.

vii. On 10<sup>th</sup> July 2015, she returned to work allegedly to collect her terminal dues. She went back even after claiming the 2<sup>nd</sup> Respondent attempted to impose himself on her two days earlier. She did not know for sure that her employment had been terminated, but claims she went to collect her terminal dues. She went alone, not in the company of Police Officers, to a house where she alleges to have been locked up, and where she alleges she was about to be violated sexually.

viii. The Court has mentioned it is rather strange that the sexual harassment took place in 2015 only, while the Claimant had been employed for 4 years. She volunteered to massage the 2<sup>nd</sup> Respondent. She makes a prayer for other services rendered. If there were services requiring physical contact with the 2<sup>nd</sup> Respondent, these seem to have been rendered willingly, and the Claimant has prayed the Court to order the 2<sup>nd</sup> Respondent to pay for other services rendered. It would be unreasonable for the Court to conclude other services rendered were in the nature of sexual harassment.

36. The Court is convinced the allegations of sexual harassment have no foundation. The Claimant turned her consensual massage of the 2<sup>nd</sup> Respondent, into a wild sexual harassment narrative, to assist

her in broadening her range of grievances and possible remedies against the Respondents. ***The claim for damages on account of sexual harassment is rejected.***

37. The Court is not persuaded by the Respondents' submission that the Claimant terminated her contract of employment. It is true the 2<sup>nd</sup> Respondent had issued warning to the Claimant about lateness and absenteeism. The Claimant absented herself on 9<sup>th</sup> July 2015 alleging she had a toothache. She however reported on 10<sup>th</sup> July 2015. She found the 2<sup>nd</sup> Respondent had already replaced her.

38. The 2<sup>nd</sup> Respondent may have had valid reason terminating the Claimant's contract, given her persistent lateness and absenteeism. He was at one time compelled to make his own tea. He did not however, follow the correct procedure in termination. His attitude was that because she was a 'maid' she was not entitled to certain rights under the Employment Act. He for instance testified she did not merit a pay slip because she was 'just a maid.' The Court emphasized the need to recognize and protect the rights of Domestic Workers in ***Industrial Court at Nairobi Cause Number 11 of 2011 between Zena Ibrahim v. Ebubekirir***, under the Employment Act 2007 and the ILO Domestic Workers Convention 189 of 2011. Domestic Workers must have clear terms and conditions of employment; have proper employment records; and brought within the scope of labour legislation. The Employment Act 2007 applies to all Employees, except those categories listed under Section 3 of the Employment Act. The 2<sup>nd</sup> Respondent should therefore not have treated the Claimant as one out of the scope of the Employment Act, just because she was a 'maid.' He should have provided her with pay slips and in the end, availed to her the full benefit of fair termination law under the Act.

39. The procedure as suggested above was not fair. The Claimant was not heard. She was available on 10<sup>th</sup> July 2015. There was no attempt made to hear why she did not come to work as expected. The 2<sup>nd</sup> Respondent rushed in replacing her without caring about the Claimant's procedural guarantees. The Court finds termination was lacking in fairness of procedure and to this extent, unfair. The Claimant is entitled to compensation for unfair termination. ***She is granted the equivalent of 5 months' salary in compensation at Kshs. 40,000.*** Considering the Claimant's role in the circumstances leading to termination, the prayer for notice pay is rejected.

40. The Respondents submit that under common practice, the terms of employment of Domestic Workers are not clearly spelt out. Domestic Workers are presumed to utilize their annual leave during Public Holidays. The Respondents cite the Court's decision in ***Lilian Akasa Shikoli v. Lillian Otundo [2014] e-KLR.***

41. This submission reflects the Respondents' attitude towards the Claimant as earlier discussed; they considered her 'just a maid', undeserving of basic conditions of employment granted to all Employees under Part V of the Employment Act. Annual leave entitlement is separate from Public Holiday entitlement. The Court in the case of ***Shikoli*** did not say anything that could be used in validating the Respondents' submission on annual leave. The Court granted the Claimant in that case, annual leave pay. Furthermore the Claimant in that case, was found to have absented herself from duty for 3 months, so that her claim for annual leave claim, of 54 days was found to be untenable. The Respondents did not establish that they granted the Claimant annual leave, or paid her in lieu of annual leave. Public Holidays taken cannot be a replacement for annual leave. Days spent by the 2<sup>nd</sup> Respondent and Wife in India, cannot on their own, be taken as Claimant's annual leave entitlement. ***The claim for accrued annual leave is allowed based on 84 days for 4 years worked, at Kshs. 307.69 per day = Kshs. 25,849.***

42. The Claimant was not registered to any Social Security Plan. She deserves service pay under Section 35 of the Employment Act. ***The Court grants her 15 days' salary, at Kshs. 4,615 x 4 years = Kshs. 18,461, as service pay.***

43. She claims salary for the whole month of June 2015 and for 10 days worked in July 2015. There were no records provided by the Employer to contradict her on this item. The 2<sup>nd</sup> Respondent's position on pay records has been discussed above. ***She is granted salary for June 2015 at Kshs. 8,000 and Kshs. 3,076 for July 2015, total Kshs. 11,076.***

44. House rent allowance is claimed in arrears, at Kshs. 57,600. The Employer's obligation under Section 31 is to provide the Employee with reasonable housing accommodation at or near the place of work, or pay the Employee reasonable amount as rent, to enable the Employee secure such accommodation. The Claimant was offered accommodation by the 2<sup>nd</sup> Respondent. She rejected the offer. She did not tell the Court that the offered housing accommodation was unreasonable. There was no reason given for rejection. The 2<sup>nd</sup> Respondent discharged his obligation under the law, and was not obliged to pay to the Claimant house rent allowance, once she rejected the housing accommodation. This item is rejected.

45. There appears to the Court to be a meeting of minds between the Parties, on the rendering of other services by the Claimant to the 2<sup>nd</sup> Respondent. This seems to have been outside the Claimant's normal cleaning duties. She testified the 2<sup>nd</sup> Respondent was to pay her Kshs. 500 per session. She gave the services, but the 2<sup>nd</sup> Respondent did not pay her anything above the monthly salary of Kshs. 8,000 for the extraneous work. The Claimant did not particularize how many sessions there were, but submits Kshs. 7,000 is sufficient. The 2<sup>nd</sup> Respondent concedes he received the services, but gave no number to the sessions when the services were received. ***The Court shall allow the figure of Kshs. 7,000 given by the Claimant as compensation for other services rendered.***

46. Without citing any Wage Order, the Claimant submits that she was underpaid by Kshs. 4,797.90 per month, amounting to Kshs. 188,513 for the whole period. She has not established this item. Claims for underpayments must be based on the relevant wage instrument. The Respondents however offered underpayment of salary at Kshs. 8,865 for the period May-July 2015. ***The Claimant is allowed underpayment of salary as conceded by the Respondents at Kshs. 8, 865.***

47. ***The Respondents shall release to the Claimant her Certificate of Service as granted under Section 51 of the Employment Act 2007.***

48. No order on the costs.

IN SUM, IT IS ORDERED:-

***a) The Claimant was not sexually harassed, and is not entitled to damages for sexual harassment.***

***b) Termination of her contract of employment was on valid ground, but lacking in fairness of procedure, and to that extent, unfair.***

***c) The Respondents shall pay to the Claimant: the equivalent of 5 months' salary in compensation for unfair termination, at Kshs. 40,000; annual leave pay at Kshs. 25,849; service pay at Kshs. 18,461; unpaid salary at Kshs. 11,076; other services rendered at Kshs. 7,000; and underpayment of salary at Kshs. 8,865 - total Kshs. 111,251.***

***d) Certificate of Service to issue.***

***e) No order as to costs.***

Dated and delivered at Mombasa this 9<sup>th</sup> day of December, 2016.

James Rika

Judge