



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 441 OF 2013

BETWEEN

N M L CLAIMANT

VERSUS

PETER PETRAUSCH..... RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Nyange Sharia Advocate instructed by Kituo Cha Sheria, Advocates for the Claimant

Mr. Peter Petrusch the Claimant, in Person

ISSUE IN DISPUTE: UNFAIR TERMINATION AND SEXUAL HARASSMENT

AWARD

[Rule 27[1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The Claimant filed her original Statement of Claim on 11th December 2013. This was amended subsequently, by the Statement filed on 17th July 2014. Ms. L states she was employed by Mr. Peter Petrusch, a German National resident in Kenya for the past 5 years, as his Domestic Help. She worked for the Respondent from 3rd September 2012 to 10th May 2013, when the Respondent unfairly and unlawfully terminated her contract of employment. She earned Kshs 10,000 as at the time of termination. L states she was subjected to unwanted sexual advances by Petrusch in the course of employment, which advances she rebuffed, leading to the termination of her employment. She seeks the following orders against the Respondent:-

- a. A declaration that the Claimant was in a regular employment relationship having worked continuously for 3 months.
- b. A declaration that termination was unlawful.
- c. A declaration that the Claimant was entitled to 1 month leave after every 12 months.
- d. Investigation and calculation of underpayment of wages to the Claimant by the Respondent and

the payment of the same.

e. An order directing the Respondent to pay to the Claimant the following sums:

- Terminal benefits at 15 days' salary for 1 year at Kshs. 5,000.
- 36 days off at Kshs 10,800.
- 1 month salary in lieu of notice at Kshs. 10,000.
- Public holidays pay at Kshs. 3,600.
- Compensation for unfair termination the equivalent of 12 months' salary at Kshs. 120,000.

Total..... Kshs. 149,400

f) General Damages for sexual harassment.

g) Certificate of Service to issue.

h) Any other relief this Honourable Court may deem fit to grant.

i) Costs.

2. The Respondent filed a Statement of Response on 11th February 2014. He states at no time did he employ Lewa. He could not therefore be called upon to issue notice of termination, to a stranger he did not employ. He stated he would raise a Preliminary Objection on the ground that the Statement of Claim is defective, and raises no cause of action against the Respondent. He asks the Court to reject the Claim with costs to him.

3. The Claimant gave evidence, on 3rd November 2014 and 11th December 2014 when she wound up her case. The Respondent gave evidence on 9th March 2015, and called one Witness Ms. Martina Kretzschmar who gave her evidence on the same day, bringing the hearing to a close.

4. L told the Court she was employed by the Respondent as his Domestic Help, on 3rd September 2012. She was paid Kshs. 10,000 per month, and worked from 7.00 a.m. to 7.00 p.m. She worked 7 days in a week. There was no rest day. She could not even attend a burial.

5. She only went for Christmas and Boxing Day. She was fully engaged on other Public Holidays. She would prepare food for the Respondent's Dogs. If she was late for work, she would be penalized by having Kshs. 300 deducted from her salary.

6. She was routinely sexually harassed by Petrausch. She specified these acts of sexual harassment to comprise the following:-

- **Petrausch patted her buttocks as she cleaned, and told her Africans were stupid.**
- **He called her a Stupid Monkey.**
- **He told her Africans overeat, and that she had become fat.**
- **He touched her breasts, asking her if she had become pregnant.**
- **He commanded her to bathe, before she went into his house.**
- **He took video pictures of the Claimant as she bathed.**
- **He demanded the Claimant has sexual intercourse with him.**

- **He demanded the Claimant watches pornographic movies with him**
- **He asked her to take a cup of coffee to his bedroom. When he was done with the coffee, he called her to retrieve the cup. She found him naked. He had covered his penis with the coffee cup. He asked her to retrieve the cup.**
- **He on another occasion called her into his bedroom while he was making love to his wife. He demanded she watches him making love to his wife, so that when his wife was gone, she would know how make love.**

7. She protested these advances and abominations. Petrusch sacked her. He paid her nothing on termination. She asked for the assistance of the County Labour Office who wrote to the Respondent a letter dated 30th May 2013, requiring the Respondent to pay her dues; he did not comply. She asked for the assistance of KITUO CHA SHERIA [Legal Aid Centre] who wrote a demand to the Respondent demanding for terminal benefits and compensation for unfair termination; the Respondent ignored the demand.

8. She lodged a criminal complaint with the Police in Mombasa for sexual harassment. The Respondent was arrested and charged *inter alia* with the Offences of sexual harassment and making of pornographic videos tending to corrupt morals. The Claimant presented copies of the Charge Sheets as part of her evidence. The criminal trial had not been concluded at the time the Parties gave their evidence in the Claim before this Court.

9. Cross-examined, L testified the Respondent reduced her salary for October 2012 to Kshs. 4,000. She did not know why deduction was made. She did not recall why he paid her Kshs. 4,500 in April 2012, instead of Kshs. 5,000. He paid her Kshs. 5,000 for Christmas. He did not pay her additional salary for her birthday. He deducted from her salary some money, because she failed to feed his dog. He called her a **Stupid Monkey**. It was not true that she drunk a litre of milk every day. He made movies of her as she bathed. He told the Claimant she had to shower daily. He said the Claimant had to be clean to work in his house. She saw the Claimant's IPAD. He said he wanted to make a movie of the Claimant. He showed her the movie. She did not have the details of the IPAD. Redirected, the Claimant testified she is owed Kshs. 25,500 in salary arrears. The money paid as a birthday present came from the Respondent to the Claimant voluntarily.

10. Petrusch testified he was born in Germany, and had, at the time of giving evidence, lived in Kenya for 5 years. He knew L. She had worked for him for about 10 months. The IPAD said to have made movies of the Claimant had no camera. The Respondent gave the Claimant Kshs. 1,500 which was to be deducted from her salary. Her Colleague Rose, told the Police the Claimant and herself, left employment voluntarily; they were not sacked by the Respondent. Petrusch attributed the instigation of the Claim herein, and the Criminal Cases elsewhere, to a Russian Man who was interested in dispossessing him of his Company.

11. Questioned by the Advocate for the Claimant, Petrusch told the Court he filed his Statement of Response through Angima Advocates. The Statement of Response holds that the Respondent does not know the Claimant. The Respondent confirmed he knows the Claimant. The IPAD number in the police inventory was altered by the Police Officers.

12. The Respondent testified he is a Constructor. He did not have a valid Work Permit, and lived on the support of friends. He started paying the Claimant Kshs. 10,000 in January 2013. Kshs. 1,500 advanced to the Claimant was to be deducted from her salary. The IPAD had no camera. The purchase receipt did not show IPAD serial number. The Respondent confirmed he is facing 2 Criminal Cases at Mombasa.

13. Martina Kretschmar testified she has known the Respondent for 9 years. She knew L. L and Rose were employed as the Respondent's Domestic Helps. They worked from 7.30 a.m. to 5.30 p.m. They were paid Kshs. 7,000, Kshs. 8,000 and Kshs.9.000 per month before the amount was raised to Kshs. 10,000. The Girls were happy. They worked in shifts. They worked on Sundays, but not simultaneously.

There were deductions made of Kshs. 1,500 from the Claimant's salary, having been an advance of salary given to her to buy a phone. A sum of Kshs. 500 was also deducted from each Girl, to offset the cost incurred by the Respondent and Martina after the girls had broken the Couple's knife. The Girls received Kshs. 5,000 from the Couple for Christmas. The Couple wanted to know how the Girls used food and drinks in the house; the Girls got angry, and left on their own. They were not sacked. They went and reported to the Labour Office.

14. Martina testified on cross-examination that she was not present when the Claimant was recruited for employment by Petrausch. She was out of Kenya. She however knew Petrausch very well. She was there when the Respondent paid the Claimant her salary and signed in acknowledgment. She was there when police took the IPAD inventory. The serial number is altered. She knew a lady called Grace Wanjiru. She was Petrausch's former Girlfriend. Martina loved Petrausch, but would not lie for him.

Submissions

15. The Claimant filed her Submissions on 11th May 2015. The Respondent seems to have filed nothing by way of Submissions.

16. Her emphasis is on sexual harassment. She submits her statements in paragraph 6 above, are correct. She submits she reported the sex offences to the Police; the Respondent was arrested; and arraigned in Court. Petrausch, the Claimant submits, did not contest these facts in his evidence in the present Claim. He confirmed he directed the Claimant to shower every morning. He did not deny the placing of an IPAD in the bathroom, but instead explained the IPAD did not have a camera. L submits the only reason the IPAD was in the bathroom, was to invade her privacy.

17. L submits she was sexually harassed, relying on the definition of sexual harassment given under Section 6 of the Employment Act 2007. An Employee is deemed sexually harassed if the Employer of that Employee or a Representative of that Employer or Co-Worker:

- a. Directly or indirectly requests that Employee for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express:-
 - i. promise of preferential treatment in employment
 - ii. threat of detrimental treatment in employment, or
 - iii. threat about the present or future employment status of the Employee
- b. Uses language, whether written or spoken, of a sexual nature
- c. Uses visual material of a sexual nature
- d. Shows physical behaviour of a sexual nature which directly or indirectly subjects the Employee to behaviour that is unwelcome or offensive to that Employee, and that by its nature has detrimental effect on that Employee's employment, job performance or job satisfaction.

18. Relying on ***Industrial Court at Mombasa Cause between M.W.M v. M.F.S and Industrial Court at Nairobi Cause between P.O. v. Board of Trustees AF & 2 Others [both cases 2014 e-KLR]***, the Claimant urges the Court to find she was sexually harassed by the Respondent, and grant her damages separate from compensation for the unfair termination.

19. On the narrow claim for unfair termination, the Claimant submits she was denied fair procedure before termination as granted under Section 41 and 45 of the Employment Act 2007. She was not notified before termination. She was not given a valid reason. She was denied procedural justice as well as substantive justice. She submits the Respondent did not show he had paid to her terminal benefits particularized in her Statement of Claim.

20. The Claim raises the following issues for the consideration of the Court:

- Was the Claimant sexually harassed by Petrausch?

- Is she entitled to damages for sexual harassment separate from any compensation for unfair termination?
- Was termination fair and if not, is the Claimant entitled to compensation?
- Does she merit terminal benefits, Certificate of Service and Costs?

The Court Finds:-

21. There are facts which are not disputed, and which need to be stated at the outset. Although the Respondent alleged not to know the Claimant in his Statement of Response, he agreed to know her in his evidence in Court. His Partner Martina too, testified the Claimant is known to the Couple. L, it is agreed, was employed by Petrusch as Domestic Help, between 3rd September 2012 and 10th September 2013. Her last salary at Kshs. 10,000 is not disputed. Other fundamental facts which are not in dispute are these: the Claimant complained to the Police that she had been sexually harassed; the Respondent was arrested pursuant to the complaint; he was charged in the Criminal Court with the offence of sexual harassment and making pornographic videos tending to corrupt morals; the criminal trial was pending at the time the Parties herein presented their respective cases; the Claimant is no longer employed by Petrusch; and lastly, she was not paid any terminal benefits at the end of the employment.

22. On sexual harassment, the Claimant gave the following evidence: Petrusch patted her buttocks as she cleaned and told her Africans were stupid; he called her a Stupid Monkey; he said Africans overeat, and she had become fat; he touched her breasts, asking her if she had become pregnant; he commanded her to bathe before she went into his house; he took video pictures of the Claimant as she bathed; he demanded to have sex with the Claimant; he demanded she watches pornographic movies with him; he covered his penis with a coffee cup after he had been served with coffee by the Claimant and asked the Claimant to retrieve the cup from his covered penis; and finally Petrusch asked the Claimant to watch him as he made love to his wife, so that the Claimant would know how to do it, when madam Petrusch was gone. The Claimant added another incidence of sexual harassment in her Closing Submissions, alleging that she was supposed to kiss Petrusch after work; if this did not happen, Petrusch would deduct Kshs. 300 from her salary. She was not clear if this rate of deduction was daily, weekly or monthly. The Court has in its past decisions ruled that Closing Submissions are not an avenue for Parties to present additional evidence to the Court. Closing submissions serve as a platform for final persuasion, based on facts already recorded by the Court. The Submission by L that she was required to kiss Petrusch every time after work, and penalized through deduction of Kshs. 300 for failure to kiss, cannot therefore be accepted by this Court as part of her evidence of sexual harassment. The Respondent had no opportunity to challenge this complaint.

23. Petrusch had adequate opportunity to challenge the other evidence on sexual harassment. The only piece of evidence he made a forlorn attempt to challenge, was on the video recording of the Claimant as she bathed. He said nothing of the other complaints, which were stated by the Claimant in plain language. He did not deny any of the other accusations contained in paragraphs 6 and 22 above. Even assuming there was no truth in the Claimant's allegations about being video recorded, where is the challenge to her other accusations, which were just as much grave, if not graver? He does not deny calling her a Stupid Monkey and an overeating African; he does not deny touching her buttocks and breasts; he does not deny covering his penis with the coffee cup, and asking L to retrieve it from his penis; he does not deny demanding to have sex with the Claimant; and says nothing about inviting the Claimant to watch him have sex with his wife, so that she could learn to do it with him, while his wife was gone. This evidence of serious sexual harassment, gender and racial bigotry passed unchallenged.

24. The evidence of Petrusch and Martina tended to confirm the complaints made by the Claimant in some aspects. L said Petrusch accused her of overeating and being fat. Petrusch suggested to the Claimant while cross-examining her, that she drunk a litre of milk everyday. His Partner Martina testified that the Couple wanted to know how the Girls used food and drinks; the Girls got angry and left employment. Petrusch did not deny he demanded the Claimant showers before she started her duties every morning. These pieces of evidence from the Respondent corroborated the Claimant's complaints relating to overeating, being fat and mandatory bathing.

25. The Respondent said nothing of the serious accusations. He instead concentrated on the salary paid to the Claimant, and in disputing her evidence on salary arrears. He focused on the IPAD, and lost sight of these other accusations. The allegation of sexual harassment had been put to him as early as 5th September 2013, in the demand letter to him, from KITUO CHA SHERIA acting for the Claimant. He did not say anything after receiving the demand. He said nothing in Court, except that the totality of the cases against him, originate from a Russian National who desires to deprive the Respondent of his Company. Unfortunately, even this theory was not given substantiation, to a degree that would result in raising doubt on the accusations mounted by L. The Court is aware the criminal cases against Petrusch are pending. From the perspective of this Court however, the findings and determinations in the Criminal Cases, are of no relevance to the proceedings before the Industrial Court. Of importance is that the Parties before the Industrial Court have been granted a hearing here. They have presented their evidence. This evidence must be evaluated against the standards required in an employment dispute.

26. *The Court accepts the evidence of Lewa on sexual harassment as truthful.*

27. The decisions of the Industrial Court cited by the Claimant in her Submissions clearly set the legal principles applicable to sexual harassment at the workplace. Section 6 of the Employment Act cited in both decisions, defines what sexual harassment is, and outlaws all forms of sexual harassment at the workplace. The Respondent's actions and innuendos against the Claimant fitted the description of sexual harassment from all angles.

28. He directly and indirectly sought to have sex with the Claimant; he used language and visual material of sexual nature; he subjected the Claimant to behaviour which was unwelcome and offensive. He engaged in physical and psychological gender violence against Ms. L.

29. As observed in the case of *P.O. v. Board of Trustees AF & 2 Others*, gender based violence is the most prevalent human rights violation in the world. No other form of sex discrimination violates so many fundamental rights as articulated in the *1948 United Nations Universal Declaration of Human Rights*. ***These include Article 1 [all human beings are born free and equal in dignity and rights]; Article 3 [Everyone has the right to life, liberty and security of the Person]; and Article 5 [No-one shall be subjected to torture or cruel, inhuman and degrading treatment or punishment].*** Other instruments cited in this decision, and which have a direct bearing on the case of L include the *1993 UN Declaration on the Elimination of Violence against Women and ILO Convention 111 [Concerning Discrimination in Respect of Employment and Occupation, 1958]*.

30. The Committee of Experts of the ILO listed examples of sexual harassment in their 1988 General Survey to include: ***insults, remarks, insinuations and inappropriate comments on a person's dress, physique, age or family situation, and a condescending or paternalistic attitude undermining dignity, unwelcome invitations or requests that are implicit or explicit, whether or not accompanied by threats, lascivious looks or other gestures associated with sexuality, unnecessary physical contact such as touching, caresses pinching or assault.***

31. The India Supreme Court Case of *Vishaka & Others v. the State of Rajasthan & Others [JJ,1997] [7] [SC 384]* which has been a major influence on the jurisprudence of sexual harassment agrees with the ILO Committee of Experts describing sexual harassment to include: ***unwelcome determined behaviour, whether direct or indirect, such as physical contact and advances, sexual favours, sexually coloured remarks, showing of pornography, and other verbal and non-verbal conduct of a sexual nature that is unwelcome or humiliating to the woman.***

32. ***The Constitution of Kenya under Article 27 is unequivocal on equality and freedom of all Persons. Article 28 guarantees every Person inherent dignity and the right to have that dignity respected and protected. Article 29 secures the right of all Persons not to be subjected to any form of violence from either public or private sources. It outlaws treatment or punishment which is cruel, inhuman or degrading. This right is not capable of any limitation, under Article 25. There is lastly the right to fair labour practices under Article 41, which encompasses the right to reasonable working conditions.*** The Claimant's rights as a Domestic Worker were violated. Petrusch appears to have acted the way he did

against the Claimant, because he felt she was a mere Domestic Worker. He objectified her, invading her body, by touching her buttocks as she cleaned his house, and touching her breasts. He injured her inherent dignity and assaulted her modesty, by demanding the Claimant have sex with him; watches him mate with his wife so she could learn how to do it in the absence of his wife; and by asking the Claimant to remove the coffee cup from his penis. She was all the more vulnerable because of her gender, race and social standing.

33. The ILO Domestic Workers Convention 189 was adopted by Member States on 16th June 2011. It calls on States to protect the human rights of Domestic Workers, and promote their rights of dignity and equality of treatment. Domestic Workers must no longer be undervalued, devalued or remain invisible. Petrausch did not create reasonable working conditions for Lewa. Domestic Workers merit the whole gamut of human rights.

34. The Respondent's conduct offended all these legal principles. The Court is satisfied Petrausch sexually harassed the Claimant, and took away her multiple guarantees and protections under our domestic and international law.

35. The question whether she merits damages separate from her claim for unfair termination has been answered by this Court in past decisions, such as ***Industrial Court at Nairobi, G.M.V v. the Bank of Africa [2013] e-KLR***. It was held gender violence cannot adequately be redressed through the ceiling of 12 months' salary given for unfair termination under the Employment Act 2007. There are multiple violations involved, as suggested while discussing the International Law and our Constitution above, with respect to the subject at hand. The Court must be careful not to see sexual harassment as just another unfair termination reason, but see it for what it is: conduct that violates the multiple rights of the individual. The Industrial Court in all the 3 decisions cited above [***G.M.V, P.O, and M.W.M***], went beyond the 12 months' salary compensation, in granting remedies to the respective Claimants.

36. ***Taking guidance from these decisions, the Claimant is granted general damages for sexual harassment at Kshs. 1,200,000.***

37. The Respondent states that the Claimant left employment after she was asked about excessive use of food and drinks in the house. The Court was not persuaded this was the case. The Respondent did not show that the Claimant voluntarily left employment. It was for the Respondent to show valid reason for termination and demonstrate fair procedure in the process of termination under Section 41, 43 and 45 of the Employment Act 2007. The circumstances of the Claimant's departure cannot be attributed to a voluntary decision on her part. The Claimant would in any event, have been entitled to consider herself constructively dismissed, granted the conditions of employment created by Petrausch, in which she found herself thrown into. The Court is satisfied termination was unfair, lacking in substantive justification as well as fairness of procedure, ***and grants the Claimant 6 months' salary at Kshs. 60,000 as compensation for unfair termination.***

38. ***She is allowed 1 month salary in notice pay at Kshs. 10,000.***

39. She was not able to show that the claims for 'terminal benefits' of Kshs. 5,000; 36 days off; and public holidays are merited. These claims are rejected. The Court has not seen a claim for arrears of salary. It was unclear why Parties went at length arguing on salary and deductions in their evidence, while there is no claim for arrears of salary in the Amended Claim.

40. An Employee who has worked for a period of at least 4 consecutive weeks, is entitled to a Certificate of Service under Section 51 of the Employment Act 2007. ***The Respondent shall release to the Claimant her Certificate of Service forthwith.***

41. The declaratory orders sought in paragraph 1 [a] and [c] of this Award do not seem to be relevant to the dispute. It has not been denied that the Claimant was a regular Domestic Worker of Petrausch, who worked continuously for over 3 months. It has not been denied that she would be entitled to annual leave. No claim for annual leave is made. These declaratory orders would amount to nothing. They add no value

to the decision of the Court, and have no bearing whatsoever on the dispute at hand.

42. *It is declared the Claimant's contract of employment was terminated unfairly and unlawfully.*

43. There was no evidence on the legal wage payable to L. She made no attempt to direct the mind of the Court to any Wage Instrument granting her a specific wage. She did not show how the rate paid to her, Kshs. 10,000 per month, was in departure from any such Wage Instrument. It would be totally a waste of time to ask the Labour Office to investigate underpayment of wages.

44. *The Respondent shall pay the costs of the Claim to the Claimant.*

In Sum, IT IS ORDERED:-

- a. ***It is declared the Claimant's contract of employment was terminated by the Respondent unfairly and unlawfully.***
- b. ***The Claimant was sexually harassed in the course of her employment by the Respondent.***
- c. ***The Respondent shall, within 30 days of the delivery of this Award pay to the Claimant Kshs. 1,200,000 in general damages for sexual harassment; 6 months' salary in compensation for unfair termination at Kshs. 60,000; and 1 month salary in notice pay at Kshs. 10,000 – total Kshs. 1,270,000.***
- d. ***The Respondent to release to the Claimant her Certificate of Service forthwith***
- e. ***Costs of the Claim to the Claimant.***

Dated and delivered at Mombasa this 19th day of June 2015

James Rika

Judge