

**EXPANDING THE SCOPE OF SEXUAL HARASSMENT LAWS IN KENYA: A  
LEGAL SCRUTINY OF THE ADEQUACY OF THE LAWS DEALING WITH  
SEXUAL HARASSMENT**

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By  
Thuku Faith Muthoni  
089310

Prepared under the supervision of  
Patricia Achieng Ouma

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Lastly, I am truly grateful to my supervisor, Patricia Ouma. Her honest insight, input, encouragement and exemplary supervision has been instrumental in the writing of this research paper.


## DECLARATION

I, THUKU FAITH MUTHONI, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:  .....

Date: 22.03.2019 .....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:  .  
Patricia Ouma

## **ABSTRACT**

Sexual harassment is a violation of human dignity and this paper seeks to analyse the adequacy of sexual harassment laws in Kenya. In doing so, the researcher shall indeed prove that there is a gap in sexual harassment laws in Kenya and illustrate the need for a wider understanding of sexual harassment. Specifically, this paper shall champion for the recognition of various contexts in which sexual harassment can take place, in addition to those that the current legal framework has envisioned.

The primary question that drives this research is: What definition and contexts of sexual harassment need to be recognised by the law, in order to provide a legal framework that not only provides recourse for survivors of sexual harassment, but also upholds human dignity and gender equality. In order to properly answer the research question, the research shall be conducted using the qualitative research model through desktop research. A comparative study against Australia shall also be conducted in order to contrast the current legal framework in Kenya. It is in doing so that the gaps in the Kenyan law will be realised.

Ultimately, the end goal for this research paper is to identify the gaps within the Kenyan law and propose ways in which the identified gaps can be filled thus expanding the current provisions of sexual harassment within the Kenyan law.

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## **LIST OF ABBREVIATIONS**

1. Convention on the Elimination of all forms of Discrimination Against Women – CEDAW
2. International Labour Organization – ILO
3. Kenya National Commission on Human Rights- KNCHR
4. Sexual Discrimination Act - SDA
5. Sexual Offences Act –SOA

## LIST OF CASES

1. *Industrial Court at Nairobi, G.M.V v. the Bank of Africa* [2013] e-KLR
2. *N M L v Peter Petrausch* [2015] eKLR
3. *P.O. v. Board of Trustees AF & 2 Others* [2014] eKLR
4. *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82
5. *STU v JKL (Qld) Pty Ltd & Ors* [2016] QCAT 505
6. *Vishaka & Others v. the State of Rajasthan & Others* [JJ, 1997] [7] [SC 384]

## **LIST OF LEGAL INSTRUMENTS**

1. Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)
2. Constitution of Kenya (2010)
3. Employment Act Cap 226
4. Penal Code Cap 63
5. Sex Discrimination Act (Australia)
6. Sexual Offences Act of No. 3 of 2006

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## CHAPTER 1: INTRODUCTION

### 1.1 Background

According to the United Nations, between fifteen and seventy six percent of women in the world are targeted for physical and or sexual violence (including sexual harassment) in their lifetime.<sup>1</sup> In Kenya, statistics showed that twenty percent of women in Nairobi have been sexually harassed at work or school.<sup>2</sup> Twenty percent may seem like a small number but when one takes into consideration that the study has been done in only one area of the country and that there is a large number of women who do not go to school or work, this figure may change significantly. In light of this, it is prudent to have adequate laws against sexual harassment that will eradicate this vice and give survivors of adequate recourse.

### 1.2 Introduction

In Kenya, sexual harassment is defined as any persistent sexual advances or requests by any person which they know, or has reasonable grounds to know, are unwelcome.<sup>3</sup> To prove a charge of sexual harassment, one must first show that the submission or rejection by the person to whom advances or requests are made is intended to be used as basis of employment or of a decision relevant to the career of the alleged victim. Such advances or requests are expected to have the effect of interfering with the alleged victim's work or educational performance. Additionally, if the advance creates an offensive working or learning environment, this does stand as a ground on which sexual harassment is punishable. In the case of a public office where there is a public officer, if one is denied a service due to them as a member of the public as a result of not consenting to sexual advances or request, the victim may also find recourse in the law of sexual harassment.<sup>4</sup>

With all the above, one cannot help but ask: what exactly does the phrase "sexual advances" encompass? What are the reasonable grounds to test an advance as unwelcome or not? Why is the law limiting sexual harassment to a career or service favour or advance? Why is sexual harassment limited to education or work performance? Must there be a pre-existing relationship for it to occur? Why is sexual harassment in public limited to a public office?

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<sup>1</sup> 'Fast Facts: Statistics on Violence against Women', <http://www.endvawnow.org> accessed on February 4 2019

<sup>2</sup> 'Fast Facts: Statistics on Violence against Women', <http://www.endvawnow.org> accessed on February 4 2019

<sup>3</sup> Section 23(1), *Sexual Offences Act* (Act No 3 of 2006)

<sup>4</sup> Section 23(2), *Sexual Offences Act* (Act No 3 of 2006)

Are these really the only instances where sexual harassment can take place? Is there more to sexual harassment than people in authority?

### **1.3 Statement of problem**

The law has for a long time recognised the possible existence of sexual harassment in the workplace as a result of a power play between the employer and the employee. The problem however arises in the ambiguity in this law as it does not fully outline acts that amount to sexual harassment. Furthermore, the same provision in the law<sup>5</sup> fails to outline all instances in which sexual harassment can take place. The very definition of sexual harassment as any persistent unwelcome sexual advance or request, raises many questions.<sup>6</sup> For example, what comprises a sexual advance and to what extent is a persistent act acceptable?

Additionally, the Act outlines that the result of the persistent sexual advance should be one that is a gain or loss to the victim in terms of their employment.<sup>7</sup> One can still receive persistent sexual advances or requests by people who are not in a position to affect the status of the victim's employment in terms of promotion, demotion or termination. Furthermore, one may be sexually harassed by someone they are not in a contractual or any other pre-existing relationship with, as the law requires.<sup>8</sup> All this has not been captured in the Sexual Offences Act or any other piece of legislation. This is problematic because there is a probability of the development of a culture that does not respect human beings for who they are thus creating a fertile ground for the violation of basic human rights.

### **1.4 Statement of objective**

The aim of this dissertation is to illustrate the following:

***i. There is a gap in Kenyan laws on sexual harassment.***

The paper shall show through the analysis of current law against standards set by principles of law, that there is a gap as far as sexual harassment laws in Kenya are concerned. The danger of an existing gap in any law is that it creates an opportunity for not only misuse and

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<sup>5</sup> Section 23, *Sexual Offences Act* (Act No 3 of 2006)

<sup>6</sup> Section 23(1), *Sexual Offences Act* (Act No 3 of 2006)

<sup>7</sup> Section 23(2), *Sexual Offences Act* (Act No 3 of 2006)

<sup>8</sup> Section 23(2), *Sexual Offences Act* (Act No 3 of 2006)

abuse of the law but also a possible injustice. The aforementioned are not the purpose of law hence the law should strive to avoid possible instances of misuse, abuse and injustice.

*ii. There is a need for a wider definition of sexual harassment*

Having established that there is a gap, the way forward will be to show that there is a possibility for the gap to be filled by adopting a wider understanding of what sexual harassment is. For example, what does the law consider sexual to be and what does an unwelcome advance look like?

*iii. Contexts in which of sexual harassment can take place*

As mentioned above, by envisioning several contexts in which sexual harassment can take place, this will lead to filling the gaps in sexual harassment law hence a more efficient and adequate legislation on sexual harassment in Kenya.

### **1.5 Research questions**

In order to expand the scope of sexual harassment laws in Kenya, the principle research question is: What definition and contexts of sexual harassment need to be recognised by the law, in order to provide a legal framework that not only provides recourse for survivors of sexual harassment, but also upholds human dignity and gender equality. In the aim of answering this question, the research shall be guided by the following questions:

- i. What is the current legal framework for sexual harassment in Kenya; what is the meaning, available contexts and available sanctions?
- ii. Does Kenyan law fully recognise all contexts of sexual harassment?
- iii. What would be a proper legal framework for sexual harassment in terms of: meaning, available contexts and available sanctions?

### **1.6 Hypothesis**

Through this paper, the researcher seeks to prove the following:

- i. That sexual harassment is a violation of human rights because it is the disrespect and violation of one's inherent human dignity.
- ii. That sexual harassment is a women's rights issue because most complaints made against sexual harassment as well as survivors of sexual harassment, are women.

- iii. That sexual harassment is not adequately addressed by Kenyan laws leading to the violation of the human dignity as well as the furtherance of a society that is not equal.

### **1.7 Significance of the study**

To begin with, sexual harassment is a human rights issue. One of the major reasons why the gap has existed from time immemorial is due to the evolution of human rights in Kenya. Nonetheless, one of the most fundamental human rights upon which all other rights find their identity is the right to human dignity. This is an inherent right that laws against sexual harassment find their refuge as it is impossible to separate sexual harassment from the violation of the right to inherent human dignity. As highlighted above, the law does not fully capture all instances in which sexual harassment take place. Empirical studies show that sexual harassment outside the work environment is a real societal problem, not only in Kenya but also in other parts of the world.<sup>9</sup>

With this in mind, this study will expose the gap in the law and offer recommendations whose purpose is to provide a worthwhile solution. Some recommendations will include: defining what sexual harassment is, what amounts to sexual harassment, the context in which it can place and what sanction should be given for the aforementioned. This, if adopted, will enable us to move forward as a country and become a society that accords to each one their human dignity.

### **1.8 Research design & methodology**

This research shall be conducted using the qualitative research model which shall be done through desktop research. This is because the topic in question is legal in nature and answering the problem questions does not fully require the use of statistics that would be collected through fieldwork. In addition to the above, given that the paper is looking into the adequacy of sexual harassment laws in Kenya, a comparative study shall be done to not only illustrate what other jurisdictions have, but also serve as an example of what Kenyan laws on sexual harassment can aspire to be. Through this method, the research shall explore primary sources, secondary sources and tertiary sources. This shall include the interpretation of

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<sup>9</sup>Williams Z, 'Sexual harassment 101: what everyone needs to know', 16 October 2017 <http://www.theguardian.com> accessed on February 2018

information as found in but not limited to: books, journals, articles, reports, case law, statute, commentaries, scholarly works, newspaper articles, and comparative study.

### **1.9 Assumptions**

In the undertaking of this research, several assumptions shall be made. The first assumption is that most sexual harassment survivors are women because most workplaces, businesses premises and schools are either owned or mostly occupied by men. Additionally, most complaints against sexual harassment are made by women. . Secondly, sexual harassment in Kenya is largely similar to sexual harassment in other countries because the survivors and perpetrators are human beings who are universal in nature. This similarity is also seen in the context in which the sexual harassment occurs, the power play that is involved and the effects which are mainly psychological.<sup>10</sup> This makes sexual harassment amongst women slightly similar across race, age, class, religion and other differences.

### **1.10 Limitations**

In the writing of this paper, a major limitation would be accessing primary sources in the form of interviews by victims. Due to time constraints, this is not possible. In addition to the above, due to the sensitive nature of sexual harassment, it is difficult to receive information on the same. Fortunately, the researcher endeavours to overcome this by heavily relying on the available secondary and tertiary sources so as to answer the research question.

### **1.11 Chapter Summary**

The first chapter of the dissertation shall serve as an introduction to the research paper. This chapter will outline the following: the problem statement, the objective, the research questions, the hypothesis, the research design, the assumptions and limitation of the study.

Chapter two shall be the theoretical framework and literature view. This chapter shall delve into a detailed analysis of the theories that have been used and can still be used to make arguments for laws on sexual harassment. It will discuss in detail the theories of human dignity, equality and feminism, as well as the harm caused by not considering these in the legislation of sexual harassment laws in Kenya. In doing so, the researcher will be better

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<sup>10</sup>Marvin G. Knittel Ed.D : Why Men Harass Women and the Impact on the Victims Sexual harassment, 3 December 2017 <http://www.psychologytoday.com> on 18 February 2018

placed to successfully analyse the efficiency of the sexual harassment laws by exposing the gaps in the existing legal framework.

Chapter three shall be an analysis of the law in Kenya with regards to sexual harassment. This chapter shall analyse the Penal Code, the Sexual Offences Act, The Employment Act as well as relevant case law on the same. The objective of this is to show that although there is an existing framework for sexual harassment in Kenya, the law still falls short as far as curbing this vice is concerned. The case law shall illustrate the application of the aforementioned statutes and in doing so, it shall show the attitude of the Courts in dealing with sexual harassment.

Chapter four will entail a comparative study between Kenya and another jurisdiction; Australia. In order to achieve this, the chapter will begin with an analysis of sexual harassment laws in Australia that are primarily enshrined in the Sex Discrimination Act of 1984. Afterwards, the researcher shall conduct a comparative analysis between the two jurisdictions and this will distinctively draw out the gaps in the Kenyan Context as well as present probable solutions.

Finally, Chapter five shall be the last chapter of the dissertation. This chapter shall conclude the study by outlining the findings and giving recommendations on the same.

## CHAPTER 2: PRINCIPLES GUIDING THE LAW ON SEXUAL HARASSMENT

### 2.1 Introduction

Concrete and stable legal successes are grounded, consciously or not, on theoretical foundations.<sup>11</sup> It is with this understanding that this chapter delves into critically analysing various theories that are fundamental in so far as justifying the need to expand the scope of sexual harassment laws in Kenya. In addition to that, the same theories also provide a marking scheme which can be used to legally assess how strong the recommendations in the final chapter are. Lastly, this chapter shall also delve into what various authors have written over time in relation to the following theories: the theory of human dignity, the theory of equality and the feminist theory.

### 2.2 Theory of Human Dignity

Human dignity as a theory has been in existence from the times of Aristotle. This theory has developed over the centuries and many debates by different schools of thought have taken place around this matter. Whereas one side of the paradigm are of the opinion that human dignity is the foundation on which every other human right is derived, the other side argues that human rights do not necessarily stem from human dignity. Although that debate is necessary, of greater importance is the actual definition of human dignity.

Amongst the legends in legal jurisprudence, we have great thinkers such as Cicero, Immanuel Kant, just to mention a few. Cicero compares humans with animals and argues that humans in general have a particular dignity by virtue of their capacity for rational thought.<sup>12</sup> This is supported by Giannozzo Manetti who furthered this argument by pushing for the universalization of human dignity in the highly aristocratic society that he lived in.<sup>13</sup>

Immanuel Kant on the other hand argues that human dignity does not consist primarily in some bare idea of rationality or freedom, but the capacity to make universal law.<sup>14</sup> He goes

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<sup>11</sup> Scales A., *Legal feminism: Activism, lawyering, and legal theory*, New York University Press, New York, 2006, 6

<sup>12</sup> Kleinig J. and Evans N.G, 'Human flourishing, human dignity, and human rights' *Law and Philosophy*, Vol. 32, No. 5 (2013), 551

<sup>13</sup> Kleinig J. and Evans N.G, 'Human flourishing, human dignity, and human rights' *Law and Philosophy*, Vol. 32, No. 5 (2013), 552

<sup>14</sup> Kleinig J. and Evans N.G, 'Human flourishing, human dignity, and human rights' *Law and Philosophy*, Vol. 32, No. 5 (2013), 553

alikehood.<sup>19</sup> This means that equality thus includes all statements to the effect that the reason one person should be treated in a certain way is that he is "like", "equal to", "similar to", "identical to" or "the same as" another who receives such treatment.<sup>20</sup>

It has been argued by the well known feminist and Catharine MacKinnon, that sexual harassment is a form of sexual discrimination; discrimination on the grounds of sex. To begin with, discrimination is unjustifiable preferential treatment given to one person or group over another. According to Anna-Maria Marshall, inequality structures everyday life where there are systems of stratification based on class, race, sex, gender, sexual orientation and ethnicity.<sup>21</sup> It is this stratification that breeds ground for discrimination.

In the book "Sexual Harassment of Working Women", Catharine MacKinnon argues that sexual harassment is a form of employment discrimination because it imposes undue burdens on women and creates adverse working conditions that men did not have to endure.<sup>22</sup> She also continues further to purport that sexual harassment is a relationship of unequal power between men and women that is not only institutionalized, but also manifested in the work place.<sup>23</sup>

The theory of equality therefore forms a fundamental part of this discussion as it provides a justification for condemning any conduct that would be categorized as discriminative. John Finnis in his works categorises equality as one of the three important elements in the conceptualization of justice. What this means is that where there is unjustifiable discrimination, there is an injustice. In relation to the subject of this paper, sexual harassment being a form of sex discrimination is clearly a manifestation of an injustice that the law should remedy as all persons are entitled to the equal protection of the law.

#### **2.4 Feminism**

According to Anna Scales, feminism is the concrete analysis of systematic oppressions, which analysis has led to a critique of objectivity in epistemological, psychological, and

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<sup>19</sup> Western P., 'The Empty Idea of Equality' *Harvard Law Review*, Vol. 95, No. 3 (1982), 543

<sup>20</sup> Western P., 'The Empty Idea of Equality' 540

<sup>21</sup> Marshall A., *Confronting sexual harassment: The law and politics of everyday life*, Ashgate Publishers USA, 2005, 1

<sup>22</sup> Marshall A., *Confronting sexual harassment: The law and politics of everyday life*, Ashgate Publishers USA, 2005, 36

<sup>23</sup> Marshall A., *Confronting sexual harassment: The law and politics of everyday life*, Ashgate Publishers USA, 2005, 16

social—as well as legal—terms.<sup>24</sup> She further argues that there is a socially constructed process that conscripts people into a gendered way of seeing the world, including but not limited to, rites of genderization for individuals and habits of thinking that are contingent but powerful.<sup>25</sup>

Professor MacKinnon supports the above notion by expressing the following:

“Male dominance is perhaps the most pervasive and tenacious system of power in history... it is metaphysically nearly perfect. Its point of view is the standard for point of viewlessness; its particularity the meaning of universality. Its force is exercised as consent, its authority as participation, its supremacy as the paradigm of order, its control as the definition of legitimacy.”<sup>26</sup>

Historically, legal feminism in the United States of America emerged in the 1960s, whereby an increasing proportion of American women were finding traditional roles less fulfilling or enduring than the prevailing ideology assumed.<sup>27</sup> In essence, the movement involved challenging the exclusion of women from equal opportunities of all sorts and more so, economic opportunities.<sup>28</sup> The thrust of the approach was to argue for neutrality in legal standards, that is, for a legal rule regarding women that did not take sex into account in so far as the opportunities were concerned.<sup>29</sup>

It goes without a say that throughout history there have been many deliberations on feminism as an ideology and several schools of thought within feminism have developed. The most influential are the radical feminism and liberal rights feminism schools of thought. The liberal rights feminism is primarily focused on achieving equality through litigation and legislative reform whereas the radical feminist groups tend to be more eclectic and more interested in changing consciousness than changing laws.<sup>30</sup>

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<sup>24</sup> Scales A., *Legal feminism: Activism, lawyering, and legal theory*, 83

<sup>25</sup> Scales A., *Legal feminism: Activism, lawyering, and legal theory*, 83

<sup>26</sup> Scales A., *Legal feminism: Activism, lawyering, and legal theory*, 84

<sup>27</sup> Rhode L.D., *Justice and gender: Sex discrimination and the law*, Harvard University Press, United States of America, 1989, 53

<sup>28</sup> Scales A., *Legal feminism: Activism, lawyering, and legal theory*, 84

<sup>29</sup> Scales A., *Legal feminism: Activism, lawyering, and legal theory*, 84

<sup>30</sup> Rhode L.D., *Justice and gender: Sex discrimination and the law*, Harvard University Press, United States of America, 1989, 59

For the purpose of this dissertation, both shall be incorporated for the following reasons. Firstly, this is a legal paper thus it is more appropriate to have a legal approach to the matter at hand. Secondly, although radical feminism is more social than legal, it offers a probable cause of the problem and a context to the problem. The two are essential ingredients in formulating a way forward. Finally, feminism as a general school of thought is very important primarily because most of the survivors of sexual harassment are women. In the wake of the “#MeToo” and “#TimesUp” movements, the United Nations through the UN Women’s division was cognizant of the fact that victims of sexual harassment globally were mostly women.<sup>31</sup>

Feminism therefore becomes very informative when legislation is being drafted because it takes into account a particular group of people and makes an accommodation that is not just suitable but relevant as well. Similarly, by having an understanding the cause of the problem, the lawmakers are in a better position to eradicate the problem. Fortunately, this also spills over into policy formation whereby policy makers are better informed and this ultimately leads to the establishment of a society that upholds the dignity of all its members.

## **2.5 Conclusion**

Injustice does not flow directly from recognising differences; injustice results when those differences are transformed into social deprivation.<sup>32</sup> The social deprivation may manifest itself in many ways including the disrespect of human beings and the effects of breaching a duty that is owed to particular people. The effect of using human rights as a methodological tool to analyse a social problem is that it ensures that every individual is recognised as a person and as a rights holder under the framework of standards, duties and obligations.<sup>33</sup> In relation to sexual harassment as a social problem, the law has the ability to impose standards on what acceptable behaviour is. Likewise, the law can also impose duties and obligations such as each right bearer respecting and upholding the dignity of another person. However, this may be impossible to achieve if lawmakers do not take into account the concept of

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<sup>31</sup> ‘UN Women appoints Purna Sen as Executive Coordinator and Spokesperson on Addressing Sexual Harassment and Other Forms of Discrimination’ *UN Women News* April 11 2018 <http://www.unwomen.org> on 7<sup>th</sup> September 2018

<sup>32</sup> Scales A., *Legal feminism: Activism, lawyering, and legal theory*, 94

<sup>33</sup> Muli E., ‘Do They Exist? Women’s Reproductive Health Rights in Kenya’ *the Law Society of Kenya Journal* (2008), 69

human dignity, equality and feminist legal theories in the construction of sexual harassment laws.

## CHAPTER 3: SEXUAL HARASSMENT LAWS IN KENYA

### 3.1 Introduction

In order to accurately assess the adequacy of sexual harassment laws in Kenya, it is prudent to delve into an in depth analysis of the existing laws as well as their application by looking into case law. This chapter shall look into most, if not all, the laws in Kenya that directly deal with sexual harassment. In doing so, the objective is to expose a gap within the laws that deal with sexual harassment in Kenya and have a framework for a comparative analysis thereafter.

### 3.2 Legal Framework

#### 3.2.1 Constitution of Kenya 2010(CoK)

This document lays out the foundation for laws against sexual harassment by first recognising that every person has inherent dignity and the right to have that dignity respected and protected.<sup>34</sup> In the same way, it guarantees the right to equality and freedom from discrimination by stating that every person is equal before the law and has the right to equal protection and equal benefit of the law.<sup>35</sup> With regards to equality, it expressly states that equality includes the full and equal enjoyment of all rights and fundamental freedoms<sup>36</sup> whereby both women and men have the right to equal opportunities in political, economic, cultural and social spheres.<sup>37</sup> It also states that a person shall not be discriminated directly or indirectly on any of the grounds, including sex.<sup>38</sup> To the extent that sexual harassment is classified as sex discrimination, the CoK, is extremely relevant as it validates and informs the legislation of sexual harassment in Kenya.

#### 3.2.2 Penal Code

The Penal Code was the first legal instrument to recognise and criminalise sexual harassment as it specifically outlaws the insulting modesty by forcible stripping.<sup>39</sup> It expressly states that a person who intentionally insults the modesty of any other person by forcibly stripping them, commits an offence and upon conviction, is liable to imprisonment for a term not less than

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<sup>34</sup> Article 28, *Constitution of Kenya* (2010)

<sup>35</sup> Article 27(1), *Constitution of Kenya* (2010)

<sup>36</sup> Article 27(2), *Constitution of Kenya* (2010)

<sup>37</sup> Article 27(3), *Constitution of Kenya* (2010)

<sup>38</sup> Article 27,(4)*Constitution of Kenya* (2010); race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth

<sup>39</sup> Section 251 A, *Penal Code*, Cap 63

ten years.<sup>40</sup> Forced stripping is an act that degrades the dignity of a person because it exposes the nudity of such a person without their consent. Unfortunately, the Penal Code only recognises one action that is categorized as sexual harassment.

### 3.2.3 Sexual Offences Act

In the late 90's and early 2000's, Civil Society and likeminded legislators lobbied intensively for the passing of the Sexual Offences Act (SOA) to curb and address sexual violence against women because the existing legal framework was inadequate.<sup>41</sup> In 2006, the SOA came into force with the aim of establishing provisions about sexual offences, including their definition, prevention and the protection of all persons from harm from unlawful sexual acts, and for connected purposes.<sup>42</sup>

The SOA states that any person in a position of authority or in a public office who persistently makes any unwelcome sexual advances or requests, is guilty of the offence of sexual harassment so long as they know or have reasonable grounds to know that the aforementioned conduct was unwelcome.<sup>43</sup> As a consequence, the perpetrator of this offence shall be liable to imprisonment for a term of not less than three years or to a fine of not less than one hundred thousand shillings or to both.<sup>44</sup>

For one to prove a charge of sexual harassment, they should show that the submission or rejection of the said advances or requests is intended to be used: as basis of employment, a decision relevant to the career of the alleged victim or of a service due to a member of the public.<sup>45</sup> Furthermore, they ought to show that such advances or requests have the effect of: interfering with the alleged victim's work or educational performance, creating an offensive working or learning environment for the alleged victim or denial of a service due to the member of the public from a public office.<sup>46</sup>

### 3.2.4 Employment Act

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<sup>40</sup> Section 251 A, *Penal Code*, Cap 63

<sup>41</sup> Mwenja K J, 'The Fallacy of Mandatory Minimum Sentencing in Sexual Offences', LL.M UoN, November 15 2016

<sup>42</sup> Preamble, *Sexual Offences Act*, No. 3 of 2006

<sup>43</sup> Section 23(1), *Sexual Offences Act*, No. 3 of 2006

<sup>44</sup> Section 23(1), *Sexual Offences Act*, No.3 of 2006

<sup>45</sup> Section 23(2), *Sexual Offences Act*, No.3 of 2006

<sup>46</sup> Section 23(2), *Sexual Offences Act*, No.3 of 2006

The Employment Act primarily declares and defines the fundamental rights of employees, to provide basic conditions of employment of employees, to regulate employment of children, and to provide for matters connected with the foregoing.<sup>47</sup> In the interest of providing basic conditions of employment, the aforementioned Act addresses sexual harassment in the workplace. It outlines that an employee<sup>48</sup> is sexually harassed if their employer,<sup>49</sup> a representative thereof or a co-worker directly or indirectly requests that employee for: sexual intercourse, sexual contact or any other form of sexual activity.<sup>50</sup> The harassment should either contain an implied or express promise of preferential treatment in employment; a threat of detrimental treatment in employment; or a threat about the present or future employment status of the employee.<sup>51</sup>

In addition to the above, an employee is also harassed where the employer, a representative thereof or a co-worker: uses language whether written or spoken of a sexual nature;<sup>52</sup> uses visual material of a sexual nature;<sup>53</sup> or shows physical behaviour of a sexual nature. As a result, such language, material or behaviour ought to directly or indirectly subject the employee to behaviour that is unwelcome or offensive to that employee and that by its nature has a detrimental effect on that employee's employment, job performance, or job satisfaction.<sup>54</sup>

Finally, an employer who employs twenty or more employees shall issue a policy statement on sexual harassment.<sup>55</sup> Although the provisions in the sexual harassment policy are at the discretion of the employer,<sup>56</sup> the policy shall contain: the definition of sexual harassment,<sup>57</sup> a guarantee that every employee is entitled to employment that is free of sexual harassment, steps taken to ensure that no employee is subjected to sexual harassment, disciplinary

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<sup>47</sup> Preamble, *Employment Act*, Cap 226

<sup>48</sup> Section 2, *Employment Act*, Cap 226; an "employee" is defined as a person employed for wages or a salary and includes an apprentice and indentured learner

<sup>49</sup>Section 2, *Employment Act*, Cap 226; An "employer" means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company

<sup>50</sup> Section 6 (1a), *Employment Act*, Cap 226

<sup>51</sup> Section 6 (1a), *Employment Act*, Cap 226

<sup>52</sup> Section 6 (1b), *Employment Act*, Cap 226

<sup>53</sup> Section 6 (1c), *Employment Act*, Cap 226

<sup>54</sup> Section 6 (1d), *Employment Act*, Cap 226

<sup>55</sup> Section 6 (2), *Employment Act*, Cap 226

<sup>56</sup> Section 6 (3), *Employment Act*, Cap 226

<sup>57</sup> Section 6 (3a), *Employment Act*, Cap 226

measures, a complaints procedure<sup>58</sup> and confidentiality in the latter process.<sup>59</sup> There lies a great danger when the provisions of the sexual harassment policy are left at the discretion of the employer. First of all, there is the already existing bargaining power and this may manifest in the remedies available. Additionally, there is a danger of the employer misusing and at any point amending the policy as they may seem fit and this could possibly work against the employees.

### **3.3 Case Law**

#### **3.3.1 P.O. v. Board of Trustees AF & 2 Others [2014] eKLR**

In this case, the Claimant (P) was employed by the Board of Trustees (R1) through the 2nd Respondent (R2) as a Training and Investigative Consultant in Kenya. In the course of work, P and R2 travelled and while there, R2 began making sexual innuendos which the P did not respond to. The following day, R1 questioned why P had rebuffed his proposal for a romantic lunch and he hit P. Thereafter, R2 terminated P's contract of employment as a punishment for failing to live up to his sexual expectation.<sup>60</sup> Some of the issues for determination included: whether P was wrongfully terminated, whether she was entitled to damages for breach, wrongful termination, pain and injury and exemplary damages.

The Court in its reasoning demonstrated the relationship between sexual harassment, actual gender based violence in the workplace and how the two are forms of sexual discrimination. The learned judge relied on the Report of the Committee on Gender Equality 98th Session of the International Labour Conference Geneva 2009 which explained that:

“Sexual harassment and other forms of harassment are serious forms of discrimination across the world that undermine the dignity of women and men, negate gender equality and can have significant implications.”<sup>61</sup>

Furthermore, the Court included arguments made by Jane Hodges<sup>62</sup> where she discusses ILO Resolutions where sexual harassment is condemned in the context of safety and health.<sup>63</sup>

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<sup>58</sup> Section 6 (3b), *Employment Act*, Cap 226

<sup>59</sup> Section 6 (3b), *Employment Act*, Cap 226

<sup>60</sup> *P.O. v. Board of Trustees AF & 2 Others [2014] eKLR*

<sup>61</sup> *P.O. v. Board of Trustees AF & 2 Others [2014] eKLR*

<sup>62</sup> Jane Hodges is an International Human Rights Consultant based in Geneva, Switzerland. Until 2014 she was the Director of the Gender, Equality and Diversity Branch of the International Labour Organization, and since

Hodges further explains that UN Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW] and the ILO consider acts to constitute sexual harassment when the victim has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment- known respectively as *quid pro quo*.<sup>64</sup>

The Court concluded by affirming the sentiments by Adrienne Cruz<sup>65</sup> and Sabine Klinger<sup>66</sup> that ending gender-based violence in the world of work is a critical step to decent work.<sup>67</sup> The learned judge asserted that victims of sexual harassment merit monetary damages to compensate for financial loss as a result of dismissal from employment, and to compensate injury to their feelings, humiliation, human dignity, and impairment and nullification of equality of opportunity or treatment in employment.<sup>68</sup> In light of this, the Court held that P had been wrongfully terminated and was awarded damages accordingly.

### 3.3.2 *N ML v Peter Petrausch [2015] eKLR*

The Claimant was employed by Mr Peter Petrausch, a German National resident in Kenya for the preceding 5 years, as his Domestic Help when the Respondent unfairly and unlawfully terminated her contract of employment. The Claimant submitted that she was subjected to unwanted sexual advances by the respondent in the course of employment, upon rejection of the sexual advances, the Claimant's employment was thereby terminated. The questions for determination by the Court were whether she was sexually harassed and whether she was wrongfully terminated from employment.

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2008 headed the ILO's Bureau for Gender Equality within the ILO's Senior Management Team. She currently edits the "International Labour Law Reports" <http://www.unfrisd.org> accessed on January 17 2019

<sup>63</sup> *P.O. v. Board of Trustees AF & 2 Others [2014] eKLR*

<sup>64</sup> *P.O. v. Board of Trustees AF & 2 Others [2014] eKLR*

<sup>65</sup> Adrienne Cruz is a gender specialist with the Gender, Equality and Diversity Branch at the International Labour Office based in Geneva. In 2011 she co-authored a working paper on Gender-based Violence in the World of Work and also co-authored the ILO Guide to mainstreaming gender in workplace responses to HIV and AIDS. Her responsibilities include coordinating the ILO Action Plan for Gender Equality 2010-15, as well as the global ILO Gender Network <http://www.itcilo.org> accessed on January 17 2019

<sup>66</sup> Sabine Klinger is academic in Gender studies. She finished her studies of interdisciplinary gender studies with the Master of Arts, at the University of Graz. She was also a member of the Research Training Group "Representation, Materiality and Gender: Present and Historical Reformulations of Gender Relations" at the Institute for Gender Studies at the University of Basel. Since 2011 she has been working as a lecturer at various universities in Europe <http://www.gender-glossar.de> accessed on January 17 2019

<sup>67</sup> *P.O. v. Board of Trustees AF & 2 Others [2014] eKLR*

<sup>68</sup> *P.O. v. Board of Trustees AF & 2 Others [2014] eKLR*

The Court in this case found that the respondent indeed directly and indirectly sought to have sex with the Claimant in addition to using language and visual material of sexual nature which was unwelcome and offensive. In doing so, the respondent objectified her, injured her inherent dignity and assaulted her modesty. This the Court duly affirmed was physical and psychological gender violence against the Claimant. As far as the right to fair labour practices is concerned, the Court found that the Claimant's rights to reasonable working conditions were violated as well.

In its reasoning, the Court explored in detail what sexual harassment was. For example, according to the General Survey of the Committee of Experts of the ILO in 1988, sexual harassment includes: 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.<sup>69</sup>

Additionally, the Court quoted the India Supreme Court Case of *Vishaka & Others v. the State of Rajasthan & Others [JJ, 1997] [7] [SC 384]* where the Court described 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.<sup>70</sup>

Ultimately, the Court was guided by the case of *Industrial Court at Nairobi, G.M.V v. the Bank of Africa [2013] e-KLR* where 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. The learned judge in the judgement cautioned that 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.<sup>71</sup>

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<sup>69</sup> *N M L v Peter Petrausch [2015] eKLR*

<sup>70</sup> *N M L v Peter Petrausch [2015] eKLR*

<sup>71</sup> *N M L v Peter Petrausch [2015] eKLR*

### 3.4 Analysis

It is clear from the above that there is a tendency or likelihood for sexual harassment cases to be dealt with in a civil Court. As per the case law discussed above, it is evident that the claims of sexual harassment are often accompanied with unlawful termination of employment suits. There are few reported cases of sexual harassment outside the scope of employment and this is a problem because the law seems to be adequately dealing with sexual harassment as manifested in the workplace but there seems to be a reluctance to have it dealt with outside the workplace. For example, sexual harassment can take place inside a restaurant, inside a mall, in a *matatu* or even on the streets.

As seen in the case of *P.O v Board of Trustees*, it is fundamentally important to establish a pre-existing employer-employee relationship in order to bring a suit alleging sexual harassment as per the Employment Act. In the event that there is no employer-employee relationship, one may institute proceedings claiming a violation of their human rights<sup>72</sup> before a high Court in Kenya.<sup>73</sup>

Alternatively, one may choose to file a criminal case against the suspect perpetrator as per the SOA but the provisions as highlighted above are very limited. As it stands, the law seems to be blind to the possibility of one being sexually harassed outside the pre-existing relationship of an employer-employee or a public officer to a member of the public. For example, there exists no provision in law that would coerce owners of public transport vehicles to have sexual harassment policies that would protect their clients.

Due to the complexity of the implementing such a requirement, criminal law then comes in to solve such an issue because the State has the machinery, power and most importantly, the duty to defend victims of offences. Criminal law in its retributive nature also is a suitable tool to deal with sexual harassment as a societal issue thus the need to have comprehensive provisions as far as defining the *mens rea* and *actus reus* of the offence are concerned. Given that the standard of proof in criminal law is beyond reasonable doubt,

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<sup>72</sup>Article 22(1) Every person has the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened, *Constitution of Kenya (2010)*

<sup>73</sup>Article 23(1); The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights, *Constitution of Kenya (2010)*

### **3.5 Conclusion**

As discussed in the previous chapter, sexual harassment is caused by a power play between the perpetrator and the victim. Although the power play has historically been enshrined in employment relations, Catharine Mackinnon argues that the power play is gendered and the employment relationship is simply a manifestation of the power play in society. According to the analysis in this chapter, it is clear that the legislators in this case took into consideration that authority is a fundamental aspect in sexual harassment. However, the law in this case clearly limits itself to particular contexts where authority is in leadership positions. This is unfortunate because in that case, the law fails to envision sexual harassment amongst peers or from a junior to their senior. Lawmakers need to go further and recognise that the power dynamic in sexual harassment is not simply enshrined in positions of authority. This will go a long way in eradicating violence against women and establishing a society that embraces equality, but also a society that upholds the respect for human dignity.

## CHAPTER 4: COMPARATIVE ANALYSIS

### AUSTRALIA

#### 4.1 Background

In the early 1980s, Australia made significant and remarkably historic strides in legally recognising sexual harassment as a form of sex discrimination. The introduction of sex discrimination legislation was the product of feminist campaigns for law reform in relation to equal opportunity and discrimination in the workplace.<sup>74</sup> It became the first country in the world to expressly legislate on sexual harassment as an offence. For the last thirty years, Australia has continued to develop its laws on sexual harassment and there are lessons to be drawn from this jurisdiction.

#### 4.2 Introduction

In Australia, complaints of sexual harassment were first pursued under anti-discrimination legislation,<sup>75</sup> however, there were no specific provisions covering sexual harassment and it was necessary to prove that such unwanted sexual behaviour was a form of sex discrimination. This consequently led to the introduction of The Sex Discrimination Act 1984 (Cth) (SDA) which was the first piece of legislation in the world to introduce a separate cause of action for sexual harassment.<sup>76</sup> Since then, Australia has made remarkable steps in ensuring that the aforementioned Act is continuously revised.

As far as implementation and policy is concerned, Australia has established the office of the Sex Discrimination Commissioner (SDC) within the Australia Human Rights Commission (AHRC). The purpose of the office of the SDC is to advance gender equality, consistent with the SDA.<sup>77</sup> Finally, Australian laws on sexual harassment have evolved over 30 years and many lessons can be drawn from the thirty years in which the SDA has been in force.

This chapter shall therefore analyse the SDA and case law from Australia with the aim of showing what an ideal and functioning legislative framework on sexual harassment should

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<sup>74</sup> Australian Feminist Judgments Project, 'Sexual Harassment', 1 <http://www.law.uq.edu.au> accessed on 11 January 2019

<sup>75</sup> Australian Feminist Judgments Project, 'Sexual Harassment', 1 <http://www.law.uq.edu.au> accessed on 11 January 2019

<sup>76</sup> Australian Feminist Judgments Project, 'Sexual Harassment', 1 <http://www.law.uq.edu.au> accessed on 11 January 2019

<sup>77</sup> 'Unleashing the power of gender equality; Priorities of Kate Jenkins Australian Sex Discrimination Commissioner' November 2017 Australian Human Rights Commission

look like. For the record, the analysis below highlights how sexual harassment is handled as a civil matter. This is intentional because the trend in Kenya, as exposed in the previous chapter, is to solve sexual harassment more as a civil dispute as opposed to a criminal one. The SDA provides a good legal framework that would be an ideal example for Kenya to follow.

### **4.3 Legal Framework**

#### ***Sexual Discrimination Act 1984 (SDA)***

This is a piece of legislation that prohibits conduct relating to discrimination on the ground of sex, marital status, pregnancy, potential pregnancy, family responsibilities or conduct involving sexual harassment.<sup>78</sup> In doing so, it affirms that every individual is equal before and under the law, and has the right to the equal protection and equal benefit of the law.<sup>79</sup> Section 28 of the SDA specifically prohibits sexual harassment by first outlining what sexual harassment is and thereafter identifying three main contexts in which the offence can take place.

According to the SDA, a person sexually harasses another person if they make an unwelcome sexual advance, an unwelcome request for sexual favours<sup>80</sup> or engages in other unwelcome conduct of a sexual nature. To qualify the above conduct as sexual harassment, the conduct must have taken place in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.<sup>81</sup> Conduct of a sexual nature refers to making an oral or written statement of a sexual nature to a person or in the presence of a person.<sup>82</sup> In addressing the aforementioned conduct, the SDA primarily discusses the following contexts.

#### *i. Workplaces*

The SDA prohibits the sexual harassment of an employee,<sup>83</sup> a potential employee,<sup>84</sup> a commission agent, a potential commission agent, a contract worker, a potential contract

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<sup>78</sup> Preamble, Chapter 4, *Sex Discrimination Act* (Australia)

<sup>79</sup> Preamble, Chapter 4, *Sex Discrimination Act* (Australia)

<sup>80</sup> Section 28A (1a), Chapter 4, *Sex Discrimination Act* (Australia)

<sup>81</sup> Section 28A (1b), Chapter 4, *Sex Discrimination Act* (Australia)

<sup>82</sup> Section 28A (2), Chapter 4, *Sex Discrimination Act* (Australia)

<sup>83</sup> Section 28B (2), Chapter 4, *Sex Discrimination Act* (Australia)

<sup>84</sup> Section 28B (1b), Chapter 4, *Sex Discrimination Act* (Australia)

worker,<sup>85</sup> a partner or potential partner.<sup>86</sup> The sexual harassment referred to is illegal whether it flows from someone in a leadership position or whether it is between workers at the same level.<sup>87</sup> In addition to the above, it is unlawful for a workplace participant<sup>88</sup> to sexually harass another workplace participant at a place that is a workplace<sup>89</sup> of both of those persons.<sup>90</sup>

*ii. Educational Institutions*

In an educational institution, it is illegal for a member of the staff to sexually harass a student or a potential student.<sup>91</sup> In the same institution, it is also illegal for an adult student<sup>92</sup> to sexually harass another adult student or a member of the staff.<sup>93</sup> In the case of a body with power to grant, it is forbidden to sexually harass a person seeking action<sup>94</sup> in connection with an occupational qualification.<sup>95</sup>

*iii. Provision of Goods, Services and Facilities*

Sexual harassment is prohibited in the course of providing or offering to provide, goods, services, facilities,<sup>96</sup> or accommodation to another person.<sup>97</sup> Also, in the course of dealing<sup>98</sup> with land, sexual harassment is prohibited.<sup>99</sup> Lastly, a member of the committee of management of a club is prohibited from sexually harassing a member of the club or a potential member of that club.<sup>100</sup>

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<sup>85</sup> Section 28B (3a), Chapter 4, *Sex Discrimination Act* (Australia)

<sup>86</sup> Section 28B (5), Chapter 4, *Sex Discrimination Act* (Australia)

<sup>87</sup> Section 28A (4), Chapter 4, *Sex Discrimination Act* (Australia)

<sup>88</sup> 'Workplace participant' means any of the following: an employer or employee; a commission agent or contract worker, or a partner in a partnership. Section 28B (7), Chapter 4, *Sex Discrimination Act* (Australia)

<sup>89</sup> 'Workplace' means a place at which a workplace participant works or otherwise carries out functions in connection with being a workplace participant. Section 28B (7), Chapter 4, *Sex Discrimination Act* (Australia)

<sup>90</sup> Section 28B (6), Chapter 4, *Sex Discrimination Act* (Australia)

<sup>91</sup> Section 28F (1), Chapter 4, *Sex Discrimination Act* (Australia)

<sup>92</sup> Section 28F (3), Chapter 4, *Sex Discrimination Act* (Australia); adult student means a student who has attained the age of 16 years

<sup>93</sup> Section 28F (2), Chapter 4, *Sex Discrimination Act* (Australia)

<sup>94</sup> Section 28C (2), Chapter 4, *Sex Discrimination Act* (Australia); Action in connection with an occupational qualification refers to: conferring, renewing, extending or revoking a qualification. The aforementioned qualification should be required for: practising a profession, carrying on a trade or engaging in an occupation

<sup>95</sup> Section 28C (1), Chapter 4, *Sex Discrimination Act* (Australia)

<sup>96</sup> Section 28G, Chapter 4, *Sex Discrimination Act* (Australia)

<sup>97</sup> Section 28H (1), Chapter 4, *Sex Discrimination Act* (Australia)

<sup>98</sup> Section 28J, Chapter 4, *Sex Discrimination Act* (Australia); Dealing refers to the disposal, potential disposal, acquisition or potential acquisition of an estate or interest in land

<sup>99</sup> Section 28J, Chapter 4, *Sex Discrimination Act* (Australia)

<sup>100</sup> Section 28K, Chapter 4, *Sex Discrimination Act* (Australia)

#### **4.4 Case Law**

##### ***Richardson v Oracle Corporation Australia Pty Ltd [2014] FCAFC 82***

Ms Richardson, the plaintiff, was working for the defendant as a consulting manager at their Sydney office. Mr Tucker, the defendant, was working for the defendant at their Melbourne office as a sales representative. Both the plaintiff and accused were placed in a bid team whose work was mostly based in Melbourne. Ms Richardson's sexual harassment case against Mr Tucker arose out of his conduct towards her in the course of their work as part of the bid team. She alleged that she was subjected to a humiliating series of slurs, alternating with unwanted sexual advances by the accused, which built into a more or less constant barrage of sexual harassment.<sup>101</sup>

In this particular case, the question before the Court was whether the respondent was guilty of sexual harassment as per section 28 of the SDA. The trial judge found that Mr Tucker had embarked on a systematic course of conduct amounting to sexual harassment within its statutory meaning.<sup>102</sup>

This case is relevant because the unwanted sexual advances that amount to sexual harassment, were perpetrated by a junior worker against his senior. This is proof that the power play that has been argued to fuel sexual harassment is not necessarily embodied in high administrative positions at the workplace but also in the social construction of society according to gender. In addition to the above, there were no tangible benefits, such as a promised career advance or a demotion that would 'incentivize' the unwanted advance. In light of this, sexual harassment laws should take cognizance of different manifestations of power play between a victim and the perpetrator, thus accommodating many contexts in which sexual harassment can take place.

##### ***STU v JKL (Qld) Pty Ltd & Ors [2016] QCAT 505***

The Applicant and the Second Respondent travelled along with other colleagues for work related causes. The aforementioned were employees of the first respondent, at different branch offices of the same company. On the first night of accommodation, the Applicant reported to have retired to sleep. Although she was to share that same room with the Second

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<sup>101</sup> *Richardson v Oracle Corporation Australia Pty Ltd [2014] FCAFC 82*

<sup>102</sup> *Richardson v Oracle Corporation Australia Pty Ltd [2014] FCAFC 82*

Respondent, the Second Respondent occupied a separate bedroom.<sup>103</sup> The following morning, she awoke to find the Second Respondent in her bedroom and he was naked.<sup>104</sup> He touched her body including her upper thigh and groin and attempted to remove her underpants.<sup>105</sup> The Applicant asked him to stop and to leave the room and he left the room but he returned saying: “this can be our little secret”.<sup>106</sup>

The issue before the Court was to determine whether Second Respondent’s behaviour towards the applicant constituted unlawful sexual harassment and whether the Third Respondent, is vicariously liable for a contravention of the SDA by the Second Respondent. In this case, the Court found that the events as described by the Applicant meet the definition of sexual harassment. Additionally, the Court found that the Second Respondent subjected the Applicant to unsolicited acts of physical intimacy and engaged in unwelcome conduct of a sexual nature with her.

#### **4.5 Analysis**

The Court in its analysis discusses in depth the concept of vicarious liability of the employer where the working environment is found to be hostile towards other employees in light of sexual harassment. This is interesting because the Court in its analysis asks how the employer contributed to the sexual harassment and what they should have done to prevent that. In this particular case, the Court found the employer culpable for having not taken enough measures to prevent the sexual harassment from taking place hence is legally obliged to compensate the plaintiff as per the Court’s instruction. It is commendable that the Court has assumed the role of ensuring that employers, owners of premises or persons of similar status, are held accountable for the violation of rights within their premises. In addition to that, the role of the Court would be to sanction any employer or the leadership of an office or premise that chooses to abuse their power or abandon the responsibility of providing a safe, comfortable space for any human being to work or seek a service.

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<sup>103</sup> *STU v JKL (Qld) Pty Ltd & Ors* [2016] QCAT 505

<sup>104</sup> *STU v JKL (Qld) Pty Ltd & Ors* [2016] QCAT 505

<sup>105</sup> *STU v JKL (Qld) Pty Ltd & Ors* [2016] QCAT 505

<sup>106</sup> *STU v JKL (Qld) Pty Ltd & Ors* [2016] QCAT 505

#### **4.6 Conclusion**

Sexual harassment should be viewed as a violation of human rights more than mere misbehaviour from one person to another. It is only when such conduct is taken with such seriousness that we shall see legal reform geared towards curbing this vice. Australia has legally recognised many instances in which sexual harassment may occur thus providing sufficient grounds upon which, one may seek legal recourse. It is interesting to see how the Courts have used the doctrine of vicarious liability in ensuring that employers are held accountable for the sexual harassment within their workplace and for failing to create and sustain a working environment that upholds the dignity of all work participants. Indeed Australia stands as a jurisdiction that Kenya can look up to with regards to the development of laws against sexual harassment.

## CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

### 5.1 Introduction

In 2017-2018, a global campaign known as ‘#MeToo’<sup>107</sup> went viral on the internet. The aforementioned hashtags gave survivors of sexual harassment a platform to shame alleged perpetrators and seek justice on the same. If the aforementioned campaign was to take place in Kenya, the question would be whether Kenya has an adequate legal framework that would be sufficient for survivors to use to seek justice. In light of that, the aim of this study was to show that there is a gap in Kenyan laws on sexual harassment and illustrate the need for a wider definition of sexual harassment. Through comparative analysis with Australia, the paper recommends a wider definition of sexual harassment by proposing possible contexts in which sexual harassment can take place and how the law can include such contexts.

### 5.2 Research findings

The main source of sexual harassment law in Kenya is Section 23 of the SOA. It provides a definition of sexual harassment and recognises the contexts in which sexual harassment can take place. A comparison with Australia truly exposes the gap within the SOA. For example, both jurisdictions generally define sexual harassment as unwanted advances or unwanted conduct of a sexual nature. However, in Australia, the law goes further to clarify that conduct of a sexual nature includes making an oral or written statement of a sexual nature to a person or in the presence of a person. Furthermore, it introduces a ‘reasonable person’ test that distinguishes an unwanted sexual advance by exclusively stating that one is sexually harassed if the advance or conduct took place in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.<sup>108</sup>

In addition to the above, unlike Kenya, Australia has a concise and wider context in which sexual harassment can be said to have taken place. For instance, in Kenya, the law simply

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1 *The Woman who Created #MeToo*: Tarana Burke, a civil rights activist from the USA, coined the phrase ‘Me Too’ more than ten years ago when working with Black American Women who had been sexually harassed or raped. In October 2017, influential women in the USA entertainment industry sparked conversations on twitter using the #MeToo where victims of sexual harassment and rape told their stories. The hashtag in a few days was used by more than 12 million people across various social media platforms namely: Twitter, Facebook and Instagram. Written by Sandra Garcia, published on October 20 2017 at <http://www.nytimes.com> accessed on January 31 2019

<sup>108</sup> Section 28, *Sex Discrimination Act (Australia)*

states that the sexual harassment has to be from a person in authority whereas in Australia, the law recognises that sexual harassment can take place between workplace participants at a place that is a workplace of both participants. Other than the general employer- employee relationship that Kenya law limits itself to, a workplace participant in Australia has been construed to include: a commission agent, a contract worker or a partner in a partnership. Other contexts which Australian law recognises include: educational institutions, registered organizations, employment agencies and membership clubs. In Kenya, one can only claim to be sexually harassed in public if they were seeking a service from a public officer. However, in Australia, it is unlawful to sexually harass another person in the course of providing or offering to provide, goods, services or facilities to another person.

In Kenya, the Employment Act imposes a requirement that an employer may formulate a policy on sexual harassment in their workplace. The first fault in this provision is that it is not coercive as it does not impose a legal obligation whose violation would be punishable by law. Secondly, it gives the power to the employer who may easily abuse this mandate in the interest of protecting themselves or the interests of the company. This may be evidenced by a sexual harassment policy that provides an inadequate remedy for the survivor of sexual harassment, such as no disciplinary action against the accused perpetrator. Case law in Australia proposes an interesting way of dealing with such a concern. The Courts have in several cases held employers vicariously liable for acts amounting to sexual harassment committed by their employees in their workplaces or areas in which their authority extends.

### **5.3 Recommendations**

#### **1. Amending laws on sexual harassment**

##### *1.1 Expansion of section 23 of the Sexual Offences Act (SOA)*

As discussed in detail throughout this dissertation, Section 23 of the SOA is clearly in need of an extensive and concise definition of sexual harassment. A proper understanding of what a sexual advance is and what conduct of a sexual nature is, would be necessary. In addition to the above, this section envisions very few contexts in which sexual harassment can take place yet this dissertation has established that sexual harassment takes place because of a power dynamic that is enshrined in gender. Therefore, with this understanding, it is vital that the law accommodates as many contexts as possible in the interest of preventing sexual harassment

or at the very least, providing possible recourse for justice for the survivors. Australia has set a perfect example in how the law can properly accommodate other contexts in which this offence can take place and I recommend that should refer to Australia. For instance, Australia envisions that sexual harassment can take place outside the workplace where one is receiving goods and services from a service provider.

### *1.2 Expansion of section 6 of the Employment Act*

Although the Employment Act has done well in recognising sexual harassment at the workplace, it still needs some improvement. Firstly, the requirement that a sexual harassment policy should be formulated where an office has more than twenty workers should be repealed. This is because sexual harassment can take place in a workplace with less than twenty workers and the employer should be held to account for failing to provide a safe working environment. Secondly, the sexual harassment policy envisioned in this provision is optional and should be amended to make it a mandatory provision. This means that the employer would have a legal obligation to take all reasonable steps to ensure that the workplace they are in charge of is one that does not accommodate or sympathize with sexual harassment in any way. A violation of this duty would then lead to liability which could be in the form of vicarious liability where the perpetrator of sexual harassment is not the employer themselves.

## **2. Social awareness**

As previously discussed in Chapter 2 of this paper, sexual harassment is as a result of a power play that is engrained in the gender dynamics of a society. In order to effectively address sexual harassment, social awareness should be done so as to challenge any teachings, practices or perceptions that seem to promote or glorify sexual harassment. For example, dressing in a particular way is not an invitation for a sexual advance or comments of a sexual nature. Social awareness can be done by, but is not limited to, individuals, civil society and government. Some activities that amount to social awareness include co-curriculum activities in schools such as human rights clubs where students discuss human rights issues such as sexual harassment, as well as conversations about sexual harassment in round table discussions, community *barazas* and social media platforms.

### 3. Active use of State Machinery

The State has a legal obligation to protect, uphold and promote human rights and specifically, gender equality.<sup>109</sup> This should be done through state machinery which the state has already established as follows.

#### 3.1 Ministry of Gender, Youth, Culture and Sports

Interestingly, this obligation is partially devolved from the State level to the County level and this evidenced by the fact both levels of government have this office.<sup>110</sup> The vision of the aforementioned ministry is to promote gender equality and gender equity.<sup>111</sup> In line with the theory of equality, sexual harassment as sex discrimination is a violation of the right to equal treatment of both women and men. In that case, both levels should actively participate in ensuring that sexual harassment is considered when policy safeguarding gender equality and violence against women, is being deliberated and implemented. In addition to that, both levels of government should create and facilitate projects and programmes that advance the eradication of sexual harassment.

#### 3.2 Kenya National Commission on Human Rights (KNCHR)

This is a constitutional body that is primarily mandated to protect and promote human rights in Kenya.<sup>112</sup> Given the magnitude of gender issues as seen with the global viral campaign against sexual harassment ‘#MeToo’, my recommendation is that Kenya should borrow from Australia and establish the office of the Sex Discrimination Commissioner within the KNCHR. The role of the aforementioned office shall be to engage various stakeholders in championing for gender issues. In relation to sexual harassment, this office would be vital in churning out information on how to legally comply with laws against sexual harassment in the work places, service industry, schools and other places in which sexual harassment can take place. In addition to the above, the said office would be very influential in championing for the expansion of sexual harassment laws in Kenya given that KNCHR is constitutionally the primary Human Rights Organization (HRO) in Kenya.

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<sup>109</sup> Article 21 (1) It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights, *Constitution of Kenya (2010)*

<sup>110</sup> Article , *Constitution of Kenya (2010)*

<sup>111</sup> <http://www.psyg.go.ke> accessed February 5 2019

<sup>112</sup> Article 59, *Constitution of Kenya (2010)*

#### **5.4 Conclusion**

As discussed extensively throughout this paper, sexual harassment stems from a power play that is enshrined in the gender stratification of society. It is only with such an understanding that legislators can properly envision several contexts in which sexual harassment can take place. The law has the power to protect potential victims of this offence and providing a recourse for survivors who seek justice. This can only be done if the law is cognizant of the fact that sexual harassment is as a result of a power play enshrined in patriarchy. It is time that the law stood up against gender constructs that are repugnant to justice by amending provisions of laws that have been inspired by gender constructs.

## **BIBLIOGRAPHY**

### **Law**

1. Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)
2. Constitution of Kenya
3. Employment Act
4. Sex Discrimination Act
5. Sexual Offences Act

### **Books**

1. Scales A., *Legal feminism: Activism, lawyering, and legal theory*, New York University Press, New York, 2006,
2. Marshall A., *Confronting sexual harassment: The law and politics of everyday life*, Ashgate Publishers USA, 2005

### **Articles**

1. Kleinig J. and Evans N.G, 'Human flourishing, human dignity, and human rights' *Law and Philosophy*, Vol. 32, No. 5 (2013)
2. Bayefsky R., 'Dignity, rights, nature: Human Dignity by Kateb G.' *The Review of Politics*, Vol. 73, No. 4 (2011)
3. Western P., 'The Empty Idea of Equality' *Harvard Law Review*, Vol. 95, No. 3 (1982)
4. Muli E., 'Do They Exist? Women's Reproductive Health Rights in Kenya' *the Law Society of Kenya Journal* (2008)

### **Dissertations**

1. Mwenja K J, *The Fallacy of Mandatory Minimum Sentencing in Sexual Offences* , , LL.M UoN, November 15 2016

### **Reports**

1. 'Unleashing the power of gender equality; Priorities of Kate Jenkins Australian Sex Discrimination Commissioner' . November 2017 Australian Human Rights Commission

### **Newspaper and Online articles**

1. Marvin G. Knittel Ed.D : Why Men Harass Women and the Impact on the Victims Sexual harassment, 3 December 2017 <http://www.psychologytoday.com> on 18 February 2018.
2. 'UN Women appoints Purna Sen as Executive Coordinator and Spokesperson on Addressing Sexual Harassment and Other Forms of Discrimination' *UN Women News* April 11 2018 <http://www.unwomen.org> on 7<sup>th</sup> September 2018.
3. Williams Z, 'Sexual harassment 101: what everyone needs to know', 16 October 2017 <http://www.theguardian.com> accessed on February 2018
4. '*Fast Facts: Statistics on Violence against Women*', <http://www.endvawnow.org> accessed on February 4 2019
5. Australian Feminist Judgments Project, 'Sexual Harassment', 1 <http://www.law.uq.edu.au> accessed on 11 January 2019
6. '*The Woman who Created #MeToo*' <http://www.nytimes.com> accessed on January 31 2019

### **Online Sources**

1. <http://www.knhcr.org> accessed on 14 February 2018
2. <http://www.unrisd.org> accessed on January 17 2019
3. <http://www.itcilo.org> accessed on January 17 2019
4. <http://www.gender-glossar.de> accessed on January 17 2019