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# ARE EMPLOYEES SHIELDED FROM ABUSE OF THEIR RIGHTS IN KENYA?

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THE RIGHT OF MEN AND WOMEN TO WORK IN AN ENVIRONMENT FREE FROM  
UNWELCOME SEXUAL ADVANCES.



Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,  
Strathmore University Law School.

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Month and Year of submission: July 2021.

Word count: 10,819

## **TABLE OF CONTENTS**

ACKNOWLEDGEMENTS.....	v
DECLARATION.....	vi
ABSTRACT.....	vii
LIST OF CASES.....	viii
LIST OF LEGAL INSTRUMENTS.....	ix
LIST OF ABBREVIATIONS .....	x
<b>CHAPTER ONE</b>	
<b>INTRODUCTION.....</b>	<b>1</b>
1.1 Background of the Study.....	1
1.2 Statement of the Problem.....	3
1.3 Justification/Rationale of the Study.....	3
1.4 Significance of the Research.....	4
1.5 Objectives of the Study. ....	4
1.6 Research Questions.....	5
1.7 Hypothesis.....	5
1.8 Theoretical Framework.....	5
1.9 Research Methodology.....	7
1.10 Literature Review.....	8
1.11 Limitations and Delimitations.....	11
1.12 Chapter Breakdown.....	11
<b>CHAPTER TWO</b>	
2.1 The Legal Framework of Sexual Harassment in Kenya.....	13
2.1.1 The Constitution of Kenya, 2010.....	13
2.1.2 The Sexual Offences Act No.3 of 2006.....	14
2.1.3 The Public Officers Ethics Act No.4 of 2003.....	14

2.1.4 The Employment Act No. 11 of 2007.....	15
2.1.5 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1981.....	16
2.1.6 General Recommendation No 35 on Gender Based Violence Against Women, updating General Recommendation 19.....	16
2.1.7 General Recommendation No 19 on Gender Based Violence.....	17
2.1.8 International Labour Organisation (ILO) Convention No 111: Discrimination (Employment and Occupation) Convention 1958.....	17
2.1.9 International Labour Organisation (ILO) Convention No. 155: Occupational Safety and Health Convention, 1981.....	18
2.1.10 The Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in Africa.....	18
2.2 Remedies of Sexual Harassment.....	19
2.3 Conclusion.....	20
 <b>CHAPTER THREE</b>	
3.1 The Consequences of Sexual Harassment in Workplaces.....	21
3.2 The Effectiveness of Access to Justice or the Policies put in Place to Prevent Sexual Harassment at Workplaces.....	24
3.3 Conclusion.....	27
 <b>CHAPTER FOUR</b>	
4.1 The Legal Framework on Sexual Harassment in South Africa and United States of America.....	28
4.1.1 South Africa.....	28
4.1.2 United States of America.....	31
4.2 Conclusion.....	33

**CHAPTER FIVE**

**RECOMMENDATIONS AND CONCLUSIONS..... 34**

5.1 Recommendations..... 34

5.2 Conclusions..... 37

**BIBLIOGRAPHY..... 38**

## **ACKNOWLEDGEMENTS**

Without the support of various individuals, I would not have been able to complete this dissertation. I thank the Almighty God with all my heart and strength for He gave me the strength, time and persistence to see this dissertation through even when it got extremely difficult. I thank my family for praying for me that I could complete this dissertation.

I would also extend profound gratitude to Ms. Melissa Muindi, I am deeply grateful for your support which came both as a supervisor and a friend.

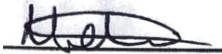
## **DECLARATION**

I, TREVOR MUSOKE NATHANIEL 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 (STUDENT):

A handwritten signature in black ink, appearing to be 'Trevor Musoke Nathaniel', written over a horizontal line.

Signed (SUPERVISOR):

A handwritten signature in black ink, written over a horizontal line.

Date: 30<sup>th</sup> July 2021.

## **ABSTRACT**

Sexual harassment is a form of discrimination that is prohibited as it violates the laws of Kenya, one's right to dignity and to work in an environment free from such a crime. This research sets out to examine the legal framework of Kenya against sexual harassment as well as that of South Africa and the United States of America. The research further explains how the legal framework of South Africa and the United States of America can be used to fill the gaps in the legal framework of Kenya against sexual harassment. This research also shows how and why victims of sexual harassment are reluctant to report such cases. The research also shows that sexual harassment had negative effects on the victim, emotional, psychological and physical trauma.

## **LIST OF CASES**

*A S L v National Bank of Kenya Limited & another* (2018) eKLR

*B W K v E K & another* (2017) eKLR

*C A S v C S Limited* (2016) eKLR

*CSL v CASN* (2020) eKLR.

*Gaga v Anglo Platinum Ltd & others* (2011), The Labour Appeal Court of South Africa.

*Grobler v Naspers Bpk* (2004), The High Court of South Africa.

*J W N v Securex Agencies (K) Limited* (2018) eKLR

*Mokone v Sahara Computers (Pty) Ltd* (2010), The High Court of South Africa.

*M W M v M F S* (2014) eKLR.

*N M L v Peter Petrausch* (2015) eKLR.

*P O v Board of Trustees, A F & 2 others* (2014) eKLR.

*S R M v G S S (K) Limited & another* (2017) eKLR.

*ZMM v Mamba NV Lunar Park* (2020) eKLR.



## **LIST OF LEGAL INSTRUMENTS**

### Kenyan Statutes

Constitution of Kenya of 2010.

Employment Act of 2012.

Protection from Harassment Act of 2011.

Public Officers Ethics Act of 2012.

Sexual offences Act of 2009.

### International Statutes

Code of Conduct and Guidelines to Prevent and Address Sexual Harassment in Workplaces of 2013.

Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace of 2005

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 1981.

Discrimination (Employment and Occupation) Convention of 1958.

Employment Equity Act of 1998.

Equal Pay Act of 1963.

General Recommendation No 19 on Gender Based Violence.

General recommendation No. 19, Violence Against Women of 1992.

General Recommendation No 35 on Gender Based Violence Against Women, updating General Recommendation 19.

Guide on Prevention of Sexual Harassment in the Workplace of 2010.

International Labour Organisation (ILO) Convention No 111: Discrimination (Employment and Occupation) Convention of 1958.

International Labour Organisation (ILO) Convention No. 155: Occupational Safety and Health Convention of 1981.

The Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in Africa of 2003.

## **LIST OF ABBREVIATIONS**

CEACR      Committee of Experts on the Application of Conventions and Recommendations

CEDAW      Convention on the Elimination of All Forms of Discrimination Against Women

EEOC      US Equal Employment Opportunity Commission

GBV      Gender Based Violence

IJMTS      International Journal of Management, Technology, and Social Sciences

ILO      International Labour Organisation

PTSD      Post-traumatic stress disorder

# CHAPTER 1

## INTRODUCTION

### **1.1. BACKGROUND OF THE STUDY**

Sexual harassment has been pervasive in and out of the workplace but it was not until 1980 that the United States of America (USA) became the first country to define sexual harassment in the work place as unlawful behaviour.<sup>1</sup> This was after the US Equal Employment Opportunity Commission (EEOC) in 1980 defined this injustice in the workplace as unlawful discriminatory conduct which could attract sanctions under Title VII of the Civil Rights Act 1964. <sup>2</sup> Following the USA's meaning of sexual harassment in the workplace as a discrimination issue, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Committee took a similar approach by defining gender violence, including sexual harassment, as a gender equality issue. To date, over one hundred countries have enacted laws addressing sexual harassment in the workplace. This includes Kenya and 25 other sub-Sahara African countries.<sup>3</sup>

Sexual harassment was not recognised in employment law until the Employment Act of 2007. Many employees experienced this injustice without an opportunity for legal redress. Employers could not explain or even deal with sexual harassment.<sup>4</sup>

The Employment Act recognises sexual harassment in employment. Section 6 of this Act states that sexual harassment involves an employer requesting for any form of sexual activity from an employee that might lead to preferential or detrimental treatment in employment or threatening an employee's future or present employment status. Sexual harassment also involves use of unwelcome sexual language or physical behavior towards an employee that might affect the employee's employment.<sup>5</sup> The Sexual Offences Act also defines sexual

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<sup>1</sup>Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. (2018). Sexual harassment in the workplace in Kenya. *East African Law Journal*, 2018, 184.

<sup>2</sup>Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. (2018). Sexual harassment in the workplace in Kenya. *East African Law Journal*, 2018, 184.

<sup>3</sup> Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. (2018). Sexual harassment in the workplace in Kenya. *East African Law Journal*, 2018, 185.

<sup>4</sup> Muiruri J, 'What does the Kenyan law say about sexual harassment at work?' *Daily Nation*, 3 January 2020 -<<https://www.nation.co.ke/lifestyle/mynetwork/sexual-harassment-at-work/3141096-5405524-t610fj/index.html>> on 3 January 2020.

<sup>5</sup> Section 6 (1), *Employment Act* (2012).

harassment as any form of sexual activity by a person in authority that the other party does not appreciate.<sup>6</sup>

Sexual harassment is not agreed upon by the parties and is unwelcome sexual behaviour which could offend, humiliate or intimidate the victim. It can be physical, verbal or written. The Employment Act of 2007 governs sexual harassment cases that happen at work or any events that are organized by the workplace. One occurrence of this injustice is enough to be held liable. Inasmuch as this offence can happen against any gender, it disproportionately affects women more.<sup>7</sup>

As provided for by the Constitution of Kenya, each individual is entitled to freedom and security of the person.<sup>8</sup> Therefore, to make any unwelcome advances towards a person, whether physical or otherwise, is a clear breach of this provision under Article 29 which is a miscarriage to the law of Kenya. Until 1976, there was no social and shared meaning of sexual harassment.<sup>9</sup> The Employment Act provides for instances that constitute sexual harassment as seen above.<sup>10</sup>

Catharine MacKinnon refers to sexual harassment as pressing of sexual requirements in the context of a relationship of unequal power. Central to the concept is the use of power deprived from one social sphere to lever benefits or impose deprivations in another. In addition, the Equal Employment Opportunity Commission defines sexual harassment as uninvited sexual advances, bidding for sexual favours and other conducts of a sexual nature.<sup>11</sup>

The research is based on the negative effect caused by sexual harassment. In addition, the study also aims at enlightening the audience on the fact that sexual harassment is not merely physical.

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<sup>6</sup> Section 23 (1), *Sexual Offences Act* (2009).

<sup>7</sup> - <[www.humanrightscommission.vic.gov.au/the-workplace/sexual-harassment-at-work](http://www.humanrightscommission.vic.gov.au/the-workplace/sexual-harassment-at-work)>

<sup>8</sup> Article 29, *Constitution of Kenya* (2010).

<sup>9</sup> Paludi A. M. and Barickman B. R, *Academic and Workplace Sexual Harassment: A Resource Manual*, State University of New York Press, Albany, 1991, 2.

<sup>10</sup> Section 6 (1), *Employment Act* (2012).

<sup>11</sup> Paludi A. M. and Barickman B. R, *Academic and Workplace Sexual Harassment: A Resource Manual*, State University of New York Press, Albany, 1991, 3.

## **1.2 STATEMENT OF THE PROBLEM**

What is the law doing in relation to sexual harassment at workplaces in Kenya? The law has set out different safeguards and sanctions to protect employees from sexual harassment. These include being imprisoned for not less than 3 years or a fine not less than 100,000 shillings, or both when convicted.<sup>12</sup> The issuance of a policy statement on sexual harassment is one of the safeguards put in place to create safe working conditions for employees.<sup>13</sup>

However, is what the law of Kenya doing in relation to sexual harassment at workplaces enough? No, this study sets out to explain how the Republic of Kenya can amend its laws to better curb sexual harassment or to provide some sort of compensation to the victims of sexual harassment for the emotional or psychological trauma they have to deal with after going through such an injustice. This includes, adaptation of certain provisions of South Africa's Employment Equity Act and the Code of Good Practice.

## **1.3 JUSTIFICATION/RATIONALE OF THE STUDY**

This study is of legal and academic relevance. Through this study, both men and women can learn that they have rights and remedies against sexual harassment. This study will also sensitize readers on the various measures to protect their workers from sexual harassment or to prevent vicarious liability due to sexual harassment at their places of work. Through this study, readers shall interact with different statutes such as the Employment Act and Sexual Offences Act.

## **1.4 SIGNIFICANCE OF THE RESEARCH**

The aftermath of this study aimed to improve or create safe working environments for employees in Kenya and to enlighten them on the various ways in which they can chide their employers in cases of sexual harassment. For instance, Section 23 of the Sexual Offences Act prescribes imprisonment of not less than three years or the fine of not less than 100,000 shillings only.<sup>14</sup> In addition, Section 6 of the Employment Act provides for issuance of a policy statement on sexual harassment and what this policy statement may contain.<sup>15</sup> Sexual

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<sup>12</sup> Section 23, *Sexual Offences Act* (2009).

<sup>13</sup> Section 6 (2), *Employment Act* (2012).

<sup>14</sup> Section 23, *Sexual Offences Act* (2006).

<sup>15</sup> Section 6 (2 & 3), *Employment Act* (2012).

harassment involves conduct which may constitute a form of sex discrimination.<sup>16</sup> Article 27 of the Constitution of Kenya provides for equality and freedom from discrimination.<sup>17</sup> This research, as shown by Section 6 of the Employment Act, intended to portray sexual harassment as not only being physical.

## **1.5 OBJECTIVES OF THE STUDY**

The objective of this study was to determine whether the right of employees to work in an environment free of sexual harassment is upheld. In addition, the study set out:

1. To establish what the laws of Kenya say in relation to sexual harassment at workplaces.
2. To determine the consequences of sexual harassment.
3. To compare the legal framework concerning sexual harassment in Kenya and that in other countries.

## **1.6 RESEARCH QUESTIONS**

The project set out to answer a variety of questions and these include;

1. What do the laws of Kenya prescribe in relation to sexual harassment at workplaces?
2. What are the consequences of sexual harassment at workplaces on victims?
3. What is the difference between the legal framework concerning sexual harassment at workplaces in Kenya and that in other countries? What lessons does Kenya learn from these frameworks?

## **1.7 HYPOTHESIS**

It is hypothesised that:

1. Women are more likely to face this experience than men
2. The legal framework on sexual harassment in Kenya is not robust enough to protect employees.

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<sup>16</sup>Franke K. M, 'What's Wrong With Sexual Harassment'? 49(4) *Stanford Law Review*, 1997, 692.

<sup>17</sup> Article 27, *Constitution of Kenya* (2010).

## 1.8 THEORETICAL FRAMEWORK

This study is grounded by the feminism theory. Feminism is the advocacy of the rights of women based on a theory of equality of sexes.<sup>18</sup> Feminist author and activist, Lin Farley, explained sexual harassment as repeated and unwanted sexual remarks, looks, suggestions or physical contact that a person finds offensive and causes a person discomfort in their job.<sup>19</sup> Renown feminist Catharine MacKinnon defines sexual harassment as dominance eroticized.<sup>20</sup> It is the sexual expression of the economic dominance of men over women in a workplace.<sup>21</sup>

Feminist Kerri Weisel argued that there is an underlying basis in sexual harassment that the supervisor was heterosexual, or that this injustice stereotyped women, or both. Weisel argues that a male conductor who harasses a female employee is heterosexual and that the administrator's heterosexuality concludes that the harassment is gender-based. This argument concludes that harassment incorporates sexual advances driven by sexual desire.<sup>22</sup>

Making a woman an object of sexual attention could undermine her image and self-confidence as a capable worker. Much of the time, harassment assumes a form that is mainly concerned with gender. 16% to 90% of working women experience sexual harassment in their lifetime according to this sample.<sup>23</sup> Sexual harassment continues to inhibit employment opportunities for many individuals.<sup>24</sup> A US National Women's Study led by the Crime Victims and Treatment Center found 12% of women experienced the injustice in their lives.<sup>25</sup> Sexual harassment comes from legitimated power along with status differences between men and women. Sexual harassment is a mechanism which men use to declare that they are more powerful than women.<sup>26</sup>

Advocates of this aforementioned approach stress gender as a key predictor of who is in danger of harassment, and there is empirical evidence which shows that females experience this injustice more than males.<sup>27</sup> Sexual harassment and inequality are sustained by the

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<sup>18</sup>Easton M, 'Feminism' 33 *Studies in Iconography*, 2012, 99.

<sup>19</sup>Hemel, D, and Dorothy S. L, 'Sexual Harassment and Corporate Law' 118(6) *Columbia Law Review*, 2018, 1594.

<sup>20</sup> Cooper C. G, 48 (1) *The University of Chicago Law Review*, 1981, 185.

<sup>21</sup> Cooper C. G, 185.

<sup>22</sup> Schultz V, 'Reconceptualizing Sexual Harassment', 1702.

<sup>23</sup> Welsh S, 'Gender and Sexual Harassment' 25(1999) *Annual Review of Sociology*, 1999, 170.

<sup>25</sup> Welsh S, 'Gender and Sexual Harassment' 176.

<sup>25</sup> Welsh S, 'Gender and Sexual Harassment' 176.

<sup>26</sup> Welsh S, 'Gender and Sexual Harassment' 176.

<sup>27</sup> Welsh S, 'Gender and Sexual Harassment' 176.

differences in power between male and female workers in an organization. Individuals with formal organizational power may use their ranks to harass their juniors.<sup>28</sup> In workplaces that are influenced by men, but also have women competing with men for jobs, men ensure to stress their coworkers' positions as women over workers. Doing this puts women in their "proper" subservient position.<sup>29</sup> Feminist legal scholars have analogized the law governing workplace harassment to rape law, stating that harassment law has no regard of women's perspectives on sexuality and for its failure to appreciate the unique harm inherent in the fact that harassment is a sexual violation.<sup>30</sup> The study completely agrees with this observation and this will be seen the following chapters.

## 1.8 RESEARCH METHODOLOGY

The research will employ the doctrinal legal research methodology in the study. The research procedure is simply studying case law. The characteristics of doctrinal research are the study is based on legal propositions and appellate court reports and other conventional legal materials readily accessible in the law library are the principal, if not the sole, sources of the data from which conclusions are drawn.<sup>31</sup>

This is defined as research which looks for what the law says in a particular case.<sup>32</sup> It is concerned with analysis of a legal doctrine and how it was developed and applied. It involves finding out the specific statement of the law relating to a certain area of research.<sup>33</sup> For instance, the Employment Act, Constitution of Kenya, cases and so on.

Some of the reasons as to why the study employs this methodology are that there is no shortage of experts. Secondly, this research is more likely to be accepted in the presence of legal research<sup>34</sup> as it is readily accessible.<sup>35</sup> In addition, the study will take a comparative approach to compare the legal framework on sexual harassment in Kenya with the legal framework of other countries such as the United States of America, South Africa and so on.

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<sup>28</sup>Welsh S, 'Gender and Sexual Harassment' 177.

<sup>29</sup> Welsh S, 'Gender and Sexual Harassment' 178.

<sup>30</sup> Schultz V, 'Reconceptualizing Sexual Harassment', 1687.

<sup>31</sup>Jones E. M, 'SOME CURRENT TRENDS IN LEGAL RESEARCH' 24(2/3) *Journal of the Indian Law Institute*, 1982, 205.

<sup>32</sup> Ali I. S, Yusoff M. Z. and Ayub A. Z, 'Legal Research of Doctrinal and Non-Doctrinal' 4(1) *International Journal of Trend in Research and Development*, 2017, 493.

<sup>33</sup> Ali I. S, Yusoff M. Z. and Ayub A. Z, 'Legal Research of Doctrinal and Non-Doctrinal', 493.

<sup>34</sup> Ali I. S, Yusoff M. Z. and Ayub A. Z, 'Legal Research of Doctrinal and Non-Doctrinal', 493.

<sup>35</sup> Jones E. M, 'SOME CURRENT TRENDS IN LEGAL RESEARCH' 205.



However, one of the limitations to this research is highly technical and doesn't consider the economic, social and political importance of the legal process. It is very narrow and restricts choice and range of topics.<sup>36</sup> In addition, this method is only reliable basing on availability of bona fide literature thus the researcher is null in case no credible literature is found.<sup>37</sup>

## 1.9 LITERATURE REVIEW

### 1.9.1 Equality and Non-Discrimination

It seems plausible that minimally harassment involves discrimination, and more particularly, sexual harassment involves sexism. In general, harassers are men in a position of power over female harassees. The functions of these men and women are reinforced by cultural and historical features of systematic sexual discrimination against women. Generally, men have influence over greater power and wealth in society, while women are economically reliant on men. Men are viewed as having the (positive) quality of aggression in sexual and social relations, while women are viewed as (appropriately) passive.<sup>38</sup>

Most victims of sexual harassment are women. This may be explained by various reasons, which include patriarchy or the rule of fathers. Patriarchy continues to thrive in many countries despite the gains, made in efforts to promote gender equality and non-discrimination. It reinforces the gender division of labour, which relegates women to the domestic sphere and privileges men's engagement in the public sphere. It is noteworthy that key decision makers in many organisations are men.<sup>39</sup> It may be argued that what defines or characterizes sexual harassment is the mental state of the harasser or harassee, or both.<sup>40</sup>

Sexual harassment can be broken down into two categories: harassment aimed at 'rewarding' the intended victim if they acquiesce to the demands of the harasser or *quid pro quo* sexual harassment involving conduct that creates a threatening, hostile or uncomfortable

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<sup>36</sup> Ali I. S, Yusoff M. Z. and Ayub A. Z, 'Legal Research of Doctrinal and Non-Doctrinal', 494.

<sup>37</sup>Pradeep M. D, 'Legal Research- Descriptive Analysis on Doctrinal Methodology' International Journal of Management, Technology, and Social Sciences (IJMTS), 4(2), 2019, 101 - <<http://doi.org/10.5281/zenodo.3564954>> on 12 January 2021.

<sup>38</sup>Dodds, S. M, Frost L, Pargetter R, Prior E. W, 'Sexual Harassment' 14(2) *Social Theory and Practice*, 1988, 112.

<sup>39</sup>Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. 'Sexual harassment in the workplace in Kenya' East African Law Journal, 2018, 189.

<sup>40</sup>Dodds, S. M, Frost L, Pargetter R, Prior E. W, 'Sexual Harassment' 117.

environment for the victims making it difficult for the victims to effectively perform their duties.<sup>41</sup>

*Quid pro quo* harassment occurs where an individual, usually a superior, seeks sexual favours or coerces an employee to grant them sexual favours in return for the employee getting an employment related benefit such as securing employment, a promotion or even a pay rise. This kind of harassment usually occurs in hierarchical workplace relationships where individuals who occupy senior positions harass their juniors for sexual favours in return for their juniors 'getting ahead' in their careers.<sup>42</sup>

In the second category, conduct that creates a hostile, intimidating or uncomfortable environment for the victims includes making offensive remarks on the victim's sexuality or with sexual undertones, sharing inappropriate images and inappropriate and unwelcome touching of an individual. Such conduct does not necessarily involve demands of a sexual nature and is often intended to create or inadvertently creates a hostile working environment for the victim.<sup>43</sup>

However, the laws on this injustice in many countries and the sexual harassment policies of many organisations focus more on the *quid pro quo* sexual harassment.<sup>44</sup> Franks argues that because of this biased focus, many employees are usually only aware of *quid pro quo* sexual harassment but not of other forms of sexual harassment.<sup>45</sup>

### 1.9.2 Power

Sexual harassment occurs more in organisations where there is significant difference in the hierarchical power relationship between the harasser and the victim. This is made possible by, as already stated, the formal authority of the superior, which enables them to confer some benefits or equally take adverse action against their junior. Superiors who sexually harass their juniors take advantage of the relationship with the promise of conferring some benefit to their juniors if the junior acquiesces to the superior's sexual harassment. Simultaneously, such superiors overtly or covertly ensure their target victims know that they

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<sup>41</sup>Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. 'Sexual harassment in the workplace in Kenya' East African Law Journal, 2018, 188.

<sup>42</sup>Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. 'Sexual harassment in the workplace in Kenya' East African Law Journal, 2018, 188.

<sup>43</sup>Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. 'Sexual harassment in the workplace in Kenya' East African Law Journal, 2018, 188.

<sup>44</sup>Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. 'Sexual harassment in the workplace in Kenya' East African Law Journal, 2018, 188.

<sup>45</sup>Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. 'Sexual harassment in the workplace in Kenya' East African Law Journal, 2018, 188.

will face adverse consequences should they decline their advances or report the sexual harassment to anyone.<sup>46</sup>

Sexual harassment in the workplace as a function of power is further compounded by the fact that in many instances, victims are supposed to report the sexual harassment to the superiors who may themselves be perpetrators of sexual harassment. Often, the superiors will shield each other or depending on their positions in the organisation, may even be deemed as 'untouchable.' Additionally, the positions that the harassers occupy in the organisation may make it impossible to undertake any meaningful inquiry into complaints of sexual harassment against them.<sup>47</sup>

### 1.9.3 Gender Politics

McLaughlin *et al* allude to sexual harassment as a function of gender politics by referring to it as the 'paradox of power'.<sup>48</sup> The form of sexual harassment prevalent under the paradox of power usually entails uttering inappropriate words touching on the female superior's sexuality with a view to making the working environment intolerable and uncomfortable for her. Consequently, such a superior would rather not oversee the juniors or supervise them and have to put up with their inappropriate conduct. As such, the sexual harassment that characterizes gender politics is not necessarily the *quid pro quo* type of sexual harassment. Rather, it is sexual harassment that is aimed at creating a hostile working environment for a female superior by her male juniors who do not view her as capable of leading them simply on account of her being female.<sup>49</sup>

The female superior's gender is used as a tool to sexually harass her. This type of harassment presents its own unique challenges. As noted above, the sexual harassment policies of most organisations focus on the *quid pro quo* sexual harassment giving little, if any regard other types of sexual harassment. Employees who are subjected to other types of sexual harassment such as those contemplated under the 'paradox of power' typology face institutional barriers in seeking redress.<sup>50</sup>

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<sup>46</sup> Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. 'Sexual harassment in the workplace in Kenya' East African Law Journal, 2018, 190.

<sup>47</sup> Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. 'Sexual harassment in the workplace in Kenya' East African Law Journal, 2018, 191.

<sup>48</sup> McLaughlin as per Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. 'Sexual harassment in the workplace in Kenya' East African Law Journal, 2018, 191.

<sup>49</sup> Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. 'Sexual harassment in the workplace in Kenya' East African Law Journal, 2018, 192.

<sup>50</sup> Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. 'Sexual harassment in the workplace in Kenya' East African Law Journal, 2018, 192.

#### 1.9.4 Culture

Cultural norms that regulate male and female behaviour have a bearing on sexual harassment in the workplace. During interactions between men and women, there are accepted standards of behaviour.<sup>51</sup> In many cultures, men are the hunters in the game of seduction. There are no defined boundaries and the likelihood of offending is great. Despite the various measures taken to combat sexual harassment in a workplace, there is often a disconnect between such laws and culture because for many individuals, conduct that is defined as sexual harassment would easily pass as part of culture.<sup>52</sup>

For instance, it is often difficult for legislative intervention to delineate sexual harassment and wooing, which is part of culture. Consequently, many individuals may knowingly or unknowingly condone sexual harassment due to their cultural background and upbringing. Such individuals may only report if they fall victims to more aggressive forms of sexual harassment. They may not take action for conduct, which they perceive as wooing, but which laws and regulations define as sexual harassment.<sup>53</sup>

Closely related to this is the issue of dressing in the workplace. Duncan Kennedy notes that for some men, sexy dressing by women in the workplace is an invitation to sexually harass such women.<sup>54</sup> For such men, sexy dressing is an invitation to sexually harass a woman on the misguided notion that her dressing warrants the harassment.<sup>55</sup>

#### 1.9.5 Labour

The labour market in various countries, particularly in sub-Saharan Africa, is distorted. The supply of labour far exceeds the demand, leading to high unemployment rates. Consequently, for many individuals securing employment is almost akin to winning the lottery. Once a person secures employment, they want to keep it at all costs.<sup>56</sup> This distorted labour market has contributed to sexual harassment in a workplace as well as none or under

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<sup>51</sup> Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. 'Sexual harassment in the workplace in Kenya' East African Law Journal, 2018, 192.

<sup>52</sup> Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. 'Sexual harassment in the workplace in Kenya' East African Law Journal, 2018, 193.

<sup>53</sup> Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. 'Sexual harassment in the workplace in Kenya' East African Law Journal, 2018, 193.

<sup>54</sup> Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. 'Sexual harassment in the workplace in Kenya' East African Law Journal, 2018, 193.

<sup>55</sup> Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. 'Sexual harassment in the workplace in Kenya' East African Law Journal, 2018, 193.

<sup>56</sup> Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. 'Sexual harassment in the workplace in Kenya' East African Law Journal, 2018, 194.

reporting of sexual harassment. Unscrupulous individuals who hold the power to hire and fire often take advantage of the distorted labour market to sexually harass prospective or current employees in return for the victim securing employment or where the victim is an employee, to secure an employment related benefit or avoid being demoted or altogether dismissed from employment.<sup>57</sup> Consequently, many employees and prospective employees often have no option but to keep the sexual harassment to themselves to avoid any adverse effects they may face if they decline or report the harassment.<sup>58</sup>

In conclusion, the overall effect of sexual harassment is to stifle the voices of the victims who would rather keep quiet about the abuse and put up with it rather than reject or report the harassment and risk dealing with the attendant adverse consequences or either rejecting or reporting the harassment. It is an unpleasant and unnecessary dilemma which many victims face but opt for the 'safer' route of putting up with the harassment rather than standing up to the harasser and the risk being loss of employment. This is further compounded by the fact that many organisations treat their human resource as a commodity, which is easily disposable and replaceable, and would therefore opt for the easier route of dealing with a 'troublesome' employee rather than address the complaints raised by such employee.<sup>59</sup>

## 1.10 LIMITATIONS AND DELIMITATIONS

The study has a couple of limitations. There are no mechanisms in some workplaces for reporting sexual harassment as seen in the case of *M W M vs. M F S* where this was held.<sup>60</sup> In addition, court held that the Respondent does not have a Sexual Harassment Policy as per the law and are therefore in breach and should therefore be punished as provided under Section 88 of Employment Act.<sup>61</sup> While it is a welcome development that many countries have taken legal measures to address sexual harassment in the work place, it is worth noting that existence of legislative provisions has not resulted in a drop in sexual harassment incidences. Various reports indicate that sexual harassment persists in many organizations.

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<sup>57</sup> Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. 'Sexual harassment in the workplace in Kenya' East African Law Journal, 2018, 194.

<sup>58</sup> Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. 'Sexual harassment in the workplace in Kenya' East African Law Journal, 2018, 194.

<sup>59</sup> Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. 'Sexual harassment in the workplace in Kenya' East African Law Journal, 2018, 194.

<sup>60</sup> *M W M v M F S* (2015) eKLR.

<sup>61</sup> *C A S v C S Limited* (2016) eKLR

Additionally, there is still under reporting of incidents of sexual harassment in the workplace.<sup>62</sup>

## **1.11 CHAPTER BREAKDOWN**

**Chapter 1:** This chapter will give an introduction and background to sexual harassment.

**Chapter 2:** This chapter explains the legal framework of Kenya on sexual harassment in workplaces. What remedies and put in place in order to create a safe working environment for women in Kenya?

**Chapter 3:** This chapter will examine the consequences of sexual harassment at workplaces in Kenya. In addition, this chapter will determine the effectiveness of the sexual harassment policy.

**Chapter 4:** This chapter will compare the legal framework concerning sexual harassment in Kenya and that in South Africa and USA to determine what lessons Kenya can pick from the other legal frameworks.

**Chapter 5:** Conclusions and Recommendations.

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<sup>62</sup> Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. (2018). Sexual harassment in the workplace in Kenya, East African Law Journal, 2018, 185.

## **CHAPTER 2**

### **2.1 THE LEGAL FRAMEWORK ON SEXUAL HARASSMENT IN KENYA**

This chapter will start by discussing the legal framework on sexual harassment. Then it will analyze the different causes of sexual harassment by dissecting the history or circumstances that have led to this vile misconduct. Furthermore, this chapter will look at the different remedies that are instilled in order to punish these perpetrators of sexual harassment. The legal framework of Kenya addressing sexual harassment can be seen in various instruments such as the Constitution of Kenya, The Sexual Offences Act, The Employment Act and the Public Offences Ethics Act.

#### **2.1.1 The Constitution of Kenya, 2010**

The Constitution of Kenya prohibits sexual harassment in various ways. For instance, no individual is more important than another and thus are all entitled to equal protection and benefit from the law. In addition to this, there shall not be any discrimination on any grounds.<sup>63</sup> The Constitution also provides that each individual has inborn dignity which must be respected and protected.<sup>64</sup> Furthermore, each individual has a right to freedom and security of the person.<sup>65</sup>

In addition, the Constitution of Kenya states that each individual has the right to fair labour practices which includes the right to reasonable working conditions.<sup>66</sup> Courts have held that sexual harassment amounts to a contravention of these Constitutionally guaranteed rights. For instance, in *P 0 v Board of Trustees, A F & 2 others*, the Industrial Court, in finding that the Claimant had been sexually harassed, stated that sexual harassment is a form of discrimination. Furthermore, the court found that the sexual violence that the claimant had been subjected to and the subsequent termination of her contract of employment amounted to inhuman and demeaning treatment. Ultimately, the court awarded the claimant general damages of KES 3,000, 000.00 for sexual harassment, wrongful and unfair termination in

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<sup>63</sup> Article 27, *Constitution of Kenya* (2010).

<sup>64</sup> Article 28, *Constitution of Kenya* (2010).

<sup>65</sup> Article 29, *Constitution of Kenya* (2010).

<sup>66</sup> Article 41, *Constitution of Kenya* (2010).

addition to the other monetary sums for dismissal without notice and one month's pay for the month she was terminated.<sup>67</sup>

### 2.1.2 The Sexual Offences Act No.3 of 2006

Section 23 of the Sexual Offences Act provides for sexual harassment. This section states that any person with authority, or in public office, who tenaciously makes any unwelcome sexual advances or requests will be guilty of this offence and shall be susceptible to detention for a period of not less than three years or to pay a fee of not less than one hundred thousand shillings or to both.<sup>68</sup> In the case, *Lydiah Mongina Mokaya v St. Leonard's Maternity Nursing Home Limited*, the claimant unlike her male colleague was not provided with accommodation or full transport which was a form of discrimination.<sup>69</sup> The claimant's job application was rejected because of the sour relations between her and the respondent's manager because of the sexual harassment escapades.<sup>70</sup> The respondent's manager sexually harassed the claimant through unwelcome behavior and sexual remarks towards the claimant. These actions were contrary to Article 27 (5) and 28 of the Constitution of Kenya, as well as Section 6 of the Employment Act.<sup>71</sup> The claimant was unfairly terminated from office, however the court found in favour of sexual harassment and discrimination at the workplace.<sup>72</sup>

### 2.1.3 The Public Officers Ethics Act No.4 of 2003

Section 21 of the Public Officers Ethics Act prohibits sexual harassment and defines sexual harassment to involve, a situation where the person committing this offence knows that it is unwelcome; requesting or pressing another for sexual activity or making any kind of sexual comment about another individual.<sup>73</sup> In the case *CSL v CASN*, the respondent was continuously sexually harassed by different staff members of the appellant.<sup>74</sup> Despite having been granted sick leave and providing evidence to show that she had attended hospital for treatment, she was dismissed.<sup>75</sup> The appellant failed to issue a policy on sexual harassment

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<sup>67</sup> Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. 'Sexual harassment in the workplace in Kenya' East African Law Journal, 2018, 199.

<sup>68</sup> Section 23, *Sexual Offences Act* (2009).

<sup>69</sup> *Lydiah Mongina Mokaya v St. Leonard's Maternity Nursing Home Limited* (2018) eKLR.

<sup>70</sup> *Lydiah Mongina Mokaya v St. Leonard's Maternity Nursing Home Limited* (2018) eKLR.

<sup>71</sup> *Lydiah Mongina Mokaya v St. Leonard's Maternity Nursing Home Limited* (2018) eKLR.

<sup>72</sup> *Lydiah Mongina Mokaya v St. Leonard's Maternity Nursing Home Limited* (2018) eKLR.

<sup>73</sup> Section 21, *Public Officers Ethics Act* (2012).

<sup>74</sup> *CSL v CASN* (2020) eKLR.

<sup>75</sup> *CSL v CASN* (2020) eKLR.



and was therefore in breach of section 6 of the Employment act.<sup>76</sup> The court found no merit in the appeal.<sup>77</sup> The laws of the United States provide for employers taking strong action to prevent sexual harassment from taking place in their workplaces such as training the employees against sexual harassment and introducing prevention programs.<sup>78</sup>

#### 2.1.4 The Employment Act No. 11 of 2007

Section 6 of the Employment Act defines sexual harassment. This section further provides for issuing a policy statement on sexual harassment for any employer who employs twenty or more employees.<sup>79</sup> In the case *A S L v National Bank of Kenya Limited & another*, the 2<sup>nd</sup> respondent subjected the applicant to prolonged sexual harassment and physical assault by persistently demanding for sex in order for the applicant to retain her job.<sup>80</sup> The 1<sup>st</sup> respondent has no policy on how to report and deal with sexual harassment, also failed to take any action against the 2<sup>nd</sup> respondent after the applicant lodged a complaint.<sup>81</sup> However, this section of the Employment Act does not protect employees who are less than twenty. In the United states, we see a number of states protecting employees who are less than the prescribed 15 number from sexual harassment.<sup>82</sup>

However, this study criticizes the legal framework of Kenya in relation to sexual harassment in a way that the laws of Kenya do not protect breastfeeding mothers who can be subjected to sexual harassment for doing this at workplaces. The laws of United States extend such protection to breastfeeding mothers, such as in Mississippi.<sup>83</sup> In addition, as seen under the Protection from Harassment Act of 2011 of South Africa, victims or complainants of sexual harassment in Kenya should be given the right to apply to court for a protection order against harassment.<sup>84</sup>

Kenya has also ratified international legal frameworks that protect the rights of employees from sexual harassment at workplaces.

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<sup>76</sup> *CSL v CASN* (2020) eKLR.

<sup>77</sup> *CSL v CASN* (2020) eKLR.

<sup>78</sup> Farkas R, Johnson B, McMurry R, Schor N, Smith A, 'State regulation of sexual harassment' XX (421) Georgetown University Law Center, 2019, 441.

<sup>79</sup> Section 6, *Employment Act* (2012).

<sup>80</sup> *A S L v National Bank of Kenya Limited & another* (2018) eKLR.

<sup>81</sup> *A S L v National Bank of Kenya Limited & another* (2018) eKLR.

<sup>82</sup> Farkas R, Johnson B, McMurry R, Schor N, Smith A, 'State regulation of sexual harassment' 436.

<sup>83</sup> Farkas R, Johnson B, McMurry R, Schor N, Smith A, 'State regulation of sexual harassment' 446.

<sup>84</sup> Section 2, *Protection from Harassment Act* (2011).

### 2.1.5 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1981

Kenya ratified CEDAW in 1985. As already stated, sexual harassment is a gender discrimination issue. Accordingly, CEDAW's provisions on discrimination are applicable to sexual harassment. CEDAW's definition of discrimination against women contemplates any act or omission whose effect is to deny women the full benefit of their fundamental rights in various spheres including the economic sphere. To the extent that sexual harassment against women in a workplace is a form of discrimination, which impairs women in a workplace from the full enjoyment of their fundamental rights and freedoms, it falls under an ambit of discrimination as defined in CEDAW.<sup>85</sup>

CEDAW condemns all forms of discrimination against women and requires State Parties to take suitable measures, including enactment of legislation to prohibit all forms of discrimination against women and to treat the rights of women as equivalent to those of men. Further, State Parties have the obligation to take appropriate measures to eliminate discrimination against women by any person or entity.<sup>86</sup>

### 2.1.6 General Recommendation No 35 on Gender Based Violence Against Women, updating General Recommendation 19

General Recommendation 35 goes beyond characterizing gender-based violence as an equality issue to further characterize it as a human rights issue. It specifically provides for the entitlement of women to a life free from gender-based violence cannot be separated from human rights. Accordingly, subjecting women to sexual harassment, which is a form of gender-based violence, is tantamount to violating the human rights of such victims. Recommendation 29 of the General Recommendation 35 orders state parties to CEDAW to enact legislation to criminalise all forms of gender-based violence against women. General Recommendation 35 requires state parties to CEDAW to pass legislation to criminalise all categories of gender-based violence against women in all spheres. Additionally, Recommendation 29 requires state parties to strengthen legal sanctions against all categories of gender-based violence which are commensurate to the offence and also introduce civil remedies. Section 6 of the Employment Act in Kenya is the principal Act which addresses

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<sup>85</sup> Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. 'Sexual harassment in the workplace in Kenya' East African Law Journal, 2018, 195.

<sup>86</sup> Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. 'Sexual harassment in the workplace in Kenya' East African Law Journal, 2018, 195.

sexual harassment in the workplace in Kenya. Recommendation 30 requires State Parties to ensure that victims of gender-based violence, which includes sexual harassment, have access to justice. This is closely related to Recommendation 40 (c) which requires states to make sure that these victims have access to low cost high quality legal aid.<sup>87</sup>

#### 2.1.7 General Recommendation No 19 on Gender Based Violence

General Recommendation No 19 (hereinafter, 'the Recommendation') by The Committee on the Elimination of all forms of Discrimination against Women addresses Gender Based Violence (GBV). The Recommendation notes that GBV, which includes sexual harassment, is discrimination covered under the definition in CEDAW. General Comment 17 of the Recommendation notes that sexual harassment in the workplace is a form of GBV, which can impair equality in employment as provided for under Article 11 of CEDAW. The upshot of the General Comment number 17 and 18 as read with Article 11 of CEDAW is that sexual harassment in the workplace hampers a realisation of equality. in employment between men and women. Accordingly, State Parties have a duty to enact measures to deal with sexual harassment in the workplace to maintain equality in employment between men and women. This is encapsulated in the specific recommendations of the committee.<sup>88</sup>

#### 2.1.8 International Labour Organisation (ILO) Convention No 111: Discrimination (Employment and Occupation) Convention 1958

The Discrimination (Employment and Occupation) Convention (Hereinafter "Convention 111") addresses discrimination in employment. In its 2017 report, the CEDAW Committee of Experts on the Application of Conventions and Recommendations (CEACR) noted that sexual harassment is a form of discrimination, which falls under the ambit of Convention 111. Accordingly, measures taken by member state to eliminate discrimination in the workplace must also include measures aimed at eradicating sexual harassment in the work place, as sexual harassment by itself is a form of discrimination.<sup>89</sup>

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<sup>87</sup> Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. 'Sexual harassment in the workplace in Kenya' East African Law Journal, 2018, 196.

<sup>88</sup> Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. 'Sexual harassment in the workplace in Kenya' East African Law Journal, 2018, 196-197.

<sup>89</sup> Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. 'Sexual harassment in the workplace in Kenya' East African Law Journal, 2018, 197.

### 2.1.9 International Labour Organisation (ILO) Convention No. 155: Occupational Safety and Health Convention, 1981

While the Occupational Safety and Health Convention (hereinafter "Convention 155) does not specifically address sexual harassment, its provisions are applicable to sexual harassment in the workplace. This is because sexual harassment in the workplace has adverse effects of the health and safety of the victims. Accordingly, sexual harassment in the workplace can be looked at as a job-related health issue.<sup>90</sup>

### 2.1.10 The Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in Africa

The Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in Africa states that parties shall embrace and impose all measures to ensure that there are equal opportunities in employment for women. In this respect, they shall be transparency in employment activities relating to women and combat and punish sexual harassment in the workplace.<sup>91</sup>

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<sup>90</sup> Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. 'Sexual harassment in the workplace in Kenya' East African Law Journal, 2018, 198.

<sup>91</sup> Article 13 (c), *The Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in Africa* (2003).

## 2.2 REMEDIES OF SEXUAL HARASSMENT

The Discrimination (Employment and Occupation) Convention requires each member state to develop a national policy aimed at eradicating discrimination in employment through ensuring equality of opportunity or treatment in employment. Further, member states have an obligation to enact legislation in furtherance of the policy.<sup>92</sup>

The Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in Africa provides for legislative measures to ensure equal opportunities in the workplace. The Protocol also provides for transparency in employment activities and punishment of sexual harassment in a workplace.<sup>93</sup>

Section 23 of the Sexual Offences Act states that any person found guilty of sexual harassment and shall be detained for a term of not less than three years or is to pay a fee of not less than 100,000 shillings or to both.<sup>94</sup>

Information on sexual harassment and on measures to keep women safe from sexual harassment and other forms of violence or coercion in the workplace in their reports by State parties.<sup>95</sup>

Each Member must declare and pursue a national policy which will promote equality of opportunity and treatment in respect of employment and to eliminate any discrimination of discrimination in employment.<sup>96</sup>

Section 6 of the Employment Act provides for a policy statement on sexual harassment and what this policy contains.<sup>97</sup> One of the remedies provided for under the policy is that an employer shall take suitable disciplinary actions against any person under their administration who sexually harasses an employee.<sup>98</sup> In *CSL v CASN*, court found no merit in the appeal as the appellant had failed to issue a policy statement on sexual harassment in the workplace.<sup>99</sup>

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<sup>92</sup> Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. 'Sexual harassment in the workplace in Kenya' East African Law Journal, 2018, 197.

<sup>93</sup> Article 13 (c), *The Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in Africa* (2003).

<sup>94</sup> Section 23, *Sexual Offences Act* (2009).

<sup>95</sup> General recommendation No. 19, *Violence Against Women* (1992).

<sup>96</sup> Article 2, *Discrimination (Employment and Occupation) Convention* (1958).

<sup>97</sup> Section 6, *Employment Act* (2012).

<sup>98</sup> Section 6, *Employment Act* (2012).

<sup>99</sup> *CSL v CASN* (2020) eKLR.

### **2.3 CONCLUSION**

Here, the study explains the different legal provisions set out in the framework of Kenya against sexual harassment. The study also touches the different provisions of other countries that expose the gaps in the laws of Kenya against sexual harassment. The study also analyses the laws of Kenya in relation to sexual harassment and mentions some laws from other legal frameworks that can be adopted in order to strengthen this framework.

## CHAPTER 3

### 3.1 THE CONSEQUENCES OF SEXUAL HARASSMENT IN WORKPLACES

Sexual harassment really is about power as it is abused by those who have it. It is using sex to humiliate, threaten, or force specific workplace behavior which another is not willing to take part of. It is precisely because those with power tend to be men and those without it tend to be women that far more women experience sexual harassment than do men.<sup>100</sup> Women are more likely than men to suffer negative repercussions from that sexual activity, regardless of the manner in which they respond. In addition, women who reject sexual activity at work are more likely than men to suffer job-related consequences, including loss of employment.<sup>101</sup> One study indicated that women were nine times more likely than men to have left a job due to sexual harassment, over twenty times to have been transferred because of sexual harassment, and over three times to have lost a job because of rejection of sexual demands.<sup>102</sup>

Victims of sexual harassment in the workplace suffer various adverse effects, which include psychological and health issues and these in turn affect their productivity at work. Ultimately, such victims may opt out of employment if the harassment does not stop. Alternatively, the victims' employment may be terminated because of low productivity without necessarily establishing the cause of the low productivity. Such eventualities have a snowball effect on both the organisation and the society. Organisations that have an environment that tolerates sexual harassment may experience high staff turnover as employees seek to avoid or stop sexual harassment.<sup>103</sup> *Quid pro quo* sexual harassment and sexual harassment, which creates or is calculated to create a hostile work environment, physically harms the victim and also causes them mental anguish.<sup>104</sup>

In the case of *J W N v Securex Agencies (K) Limited*, the claimant prayed for a declaration that the respondent acted irrationally, unfairly, unreasonably, and disregarded the human

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<sup>100</sup>Leibman, A. J, 'Doubting Thomas: Sexual harassment truth or consequences' 65(3) *Southern California Law Review*, 1992, 1443.

<sup>101</sup> Hebert, L, 'Sexual harassment is gender harassment' 43(3) *Kansas Law Review*, 1995, 603.

<sup>102</sup> Hebert, L, 'Sexual harassment is gender harassment' 43(3) *Kansas Law Review*, 1995, 603.

<sup>103</sup> Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. 'Sexual harassment in the workplace in Kenya' *East African Law Journal*, 2018, 185.

<sup>104</sup> Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. 'Sexual harassment in the workplace in Kenya' *East African Law Journal*, 2018, 198.

dignity of the claimant by making disclosure relating to allegations of sexual nature without verifying or ascertaining their veracity consequently occasioning her and her family psychological and social torment, trauma and distraught contravening Article 28 of the Constitution. It was submitted for the claimant that making false allegations of sexual escapade against the claimant publicly at the parade was dehumanising and an infringement on the claimant's right to dignified treatment as protected in Article 28 of the Constitution of Kenya, 2010.<sup>105</sup>

In a case *A S L v National Bank of Kenya Limited & another*, the 2<sup>nd</sup> respondent subjected the applicant to sexual harassment and physical assault by constantly demanding for sex as a condition for the appellant to keep her job.<sup>106</sup> When the applicant finally said no, she was subjected to sexual and physical assault in public which caused emotional stress, trauma, humiliation, distress, mental anguish and low self-esteem.<sup>107</sup> Similarly, in the case of *Adcock Ingram Healthcare Proprietary Limited and Giwusa Obo Bongani Khumalo, National Bargaining Council of the Chemical Industry & Commissioner Joseph Mphaphuli*, Ms S felt small and disrespected because of the indecent actions and remarks Mr. Khumalo said to her.<sup>108</sup>

Sexual harassment creates an intimidating, uncomfortable and hostile working environment, which negatively affects work output and jeopardizes the career progression or even employment. In one case, Adero, a manufacturing sector worker, was forced to leave work because of continuous attempts by a floor manager to assault her which led to psychological trauma. However, she had to return in order to care for her children and claimed that she had no other choice.<sup>109</sup> Superiors at workplaces overtly or covertly ensure their target victims know that they will face adverse consequences should they decline their advances or report the sexual harassment to anyone. In organisations with weak institutional structures for addressing sexual harassment, superiors can easily get away with sexual harassment because of the power they wield. Most victims comply because they either fear the results of failing to accept the inappropriate overtures or because the superior has the power to

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<sup>105</sup> *J W N v Securex Agencies (K) Limited* (2018) eKLR.

<sup>106</sup> *A S L v National Bank of Kenya Limited & another* (2018) eKLR.

<sup>107</sup> *A S L v National Bank of Kenya Limited & another* (2018) eKLR.

<sup>108</sup> *Adcock Ingram Healthcare Proprietary Limited and Giwusa Obo Bongani Khumalo, National Bargaining Council of the Chemical Industry & Commissioner Joseph Mphaphuli* (2019) The Labour Court of South Africa.

<sup>109</sup> Karega G. M. R, "VIOLENCE AGAINST WOMEN IN THE WORKPLACE IN KENYA: Assessment of Workplace Sexual Harassment in the Commercial Agriculture and Textile Manufacturing Sectors in Kenya" Bureau of Education Research, 2002, 2.



determine their fate in the organisation. To many victims, reporting the harassment is a zero-sum game.<sup>110</sup>

In addition, sometimes the victim is forced to resign from his or her job due to Post-traumatic stress disorder (PTSD) which might be caused by the perpetrator retaining his or her job as was the case in *E v Ikwezi Municipality & another*.<sup>111</sup> The municipality was vicariously liable in this case as they failed to protect the victim from sexual harassment as their senior officer sexually harassed his subordinate.<sup>112</sup>

General Recommendation No. 19 on Violence Against Women General Comment 18 notes that sexual harassment also amounts to discrimination where the victim of sexual harassment reasonably believes that rejecting the inappropriate sexual conduct will adversely affect her employment as manifested through unfair denial of employment related benefits or an uncomfortable working environment.<sup>113</sup> This can be seen in the case; *P O v Board of Trustees, A F & 2 others*, where the 2<sup>nd</sup> respondent physically abused the claimant because she denied his sexual advances. The claimant reported the incident to her workplace, but her contract of employment was terminated by the 2<sup>nd</sup> respondent reason being the claimant's supposed misdeed in in South Africa. In addition, she was not paid her salary for the month of May 2010.<sup>114</sup> Another case is *N M L v Peter Petrausch*, where the claimant states that she was the recipient of unwanted sexual advances by Petrausch in the course of employment, which advances she rebuffed, leading to the termination of her employment.<sup>115</sup>

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<sup>110</sup> Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. 'Sexual harassment in the workplace in Kenya' East African Law Journal, 2018, 189-190.

<sup>111</sup> *E v Ikwezi Municipality & another* (2016) The High Court of South Africa.

<sup>112</sup> Calitz K, 'Sexual Harassment: Why do Victims so often Resign'? Potchefstroom Electronic Law Journal, 2019, 18.

<sup>113</sup> Kameri-Mbote P., Kinyanjui, S., & Gadaffi, Y. 'Sexual harassment in the workplace in Kenya' East African Law Journal, 2018, 196.

<sup>114</sup> *P O v Board of Trustees, A F & 2 others* (2014) eKLR.

<sup>115</sup> *N M L v Peter Petrausch* (2015) eKLR.

### 3.2 THE EFFECTIVENESS OF ACCESS TO JUSTICE OR THE POLICIES PUT IN PLACE TO PREVENT SEXUAL HARASSMENT AT WORKPLACES

Whereas both men and women can be victims of sexual harassment, studies show that women are usually the ones on the receiving end.<sup>116</sup> In addition, this injustice is usually not persecuted when reported and this is because; women fear the stigma that is associated with victims of sexual harassment, or reprisal, fear of not being believed or fear of being blamed for the perpetrator's actions.<sup>117</sup> Secondly there is no adequate support system for victims of sexual harassment, or reporting might lead to loss of one's job.<sup>118</sup> For instance in the case of *ZMM v Mamba NV Lunar Park*, the claimant claimed that the respondent's manager on various occasions sexually harassed her. However, upon refusal of the manager's advances, he proceeded to the claimant's colleague.<sup>119</sup> When she reported both of them to one of the respondent's managers and was later unfairly dismissed.<sup>120</sup>

Article 48 of the Constitution provides for access to justice of all persons by the state and a reasonable fee which shall not impede one's right to access justice.<sup>121</sup> The hindrances to access of justice come in various forms,<sup>122</sup> for instance; the social stigma associated to a victim after he or she reports this injustice and the lack of clear laws on this misconduct.<sup>123</sup> For instance, in the case *A S L v National Bank of Kenya Limited & another*, despite having been sexually and physically assaulted by the 2<sup>nd</sup> respondent, and the fact that the 1<sup>st</sup> respondent had not put in place any policy explaining ways of handling and reporting cases of sexual harassment, the court did not make any orders and directed the case to proceed to full hearing.<sup>124</sup>

Where an employee is sexually harassed by another employee, he or she ought to refer to the policy statement on how the complaint ought to be brought forward.<sup>125</sup> However, in

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<sup>116</sup> Mogapaesi T, 'Sexual harassment in the workplace and women's access to justice: lessons for Botswana from a South African perspective' Commonwealth Law Bulletin, 2019, 433.

<sup>117</sup> Mogapaesi T, 'Sexual harassment in the workplace and women's access to justice: lessons for Botswana from a South African perspective' Commonwealth Law Bulletin, 2019, 433.

<sup>118</sup> Mogapaesi T, 'Sexual harassment in the workplace and women's access to justice: lessons for Botswana from a South African perspective' Commonwealth Law Bulletin, 2019, 434.

<sup>119</sup> *ZMM v Mamba NV Lunar Park* (2020) eKLR.

<sup>120</sup> *ZMM v Mamba NV Lunar Park* (2020) eKLR.

<sup>121</sup> Article 48, *Constitution of Kenya* (2010).

<sup>122</sup> Mogapaesi T, 'Sexual harassment in the workplace and women's access to justice: lessons for Botswana from a South African perspective' Commonwealth Law Bulletin, 2019, 436.

<sup>123</sup> Mogapaesi T, 'Sexual harassment in the workplace and women's access to justice: lessons for Botswana from a South African perspective' Commonwealth Law Bulletin, 2019, 436.

<sup>124</sup> *A S L v National Bank of Kenya Limited & another* (2018) eKLR.

<sup>125</sup> Section 6 (3) (b), *Employment Act* (2012).

some cases the perpetrator of the offence is whom the complaint ought to be forwarded to which creates doubt or questions the effectiveness of the reporting mechanism.<sup>126</sup> For instance, in *S R M v G S S (K) Limited & another*, the 2<sup>nd</sup> respondent who was the Human Resource Director consistently commented on the claimant's body and threatened to withdraw the claimant's office driver if she did not succumb to his sexual advances.<sup>127</sup> When the claimant complained about the 2<sup>nd</sup> respondent, the 1<sup>st</sup> respondent tried to force her to withdraw the claim and said that the 2<sup>nd</sup> respondent had the right to act in any way he deemed fit.<sup>128</sup>

Similarly, in *M W M v M F S*, the claimant never reported the sexual harassment incident as the managing director was the senior most officer of the respondent and because there was no policy statement put in place to deal with issues on sexual harassment.<sup>129</sup> It was held that the respondent would not benefit from the claimant not reporting the case as there was no reporting mechanism put in place.<sup>130</sup>

From data collected at Kenyatta National Hospital, sexual harassment occurred in various forms and the perpetrators were usually male colleagues.<sup>131</sup> There was a reporting procedure but attempts to report were frequently met with threats of dismissal which led to reluctance to report such incidents. In addition, some victims viewed this as a tolerable precondition for career progression.<sup>132</sup> In another study within the Medical College of Nairobi, 27% of the staff had experienced sexual harassment and not to mention, only 38% of the staff knew where to report cases of sexual harassment.<sup>133</sup>

In the United Nations office, majority of the victims prefer to report cases of sexual harassment to external bodies including the police or media as they were more likely to expose the injustice or the perpetrators and help them get justice.<sup>134</sup> When there is an internal

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<sup>126</sup>Nyaga K, 'Examining the reporting mechanism for sexual harassment at the workplace: a focus on section 6 of the Kenyan Employment Act' *Strathmore Law Review*, 2020, 27.

<sup>127</sup> *S R M v G S S (K) Limited & another* (2017) eKLR.

<sup>128</sup> *S R M v G S S (K) Limited & another* (2017) eKLR.

<sup>129</sup> *M W M v M F S* (2014) eKLR.

<sup>130</sup> *M W M v M F S* (2014) eKLR.

<sup>131</sup>Nyaga K, 'Examining the reporting mechanism for sexual harassment at the workplace: a focus on section 6 of the Kenyan Employment Act' *Strathmore Law Review*, 2020, 27.

<sup>132</sup>Nyaga K, 'Examining the reporting mechanism for sexual harassment at the workplace: a focus on section 6 of the Kenyan Employment Act' *Strathmore Law Review*, 2020, 28.

<sup>133</sup>Nyaga K, 'Examining the reporting mechanism for sexual harassment at the workplace: a focus on section 6 of the Kenyan Employment Act' *Strathmore Law Review*, 2020, 28.

<sup>134</sup>Nyaga K, 'Examining the reporting mechanism for sexual harassment at the workplace: a focus on section 6 of the Kenyan Employment Act' *Strathmore Law Review*, 2020, 28.

reporting mechanism, victims may opt not to use it due to fear of retaliation and lack of confidence in the mechanism.<sup>135</sup>

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<sup>135</sup>Nyaga K, 'Examining the reporting mechanism for sexual harassment at the workplace: a focus on section 6 of the Kenyan Employment Act' *Strathmore Law Review*, 2020, 30.

### **3.3 CONCLUSION**

Here, the study provides for some of the consequences of sexual harassment and whether there is access to justice for the victims or complainants of sexual harassment. The objective was to examine the consequences of sexual harassment and these include, termination of employment, psychological and emotional disorders. This chapter also shows how aggressors use their authority to bar victims from accessing justice by threatening to terminate their contracts or even when the employers do not put policy against sexual harassment in place.

## CHAPTER 4

### **4.1 THE LEGAL FRAMEWORK ON SEXUAL HARASSMENT IN SOUTH AFRICA AND USA**

In this chapter, the study will set out different provisions in the legal frameworks of South Africa and USA in relation to sexual harassment and show how the laws of Kenya on sexual harassment at workplaces must be reformed for the greater good of the people of Kenya. In the aforementioned chapter, the provisions of Kenya in relation to sexual harassment have been mentioned. This chapter will therefore get straight to the provisions set out by South Africa and USA to prevent or punish the aggressors in cases of sexual harassment. One of the reasons as to why the study uses South Africa is because South Africa has a Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace whose main objective is the prevention of sexual harassment at workplaces.<sup>136</sup>

#### 4.1.1 South Africa

Here, the study will focus on the Employment Equity Act as it is the main legal framework against sexual harassment at workplaces in South Africa.<sup>137</sup>

An employee can terminate his or her contract and claim compensation in a case where the employer makes the employment intolerable.<sup>138</sup> In the case of *E v Ikwezi Municipality & another*, the second defendant who was employed by the first defendant tried to sexually harass the plaintiff. Upon reporting this incident to the first defendant, not enough was done to prevent this from happening again. For that matter, the plaintiff often ran into her aggressor, the second defendant, which led to more trauma and crying. She then resigned as the working environment had become intolerable. The defendants were jointly and severally liable.<sup>139</sup> Kenya may adopt this law because it gives the victim the chance to step out of a toxic employment.

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<sup>136</sup> Item 1, *Amended Code of Good Practice on the Handling Cases of Sexual Harassment in the Workplace* (2005).

<sup>137</sup> Mogapaesi T, 'Sexual harassment in the workplace and women's access to justice: lessons for Botswana from a South African perspective' *Commonwealth Law Bulletin*, 2019, 442.

<sup>138</sup> Mogapaesi T, 'Sexual harassment in the workplace and women's access to justice: lessons for Botswana from a South African perspective' *Commonwealth Law Bulletin*, 2019, 441.

<sup>139</sup> *E v Ikwezi Municipality & another* (2011), The High Court of South Africa.

A complainant may apply for a protection order against harassment which is provided for under the Protection from Harassment Act.<sup>140</sup> In the case of *Sindisiwe Lovedaly Mnyandu v Thivianathan Padayachi*, the court found in favour of the respondent and issued a final protection order against the appellant.<sup>141</sup> Kenya may adopt this provision because it gives victims of sexual harassment the opportunity to get protection against further attacks. Harassment of an employee is listed as a form of discrimination and is therefore prohibited on anyone.<sup>142</sup> This is also provided for in the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace (herein referred to as the Code).<sup>143</sup>

Section 60 provides for liability of an employer. In a case where an employer is unsuccessful in taking the requisite steps to eliminate the alleged injustice, he or she will be held liable for the injustice that occurred.<sup>144</sup> In addition, the employer must consult all relevant parties to eliminate this injustice.<sup>145</sup> In the case *Media 24 Ltd & another v Grobler*, the first appellant was held to be vicariously liable for the actions of the second appellant who sexually harassed a secretary of the same company. This was justified as the company to whom this injustice was reported did not take any measures to put an end to the offence.<sup>146</sup> In addition, failure to provide a harmless working environment for an employee by an employer is a violation of that employer's duty to the employee.<sup>147</sup> The High court also demonstrated that it had powers to award remedies to a victim whose employer's leadership and disciplinary system were inadequate to do so.<sup>148</sup> All these provisions are beneficial to Kenya because they help to protect the rights of an employee to work in a safe and conducive environment.

Section 50 (2) grants the court power to issue any appropriate order that is fair and equitable which includes payment of compensation, damages, an order directing the employer from preventing such an injustice from occurring in the future, removal of the employer's name from the register and so on.<sup>149</sup> This is beneficial to Kenya as it gives the courts the power to

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<sup>140</sup> Section 2, *Protection from Harassment Act* (2011).

<sup>141</sup> *Sindisiwe Lovedaly Mnyandu v Thivianathan Padayachi* (2014), The High Court of South Africa.

<sup>142</sup> Section 6 (3), *Employment Equity Act* (1998).

<sup>143</sup> Item 3, *Amended Code of Good Practice on the Handling Cases of Sexual Harassment in the Workplace* (2005).

<sup>144</sup> Section 60 (3), *Employment Equity Act* (1998).

<sup>145</sup> Section 60 (2), *Employment Equity Act* (1998).

<sup>146</sup> *Media 24 Ltd & another v Grobler* (2004), The Supreme Court of South Africa.

<sup>147</sup> *Mokone v Sahara Computers (Pty) Ltd* (2010), The High Court of South Africa.

<sup>148</sup> *Mokone v Sahara Computers (Pty) Ltd* (2010), The High Court of South Africa.

<sup>149</sup> Section 50 (2), *Employment Equity Act* (1998).

give compensation to victims which is beyond unfair dismissal. This allows courts to provide for emotional or psychological distress.

The Code has an objective which is to put an end to sexual harassment in workplaces. The Code also provides appropriate courses of action to deal with cases of sexual harassment.<sup>150</sup> The Code also gives a list of more perpetrators and victims of sexual harassment besides an employer and employee.<sup>151</sup> Under the Code, a climate should be created where complainants do not feel like their complaints are shunned, or be afraid of reprisals.<sup>152</sup> In addition, the Code provides for procedures for reporting of sexual harassment claims<sup>153</sup> which isn't provided for in the laws of Kenya. Where a matter is not resolved to the satisfaction of the complainant or perpetrator by internal procedures, he or she may direct the dispute to the Commission for Conciliation, Mediation and Arbitration.<sup>154</sup>

Where the employee requires trauma counselling in cases of serious sexual harassment, the employer should grant him or her additional paid sick leave in case his or her sick leave entitlement has been spent.<sup>155</sup> Kenya may adopt this provision or law as it offers additional help to victims of sexual harassment to recover or at least deal with the trauma one faces.

In *Gaga v Anglo Platinum Ltd & others*, despite the Commission for Conciliation, Mediation and Arbitration having held that the victim had not been offended by the injustice as she did not report it, the Labour Appeal Court held that the Code of Good Practice does not require this act to be derogatory for it to be looked at as sexual harassment.<sup>156</sup> Kenya may adopt this provision as it applies to cases where the victim takes long to appear before the court. In *Grobler v Naspers Bpk*, court held that when an employer is found vicariously liable, both the employer and employee are jointly and severally liable to pay damages to the victim.<sup>157</sup>

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<sup>150</sup> Section 1, *Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace* (2005).

<sup>151</sup> Section 2, *Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace* (2005).

<sup>152</sup> Section 6, *Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace* (2005).

<sup>153</sup> Section 8, *Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace* (2005).

<sup>154</sup> Section 8, *Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace* (2005).

<sup>155</sup> Section 10, *Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace* (2005).

<sup>156</sup> *Gaga v Anglo Platinum Ltd & others* (2011), The Labour Appeal Court of South Africa.

<sup>157</sup> *Grobler v Naspers Bpk* (2004), The High Court of South Africa.



#### 4.1.2 United States of America

Title VII of the Civil Rights Act of 1964 prohibits discrimination on grounds of race and sex in employment activities.<sup>158</sup> Title VII applies to employers with a minimum of 15 employees, trade unions and employment agencies. In addition, this section of the Civil Rights led to the creation of the Equal Employment Opportunity Commission.<sup>159</sup> however, some states provide this protection even to employees whose employer has one or more employees.<sup>160</sup>

The United States has a federal agency known as the Equal Employment Opportunity Commission which is responsible for enforcing laws that prevent discrimination of an employee on grounds of race, sex, age and so on.<sup>161</sup> Employers with a minimum of 15 employees, trade unions and employment agencies are covered by this commission.<sup>162</sup> This commission has the authority to investigate claims of discrimination, and through outreach, education and technical programs works to prevent this injustice.<sup>163</sup>

There are bodies called Fair Employment Practices Agencies which are in charge of putting in place geographic-specific-anti-discrimination laws.<sup>164</sup> The Equal Pay Act prohibits discrimination on grounds of sex when it comes to wages being paid to employees.<sup>165</sup>

Title IX which is an amendment to the Civil Rights Act of 1964 prohibits discrimination on grounds of sex in any education institutions or activities such as admissions into the institutions.<sup>166</sup> In addition, this section of the Civil Rights Act also sets out the procedure to be followed in cases of sexual harassment on the college campus.<sup>167</sup>

Many states demand that employers take affirmative action to prevent sexual harassment in workplaces such as formal training, a written policy against sexual harassment, putting up signs that mention employees' rights and taking all measures possible to ensure that sexual harassment does not occur in workplaces.<sup>168</sup> The Equal Employment Opportunity

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<sup>158</sup>Farkas R, Johnson B, McMurry R, Schor N, Smith A, 'State regulation of sexual harassment' 428.

<sup>159</sup> Farkas R, Johnson B, McMurry R, Schor N, Smith A, 'State regulation of sexual harassment' 429.

<sup>160</sup> Farkas R, Johnson B, McMurry R, Schor N, Smith A, 'State regulation of sexual harassment' 436.

<sup>161</sup> -<https://www.eeoc.gov/overview> on 8 January 2021.

<sup>162</sup> -<https://www.eeoc.gov/overview> on 8 January 2021.

<sup>163</sup> -<https://www.eeoc.gov/overview> on 8 January 2021.

<sup>164</sup> Farkas R, Johnson B, McMurry R, Schor N, Smith A, 'State regulation of sexual harassment' 431.

<sup>165</sup> *Equal Pay Act* (1963).

<sup>166</sup> Farkas R, Johnson B, McMurry R, Schor N, Smith A, 'State regulation of sexual harassment' 432.

<sup>167</sup> Farkas R, Johnson B, McMurry R, Schor N, Smith A, 'State regulation of sexual harassment' 432.

<sup>168</sup> Farkas R, Johnson B, McMurry R, Schor N, Smith A, 'State regulation of sexual harassment' 440.

Commission provides for employees posting notices which describe Federal laws that prohibit discrimination in workplaces on grounds of sex.<sup>169</sup>

The laws of Mississippi also protect breastfeeding mothers who do so in their breaktime from any kind of discrimination.<sup>170</sup>

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<sup>169</sup> Farkas R, Johnson B, McMurry R, Schor N, Smith A, 'State regulation of sexual harassment' 444.

<sup>170</sup> Farkas R, Johnson B, McMurry R, Schor N, Smith A, 'State regulation of sexual harassment' 446.

## **4.2 CONCLUSION**

In summary, here the study shows what strides South Africa and USA have taken to strengthen their legal frameworks to better protect employees against sexual harassment in workplaces.

## **CHAPTER 5**

### **RECOMMENDATIONS AND CONCLUSIONS**

#### **5.1 RECOMMENDATIONS**

This study set out to determine whether the right of employees to work in an environment free of sexual harassment is upheld in Kenya. Chapter 2 of the study mentions the consequences of sexual harassment and access to justice for the victims or complainants of sexual harassment. This meets one of the objectives of the study which is to determine the effects of sexual harassment. Chapter 3 of the study examines the legal framework of sexual harassment while exposing the gaps it has with regard to that of other countries. Chapter 4 provides for the legal frameworks of South Africa and USA in relation to sexual harassment, and this provides for the different amendments Kenya can make to strengthen its laws against sexual harassment in workplaces.

From this study, it is comprehensible that the regulations on sexual harassment in workplaces in Kenya are not sufficient. However, the legislative framework of countries such as South Africa is one that Kenya can learn a thing or two from in regard to this issue. As seen throughout this paper, sexual harassment mainly prevails against females. In addition, the number of reported cases is low because the victims are afraid of the retaliatory acts they might face.

Below are a couple of recommendations towards reducing or preventing cases of sexual harassment in workplaces:

Increasing reporting avenues in workplaces: victims of this offence usually have an issue with reporting this injustice to the specified avenue because in some cases, the aggressor can have an impact on the results of the report.<sup>171</sup> Section 6 (2) of the Employment Act provides for the only reporting mechanism which is governed by the employer.<sup>172</sup> This mechanism can be compromised as it is governed by the employer who can be the aggressor or he or she can simply warn the aggressor or do nothing at all. Other reporting mechanisms should be introduced such as external mechanisms which will encourage the victims to

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<sup>171</sup> Nyaga K, 'Examining the reporting mechanism for sexual harassment at the workplace: a focus on section 6 of the Kenyan Employment Act' *Strathmore Law Review*, 2020, 32.

<sup>172</sup> Section 6, *Employment Act* (2012).

report this injustice or prevent intervention by parties trying to stand in the way of justice.<sup>173</sup> The study reached this conclusion as it is clear that there is a shortage of reporting avenues in Kenya as the legislative framework only provides for a policy on sexual harassment.

Introduction of informal procedures to deal with cases of sexual harassment such as: giving the victim the opportunity and support to explain to the offender that such an injustice is unwelcome, providing confidential advice to the victim about solutions or requesting the superior or relevant officer to speak to the aggressor.<sup>174</sup> This form of resolution is carried out in Sri Lanka and it would be a beneficial practice in Kenya.

In addition, victims can complain to social organizations such as the children and women's committee, women's association or women worker's committee of the trade union.<sup>175</sup> In case these do not exist, another recommendation can be that such organizations are created. The only form of complaint provided for in Kenya is based on the policy issued on sexual harassment therefore informing people of other forms of making complaints would be of great use to the victims.

Launch regular education and training campaigns against sexual harassment in workplaces: these campaigns ought to have a mandatory attendance for all employees, new or old.<sup>176</sup> This is not provided for in Kenya, but it would help if employees were aware of their rights. Some employers as seen in the study do not report cases of sexual harassment in fear of retaliation from the aggressor or other people in positions of authority.

Introduction of prevention of sexual harassment as a contractual obligation: in other words, this should be provided for in the employment contracts stating that the said employee will refrain from any sort of sexual harassment behaviour towards his or her colleagues.<sup>177</sup> Employment contracts in Kenya do not mention liability that will arise in case of sexual harassment. This should be implemented.

I recommend that employers post signs in workplaces that mention the rights of employees to work in an environment free from sexual harassment or discrimination on grounds of sex.

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<sup>173</sup> Nyaga K, 'Examining the reporting mechanism for sexual harassment at the workplace: a focus on section 6 of the Kenyan Employment Act' *Strathmore Law Review*, 2020, 32.

<sup>174</sup> Code of Conduct and Guidelines to Prevent and Address Sexual Harassment in Workplaces, 2013, 11.

<sup>175</sup> Guide on Prevention of Sexual Harassment in the Workplace, 2010, 11.

<sup>176</sup> Guide on Prevention of Sexual Harassment in the Workplace, 2010, 16.

<sup>177</sup> Guide on Prevention of Sexual Harassment in the Workplace, 2010, 18.

This will be useful as it will act as a constant reminder to employees and employers in a workplace.

I recommend that employers are held vicariously liable if sexual harassment occurs during the course of one of their employees or if an employer in a managerial authority does not do anything to prevent or stop this injustice where he or she is aware that it is taking place. This practice is carried out in South Africa and it would be a great addition to the laws of Kenya on sexual harassment.

Introduction of conciliation or mediation commissions to which disputes of sexual harassment may be taken by the complainant. This should be adopted as it offers the victims more options for redress.

## **5.2 CONCLUSION**

This study is based on whether employees are shielded from sexual harassment in workplaces as provided for by legislative framework of Kenya such as the Employment Act 2007. The study has provided the various legal provisions that protect employees from sexual harassment or discrimination in workplaces. However, the study has also shown the shortcomings of these legal provisions. This is through various cases and articles related to sexual harassment. The recommendations provided for above may help to stop this injustice in case they are adopted.

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