

**SEXUAL HARASSMENT IN THE KENYAN WORKPLACE: AN ANALYSIS OF
JUDICIAL REASONING IN DISMISSING SEXUAL HARASSMENT CLAIMS**

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

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JANUARY 2024

9275 Words (excluding footnotes and bibliography)

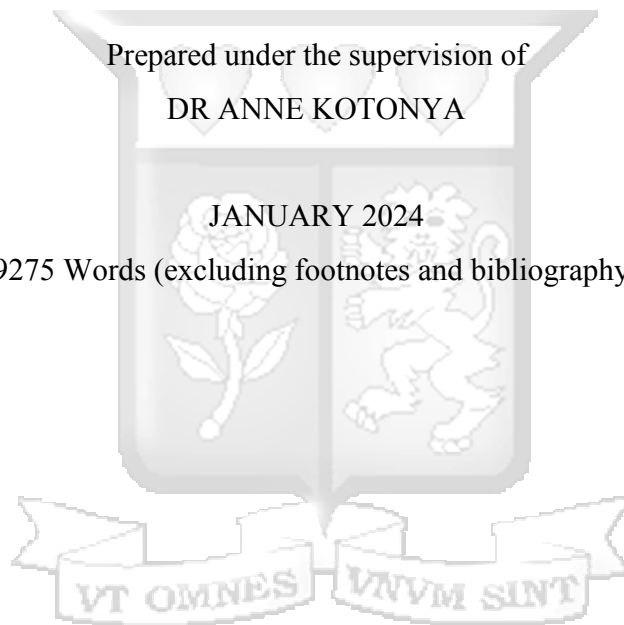
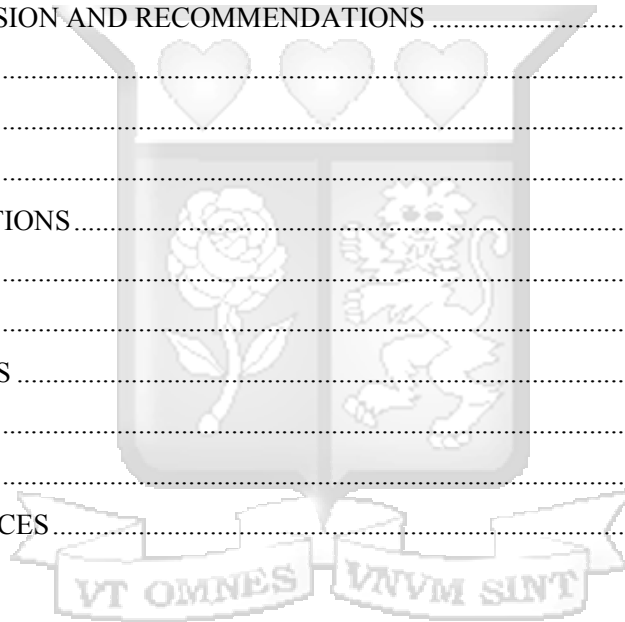


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ACKNOWLEDGEMENT

I would like to thank God for giving me the knowledge, strength and wisdom to undertake this project. I would like to acknowledge the support and guidance of my supervisor Dr. Anne Kotonya. My heartfelt appreciation goes to my family and friends for their love and support throughout this journey.



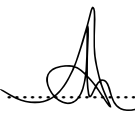
DECLARATION

I, MALUKI MARGARET MUMBUA, 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.

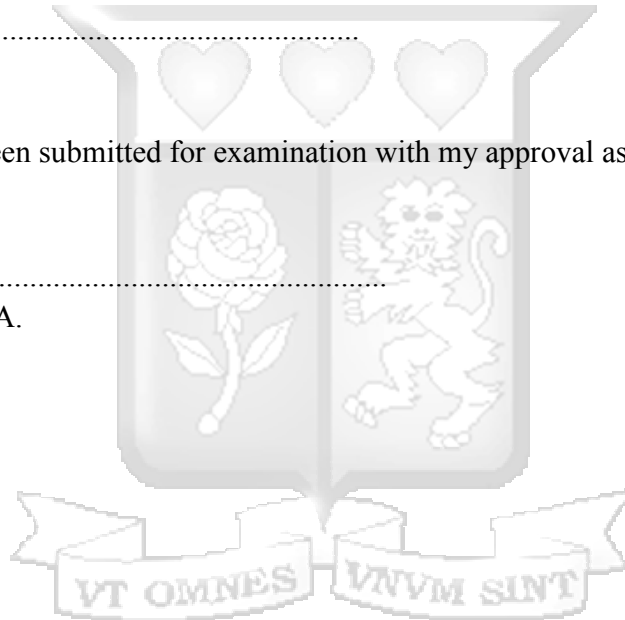
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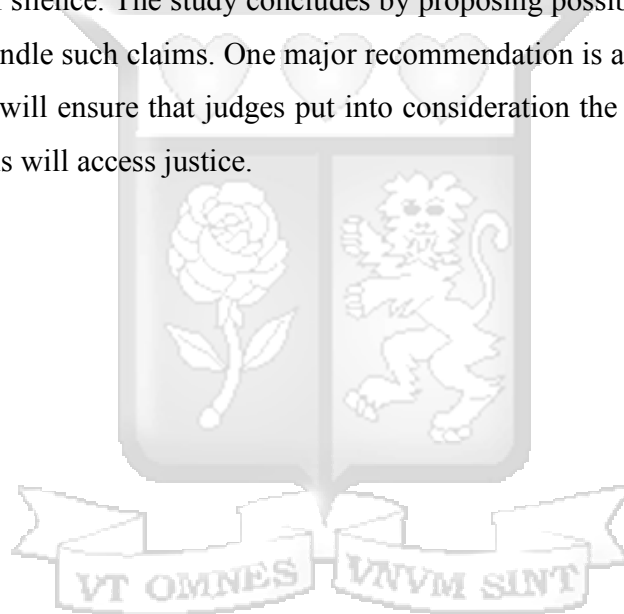
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ABSTRACT

Sexual harassment in the workplace has proven to be a prevalent challenge in Kenya. This study analyses this with a particular focus on the judicial reasoning in dismissing sexual harassment claims when victims do not immediately report the incident. The hypothesis proposes that courts in Kenya have erred in dismissing claims of sexual harassment due to delay in reporting because they fail to consider the realities that the victims go through. Results drawn from case law and scholarly articles reveal that the system is failing victims who develop the courage to come forward only for their claims to be discarded. The study also reveals that as a result of dismissing sexual harassment claims, the victims of sexual harassment lose faith in the legal justice system and this perpetuates a culture of silence. The study concludes by proposing possible recommendations on how judges can best handle such claims. One major recommendation is adapting a human rights-based approach which will ensure that judges put into consideration the realities that victims go through and that victims will access justice.



LIST OF ABBREVIATIONS

CEDAW- Convention on the Elimination of All forms of Discrimination Against Women.
HR Manager- Human Resource Manager.

LIST OF CASES

Associated Provincial Pictures Houses Ltd v Wednesbury Corporation (1948)
BWK v EK and another (2017) eKLR.
Gitau v Kenya Methodist University (2021) eKLR.
GKN v SMFB limited (2018) eKLR.
Henry Hidayla Ilanga v Manyema Manyoka (1961) EA.
JWK v Multimedia University College of Kenya (2019) eKLR.
Kenya Ports Authority v Kenya Power and Lighting Company ltd (2012) eKLR.
LAO v Compact Freight Systems ltd (2020) eKLR.
Lydia Mongina Mokaya v St Leonard's Maternity Nursing Home limited (2018) eKLR.
Siraj Din v Ali Mohammed Khan (1957) EA.
SRM v GSS (K) Limited and another (2017) eKLR.
SWK v Diakonie Katastrophenhilfe (2019) eKLR.

LIST OF LEGAL INSTRUMENTS

Civil Procedure Rules (2010)
Constitution of Kenya (2010)
Employment Act (Act No. 11 of 2007)
Fair Administrative Actions Act (Act No.4 of 2015)
International Labour Organization's Discrimination (Employment and Occupation) Convention
Limitation of Actions Act (Act No. 21 of 1968)
Occupational Safety and Health Act (Act No. 15 of 2007)
Sexual Offences Act (Act No. 3 of 2006)
United Nations Convention on the Elimination of All forms of Discrimination Against Women

CHAPTER 1: INTRODUCTION

1.1 BACKGROUND

Sexual Harassment refers to any direct or indirect requests for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express promise of preferential treatment in employment, threat of detrimental treatment in employment or threat about the present or future employment status of the employee.¹ Additionally, it involves any unwelcome or offensive sexual behaviour, including physical actions, visual displays, and various forms of communication, whether verbal, written, or nonverbal, including electronic means.²

In Kenya, sexual harassment is primarily addressed under the Employment Act. The Act recognizes the right of every employee to work in an environment free from discrimination, including sexual harassment. The Employment Act prohibits sexual harassment in the workplace and outlines the necessary measures to protect employees from sexual harassment.³ The Act requires establishments with twenty or more employees to have a workplace sexual harassment policy. The Act allows employers flexibility in determining the contents of the policy but mandates that it include a definition of sexual harassment, a declaration affirming every employee's right to a workplace free from sexual harassment, an assurance that the employer will take measures to prevent sexual harassment, a commitment to impose disciplinary actions as deemed necessary against individuals under the employer's authority who engage in sexual harassment, guidelines on how complaints can be reported to the employer, and provisions regarding confidentiality and non-disclosure to external parties.⁴

The Sexual Offences Act prohibits sexual harassment, defining the offense in section 23. According to this provision, individuals in positions of authority or holding public office who persistently make unwelcome sexual advances or requests are guilty of sexual harassment. Those

¹ Section 6(1), *Employment Act* (Act No. 11 of 2007).

² Section 23 (1), *Sexual Offences Act* (Act No. 3 of 2006).

³ Section 6, *Employment Act* (Act No. 11 of 2007).

⁴ Section 6(3), *Employment Act* (Act No. 11 of 2007).

found guilty could face imprisonment for a minimum of three years, a fine of at least one hundred thousand shillings, or both penalties.⁵

The Fair Administrative Actions Act stipulates that any administrative actions with potential impact on individuals, such as employment rights and opportunities, must be carried out in a fair, transparent, prompt, effective, and lawful manner. It underscores the requirement to furnish written explanations for any administrative actions taken against individuals, including employees, and to afford every individual the opportunity to present their case before a decision is reached. The Occupational Safety and Health Act provides for a conducive work environment. Section 8 of the Act provides that “an occupier shall not dismiss an employee, injure the employee or discriminate against or disadvantage an employee in respect of the employee’s employment, or alter the employee’s position to the detriment of the employee by reason only that the employee makes a complaint about a matter which the employee considers is not safe or is a risk to his health.”⁶ This can include complaints about Sexual harassment in the workplace.

Kenya has ratified various international legal instruments such as the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). This treaty acknowledges that equality in employment can be significantly undermined when workers face gender-specific violence, such as sexual harassment. The International Labour Organization’s Discrimination (Employment and Occupation) Convention is also a significant instrument which requires employers to provide a conducive workplace and prohibits sexual harassment which is identified as a form of sex discrimination.

Despite the presence of legal safeguards to address sexual harassment in the work place, sexual harassment continues to persist in various organisations.⁷ Additionally, very few cases of sexual harassment are reported. Power differentials in the organization is one of the reasons why employees would fail to report an incidence of sexual harassment.⁸ Most victims would not report

⁵ Section 23(1), *Sexual offences Act*, (Act No. 3 of 2006).

⁶ Section 8, *Occupational Safety and Health Act*, (Act No. 15 of 2007).

⁷ Kameri P, Kinyanjui S and Gadaffi Y, ‘Sexual harassment in the workplace in Kenya’ *East Africa Law Journal*, 2018, 185.

⁸ Kameri P, Kinyanjui S and Gadaffi Y, ‘Sexual harassment in the workplace in Kenya’ 190.

because of the fear of the consequences they might face if they proceed to make a formal complaint.

Although it is expected that victims will seize every chance to halt the harassment, powerlessness will cause them to behave against what is in their best interests, which is to stop the harassment. Despite the existing realities that would bar a victim from reporting sexual harassment or rather, report immediately, courts have considered failure to make prompt complaints as unreasonable. Courts reward employers for adopting sexual harassment policies and procedures and punish victims of harassment for not reporting promptly.⁹ Employers can now easily avoid vicarious liability for sexual harassment at the expense of victims.¹⁰

The failure of a harassed employee to officially report sexual harassment to the employer has almost always been deemed unreasonable by courts.¹¹ Kenyan courts are seen to ignore the realities of victims who failed to make a formal complaint as soon as the alleged incident occurred. The case of *JWK v Multimedia University College of Kenya (2019)* is one good example. In this case, the judge observed that it was not clear why the claimant reported to Langata Police Station eight months after the alleged sexual advances took place. The judge dismissed her claim stating that the claimant is an educated person and had many opportunities to complain about the incident but she failed to bring up the matter.¹² Similarly in *BWK v EK and another (2017)*, the court dismissed the plaintiff's claim on sexual harassment since she failed to lodge her complaint until months after the incident took place. The court held that the plaintiff failed to take the steps which she was ordinarily expected to take and therefore dismissed the claim despite the plaintiff proving that the delay was due to the fact that she was traumatised and was scared of the repercussions that would follow her reporting of the incident.¹³

It appears that we are in a system in which an employer is only required to develop and disseminate an anti-harassment policy and grievance process in order to limit its liability for sexual

⁹ Potter E, 'When women's silence is reasonable: Reforming the Faragher/Ellerth defence in the #Me Too era' 85 *Brooklyn Law Review* 2, 2020, 605.

¹⁰ Grossman J, 'The first bite is free: Employment liability for sexual harassment' 61 *University of Pittsburgh Law Review* 671, 2000, 708.

¹¹ Sherwyn D, Heise M and Zev J, 'Don't train your employees and cancel your '1-800' harassment hotline: An empirical examination and correction of flaws in the affirmative defense to sexual harassment charges' 69 *Fordham Law Review*, 2001, 1286.

¹² *JWK V Multimedia University College of Kenya (2019)* eKLR.

¹³ *BWK v EK and another (2017)* eKLR.

harassment.¹⁴ On the other hand, courts continue to ignore victim's assertions and instead, engage in assumptions about the way victims ought to behave, creating standards that cannot be met.¹⁵ In civil litigation, the standard of proof is not one that eradicates all doubt but rather one that establishes a preponderance of the evidence in favour of one side over the other. To assert that any and all doubt must be eliminated is to set a bar higher than necessary.¹⁶

1.2 STATEMENT OF PROBLEM

The legal framework in Kenya is embedded with safeguards to ensure a work environment that is free from sexual harassment. Despite this, sexual harassment continues to prevail as the number of unreported cases continue to rise.¹⁷ A conspicuous gap exists between the law and the reality on the ground. Courts dismiss claims where the victim delayed in reporting the alleged harassment without considering the circumstances that may cause the delay or rather, immediate reporting. Further, where an employer has put in place sexual harassment policies and redress mechanisms, they are relieved from liability whereas the employee-victim's claim is dismissed because they did not utilise the available mechanisms reasonably. This study will examine the reasonableness of Kenyan courts in dismissing sexual harassment claims on the basis of delay in reporting.

1.3 RESEARCH OBJECTIVES

1. To evaluate the criteria used to dismiss sexual harassment claims by Kenyan Courts and to determine whether it is reasonable.
2. To evaluate the factors contributing to delay in reporting of sexual harassment claims.
3. To evaluate the best approach to be implemented by judges in determining whether to dismiss a sexual harassment claim.

1.4 RESEARCH QUESTIONS

1. What is the criteria used to dismiss sexual harassment claims by Kenyan courts?
2. What are the factors contributing to delay in reporting of sexual harassment claims?

¹⁴ Lawton A, 'Operating in an empirical vacuum: The Ellerth and Faragher affirmative defence' 13 *Columbia Journal of Gender and Law* 2, 2004, 199.

¹⁵ Beiner T, 'Using evidence of women's stories in sexual harassment cases' 24 *University of Arkansas at Little Rock Law Review*, 2001, 117.

¹⁶ *Siraj Din v Ali Mohammed Khan* (1957) EA.

¹⁷ Kameri P, Kinyanjui S and Gadaffi Y, 'Sexual harassment in the workplace in Kenya' 186.

3. What is the best approach to be implemented by judges in determining whether to dismiss a sexual harassment claim?

1.5 HYPOTHESIS

Kenyan courts have made assumptions about how victims should act, assumptions which do not often correspond to actuality.¹⁸ The courts have failed to appreciate and consider context.¹⁹ Thus, Kenyan courts have erred in dismissing claims of sexual harassment due to delay in reporting.

1.6 JUSTIFICATION

Sexual harassment negatively impacts the victim's psychological well-being.²⁰ This may cause hesitation in reporting harassment incidents. Unfortunately courts have formulated assumptions as to how the victim ought to react without taking into consideration the factors advancing delayed reporting. Employees are thus barred from justice despite undergoing harassment. This study will be useful in so far as it seeks to unveil the reasoning behind the delay in reporting of sexual harassment and thus, it purposes to explain that it would not be appropriate for Kenyan courts to rush in dismissing claims because of delayed reporting.

This study will provide information that is useful to judges in determining sexual harassment cases. They will understand that it is not automatic for victims to report sexual harassment immediately after the incident occurs. The study will be beneficial to employers given that it emphasizes on the importance of employers putting in place sexual harassment policies that can be approachable by aggrieved employees. This study will also benefit employees in so far as it will aid them in preparing a strong case in the event sexual harassment claims escalate to court.

1.7 THEORETICAL FRAMEWORK: LEGAL REALISM THEORY

Judicial decision making is of crucial importance in the administration of justice. This work relies on the theory of legal realism. Legal realism questions the traditional understanding of the law as an impersonal, rule-based system and places an emphasis on the influence of social, political, and

¹⁸ Beiner T, 'Using evidence of women's stories in sexual harassment cases' 117.

¹⁹ Zev J, Sherwyn D and Nicholas F, 'When rules are made to be broken' 109 *Northwestern University Law Review* 1, 2015, 157.

²⁰ Kimberly T and Suzanne S, 'Job-related and psychological effects of sexual harassment in the workplace: Empirical evidence from two organizations' 82 *Journal of Applied Psychology* 3, 1997,412.

practical factors on the decisions made by judges. Legal realism asserts that judges are impacted by a variety of outside factors and do not base their decisions exclusively on neutral legal principles.

The theory is affiliated with jurists such as Oliver Wendell Holmes. According to legal realism, judges assess the result of a lawsuit before determining if it aligns with an established legal principle.²¹ This theory suggests that judicial decision making has two main arguments. Firstly, judges often hold a preconceived notion of the desired outcome in a case, influenced by notions of fairness, characteristics of the involved parties, ideological beliefs, and societal policies.²² The second is that judges typically find ways to align their preferred outcomes with existing legal principles, thereby justifying their decisions within the framework of the law.

Jerome Frank, a realist scholar, contends that judges' decisions are not rooted in systematic examination of law but rather on their intuitive judgement known as the judicial hunch. The judicial hunch was described by Justice Hutcheson as 'intuitive flash of understanding that makes the jump-spark connection between question and decision and at the point where the path is darkest for the judicial feet, sets its light along the way'.²³

Legal realism theory provides an understanding on judicial decision making and sheds light on how judges may be influenced by various factors that are beyond legal doctrines. Though legal realists argue that legal doctrine is not the sole determinant of decisions, they do not discredit its importance. Legal doctrine provides a guideline but judges may depart from it when they believe that justice and practical considerations demand it. Many critics have argued that the legal realism theory overstates the extent to which the law is 'riddled' with gaps and ambiguities.²⁴ However, while certain elements of legal realism are viewed as obsolete, most legal scholars accept that realists have been fruitful in their endeavour to challenge formalistic and mechanistic legal concepts.

²¹ Martin P and George C, *Jurisprudence: Text and readings on the philosophy of law*, 3ed, Thompson/ West, 2008.

²² Tumonis V, 'Legal realism and judicial decision making' 19(4) *Mykolas Romeris University Faculty of Law*, 2012, 1367.

²³ Hutcheson J, 'Judgement intuitive: The function of the hunch in judicial decision' 14(3) *Cornell Law Review*, 1929, 274.

²⁴ Jain V, 'Legal realism and legal positivism' Law Sikho, <https://blog.ipleaders.in/legal-realism-legal-positivism/> on 3 January 2021.

The legal realism theory has been utilised in this study to emphasise on the importance of taking into consideration prevailing social norms and other practical factors in shaping judges' decisions. In deciding whether to dismiss a claim, a judge's decision will be more reasonable if they consider the victims' assertions and reasoning for delayed reporting and this would inform their decision making.

1.8 LITERATURE REVIEW

1.8.1 On the consequences of dismissing sexual harassment claims

There is no doubt that vigilance is the price of liberty. The maxim of delay defeats equity stipulates that where an injured party is slow to demand a remedy for a wrong attributed to them, courts may be reluctant to grant them a remedy. Claims ought to be brought forward as soon as possible so as to preserve quality evidence.²⁵ Although it is important for claims to be filed promptly, it is also significant for courts to consider the overriding objective principle which is aimed at delivery of justice without undue regard to procedural formalities.

Calistus Mboya states that it is the litigants' aspirations that the person who is right will walk away as the victor in the dispute.²⁶ When the case is dismissed because of technicalities of procedure, the aspirations of litigants are not met.²⁷ Where a court dismisses a claim because of delayed reporting, without considering the reasons as to the delay, it indicates that the court has occasioned injustice to the claimant.

Thus, when it comes to sexual harassment claims, courts ought to consider the realities that are faced by the victims of sexual harassment. Such victims may struggle to come forward due to a variety of reasons and it may take a long time for them to process the harm that they went through and to accept that they were sexually harassed.²⁸ Sophie Poinar posits that the courts' expectations

²⁵ Poinar S, 'Are delayed complaints of sexual harassment not worthy of human rights protection? A case study against the human rights limitation system' *WJ Legal Stud.*, 2023, 14.

²⁶ Mboya C, 'The principle of the overriding objective: The case of Kenya'

https://www.academia.edu/25271351/The_Principle_of_The_Overriding_Objective_The_Case_of_Kenya

²⁷ Mboya C, 'The principle of the overriding objective: The case of Kenya'

https://www.academia.edu/25271351/The_Principle_of_The_Overriding_Objective_The_Case_of_Kenya

²⁸ Poinar S, 'Are delayed complaints of sexual harassment not worthy of human rights protection? A case study against the human rights limitation system' 18.

for victims to come out sooner is unsympathetic and ignorant to the challenges they face.²⁹ She further mentions that judges have failed to give much thought to the journey of trauma and recovery.

Augustus Bonner mentions in his article that the problem with legal rules is that they appear to be disconnected from social realities.³⁰ He mentions that where the law's protection is limited to those who respond immediately by lodging formal complaints, then the law appears to be on a collision course with reality.³¹ Every person is entitled to a fair hearing. Any system of government founded on the rule of law must provide access to justice for everyone with a valid legal claim, including the vulnerable, and the disadvantaged members of society.³²

1.8.2 On factors contributing to delayed reporting of sexual harassment claims

Courts describe women who delay in making complaints of sexual harassment as being unreasonable. They impose unrealistic expectations which only few can meet.³³ Such expectations do not reflect the reality of how victims respond to sexual harassment. The injustice faced by victims could be solved if courts would take a more contextualised approach to assessing reasonableness.³⁴

Patricia Eastel argues that the thought that victims will immediately report the offence overlooks the emotional trauma and distress experienced by victims, which can impact their memory and ability to disclose incidents of sexual harassment.³⁵ Balogh posits in his article that sexual harassment causes mental distress and thus, individuals may need time to deal with the traumatic

²⁹ Poinar S, 'Are delayed complaints of sexual harassment not worthy of human rights protection? A case study against the human rights limitation system' 19.

³⁰ Bonner A, 'Legal design and reporting harassment: Preliminary considerations on the comparative efficacy of U.S and Brazilian sexual harassment law' 3(2) *Curitiba*, 2012, 417.

³¹ Bonner A, 'Legal design and reporting harassment: Preliminary considerations on the comparative efficacy of U.S and Brazilian sexual harassment law' 417.

³² Helbling J, Kalim W and Nobirabo P, 'Access to justice, impunity and legal pluralism in Kenya' 47(2) *The Journal of Legal Pluralism and Unofficial Law*, 2015, 349.

³³ Hebert C, 'Why don't reasonable women complain about sexual harassment?' 742.

³⁴ Grossman J, 'The first bite is free: Employment liability for sexual harassment' 728.

³⁵ Eastel P, 'She said he said: Credibility and sexual harassment cases in Australia' 31 *University of Canberra Faculty of law* 5, 2008, 337.

events.³⁶ As such, courts should consider that employees may refrain from reporting because they experience natural psychological responses to the harassment.³⁷

Other common reasons that may cause employees to delay in reporting are the concerns that they will not be believed and the fear that the employer will not take up any action in response to the claim.³⁸ Employees who are sexually harassed indulge in self-blame and thus, they attempt to manage the harassment in their own way. Deb Tyler and Patricia Eastel mention in their article that some women find that their only power is to adjust their behaviour in the hope that the harassment will cease.³⁹ Unfortunately, sexual harassment will still continue. Victims may not report sexual harassment immediately as they may not be aware of their rights. Majority of these victims fall under unrepresented groups and women working in male dominated industries.

Kelly Nyaga notes in his article that there is evidence that numerous victims hesitate to utilise internal reporting procedures to officially report harassment.⁴⁰ This reluctance primarily stems from the power dynamics involved, particularly when the perpetrator holds a position of authority within the workplace. In such cases, victims may fear potential retaliation from the perpetrator, which could serve as a deterrent for other victims to step forward.

CONTRIBUTION

This study will contribute to the discussion of sexual harassment in Kenya. It will serve as a critique on how judges handle sexual harassment claims when victims do not make prompt complaints. Although other contributions have attempted to do this, most of the scholarly works focus on factors that may cause delayed reporting. This contribution will be unique in so far as it not only explains the factors that cause delayed reporting but also adds on to how judges should engage in reasonable decision making and not dismiss claims just because of a delayed filing of a complaint.

³⁶ Balogh D, 'The effects of delayed report and motive for reporting on perceptions of sexual harassment' 48, 2003, 339.

³⁷ Beverly E, 'Why don't victims of sexual harassment come forward sooner' 2017, <https://www.psychologytoday.com/us/blog/> on 16 November 2017.

³⁸ Miller C, 'It's not just fox: Why women don't report sexual harassment' New York times, 10 April 2017 <https://www.nytimes.com/2017/04/10/upshot/its-not-just-fox-why-women-dont-report-sexual-harassment.html> on 10 April 2017.

³⁹ Tyler D and Eastel P, 'The credibility gap' 23 *Alternative law journal* 5, 1998, 214.

⁴⁰ Nyaga K, 'Examining the reporting mechanism for sexual harassment at the work place: A focus on Section 6 of the Kenyan Employment Act' 1 *Strathmore Law Review* 1, 2020.

1.9 METHODOLOGY

In this study, the nature of research will be qualitative as it relies on secondary sources such as books, articles, case laws and reports as the main source of data. The study will utilise a deductive approach with the chapters establishing a premise from which the claim will be derived. The deductive approach works best for this study since it uses the research objectives as a guide to eventually prove the hypothesis of this study.

This study discusses the circumstances that may contribute to delay in reporting by victims. This will entail a doctrinal analysis of courts decisions on how they perceive delay and will also rely on books and legal articles. The study will utilise a doctrinal analysis in order to illustrate that there exists a legal gap in the court's decision to dismiss sexual harassment claims. A critical analysis will be used to illustrate the dismissal of cases due to delay in reporting. It will rely on statutes and scholarly articles.

1.10 CHAPTER BREAKDOWN

Chapter one is the introductory part of this study. It features research objectives and the subsequent research questions and the theoretical framework. Thus, it sets the foundation of the subsequent chapters. Chapter two will evaluate the criteria used to dismiss sexual harassment claims by Kenyan Courts and to determine whether it is reasonable. It will make the argument that the criteria used is unreasonable given that the judges have failed to consider the realities of victims of sexual harassment. Further, it will discuss the consequences of dismissing sexual harassment due to delayed reporting.

Chapter three will then discuss on the factors contributing to delay in reporting sexual harassment. Chapter four will provide an approach to be implemented by judges in determining whether to dismiss sexual harassment claims. The final chapter will present the findings derived from the study and proceed to make recommendations on the way forward.

CHAPTER 2: THE CRITERIA USED TO DISMISS SEXUAL HARASSMENT CLAIMS

2.1 INTRODUCTION

This chapter looks into the criteria used by courts to dismiss sexual harassment claims. It focuses on reasonableness as the cornerstone of administrative justice, emphasising the soundness of decisions made by judges. This chapter also looks into grounds of dismissing a case and examines whether the grounds used to dismiss sexual harassment claims are reasonable.

2.2 REASONABLE DECISION MAKING

Every person has the right to administrative action that is reasonable and procedurally fair.⁴¹ According to the doctrine of reasonableness, reasonableness is about the soundness of a decision. It is an appropriate standard of administrative justice that values the accountability of public officials such as judges.⁴² In *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*, it was stipulated that a decision is unreasonable if it is absurd and outrageous in defiance of logic.⁴³ Reason is the foundation of legal logic, and any rule or legislation supported by sound reasoning has fewer issues and is more likely to be accepted and followed. Therefore, reasonableness is used to assert legitimacy. With regards to sexual harassment claims, relating the decision of judges to dismiss the claims on the basis of delay with the facets of reasonable decision making clearly show that their decision is unreasonable. According to the first facet, a decision should be founded on logic. A judge's decision to dismiss a claim due to delayed reporting is based on unrealistic expectations which does not consider the realities that victims go through.⁴⁴

Reasonable decision making is characterised by fairness. Decision makers are under an obligation to make decisions while taking into consideration the rules of natural justice.⁴⁵ Thus, judges have a duty to guarantee that all parties receive equal treatment and that prejudice or bias has no bearing on the decision. This entails treating everyone equally when presenting their case and

⁴¹ Article 47, *Constitution of Kenya* (2010)

⁴² Brynard D, 'Justifying administrative action for reasonableness: A quest for accountable public administration' 21(1) *Department of Public Administration and Management University of South Africa*, 2013, 69.

⁴³ *Associated Provincial Picture Houses limited v Wednesbury Corporation* (1948), Court of Appeal of England and Wales.

⁴⁴ Hebert C, 'Why don't reasonable women complain about sexual harassment?' 742.

⁴⁵ Sossin L, 'An intimate approach to fairness, impartiality and reasonableness' 27 *Queens Law Journal*, 2002, 5.

administering the law impartially. It seems that judges' decision to dismiss sexual harassment claim would not be fair as it appears that courts assume employers to be objective and non-discriminatory entities that do not tolerate harassment in the work place just because they have sexual harassment policies. They reward employers for mere compliance with employment laws and punish victims for 'lack of urgency' in lodging a complaint. Judges ought to look beyond employers' paper policies and procedures to determine whether harassment policies are accessible and effective.⁴⁶

Further reasonable decision making entails taking into consideration the claimant's fundamental human and constitutional rights. Even in the face of conflicting interests or acts by the government, a fair judgement should preserve and promote these rights and ideals. The other element on reasonable decision making is that, before a judge makes a decision, he ought to look at the potential consequences and impact of the decision on the society. Dismissing sexual harassment claims due to delayed reporting has the potential consequences of discouraging victims from coming forward. The rate of unreported cases will increase and victims will continue to suffer while the perpetrators walk Scott free.

2.3 ANALYSIS OF KENYAN CASES

In order to understand whether the criteria used to dismiss sexual harassment claims is unreasonable, it is imperative to look into several past cases and analyse the decisions of the judges. The cases discussed in this part illustrate how judges are glued on formal legal norms, and are not embracing the realities that victims of sexual harassment go through. As such, the analysis portrays the importance of the legal realism theory in that judges will make reasonable decisions if they take into consideration the social realities that victims of sexual harassment go through.

In *BWK v EK and another*, the claimant brought a sexual harassment suit against the defendant who was a manager at the hotel she worked at as the Guest Relations Officer.⁴⁷ She claimed that the defendant habitually abused, sexually assaulted and oppressed her. She further alleged that on

⁴⁶ Lawton A, 'Between Scylla and Charybdis: The perils of reporting sexual harassment' 9(3) *University of Pennsylvania Journal of Labor and Employment Law*, 2007,606.

⁴⁷ *BWK v EK and another* (2010) eKLR.

one particular occasion, the defendant went to her house and tried to have sexual intercourse with her.

As a result of the defendant's actions, she claimed that she suffered acute embarrassment, mental torture and trauma. Consequently, she requested some time off as her ability to work was impacted by the incident. In re-examination, the claimant stated that she did not report immediately because she was scared. According to her, the hotel did not take her seriously nor took appropriate action on her complaint hence the reason for the suit. The court held that 'the plaintiff failed to take the steps which she was ordinarily expected to take. She did not lodge a complaint until months after the incident.' Therefore, the suit was dismissed.

In the case of *JWK v Multimedia University College of Kenya and another*, the claimant was employed by the respondent as the Director Corporate Affairs.⁴⁸ She claimed that between various dates spanning from mid-January 2012 to June 2012 she was sexually harassed by the male guards who commenced a physical search on her instead of fetching a female guard to undertake the search. During the search, one of the guards fondled her breasts and other parts of her body under the guise of checking whether she had any stolen property. She averred that this was done despite protests from her.

Due to the purported sexual harassment, she endured significant pain and distress, often finding herself in tears following intimidations from the respondents. On cross-examination she contended that she reported the matter to Langata police station after her report with the 1st respondent was not handled properly. The court dismissed the suit and held that the claimant failed to take the steps she was ordinarily expected to take. She did not lodge a complaint until months after the incident despite the fact that she stood in a place of authority in the workplace, she is an educated person and she had many opportunities to report the incident.

In *SWK v Diakonie Katastrophenhilfe*, the claimant was employed by the respondent as a receptionist and was later promoted to the position of Logistics officer.⁴⁹ The claimant contended that the respondent's director used sexual innuendos on several occasions with the aim of embarrassing and humiliating her in the presence of her colleagues and also occasionally described her as too old to be moulded or as a single lady who could not represent the interest of the

⁴⁸ *JWK v Multimedia University College of Kenya and another* (2019) eKLR.

⁴⁹ *SWK v Diakonie Katastrophenhilfe* (2019) eKLR.

respondent in meetings. She further maintained that the director harassed her by using insults like ‘if you continue eating that cake your ass will become big.’ The court held that it found no merit in the claimant’s allegation of sexual harassment and insults since the claimant never raised the issue with her supervisor or raise the issue directly to the Headquarters until the end of her contract.

In *GKN v SMFB Limited*, the claimant was employed by the respondent as a business development officer.⁵⁰ She testified that her manager made sexual requests to her which she declined. She raised the issue with the Human Resource (HR) who requested her to send him an email on the complaint. The Claimant submitted that she had reported the matter via email which email the respondent’s witness confirmed that they had blocked thus making it difficult for the claimant to access it and produce evidence. The claimant argued that the respondent's actions were intended to obstruct the course of justice.

Further, she submitted that the respondent never produced any anti-sexual harassment policy which would have been applicable to its employees nor did it confirm that it had such a policy displayed somewhere for employees to comply with. She submitted that in the absence of such a policy the employees were vulnerable and exposed to sexual harassment since there was nothing to bind the offenders. The court dismissed the claim and held that the claimant did not adduce evidence to prove that she suffered sexual harassment.

In *LAO v Compact Freight Systems ltd*, the claimant was employed as the HR Officer.⁵¹ She averred that she was called to the office of the Finance Controller and found him in the company of two colleagues. She claimed that the Finance Controller sexually harassed her, in the presence of the two colleagues, by fondling her breasts. The claimant averred that the incident triggered an asthmatic attack upon which she rushed home to get her inhaler. She reported the alleged incident to the General Manager. On cross-examination, the General Manager admitted that there was no sexual harassment policy in place. The court dismissed the sexual harassment claim and ordered the respondent to put in place a sexual harassment policy within the next three months from the date of judgement.

Although in *GKN v SMFB limited* and *LAO v Compact Freight systems limited* there was no delay in reporting sexual harassment, the cases are of great importance to this study as they illustrate the

⁵⁰ *GKN v SMFB limited* (2018) eKLR.

⁵¹ *LAO v Compact Freight Systems ltd* (2020) eKLR.

unreasonable decision to dismiss the claims when it was found that the organisations did not have sexual harassment policies in place. The employers in both cases were not held liable for their failure to implement sexual harassment policies. Further, the claimants in both cases were imposed upon evidentiary standards that were not realistic. In *GKN v SMFB limited*, the claimant did not have access to the email as the HR blocked the same. Unfortunately the court failed to consider this factor and dismissed her claim.

2.4 GROUNDS FOR THE DISMISSAL OF A CASE

Various legal systems frequently dismiss civil lawsuits for a variety of reasons, such as inadequate evidence, procedural technicalities, or inability to comply with legislative requirements. Some cases involving allegations of sexual harassment are dropped because the victims did not disclose the incident immediately. This part examines the justifications for dismissing civil lawsuits and evaluates whether it is appropriate to reject allegations of sexual harassment when there is a delay in reporting.

Procedural technicalities is one of the primary grounds for dismissal of civil suits. These technicalities could relate to issues such as the statute of limitations or the failure to follow court rules. In *Kenya Ports Authority v Kenya Power and Lighting Company ltd*, Justice Mwongo defined procedural technicality as the things concerning the modes of proceedings and the rules regulating formality rather than substantive rights under law.⁵²

Courts are obliged to adopt an approach which prefers the determination of a case on merit rather than on procedural technicalities. Undue regard to procedural technicalities would depart the end goal of the law which is to promote justice.

Justice should be administered without undue regard to procedural technicalities. A judge should not dismiss sexual harassment claims just because of a delay in filing the claim. In the case of *Gitau v Kenya Methodist University*, Justice Mativo presented that a resolution on merit occurs when a lawsuit is decided according to rules designed to give parties the opportunity to participate in presenting the proofs and reasoned arguments on which a court can decide a case.⁵³ Thus, alleged victims of sexual harassment ought to be given the opportunity to present their case and explain

⁵² *Kenya Ports Authority v Kenya Power and Lighting Company ltd* (2012) eKLR.

⁵³ *Gitau v Kenya Methodist University* (2021) eKLR.

their reasons for the failure to make a prompt complaint. Sexual harassment victims frequently encounter particular difficulties that may discourage them from coming forward with their reports on time. These difficulties might include trauma, power disparities at work, and fear of retaliation. Determining whether delayed reporting is appropriate requires an understanding of these difficulties.

Civil lawsuits may be dismissed by courts if the plaintiffs do not have enough proof to back up their allegations. Usually, the plaintiff has the burden of proof, and the court may rule that the lawsuit has no merit if the plaintiff is unable to support their claims with concrete evidence. One of the main tenets of a limitation system is the preservation of evidence. The quality and availability of evidence often diminishes with the passage of time.⁵⁴

However, due to the nature of sexual harassment, such as the fact that sexual harassment does not often occur in the public, there are often no witnesses and thus there may be no material evidence to confirm an incident of sexual harassment. As such, the objective of preserving sexual harassment should be a peripheral tenet.⁵⁵ Even though it is usually advised to report sexual harassment as soon as possible, waiting to report does not always mean that a claim is not legitimate. Courts ought to take into account whether the victim's recollection of specific facts or the collection of evidence is seriously hampered by the delay. It might not make sense to reject the claim if the impact is minimal.

Courts fail to be sympathetic to victims who claim they did not immediately complain of the sexual harassment because of the consequences they would face from reporting, and even when courts acknowledge the risk of retaliation as a valid reason for delay, they demand concrete evidence that retaliation was probable if the employee reported the harassment.⁵⁶

2.5 CONSEQUENCES OF DISMISSING SEXUAL HARASSMENT CLAIMS

Reporting an incident of sexual harassment is a deeply personal and often fraught decision, involving significant risks to one's personal and professional well-being. When victims decide to walk this difficult path, they do so in the hopes of receiving safety and support, but more than

⁵⁴ Mew G, Rolph D and Zacks D, *The law of limitations*, 4ed, *LexisNexis*, 2013.

⁵⁵ Poiner S, 'Are delayed complaints of sexual harassment not worthy of human rights protection? A case study against the human rights limitation system' 12.

⁵⁶ Hebert C, 'Why don't reasonable women complain about sexual harassment?' 725.

anything, they want their experiences to be acknowledged and the harm they have suffered to be validated. However, the dismissal of sexual harassment claims, particularly on the grounds of delayed reporting, can inflict profound consequences upon those who have bravely chosen to come forward.

2.5.1 Psychological impact on victims

When victims decide to take the significant personal or professional risks associated with getting help, they are looking for support and safety. However, they also want their experiences to be acknowledged in order to receive recognition for the harm they have suffered.⁵⁷ Dismissing sexual harassment claims because victims did not make a prompt complaint can be deeply traumatic for those who have the courage to come forward.

Victims may develop a sense of powerlessness and futility whereby they feel that they have taken an enormous risk to come forward only for their cries to be discarded.⁵⁸ Further, victims may develop a sense of worthlessness and self-doubt and this may influence their perceptions to presume that the legal system is inaccessible. Thus, the traumatic experiences that victims face when they come out perpetuates a culture of silence where victims feel deterred from reporting fearing their claims will be dismissed.⁵⁹

2.5.2 Culture of impunity

Impunity prevails when perpetrators of illegal activity are not held liable for their actions because the victims cannot access judicial institutions or get sufficient redress from them.⁶⁰ Numerous reports indicate that sexual harassment persists in many organisations. Additionally, many of the incidents are under-reported.⁶¹ The challenge with under-reporting is that sexual harassment disciplinary procedures is predicated on the victim reporting sexual harassment.⁶²

⁵⁷ Epstein D, 'Discounting credibility: Doubting the stories of women survivors of sexual harassment' 51(2) *Seton Hall Law Review*, 2020, 321.

⁵⁸ Epstein D and Goodman L, 'Discounting credibility: Doubting domestic violence survivors' credibility and dismissing their experiences' 167(2) *University of Pennsylvania Law Review*, 2019, 449.

⁵⁹ Smith C and Freyd J, 'Institutional betrayal' 69(6) *American Psychologist*, 2014, 575.

⁶⁰ Helbling J, Kalim W and Nobirabo P, 'Access to justice, impunity and legal pluralism in Kenya' 350.

⁶¹ Karega R, 'Violence against women in the workplace in Kenya: Assessment of workplace sexual harassment in the commercial, agricultural and textile manufacturing sectors in Kenya', 2002,4, <https://laborrights.org/sites/default/files/publications-and-resources/Kenya.pdf> on May 2002.

⁶² Lawton A, 'The bad apple theory', 13(4) *George Mason Law Review*, 2005, 847.

Many victims may fail to report sexual harassment because they have seen how previous cases have been mishandled.⁶³ Where a victim lodges a complaint and pursues a formal investigation, they often emerge more violated and victimised than they were before they reported.⁶⁴ They fail to obtain legal recourse because of the nature in which judges handle their claims. Rather than encouraging victims to report, dismissal of victims' claims may hinder reporting as victims may decide that reporting is not worthwhile because their claims are likely to be disregarded.⁶⁵

The victims end up losing hope of attaining justice and this may discourage other victims from coming forward. As such, the number of under-reported cases continues to increase while the perpetrators are not held liable for their actions.

2.5.3 Undermining the gravity of sexual harassment

Judges run the risk of downplaying the seriousness of sexual harassment by dismissing sexual harassment claims due to delayed reporting. This may have a cascading effect on attitudes within society and the propagation of myths that downplay the severity of sexual harassment. Women, who are often the primary targets of sexual harassment, may find their credibility undermined when their claims are not taken seriously. This perpetuates a broader societal pattern where women's voices and experiences are marginalised, reinforcing existing gender disparities. Further, societal progress toward gender equality is impeded when judges dismiss sexual harassment claims. It discourages those advocating for equal rights and protection under the law. This erosion of confidence in the law hampers broader efforts to create a more just and equitable society.

The dismissal of sexual harassment claims due to delayed reporting will undermine the gravity of sexual harassment as harmful gender norms will begin to be normalised. This is because, when claims are not taken seriously, it sends a message that certain behaviours, even those that are abusive and discriminatory are acceptable.

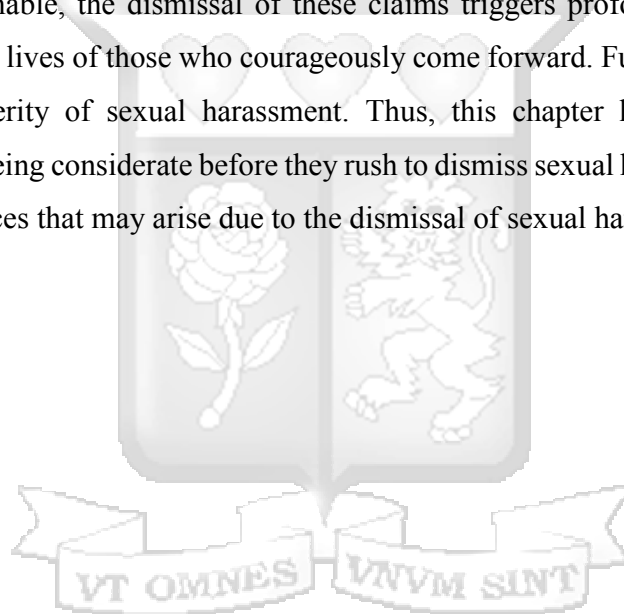
⁶³ Meyersfeld Bonita, 'Sexual harassment and disciplinary procedures: Never the twain shall meet', 10 *Constitutional Court Review*, 2020, 308.

⁶⁴ Grossman J, 'The culture of compliance: The final triumph of form over substance in sexual harassment law' 26 *Harvard Women's Law Journal*, 2003, 52.

⁶⁵ Messina B, 'Redefining reasonableness: Supervisory harassment claims in the era of #MeToo' 168 *University of Pennsylvania Law Review*, 2020, 1082.

2.6 CONCLUSION

This chapter explains that the criteria used by courts to dismiss sexual harassment claims is unreasonable. With regards to decision making, judges decide to dismiss the claims without regard to logic and realities that deter victims from making prompt complaints. Their decisions to dismiss claims due to delayed reporting jeopardises the victims' human and constitutional rights and bars them from access to justice. Further when looking into the grounds for dismissing claims, judges have undue regard to procedural technicalities that they dismiss claims due to delayed report without hearing out the victims' reasons for delayed reporting. Further they impose high evidential thresholds that are unrealistic for the victims to meet. Given that the criteria for dismissing sexual harassment is unreasonable, the dismissal of these claims triggers profound consequences that reverberate through the lives of those who courageously come forward. Further, they foster myths that trivialise the severity of sexual harassment. Thus, this chapter has emphasised on the importance of judges being considerate before they rush to dismiss sexual harassment claims given the adverse consequences that may arise due to the dismissal of sexual harassment claims.



CHAPTER 3: BARRIERS TO REPORTING SEXUAL HARASSMENT

3.1 INTRODUCTION

Sexual harassment continues to be an issue in the workplace and yet, only few cases are reported. Why are victims not coming out? The law has numerous procedural and substantive obstacles that significantly reduce not only the number of meritorious complaints of harassment that are filed but also the number of cases in which any meaningful review of the actions of employers is undertaken. This chapter looks at the legal hurdles that may hinder a victim from lodging a prompt complaint or rather reporting. It reflects the realities that victims go through and thus gives more emphasis on why judges should be reasonable in handling sexual harassment claims.

3.2 LIMITATION OF ACTIONS

The Limitation of Actions Act outlines the time frames in which a court proceeding in respect of a civil claim must be instituted. Where an individual believes that they have a claim to remedy an injury, loss or damage, the Limitation of Actions Act specifies the amount of time that an individual has to institute a claim against a defendant. The Act stipulates that an action founded on tort (personal injury) may not be brought after the end of three years from the date on which the cause of action accrued.⁶⁶

There are various underlying rationales for limiting the period of instituting a claim. The main objective of limiting the time within which a suit can be instigated is to promote repose. In the context of limitation of actions, repose entails peace of mind and reduction of uncertainty about the future.⁶⁷ Another principal reason is to prevent bringing claims where evidence is lost and witnesses are no longer available.⁶⁸ Further with regards to ensuring credible evidence, the limitation of actions seeks to ensure accuracy in fact finding and to deter the assertion of fraudulent claims.⁶⁹

⁶⁶ Section 4(2), *Limitation of Actions Act* (Act No. 21 of 1968)

⁶⁷ Tyler T and Andrew J, 'The puzzling purpose of statutes of limitation' 28(1) *Pacific Law Journal*, 1997, 460.

⁶⁸ Poinar S, 'Are delayed complaints of sexual harassment not worthy of human rights protection? A case study against the human rights limitation system' 14.

⁶⁹ Tyler T and Andrew J, 'The puzzling purpose of statutes of limitation' 471.

Given the importance of having limitation of actions, how is it a barrier to reporting sexual harassment? The answer lies in the nature of sexual harassment and the realities that victims go through. Having a limitation of actions on sexual harassment is at odds with the ways in which many victims respond.⁷⁰ Depending on the nature of the harassment, it might take the victim some time to process what has happened to them.⁷¹ Sexual harassment can take various forms such as inappropriate calling, requests for sexual favours or physical acts of sexual assault. The nature and severity of the harassment may trigger different reactions in victims which may affect how they report the incident.

Victims may decide to report or refrain from reporting the harassment based upon the nature of their relationship with the harasser.⁷² Majority of the victims of harassment hold subordinate positions in the workplace. The power differentials may hinder the victim from lodging a complaint since the victim might fear the repercussions that might follow such as losing their job.⁷³ The victim might decide to tolerate the harassment or fail to report since they are dependent on the job to survive. For the few victims with the ability to easily move from one job to another without sacrificing their salary, finding other employment may be the best solution.⁷⁴

Victims may rely on social support networks, like friends and family, rather than formal channels to voice their complaints about the harassment they endure at work. These connections offer consolation and occasionally serve as a warning not to take any action against the perpetrator. This is explained by the theory of planned behaviour which stipulates that an employee's intention to report may be influenced by their fellow employees or friends as victims tend to confide in them. Their peers might advise them not to report the matter and hence the victim remains silent.⁷⁵

⁷⁰ Fitzgerald L, 'Sexual harassment: Violence against women in the workplace' 48(10) *American psychologist*, 1993, 1070.

⁷¹ Fitzgerald L, 'Sexual harassment: Violence against women in the workplace' 1074.

⁷² Morgan P, 'Risking relationships: Understanding the litigation chances of sexually harassed women' 33(1) *Law and Society Review*, 1999, 71.

⁷³ Kameri P, Kinyanjui S and Gadaffi Y, 'Sexual harassment in the workplace in Kenya' 190.

⁷⁴ Lawton A, 'Between Scylla and Charybdis: The perils of reporting sexual harassment' 605.

⁷⁵ Nguyet L, 'A thematic and quantitative analysis of unreported sexual harassment and assault: Utilizing social listening in the twitter sphere' Unpublished LLM thesis, University of Lethbridge, Alberta, 2021,27.

3.3 INTERNAL GRIEVANCE PROCEDURES

The Employment Act provides for the components of a sexual harassment policy.⁷⁶ The Act states that an employer shall issue a policy statement on sexual harassment explaining how complaints of sexual harassment may be brought to the attention of the employer. Therefore the law empowers the employer to prevent and correct harassment in the workplace. However, the law does not offer effective oversight of the procedures used by most institutions. As such, institutions could comply with the law by having sexual harassment policies but which do not meet the criteria stipulated in the law. Such policies are inefficient in curbing sexual harassment, thus discouraging victims from using them.

Internal grievance procedures could be a barrier to reporting sexual harassment due to conflict of interests. Internal grievance procedures are obscured by an inherent conflict within the institution as it tries simultaneously to eliminate sexual harassment from the workplace and to protect itself from liability.⁷⁷ When a victim lodges a complaint via the internal mechanisms, there could be a potential legal claim against the party controlling the procedure and thus the institution's goal could not be consistent with those of the victim.⁷⁸ Therefore, it should come as no surprise that a large number of harassment victims decide against using the internal grievance procedures of their institutions, thinking that either nothing will be done or that they will suffer unfavourable effects.⁷⁹

Another reason as to why the grievance mechanisms could be an obstacle is because they are private in nature and hence, there is little public scrutiny. Institutions could handle incidents of sexual harassment as they deem fit. The manner in which they would choose to handle the matter could be inconsistent with the law hence aggravating the victim. Potential victims may fear to approach the grievance mechanisms as they would assume that they would also be aggrieved.

⁷⁶ Section 6(3), *Employment Act* (Act No. 11 of 2007)

⁷⁷ Kihnley J, 'Unravelling the ivory fabric: Institutional obstacles to the handling of sexual harassment complaints' 25(1) *Law and Social inquiry*, 2000, 69.

⁷⁸ Lawton A, 'Tipping the scales of justice' 27(3) *Ohio Northern University Law Review*, 2001, 527.

⁷⁹ Nyaga K, 'Examining the reporting mechanism for sexual harassment at the work place: A focus on Section 6 of the Kenyan Employment Act' 1 *Strathmore Law Review* 1, 2020.

3.4 HIGH EVIDENTIARY THRESHOLD

Evidence plays an important role in proving or disproving a defendant's guilt and building a solid case. The evidential threshold in civil cases is on the balance of probability. In sexual harassment claims the burden of proving that sexual harassment took place is on the employee-victim. Sexual harassment is a serious offence and should not be taken lightly. In *Henry Hidaya Ilanga v Manyema Manyoka*, the court held that, 'although the standard of proof required in a civil case is not as high as the standard of proof in criminal cases, it would be wrong to imply that the standard of proof is the same in all civil cases. The standard varies according to the gravity of the matter to be proved. The more serious the allegation, the higher the degree of probability that is required.'⁸⁰

There is no doubt that sexual harassment is a serious charge as it demeans one's dignity and has the effect of reducing one to the status of a chattel. Thus, even though a higher standard of proof is required, caution must be exercised so as not to escalate the standard of proof to a higher pedestal. In *Siraj Din v Ali Mohammed Khan*, the court stated that, 'the quantum of proof in civil litigation is not such as to resolve all doubt whatsoever. To say that all doubt whatsoever must be dispelled is invoking a test that is even higher than the standard required in criminal matters.'⁸¹

Judges are failing to exercise great caution and as such, are imposing stringent standards that victims of sexual harassment cannot meet. They fail to consider the nature of sexual harassment which is, it does not often occur in the open as it often only involves the victim and the perpetrator.⁸² A high evidentiary threshold can be a barrier to reporting sexual harassment since victims may find it challenging to meet stringent proof requirements, discouraging them from pursuing legal action.

The burden of gathering substantial evidence can contribute to underreporting due to fears of not meeting the demanding standards set by the law. Victims may perceive the legal process as intimidating, hence deterring them from coming forward and seeking justice for the harassment they have experienced.

⁸⁰ *Henry Hidaya Ilanga v Manyema Manyoka* (1961) EA.

⁸¹ *Siraj Din v Ali Mohammed Khan* (1957) EA.

⁸² Poinar S, 'Are delayed complaints of sexual harassment not worthy of human rights protection? A case study against the human rights limitation system' 16.

3.5 SUMMARY JUDGEMENT

A court may give summary judgement against a claimant or defendant if it considers that the party has no real prospect of succeeding on the claim or defence, and there is no other compelling reason why the case or issue should be disposed of at trial.⁸³ Summary judgement is a tool for courts to eliminate cases that have little to no factual support.⁸⁴ It has been contended that compared to other types of cases, summary judgement is granted more frequently in employment-discrimination cases.⁸⁵ More often than not, summary judgement is granted to the employer defendant.⁸⁶

Summary judgement can potentially act as a barrier to reporting sexual harassment. Victims may be discouraged from reporting sexual harassment if they feel that their cases are being prematurely dismissed, without full review of the available legal arguments.⁸⁷ Further, sexual harassment victims may feel that the legal system is biased against them if they think that courts routinely grant summary judgement in favour of defendants without giving the case enough thought.

3.6 CONCLUSION

Many victims of sexual harassment fail to report sexual harassment or delay in reporting because of various obstacles in the law. This chapter has addressed a number of legal barriers that prevent victims from coming forward. These barriers not only discourage victims from seeking justice but also perpetuate a culture of silence and impunity in workplaces. It therefore explains that it would be unreasonable for judges to expect prompt complaints of sexual harassment, when the law appears to box victims in. Therefore, it is imperative for lawmakers and judicial authorities to reassess these legal hurdles and adopt measures that fosters an environment where victims feel empowered to report harassment without fear of reprisal or systemic obstacles.

⁸³ Order 36, *Civil Procedure Rules* (2010)

⁸⁴ Beiner T, 'The misuse of summary judgement in hostile environment cases' 34(1) *Wake Forest Law Review*, 1999, 72.

⁸⁵ Stone K, 'Shortcuts in employment discrimination law' 56(1) *Florida International University Legal Studies*, 2012, 112.

⁸⁶ Lawton A, 'Tipping the scales of justice' 532.

⁸⁷ Lawton A, 'Tipping the scales of justice' 537.

CHAPTER 4: A HUMAN RIGHTS-BASED APPROACH TO SEXUAL HARASSMENT CASES

4.1 INTRODUCTION

This chapter proposes the approach that judges should implement in deciding whether to dismiss sexual harassment cases due to delayed reporting. It proposes a human rights based approach as the best approach to be implemented by judges when dealing with sexual harassment cases. This chapter suggests that without a human rights-based approach, it is less likely that victims of sexual harassment will realise their rights and thus, they will not have access to justice.

4.2 ELEMENTS OF A HUMAN-RIGHTS BASED APPROACH

The Constitution of Kenya stipulates that the purpose of recognising and protecting human rights is to uphold the dignity of individuals and to advance social justice and the realisation of the potential of human beings.⁸⁸ Further, it states that every person has the right to initiate court proceedings claiming that a right or fundamental freedom has been infringed.⁸⁹ Without knowledge about human rights, access to justice is placed in question. A human rights-based approach to access to justice has various elements.

The first element is, focusing on the immediate as well as underlying causes of the problem. This entails looking at the factors impeding access to justice such as lack of safeguards to access, or inadequate mechanisms that uphold justice.⁹⁰ Victims' responses often mirror those of the reporting and justice mechanisms. For instance, people who have observed the authorities respond to sexual harassment cases in a prompt, discreet, and extremely professional manner are more likely to report than those who have seen the authorities fail to provide adequate care.⁹¹

The second element entails identifying the position of the claim holder.⁹² The claim holder could be a vulnerable member of society such as the poor, ethnic minorities, women or older persons.

⁸⁸ Article 19(2), *Constitution of Kenya* (2010)

⁸⁹ Article 22, *Constitution of Kenya* (2010)

⁹⁰ United Nations Development Programme, Practice Note, 2004,5.

⁹¹ Warega N, 'Access to justice for sexual violence against women: A socio-legal analysis of case reporting in Kenya' in Emma Lubaale, Ashwanee Budoo-Scholtz (eds), *Violence against women and criminal justice in Africa*, Springer Nature Switzerland, 2020, 153.

⁹² Gutterman A, 'What is access to justice?' 2022, 3.

Sexual harassment has a variety of psychological and physical effects on victims such as stress, low self-esteem, insomnia and suicidal ideation.⁹³ Victims of sexual harassment are vulnerable members in the society and therefore judges should ensure that such people get access to justice by considering their circumstances and allowing them to seek legal recourse. They ought to appreciate the courage of the victims who decide to speak up even though they might not have come out sooner.

The third element is that this approach identifies the duty bearers which includes the people who should be held accountable. In workplace sexual harassment, the duty bearer is the employer as he is to be held liable for the harassment of his employees. Further the employer is compelled to issue a sexual harassment policy and ensure that the policy is effective in the sense that it should explain how complaints may be brought to the attention of the employer.⁹⁴

The fourth element is assessing the capacity gaps of claim holders to be able to claim their rights and of duty bearers to be able to meet their obligations. With regards to claim holders, some of the capacity gaps that may inhibit reporting of sexual harassment cases are lack of reporting guidelines. For example, the Sexual Offences Act neither provides for the reporting guidelines for victims nor elaborates on the guidelines to service providers to ensure support to the victims.⁹⁵

4.3 APPLICATION OF HUMAN RIGHTS-BASED APPROACH BY JUDGES

Courts often allow employers to escape liability when they prove that they have sexual harassment policies and/or employees failed to take up reasonable action such as utilising the sexual harassment policies to express their grievances.⁹⁶ They ignore the difficulties that the victims might face in attempting to report the alleged occurrence despite the workplace having a sexual harassment policy. For instance, in *SRM v GSS (K) Limited and another*, the claimant was a victim

⁹³ Malik S and Farooq Y, 'General and sexual harassment as predictors of post-traumatic stress symptoms among female health professionals', 10(1) *World Journal of Medical Sciences*, 2014, 43.

⁹⁴ Section 6(3), *Employment Act* (Act No. 11 of 2007)

⁹⁵ Warega N, 'Access to justice for sexual violence against women: A socio-legal analysis of case reporting in Kenya', 165.

⁹⁶ Robert D and Paul S, 'Employer liability for employee sexual harassment: A judicial policy- making study', 60(2) *Public administration review*, 2000,131.

of sexual harassment by the Human Resource (HR) Manager. She attempted to use the internal reporting mechanisms which directed her complaints to the same HR Manager.⁹⁷

In sexual harassment claims, judges can apply a human rights-based approach by directing their focus on whether an employer had an effective sexual harassment policy. In addition to this, the judges should question whether the complaints procedure is approachable by the vulnerable victims rather than focusing on delayed reporting which could be valid given the challenges victims undergo. In *Lydia Mongina Mokaya v St Leonard's Maternity Nursing Home Limited*, the courts stated that 'it is expected that when sexual harassment arises, action should be taken towards reporting the same to the employer or his agents. However, sometimes the prevailing environment may not be facilitative of this.'⁹⁸ In doing so, judges will have met the elements discussed above. This is because firstly, the factors inhibiting reporting would be identified, secondly, the duty bearer will be held accountable for their mistakes and thirdly, the existing capacity gaps will be identified hence, potentially advocating for redress mechanisms.

Judges could also apply a human rights-based approach by using the doctrine of equitable tolling. The doctrine of equitable tolling stipulates that, when certain factual circumstances exist that make it impossible for claimants to bring their claims on time, the court may pause the statute of limitations in order to provide the claimant more flexible time to bring their case.⁹⁹ Thus, the doctrine suspends the running of the limitations period against the claimant who failed to file their complaint on time, through no fault of their own.¹⁰⁰

Courts should consider those situations such as psychological or emotional trauma, fear of reprisal and other factors which made the claimant unable to file a timely complaint in order to apply the equitable tolling. This will enable the victims to access justice and the defendants will not be able to benefit from their wrongdoings.¹⁰¹ By applying the doctrine of equitable tolling, all the elements of a human rights-based approach will be fulfilled given that the court will be able to consider that

⁹⁷ *SRM v GSS (K) Limited and another* (2017) eKLR.

⁹⁸ *Lydia Mongina Mokaya v St Leonard's Maternity Nursing Home limited* (2018) eKLR.

⁹⁹ Seiner J, 'Time, equity and sexual harassment', 12(2) *UC Irvine Law Review*, 2022, 578.

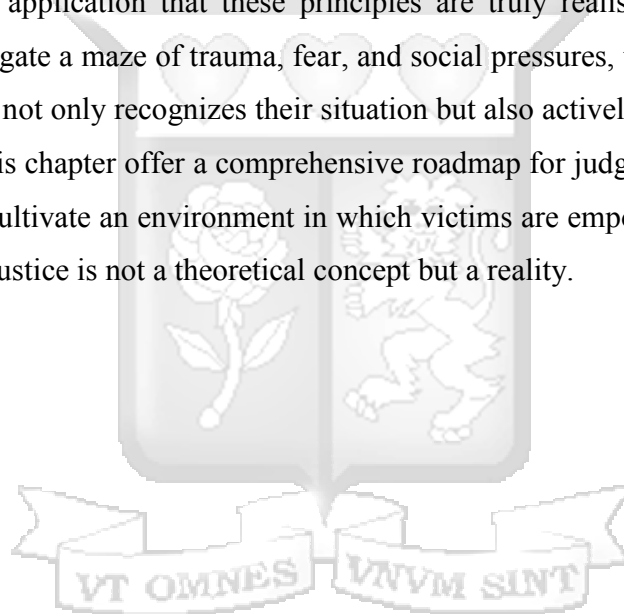
¹⁰⁰ Rudolph D, 'Workers, dignity and equitable tolling', 15(1) *Northwestern Journal of Human Rights*, 2017, 127

¹⁰¹ Seiner J, 'Time, equity and sexual harassment', 576.

failing to make a prompt complaint was not the fault of the victim but rather, because of the challenges that the victims undergo.

4.4 CONCLUSION

It is necessary to have a considerate approach, particularly when it comes to cases involving sexual harassment. This chapter explains how a human rights-based approach becomes the lighthouse that directs judges' decisions. An approach like this emphasises how critical it is to acknowledge and protect each person's inherent dignity, especially those who belong to marginalised groups in the society. Although the Constitution of Kenya enshrines the rights and freedoms of individuals, it is through practical application that these principles are truly realised. Given that victims frequently have to navigate a maze of trauma, fear, and social pressures, they should have access to a justice system that not only recognizes their situation but also actively works to make it. The elements outlined in this chapter offer a comprehensive roadmap for judges. By integrating these elements, judges will cultivate an environment in which victims are empowered, wrongdoers are held accountable, and justice is not a theoretical concept but a reality.



CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

This chapter provides a summary of the study by providing the findings of each research question. It also seeks to assess whether the objectives of the study have been met.

5.2 FINDINGS

Pursuant to the first research question, the study has evaluated the grounds for dismissing a case. It has also analysed five Kenyan case laws relating to the dismissal of sexual harassment claims. The study has found that the criteria used to dismiss sexual harassment claims is unreasonable. Further, the study has assessed the consequences that might arise when judges dismiss sexual harassment claims due to delayed reporting. The study has found that such consequences will not only affect the victims of sexual harassment but also the perception of sexual harassment by the society.

With regards to the second research question, the study has found that the law has obstacles that may bar victims of sexual harassment from making prompt complaints. The study has also found that the loopholes in the law have the potential of discouraging victims from reporting sexual harassment due to their loss of confidence in the law. For the final research question, the study has found that a human rights-based approach is the suitable approach that judges should employ when determining whether to dismiss sexual harassment claims due to delayed reporting as it would ensure that the victims of sexual harassment access justice.

5.3 CONCLUSION

Results drawn from answers to the research questions have proven the hypothesis by demonstrating that judges are unreasonable in dismissing claims of sexual harassment due to delay in reporting in the following ways; judges have undue regard to procedural technicalities, they ignore the realities that victims go through, the law has significant barriers that discourage reporting of sexual harassment and dismissing sexual harassment cases has adverse consequences.

5.4 RECOMMENDATIONS

The following recommendations have been proposed:

In light of the insights provided in chapter four regarding a human rights-based approach to sexual harassment cases, Kenyan courts should adopt a more nuanced and compassionate stance when adjudicating such matters. Courts should recognize that the fundamental purpose of protecting human rights is to uphold the dignity of individuals and promote social justice. Thus, judges must consider the inherent vulnerability of victims and strive to ensure their access to justice is not compromised. Further, judges should delve deeper into the underlying factors that impede victims' access to justice, such as inadequate reporting mechanisms and other legal barriers. By addressing these root causes, courts can better facilitate the reporting and resolution of sexual harassment cases.

Courts should approach cases with sensitivity to the unique challenges faced by victims of sexual harassment. Judges should ensure that the legal process is accessible and supportive for all claim holders, irrespective of their social status.

Employers have a duty to prevent and address sexual harassment in the workplace. Therefore, courts should scrutinize the effectiveness of employers' sexual harassment policies, focusing on whether they are approachable and whether they provide genuine avenues for victims to report sexual harassment without fear of reprisal.

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