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**AN EXAMINATION OF THE REPORTING MECHANISM UNDER
SECTION 6 OF THE EMPLOYMENT ACT 2007: BARRIERS TO
REPORTING SEXUAL HARASSMENT IN THE WORKPLACE**

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Declaration

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

Signed:

Date:

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

Signed:

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LIST OF ABBREVIATIONS

High-Level Reporting Mechanism	HLRM
International Labour Organisation	ILO

LIST OF CASES

MWM v MFS (2014) eKLR.

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

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

NML v Peter Petrausch (2015) eKLR.

LIST OF LEGAL INSTRUMENTS

Constitution of Kenya (2010)

Employment Act (No.11 of 2007)

Sexual Offences Act (No.3 of 2006)

Occupational Safety and Health Act (No.15 of 2007)

Violence and Harassment Convention, 21 June 2019, No. 190

ABSTRACT

Sexual harassment in the workplace refers to any unwanted sexual attention by employers or colleagues which impedes performance in a place of employment. It has proven to be a prevalent challenge to reasonable working conditions in Kenya. The hypothesis proposes that a significant relationship exists between the structure of the reporting mechanism under section 6 of the Employment Act and the reluctance displayed by victims in using it.

Against this background, the study explores the relationship between the structure reporting mechanism in the Employment Act and the willingness of victims to report. The study has been informed by the dominance feminism theory that identifies dominance as the basis for sexual harassment. Results drawn from studies and case law surrounding sexual harassment in Kenya identify challenges that affect the reporting mechanism such as interference by the perpetrator and retaliation against the victims.

The study concludes by putting forward possible recommendations for the improvement of the effectiveness of the reporting mechanism which include; increasing the avenues of reporting sexual harassment within the workplace, ratifying and domesticating the Convention against Violence and Harassment in the World of Work and providing a platform for complainants to openly discuss instances of sexual harassment.

Much of the information gathered has been sourced from books, papers, case law and published journals.

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1.0 INTRODUCTION

1.1 Background

An employee is sexually harassed at the workplace if an employer, his representative or a co-worker makes unwelcome sexual advances or requests.¹ Additionally, an employee is sexually harassed if the employer, his representative or co-worker shows physical behaviour of a sexual nature which directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee.² Sexual harassment in the workplace negatively affects victims as it results in high turnover, absenteeism, low productivity, increased complaints, and legal expenses.³ Additionally, victims are likely to report psychological symptoms such as depression and nervousness.⁴

Workplace sexual harassment is prevalent in Kenya. This is evidenced, in part, by the results of a study conducted on 356 participants in the Medical College of Nairobi that revealed that 43% of the students and 27% of the staff had experienced various forms of sexual harassment.⁵ The prevalence is further highlighted through studies and case law that have been discussed in Chapter 4.1.

The Sexual Offences Act 2006 recognises sexual harassment as an offence.⁶ It is also prohibited within the workplace by Section 6(1) of the Employment Act.⁷ Additionally, the Employment Act mandates an employer of more than 20 employees to have a policy statement on sexual harassment in place.⁸ The policy statement *inter alia* sets out the reporting mechanism for sexual harassment in the workplace.⁹ Therefore, if an employee believes that they have been sexually harassed they must make a formal complaint under the procedure that has been set out by the employer. While the Employment Act fails to provide a singular uniform framework for a reporting mechanism it mandates a workplace with over 20

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

² *SRM v GSS(K) Limited & another* (2017) eKLR, 69.

³ Koi *Vet al*, 'Perceived magnitude of sexual harassment in learning institutions', 67.

⁴ Vijayasiri G, 'Reporting sexual harassment: The importance of organizational culture and trust' 25(1) *Gender Issues*, 43

⁵ Koi V, Auka J and Kilaha S, 'Perceived magnitude of sexual harassment in learning institutions: A case study of Kenya medical training college, Nairobi' 2(1) *International Academic Journal of Social Sciences and Education*, 2018, 70-71.

⁶ Section 23 (1), *Sexual Offences Act* (Act No. 3 of 2006).

⁷ Section 6(3), *Employment Act* (Act No.11 of 2007).

⁸ Section 6(2), *Employment Act* (Act No.11 of 2007).

⁹ Section 6(2), *Employment Act* (Act No.11 of 2007).

employees to have one.¹⁰ Moreover, the Act places the adjudicatory and disciplinary power of the reporting mechanism in the hands of the employer upon the complaint being made.¹¹

Despite the widespread nature of the offence and serious consequences, the material covered indicates that many victims are reluctant to formally report the workplace harassment using this internal reporting mechanism. The reluctance is based on the influence the perpetrator may have over the resolution of the claim which entails retaliatory acts against the victim for reporting in some cases. Such influence is based on their proximity to the employer who has adjudicatory and disciplinary power over the complaints. In some cases, the perpetrator may be the employer.¹²

This flaw in the reporting mechanism was clearly illustrated in *SRM v GSS(K) Limited & another* where the claimant was the victim of sexual harassment by the Human Resources (HR) manager. Despite her numerous protests and requests, the HR manager continued to sexually harass her. Eventually she attempted to use the internal reporting mechanism however it directed sexual harassment complaints directly to the same HR manager. Upon receiving the complaint, he used his position to perpetuate retaliatory acts against the claimant such as exclusion from trainings as well as denial of permission to use company transportation to university for evening classes despite a prior agreement. She then reported the matter to the perpetrator's senior but upon the conclusion of the investigation the only sanction imposed was a cautionary email informing him of the discomfort caused to the claimant. Since no remedy was available internally, the claimant sought the intervention of the court which held that the HR manager's conduct amounted to sexual harassment.¹³

Against this background, the objective of this study is to discuss why victims of sexual harassment are reluctant to use the internal reporting mechanism to address these discriminatory behaviours. Therefore, the hypothesis of the study is that a nexus exists between the structure of the reporting mechanism and the reluctance of victims to report incidents of sexual harassment.

1.2 Statement of problem

Under section 2 of the Employment Act, an employer is defined as any person, public body, firm, corporation or company who or which has entered into a contract of service to employ

¹⁰ Section 6(3) (b) (iv), *Employment Act* (Act No.11 of 2007).

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

¹² *NML v Peter Petrausch* (2015) eKLR

¹³ *SRM v GSS (K) Limited and another* (2017) eKLR.

any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.¹⁴

From the reading of section 6(3) even supervisors and senior managers are capable of handling incidences of sexual harassment in the workplace. This coupled with the fact that the main perpetrators are often senior personnel results in victims reporting to individuals closely linked in seniority to their assaulters. This jeopardises the entire reporting mechanism enshrined under section 6(3).

The overall problem addressed in this study is therefore to assess whether the structure of the reporting mechanism provided for under section 6(3) of the Employment Act discourages victims of sexual harassment in the workplace from reporting. This is due to its current state where disciplinary powers and the mandate of protection against sexual harassment rests with the employer.

1.3 Statement of objectives

1. To investigate the link between the reporting mechanism provided in the Employment Act and action taken against perpetrators as well as consequences faced by the victims due to reporting.
2. To use the link to analyse the effectiveness of the reporting mechanism in encouraging reporting of sexual harassment in the workplace.
3. To provide recommendations for promoting the confidence of the victim's in the reporting mechanism.

Suggestions have been made for further areas of research that would promote the effectiveness of the reporting mechanism.

1.4 Hypothesis

The structure of the reporting mechanism currently, by requiring the employee to report incidences of workplace sexual harassment to the employer, is ineffective because employers are often closely linked to or are the perpetrators of the violation. There is a need for an independent supervisory body to receive reports of sexual harassment in the workplace thus diverting the mandate away from the employer.

¹⁴ Section 2, *Employment Act* (No.11 of 2007).

Consequently, a significant relationship exists between the structure of the reporting mechanism under section 6 of the Employment Act and the reluctance displayed by victims in using it.

1.5 Research design and methodology

Desk-based research was conducted, and it entailed collecting already existing information. The research looked at relevant provisions in the Constitution of Kenya, Employment Act and other legal instruments related to the reporting mechanism on sexual harassment in the workplace.

The research applied relied on decided case law in showing the current state of the reporting mechanisms as well as the progress made in applying and interpreting legal provisions. Additionally, the research consulted literature related to the topic in coming up with recommendations on how to improve the reporting mechanisms on sexual harassment in the workplace in Kenya by drawing solutions from within the country as well as from other jurisdictions.

The rationale for adopting the desk-based research method is that it was the most efficient approach to gather the relevant material that informed the study. This is the case where the relevant materials relied on are available through desktop research.¹⁵

1.6 Research questions

The study has answered the following questions;

1. What is the link between the reporting mechanism and action taken against perpetrators as a result of reporting?
2. What are the outcomes experienced by victims who do report and does the reporting mechanism discourage reporting sexual harassment in the workplace in Kenya?
3. How can the quality of this reporting mechanism in the Employment Act be improved in order to promote confidence of victims in a partial resolution?

1.7 Justification

Despite all the negative impacts of sexual harassment on the victims as well as its prevalence, there exists a lacuna in research done on the topic. Most reports are vague in that they brush over the structure and impact of the reporting mechanism on sexual harassment at the

¹⁵ Kothari C, *Research methodology: Methods and techniques*, Second edition, New age international publishers, Delhi, 2004, 95-96.

workplace. Even where they do focus on it, the scope is limited to a singular institution. The study therefore assumes added relevance in that it sheds light on shortfalls of the reporting mechanism within current legislation on sexual harassment in the workplace in Kenya. This will enable victims of the violation within the workplace to access justice as well as deter its occurrence.

Additionally, no previous research has been conducted that exclusively concerns itself with the reporting mechanism on sexual harassment in the workplace in Kenya. Therefore, this study is helpful for future revision of the Employment Act as well as instrumental in aiding judges in the interpretation of section 6 of the same Act.

1.8 Scope and limitations

Sexual harassment in the workplace is a broad topic that cannot be thoroughly discussed in a single dissertation. This study, therefore, narrows down its scope to analyzing whether the structure of the reporting mechanism discourages reporting. The cases and secondary materials from Kenya that have been used are limited to 2007 onwards as this is when the Employment Act came into the force of law.

Furthermore, the author is cognizant that sexual harassment in the workplace has both civil and criminal tones due to the two legal instruments that apply to it; the Employment Act 2007 and the Sexual Offences Act 2006.¹⁶ However, the study is limited to sexual harassment as a civic wrong that is dealt with as a labour and employment issue as opposed to a criminal matter.

The research has been carried out through reference mainly to available secondary documents. Most of the information gathered has been sourced from books, papers, and published journals. The limitation faced in this study is the scarcity of up to date data on sexual harassment in the workplace in the Kenyan context. For this reason, some of the data relied on originates from other jurisdictions, however, its relevance to the Kenyan context has been elaborated upon. The data is based on other jurisdictions that have tackled or are tackling the issue of workplace sexual harassment and is therefore relevant as it informs the solutions put forward in this study.

¹⁶ Section 23 (1), *Sexual Offences Act* (Act No. 3 of 2006); Section 6, *Employment Act* (Act No.11 of 2007).

1.9 Definition of terms

Sexual harassment in the workplace refers to any unwanted sexual attention by employers or colleagues in a place of employment.¹⁷ Section 6 (1) of the Employment Act provides an illustrative list on the possible forms the offence can take.

An employee is any person employed for a salary and this both includes an apprentice and indentured learner.¹⁸

An employer means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.¹⁹

A workplace is any land, premises, location, vessel or thing, at, in, upon, or near which, a worker is, in the course of employment.²⁰

2.0 Outline of the dissertation and its flow of argument

The study begins with a hypothesis on the relationship between the structure of the reporting mechanism and the reluctance to report displayed by victims. It then sets out three research questions that when answered address the hypothesis. The study then proceeds to set out the theories relevant to its subject matter and settles on the dominance feminism theory as the central theory of the study.

Using the theory, it answers the research questions and proves the hypothesis is correct in that the structure of the reporting mechanism discourages reporting because of the barriers victims face. Finally, the study concludes with providing the recommendations necessary to increase the effectiveness of the reporting mechanism.

2.1 Summary of overall results

The findings of the study indicate that sexual harassment is rampant in Kenyan workplaces despite its prohibition within legislation.²¹ Moreover, the structure of the reporting mechanism, which leaves the determination of internal reports of sexual harassment solely to the employer who is often a perpetrator themselves, results in reluctance to report.

¹⁷ Mackinnon C, *Sexual harassment of working women: A case of sex discrimination*, First ed, Yale University Press, Connecticut, 1979, 174.

¹⁸ Section 2, *Employment Act* (No.11 of 2007).

¹⁹ Section 2, *Employment Act* (No.11 of 2007).

²⁰ Section 2, *Occupational Safety and Health Act* (No.15 of 2007).

²¹ Section 6, *Employment Act* (No.11 of 2007).

2.2 Summary of overall conclusions

The hypothesis set out in chapter 1.4 has been proven. Consequently, the study concludes that the structure of the reporting mechanism in directing complaints to the employer raises barriers to victims reporting and as such the complaints must be directed elsewhere. The study also provides recommendations which include increasing the avenues of reporting sexual harassment within the workplace, ratifying and domesticating the Convention against Violence and Harassment in the World of Work and providing a platform for complainants to openly discuss instances of sexual harassment.

2.3 Chapter breakdown

Chapter 1 is the introduction and gives an overview of what sexual harassment in the workplace constitutes of. It further discusses the reporting mechanism provided by law.

Chapter 2 discusses the literature that was reviewed for this study in order to clarify the problem, it shows the relevance of this literature to the study, identifies the gap in knowledge surrounding the reporting mechanism and addresses views that diverge from those of this study.

Chapter 3 conducts an in-depth discussion of the theories pertinent to this study and shows how these legal theories relate to the subject matter of the study.

Chapter 4 investigates the link between the reporting mechanism and action taken against perpetrators as well as outcomes on the victims who do report. In this way it examines the relationship between the structure and the willingness of victims to report.

Chapter 5 provides recommendations on how this reporting mechanism can be improved upon. It also suggests further areas of interest for future researchers that would promote the reporting mechanisms on sexual harassment in the workplace in Kenya.

Chapter 6 provides a conclusion to the study by consolidating the research undertaken as well as the recommendations made.

2.0 LITERATURE REVIEW

Geter Wasilwa discusses sexual harassment as being rampant within Kenyatta National Hospital.²² She asserts that the violation is mostly perpetrated by senior male managers against junior female staff who were newly recruited. Victims who reported were often met by retaliatory acts ranging from dismissal, transfers and withdrawal of benefits such as off days. This disincetivised others from reporting thus leading to a tolerant attitude towards it. The paper adds value to this study in that it sheds light on the reality faced by victims where they seek to report incidences of sexual harassment especially by senior staff. This is despite reporting mechanism being available. It shows retaliatory acts used as threats that have served to deter reporting by victims as they face victimization if they do. It speaks to the problem statement as it focuses on the relationship between reporting mechanisms and the outcome of reporting.

According to Victoria Koi, Josh Auka and Solomon Kilaha, sexual harassment is rampant within the Medical College Nairobi amongst students and staff alike.²³ The results of their study show that of the total staff interviewed, 27% had experienced some form of sexual harassment. They further assert that from their findings many victims are not aware of the mediums through which they can report such incidences. Further, that sexual harassment is also experienced through virtual mediums such as sexual messages and unconsented to exposure to pornographic material. The paper is important to this study as it provides accurate data on the prevalence of sexual harassment in the workplace, despite it being in a single institution. It further shows that sexual harassment is also expressed virtually and is not limited to physical and verbal forms. The paper only mentions the lack of awareness of victims as to the reporting mechanisms available but fails to further address the issue as to whether the reporting mechanism, that does exist, provides a real chance of redress for the victims.

Pacific Okwema discusses sexual harassment in the workplace in Kenya by beginning with defining sexual harassment, she proceeds to establishing its elements when in the workplace as set out in section 6 of the Employment Act. From the data collected she shows that sexual harassment in the workplace despite being predominantly targeted towards female employees also affects male employees. She does an in-depth analysis on the effects of sexual

²² Wasilwa G, 'Sexual harassment of women employees at Kenyatta National Hospital, Nairobi county' published, University of Nairobi, Nairobi, 2012.

²³ Koi V, Auka J and Kilaha S, 'Perceived magnitude of sexual harassment in learning institutions: a case study of Kenya medical training college, Nairobi', 2018.

harassment in the workplace on the victims. The paper concludes by giving possible solutions to stopping sexual harassment in the workplace which includes creating effective channels of reporting and specialised training of individuals receiving reports.²⁴ The paper adds value to my study as it shows the negative impacts of sexual harassment in the workplace. It further discusses how to stop the violation through *inter alia* an improvement of reporting mechanisms and training of officials who receive the reports so that they have the capacity to handle such incidences.

Benson M.O. Agaya and Masiga Asunza delve into the working conditions of domestic workers residing in Mukuru informal settlement.²⁵ The authors attempt to highlight the challenges affecting such workers as they work in people's homes. A major concern discussed is sexual harassment by the employers. There is a general attitude of submissiveness by the workers to such violations because of their economic vulnerability. It further shows that the reporting mechanisms in place are unclear especially where the employer has no policy statement of sexual harassment. This leads most victims to reporting to the chief or police. Both institutions have proved ineffective as employers often bribe officials to disregard such claims. The workers experience numerous obstacles in reporting sexual harassment at the workplace. This has led them to adopt coping mechanism such as boycotting work at such homes. Despite the workers being lower than 20 at any given time thus been excluded from the scope of the reporting mechanism, the report is still of relevance to this study in that it shows the light consequences faced by the perpetrators when reported. There is a lack of seriousness in prosecuting them and reporting mechanisms appear to be ineffective especially where they do not clearly state to whom the victim is supposed to report to where the employer has less than twenty employees.²⁶ And even when reported to relevant authorities, employers are not under any real risk of punishment.

According to Susie Jacobs, Bénédicte Brahic and Marta Medusa Olaiya, from data collected from a study of 62 farms in Kenya, Uganda, Ethiopia and Tanzania, sexual harassment is fostered both by coercive labour conditions within global value chains and by existing hierarchical gender relations.²⁷ Results indicated that sexual harassment is widespread on farms and that temporary and casual workers are the most likely targets of harassment. Poor

²⁴ Okwema P, 'Sexual harassment in the workplace: Its nature, impact and mitigation' Conference on Gender Based Violence, Nairobi, August 2012.

²⁵ Oxfam, *Report of a baseline survey of women domestic workers in Mukuru informal settlement - Nairobi Kenya*, 2013.

²⁶ Section 6(2) *Employment Act* (No.11 of 2007).

²⁷ Jacobs S, Brahic B and Olaiya M, 'Sexual harassment in an East African agribusiness supply chain', 2015.

living conditions and low wages creating over reliance on the employment have enabled the prevalence of sexual harassment. Successes in the fight against sexual harassment were highlighted. These included action research that helped to give a 'voice' to marginalised. This created an enabling environment for violations to be openly discussed as collective grievances instead of being secretly guarded by victims in shame and anger. Such efforts showed marked results in reducing tolerance of sexual harassment as a part of the work culture in the horticultural sector as well as giving victims viable mediums through which they could seek redress. The article adds relevance to this study as it shows that through improving the reporting mechanisms, incidences were reported more frequently which in turn greatly reduced the occurrence of the violation.

From the literature discussed, the procedure of reporting sexual harassment in the workplace in Kenya poses a challenge to victims. This is because of the recurring theme whereby the employer is often the perpetrator, yet employees affected by sexual harassment are to report to the employer who will decide on the appropriate action to be taken. Even in cases where the employer is not the perpetrator the process may be influenced by the perpetrator who, because of their authority, is able to do so.

3.0 THEORETICAL FRAMEWORK

This chapter covers the theories that are relevant to the study. The theories discussed are the bad apple theory, the normalisation theory and the dominance feminism theory. In doing so the chapter isolates the dominance feminism theory as the most applicable to the current study. The reason is expounded upon in the chapter.

3.1 Bad apple theory

The theory considers human error as isolated events attributable to individual actors (bad apples) as opposed to a culmination of underlying problems.²⁸ It was first proposed by Sidney Dekker as an explanation for the inefficiency of dismissing a few doctors ‘the bad apples’ instead of introducing institutional changes that would prevent the accidents from occurring.²⁹

In relation to workplace sexual harassment, the theory introduces the individual model of workplace sexual harassment where an incidence is looked at as a dispute between the victim and harasser.³⁰ The broader spectrum of factors enabling the incidence to occur, such as institutional tolerance and ambiguous reporting mechanisms, are generally ignored.³¹

Furthermore, the employer is seen as an innocent by-stander who is only responsible for addressing the harassment once a report is made.³² This shifts the responsibility of deterring sexual harassment from the employer to the employee. Therefore, a victim of sexual harassment is to blame for the harasser not being reprimanded if the former fails to report.³³ This is despite the difficulties of reporting because of the attached consequences.

The theory is relevant to this study as it shows the importance of considering sexual harassment holistically, and not as an individual sexualized dispute between the victim and the harasser. This exposes the broader context in which the offence occurs and the power asymmetry that influences it. Therefore, the structure of a reporting mechanism should address not only the facts of an incidence but also the factors that enabled the incidence to occur.

²⁸ Dekker S, *The field guide to understanding human error*, Third edition, CRC Press, Florida, 2014, 3-5.

²⁹ Dekker S and Leveson N, ‘The bad apple theory won't work: Response to challenging the systems approach: why adverse event rates are not improving by Dr Levitt’ Volume 23 *BMJ Quality & Safety*, 2014, 1050-1051.

³⁰ Lawton A, ‘The bad apple theory in sexual harassment law’ Volume 13 *George Mason Law Review* Issue 4, 2005, 819.

³¹ Lawton, ‘The bad apple theory in sexual harassment law,’ 819.

³² Lawton, ‘The bad apple theory in sexual harassment law,’ 820.

³³ Harker H, ‘Normalising sexual violence: Young women account for harassment and abuse’ Volume 28 *Gender and society* Issue 3, 2014, 347.

3.2 Normalisation theory

The challenges faced by victims of sexual harassment regarding reporting can best be understood from the societal perception of the offence. Through the normalisation theory, Heather Harker proposes that sexual harassment perpetrators are not reprimanded because of the view that the harassment is a normal outcome of heterosexual interactions in a society.³⁴ This is because children are often socialized into a patriarchal society that views male power and female acquiescence, especially in the context of heterosexual relationships, as normal.³⁵

Consequently, the normalization discourages victims from reporting by creating a categorization of serious reportable sexual abuse such as rape vis-à-vis trivial sexual abuse that does not warrant reporting such as workplace sexual harassment.³⁶ This normalisation in the workplace results in an environment that is tolerant of the offence hence effectively creating a bar to reporting. The reason being that the employer is likely to lightly reprimand a reported harasser while viewing the victim's allegations as an exaggeration of a normal occurrence.

The theory explains why an employer, in a workplace where sexual harassment is prevalent, is still unlikely to take measures against the harasser that will deter the offence. Additionally, it shows why victims who report are likely to attract detrimental treatment.³⁷ Conclusively, for an effective reporting mechanism, the mandate of resolving a dispute on sexual harassment should be handled by a party outside of the workplace environment that enabled the sexual harassment to occur in the first place

3.3 Dominance feminism theory

Feminism originates from the Latin word 'femina' that describes women's issues.³⁸ It covers various social, artistic, and political movements. Additionally, it views women not only as biological beings but also as a social category and it is therefore based on women's daily life experiences as they interact with other social categories. Within this social categorisation feminism primarily deals with gender inequalities and equal rights for women where women

³⁴ Harker, 'Normalising sexual violence: Young women account for harassment and abuse' 339.

³⁵ Tolman D, Spencer R, Reynosa M, and Porche M, 'Sowing the seeds of violence in heterosexual relationships: Early adolescents narrate compulsory heterosexuality' Volume 59 *Journal of Social Issues* Issue 1, 2003, 160.

³⁶ Harker, 'Normalising sexual violence: Young women account for harassment and abuse' 341.

³⁷ Albert A, 'The Use of MacKinnon's Dominance feminism to evaluate and effectuate the advancement of women lawyers as leaders within large law firms' Volume 35 *Hofstra Law Review* Issue 1, 2006, 302.

³⁸ Ghorfati A, 'Feminism and its impact on woman in the modern society' unpublished, University of Tlemcen, Tlemcen, 2015, 7.

are disadvantaged based on their gender within a patriarchal community. Consequently, it champions legal and political equality for women.

The dominance feminism theory, as a branch of feminist theory, views sexual harassment as a form of sex discrimination based on the power imbalance between genders.³⁹ It is an offence motivated by a need to dominate as opposed to a desire for sexual pleasure.⁴⁰ The theory is put forward by domination theorists who concern themselves with male domination.⁴¹ Through this theory, relations in a gendered society reveal a power imbalance that is justified by the differences in genders.⁴² This is not to say that differences do not exist between sexes but that such differences are only invoked after the fact of domination as a flimsy justification.⁴³ In line with this Catherine MacKinnon, a domination theorist, posited that difference is the velvet glove on the iron fist of discrimination.⁴⁴

Consequently, the theory advances the notion that male and female is not just a distinction of difference but also of power and powerlessness.⁴⁵ Thus to be masculine is to be free whereas to be feminine is to be subjugated.⁴⁶ Additionally, dominance is seen as both social and sexual as it establishes the political right over women and simultaneously establishes structural access by men to the bodies of women.⁴⁷ This position is advanced by Pateman who says that the contract founding patriarchal society is a social-sexual contract.⁴⁸ Furthermore, Andrea Dworkin supports the position of sexual dominance as an expression of male supremacy through his view of heterosexual intercourse. This view is that the act of heterosexual intercourse is an invasive, possessive and domineering act by the male done to the female.⁴⁹ It provides the pretext for other socially unacceptable instances of male domination such as rape and sexual harassment. Therefore, sexual harassment as an outcome of gender interactions in heterosexual society is not a result of sexual attraction but rather an expression of eroticised dominance.⁵⁰

³⁹ MacKinnon C, *Sexual harassment of working women: A case of sex discrimination*, 174.

⁴⁰ MacKinnon, *Sexual harassment of working women*, 154.

⁴¹ Allen A, 'Rethinking power' 13 (1) *Hypatia*, 1998, 22.

Surname I, 'Article title' Volume No *Journal Name* Issue No, year, page number

⁴² Allen A, 'Rethinking power' 22-23.

⁴³ MacKinnon C, *Feminism unmodified: Discourses on life and law*, 1 ed, Harvard University Press, Cambridge, 1987, 34.

⁴⁴ MacKinnon C, *Toward a feminist theory of the state*, 1 ed, Harvard University Press, Cambridge, 1989, 219.

⁴⁵ MacKinnon C, *Feminism unmodified*, 123.

⁴⁶ MacKinnon C, *Feminism unmodified*, 51.

⁴⁷ Pateman, C, *The sexual contract*, 1 ed, Stanford University Press, Stanford, 1988, 182.

⁴⁸ Pateman, C, *The sexual contract*, 2.

⁴⁹ Dworkin A, *Intercourse*, 1 ed, The Free Press, New York, 1987, 63.

⁵⁰ Cooper C, 'A review of sexual harassment of working women', 185.

The theory is relevant to this article as it speaks to the predominant model of sexual harassment where a person in authority, such as an employer, is the sexual aggressor and the employee is the victim. In this way, the theory exposes a legislative loophole where the persons mandated to deal with sexual harassment in the workplace may simultaneously be the sexual aggressors or are closely linked in hierarchy to the sexual aggressors. This prejudices the victims' case where the perpetrator is a judge in his own case.

Therefore, it relates to the hypothesis of the article by revealing the power imbalance between the employer and employee which may cause reluctance to report where the employer or his representative is the perpetrator of the offence. At this stage it is important to note that an employer means any person, public body, firm, corporation, or company who or which has entered into a contract of service to employ any individual. The definition encompasses the agent, foreman, manager or factor of such person, public body, firm, corporation, or company.⁵¹

3.3.A Critique of the dominance feminism theory

The theory has been subject to criticism especially on two fronts: first, it appears to imply that all men have equal and unfettered power over all women.⁵² Second, its one-sided approach to power makes it difficult to envision female power within its framework.⁵³ In the first instance, the theory implies that all women are dominated equally by all men.⁵⁴ Catherine McKinnon supports this position by stating that no woman can escape the meaning of being woman because gender inequality is not only pervasive but also universal.⁵⁵

However, this is not necessarily true as different males have access to different levels of power.⁵⁶ A Factor such as race will determine the form and degree of power a male has over a female.⁵⁷ For instance, a coloured male may have a different degree of control over a white woman than a white male does over a coloured woman.⁵⁸ Furthermore, the theory assumes that all women are exposed to the same degree of domination.⁵⁹ This paradigmatic example of

⁵¹ Section 2, *Employment Act* (Act No.11 of 2007).

⁵² Allen A, 'Rethinking power' 23-24.

⁵³ Allen A, 'Rethinking power' 26.

⁵⁴ Pateman, C, *The sexual contract*, 219.

⁵⁵ MacKinnon C, *Toward a feminist theory of the state*, 104-105.

⁵⁶ Spelman E, *Inessential Woman: Problems of Exclusion in Feminist Thought*, 1 ed, Beacon Press, Boston, 1989, 186.

⁵⁷ Allen A, 'Rethinking power' 23.

⁵⁸ Allen A, 'Rethinking power' 26.

⁵⁹ Allen A, 'Rethinking power' 32.

‘woman’ does not consider differences in class and racial identity.⁶⁰ The failure to consider differences among women and among men consequently limits the understanding of female subordination.⁶¹

The second ground of criticism is the one-sided approach to the power relations where men are powerful and women powerless.⁶² This is despite agitation by domination theorists for women to invoke their own power in order to resist male domination.⁶³ Consequently, the theory does not provide a framework within which women can develop and exercise their own power.⁶⁴

3.3.B Justification of the use of the dominance feminism theory

The dominance feminism theory is the most relevant theory to this study because it exposes sexual harassment as an act of dominance and not sexual desire.⁶⁵ The theory speaks to the predominant model of sexual harassment where persons in authority, such as employers, are more likely to be the sexual aggressor and the employees are more likely to be the victims. In this way the theory exposes a legislative loophole where the persons mandated to deal with sexual harassment in the workplace are often the sexual aggressors or are closely linked in hierarchy to the sexual aggressors. This prejudices the victims’ case where the perpetrator is a judge in his own case.

Furthermore, the theory addresses the fundamental research objectives at the core of this study. It relates to the first research objective concerning the link between the reporting mechanism and the actions taken against the perpetrator. This is because the theory exposes the perpetrator as a person of authority who uses the sexual harassment as a tool to maintain the power imbalance. The authority held by this person allows them to either directly or indirectly influence the procedure of the reporting mechanism so as to exclude liability or reduce severity of sanctions imposed.

The case law surrounding workplace sexual harassment shows that light disciplinary measures are taken against the perpetrator internally because of this position of authority where either the perpetrator is the one mandated to address the offence or is closely linked to the person

⁶⁰ Spelman E, *Inessential Woman*, 186.

⁶¹ Spelman E, *Inessential Woman*, 186.

⁶² MacKinnon C, *Feminism unmodified*, 51.

⁶³ MacKinnon C, *Feminism unmodified*, 7; 1988, 15.

⁶⁴ Allen A, ‘Rethinking power’ 26.

⁶⁵ Mackinnon, *Sexual harassment of working women*, 154.

who is.⁶⁶ The measures are minimal in contrast to the consequences faced by victims for reporting the harassment which takes the form of retaliatory acts.

Additionally, it relates to the second research objective of whether the reporting mechanism discourages victims from reporting due to the barriers faced. It achieves this by highlighting the shortcomings of placing the mandate of addressing reports of sexual harassment with the employer because of the existing power asymmetry. This is because of the possibility of partiality in dealing with the case especially where the employer is involved in the harassment.

The theory also relates to the third research objective which is concerned with improving the confidence of the victims in the reporting mechanism. The insight provided on human behavior in a heterosexual society can be used to structure a reporting mechanism by approaching the offence as an act of dominance as opposed to an act of sexual desire. In this way the reporting mechanism will cure the disease and not treat the symptoms, as has been the case. Such a cure places the mandate with an external and impartial body that is well-equipped to provide redress to victims and sanctions to perpetrators.

Conclusively, the theory is crucial to this study as it interacts with and tackles the fundamental research objectives of the study. It dissuades the reader from the perception of a benevolent employer who is far removed from incidences of sexual harassment thus well-suited to impartially investigate and adjudicate internally over the offence. By doing so it guides the study in assessing whether or not the structure of the reporting mechanism deters victims from reporting workplace sexual harassment.

⁶⁶ *MWM v MFS* (2014) eKLR; *NML v Peter Petrausch* (2015) eKLR; and *SRM v GSS(K) Limited & another* (2017) eKLR.

4.0 THE RELATIONSHIP BETWEEN THE STRUCTURE OF THE REPORTING MECHANISM AND THE OUTCOMES OF REPORTING

This chapter investigates the link between the structure of the reporting mechanism and its outcomes. In this way it examines the impact of this structure on the willingness of victims to use the mechanism. The analysis has been conducted by reviewing the action taken against the reported perpetrator, the remedies available to the victim and the consequences that arise from reporting.

The chapter relies on Kenyan case law as well as studies based on workplace sexual harassment in Kenya in order to give results relevant to the Kenyan context. The compulsory components of the reporting mechanism in the Employment Act are then benchmarked against an ideal reporting mechanism envisaged by the International Labour Organisation (ILO) Violence and Harassment Convention 2019.

4.1 Outcomes of using the reporting mechanism

The Employment Act sets out the minimum ingredients of a sexual harassment policy.⁶⁷ The reporting mechanism this study focuses on is one of these minimums. The Act reads as follows;

*The employer shall provide a statement explaining how complaints of sexual harassment may be brought to the attention of the employer.*⁶⁸

This means that the reporting mechanism can only exist where an employer provides a sexual harassment policy. Furthermore, the Employment Act places the mandate of receiving, investigating and determining reports of sexual harassment with the employer.⁶⁹ This is in light of the dominance feminism theory that points to the employer, as a person in authority, being a likely sexual aggressor as has been affirmed in the body of case law and literature covered in this chapter.

4.1.A Studies on sexual harassment in the workplace in Kenya

The studies discussed below are relevant as they respond to the second research objective by showing the link between reporting through the reporting mechanism and the reluctance of reporting displayed by victims. The studies cover a broad spectrum of workplaces in the country including a hospital, a college and flower farms.

⁶⁷ Section 6(3), *Employment Act* (No 11 of 2007).

⁶⁸ Section 6(3) (b) (iv), *Employment Act* (No 11 of 2007).

⁶⁹ Section 6(3) (b), *Employment Act* (No 11 of 2007).

In a study carried out in 2012 on the prevalence of sexual harassment within Kenyatta National Hospital the sexual aggressors were predominantly senior male managers and the victims were junior female staff who were newly recruited.⁷⁰ These findings are buttressed by the dominance feminism theory where sexual harassment is an act of dominance and is possible because of a power imbalance. Victims who reported the incidences were often met with retaliatory acts ranging from dismissal, transfers and withdrawal of benefits such as off days.⁷¹ Such measures created a chilling effect on reporting.

The seniority of the staff who were the sexual aggressors meant that the actions taken against them were light in comparison to the severity and frequency of their harassment. In most cases the disciplinary measures oscillated between verbal warnings and no action at all.⁷² In the latter, the victim was expected to tolerate the harassment as a normal component of the working environment. The study directly highlights the relationship between the reporting mechanism and the outcome of reporting.

In another study that investigated sexual harassment within the Medical College of Nairobi amongst students and staff alike, the results showed that of the total staff interviewed, 27% had experienced some form of sexual harassment.⁷³ From the findings many victims were not aware of the mediums through which they could report such incidences. Moreover, sexual harassment was also experienced through virtual mediums such as sexual messages and unconsented to exposure to pornographic material.⁷⁴ The study fails to state whether the reporting mechanism, that does exist, provides a real chance of justice for the victims.

Yet another study based on data collected from a study of 62 farms in Kenya, Uganda, Ethiopia and Tanzania, indicated that sexual harassment is widespread on farms and that temporary and casual workers were the most likely targets of harassment. This is because of the poor living conditions and low wages coupled with job insecurity that create over reliance on the employment hence enabling the prevalence of sexual harassment.⁷⁵

The study is relevant to the recommendations in the present study because it highlighted measures taken to combat sexual harassment and the successes of those measures. These results have influenced the recommendations made in the present study. The measures taken

⁷⁰ Wasilwa G, 'Sexual harassment of women employees at Kenyatta National Hospital'.

⁷¹ Wasilwa G, 'Sexual harassment of women employees at Kenyatta National Hospital' 4.

⁷² Wasilwa G, 'Sexual harassment of women employees at Kenyatta National Hospital' 4-6.

⁷³ Koi V, Auka J and Kilaha S, 'Perceived magnitude of sexual harassment in learning institutions.

⁷⁴ Koi V, Auka J and Kilaha S, 'Perceived magnitude of sexual harassment in learning institution' 5.

⁷⁵ Jacobs S, Brahic B and Olaiya M, 'Sexual harassment in an East African agribusiness supply chain' 5.

included action research that created an enabling environment for violations to be openly discussed as collective grievances instead of being secretly guarded by victims in shame.⁷⁶ Such efforts showed marked results in reducing tolerance of sexual harassment as a part of the work culture in the horticultural sector as well as giving victims viable mediums through which they could seek redress.

4.1.B Approaches taken by domestic courts in determining claims of sexual harassment in the workplace

The following cases show the approaches taken by the domestic courts in adjudicating over claims of workplace sexual harassment. While in some of the cases a sexual harassment policy and corresponding reporting mechanism was absent, the cases are still relevant in showing the trends in approaches to the offence.

In *SRM v GSS(K) Limited & another* (2017) the claimant reported sexual harassment by the Human Resources (HR) manager using the internal reporting procedure provided in the sexual harassment policy at her workplace. However, the policy directed sexual harassment complaints directly to the same HR manager. He used his position to perpetuate retaliatory acts against the claimant such as exclusion from trainings as well as denial of permission to use company transportation to university for evening classes despite a prior agreement. Upon the conclusion of the investigation the only sanctions imposed were an email from a colleague in the same department informing him of the discomfort caused to the Claimant. Since no remedy was available internally, the claimant sought the intervention of the court.⁷⁷

In making a judgement, the court recognised sexual harassment in the workplace is a form of gender-based violence and that there was a low number of cases on the offence in the workplace that had been determined by Kenyan courts. The scarcity identified is still largely the same. It also appreciated the presence of power imbalance in the relationship between the claimant and alleged offender. Furthermore, it held that the standard of proof required is that of a balance of probabilities. The court conclusively found that the acts of the HR manager constituted sexual harassment and that the disciplinary measures taken against him were inadequate to rectify the harm caused. The claimant was compensated with an award of two years' salary.

⁷⁶ Jacobs S, Brahic B and Olaiya M, 'Sexual harassment in an East African agribusiness supply chain' 15.

⁷⁷ *SRM v GSS(K) Limited & another* (2017) eKLR.

In *MWM v MFS* (2014), the claimant had been employed for 5 years after which her employment became permanent and was pensionable. She was a victim of sexual harassment in the form of an unwelcome tight hug from the Managing Director despite efforts to avoid him. She provided evidence of this through an email where she complained of the same. The failure to report the incident was compounded by two factors; first, the respondent did not have a policy on sexual harassment in place therefore this limited the claimant's access to redress as there was no reporting mechanism. Second, the claimant was fearful of reporting the incidence because of a threat of retaliation as the Managing Director was the respondent's senior most officer. The claim on Sexual harassment was successful as the Managing Director failed to contest the allegations.⁷⁸

In the judgement, Justice O.N Makau stated that the respondent will not benefit from a failure by the claimant to report a sexual harassment incidence where the respondent has failed to provide a mechanism to do so. It was further stated that the case should act as a warning to other employers who fail to comply with section 6(2) of the Employment Act.

Despite this warning employers still display laxity in abiding with this legal requirement as was seen in *JWN v Securex Agencies (K) Limited* (2018) where the claimant was assigned to provide guarding services in a premise then known as Nakumatt Junction Mall. During a routine morning parade on the respondent's supervisor stated that CCTV footage from the previous night showed a female guard having sexual intercourse while on duty. He proceeded to publicly accuse the claimant of the act. She broke down in tears and left the parade.⁷⁹

The statement was later retracted due to its falsehood. The respondent had no sexual harassment policy in place thus the claimant could not lodge an internal complaint. It was held that the accusation constituted sexual harassment. Moreover, that the failure to issue a policy exposed the claimant to sexual harassment and injury of dignity which is a violation of the Bill of Rights in the Constitution of Kenya.⁸⁰

Section 6(2) requires employers with a minimum of 20 employees to issue the policy, this results in a vulnerable position for employees where an employer has employees below this minimum.⁸¹ The reason being that sexual harassment can still occur where employees are less

⁷⁸ *MWM v MFS* (2014) eKLR.

⁷⁹ *JWN v Securex Agencies (K) Limited* (2018) eKLR.

⁸⁰ Article 28, *Constitution of Kenya* (2010).

⁸¹ Section 6(2), *Employment Act* (No 11 of 2007).

than 20 and because of this exclusion they would not have a means of reporting the violation thus seeking redress internally.

This was the case in *NML v Peter Petrausch* (2015) where the claimant was a domestic worker employed by the respondent who was a German citizen. The claimant was routinely sexually harassed in a multitude of ways including requesting sexual acts with threat of termination, unwelcome physical acts such as touching of her buttocks, making pornographic films and retrieving a coffee cup which was placed on the respondent's genitalia. The claimant's refusal to perform such acts led to the termination of her employment. It was held that sexual harassment of the claimant did occur as the respondent only contested one allegation on the filming of the claimant as she showered.⁸² In the above case it is clear that where employees are fewer they may be at a higher risk of the violation due to a more intimate relationship with the employer.

4.2 A tool of measurement

Effectiveness is defined as the proximity of actual results achieved to meeting expectations.⁸³ This means that when determining effectiveness, the expectations are weighed against the results. The effectiveness of a reporting mechanism is therefore determined by how well it meets its expected outcomes. Through improving the reporting mechanism, the quality of redress is also improved thus promoting confidence in it.⁸⁴ The effectiveness of the reporting mechanism therefore has an impact on the willingness of victims to report.

To determine whether the reporting mechanism is effective, the proximity of its outcomes with those of its expected outcomes must be compared to that of an ideal reporting mechanism that produces its expected outcomes. The ideal reporting mechanism is the reporting mechanism set out in article 10 of the Violence and Harassment Convention issued by ILO.⁸⁵ This is the ideal reporting mechanism because it was drafted with the vulnerability of the employee in mind. Additionally, it was the result of numerous and extensive discussions by focus groups on how to prevent violence and harassment in the world of work.⁸⁶ In doing so, it incorporated international best practices and came up with a cumulative

⁸² *NML v Peter Petrausch* (2015) eKLR.

⁸³ Black's Law Dictionary, 3 ed.

⁸⁴ Jacobs S, Brahic B and Olaiya M, 'Sexual harassment in an East African agribusiness supply chain' 10.

⁸⁵ Article 10, *Violence and Harassment Convention*, 21 June 2019, No. 190.

list of all components that make a sexual harassment policy comprehensive.⁸⁷ It was created for use by both private and public actors.⁸⁸

The reporting mechanism in the Convention is cognisant of the fact that the sexual aggressor may be the person to whom complaints are directed. For this reason, it provides that the reporting mechanism should not only provide for an internal reporting mechanism but also an external one.⁸⁹ It insists that employees be provided with alternatives of reporting. By providing such an outcome, the reporting mechanism in the Convention overcomes the potential barrier of a conflict of interest of the employer in dealing with a complaint made.⁹⁰ The Convention also recognises the risk victims and other parties such as whistle-blowers face when lodging reports and mandates protections of these parties by the signatory state.⁹¹

The actual outcomes are illustrated by the material discussed above where the common thread weaving through the above cases and studies is that the sexual aggressor is often a person of authority and the victim is part of the junior staff. The power imbalance in this relationship allows the sexual aggressor to influence the reporting mechanism, when it is available, because either they are responsible for handling complaints of sexual harassment⁹² or they are closely linked to the person who is.⁹³ Because of the inability of the internal reporting mechanism to provide an adequate resolution of the matter, victims of sexual harassment in these cases have had to look to other avenues for resolution of the dispute.

The study has found that the reporting mechanism, in its current state, is therefore not effective in providing resolution for cases of sexual harassment in the workplace in the following ways; reporting is discouraged by the fear of retaliatory acts, due to the proximity of the perpetrator with the adjudicator the investigation and sanctions taken are in some cases subjective and partial, the absence of an external reporting mechanism discourages victims from reporting the offence.

⁸⁶ International Labour Organisation, *Ending violence and harassment against women and men in the world of work*, 108 session report, 2019.

⁸⁷ Article 10 (b), *Violence and Harassment Convention*, 21 June 2019, No. 190.

⁸⁸ Article 3, *Violence and Harassment Convention*, 21 June 2019, No. 190.

⁸⁹ Article 10 (b) (ii), *Violence and Harassment Convention*, 21 June 2019, No. 190.

⁹⁰ International Labour Office, *Ending violence and harassment against women and men in the world of work*, 2018, 95-96.

⁹¹ Article 10 (b) (iv), *Violence and Harassment Convention*, 21 June 2019, No. 190.

⁹² *SRM v GSS(K) Limited & another* (2017) eKLR.

⁹³ *MWM v MFS* (2014) eKLR.

This proves the hypothesis that the structure of the reporting mechanism is ineffective as it discourages reporting. Recommendations to improve this effectiveness have been discussed in chapter 5.

5.0 SUMMARY AND RECOMMENDATIONS

Sexual harassment is a vice that has been woven into the tapestry of the workplace, so much so that it was almost invisible due to its normalisation. It has recently been a matter of global concern after numerous actresses came forward, through the ‘me too’ movement, to share their experiences as victims of sexual harassment in the world of entertainment.⁹⁴ The problem is very much alive in the Kenyan context as has been demonstrated by the literature covered in this study.

While sexual harassment affects all genders at all positions in the work hierarchy⁹⁵ the findings in this study suggest that a certain model of sexual harassment is prevalent in the workplace. It is one of dominance of female employees by male employers where the latter is in a position of authority in the workplace and uses this position to strong arm the former. This model is informed by the dominance feminism theory that is based on the use of sexual harassment as an expression of dominance within a heterosexual society.⁹⁶ It was best elucidated by Catherine Mackinnon when she stated that *‘the distinction between male and female is created by erotization of dominance and submission respectively’*.⁹⁷

Through section 6(2) of the Employment Act, this prevalent model has been coupled with a reporting mechanism that yields more power where a power imbalance already exists. Furthermore, the victim who reports sexual harassment faces retaliatory acts while the perpetrator is often let off with a light warning.⁹⁸ Based on these, findings the study concludes that the reporting mechanism as envisaged in the Employment Act is ineffective in its current state as it deters victims from reporting.

Arising thereof, the following are various recommendations on how to improve on the structural effectiveness of the reporting mechanism in order to prevent raising barriers to victim reporting;

⁹⁴ Tippet E, ‘The legal implications of the MeToo movement’ Volume 103 *Minnesota Law Review* Issue 229, 2019, 230-235.

⁹⁵ McLaughlin H, Uggem C and Blackstone A, ‘Sexual harassment, workplace authority, and the paradox of power’.

⁹⁶ Mackinnon, *Sexual harassment of working women*, 174.

⁹⁷ MacKinnon C, ‘Feminism, marxism, method, and the state: Toward feminist jurisprudence’ Volume 8 *Signs* Issue 4, 1983.

⁹⁸ *MWM v MFS* (2014) eKLR; *SRM v GSS(K) Limited & another* (2017) eKLR.

i. *Increase the avenues of reporting sexual harassment within the workplace*

Victims of sexual harassment are often faced with the challenge of having a singular medium for seeking resolution of the offence.⁹⁹ The situation is worsened where the singular medium is compromised because of the perpetrator having an influence on the outcome. The result has a chilling effect on the reporting of sexual harassment in the workplace.¹⁰⁰

The singular avenue in the Kenyan context is the reporting mechanism under the Employment Act which only provides for the resolution of cases of sexual harassment by the employer.¹⁰¹ To improve the effectiveness of this reporting mechanism, options for reporting should be broadened to include external adjudicators in order to provide victims with a variety of avenues. This will increase the confidence that complainants have in the independence of the reporting mechanism, eradicate interference of the perpetrator with the investigation process, prevent retaliatory measures being taken against the complainant and provide sanctions equivalent to the offence.¹⁰²

A possible external adjudicator to emulate is the Equal Employment Opportunity Commission (EEOC), which is the lead enforcement agency on workplace discrimination in the USA.¹⁰³ It has the authority to investigate charges of discrimination against employers who are covered by the law.¹⁰⁴ This includes sex discrimination that takes the form of sexual harassment.¹⁰⁵ Sexual harassment as a form of discrimination was recognised within the Kenyan legal system by Justice Rika in *P O v Board of Trustees, A F & 2 others*.¹⁰⁶

Once a discrimination charge is filed, the EEOC coordinates a mediation session between the employer and employee(s). Where no mutually acceptable agreement is arrived at, the EEOC conducts an independent investigation to determine whether discrimination has occurred. The EEOC subsequently attempts to resolve well-founded charges through its administrative enforcement process. As a last resort to litigation, the EEOC is required to facilitate a conciliation during which the parties may negotiate an appropriate remedy for the alleged

⁹⁹ Code of conduct and guidelines to prevent and address sexual harassment in workplaces, International Labour Organisation, 2013, 11-12.

¹⁰⁰ Maina L, 'Impact of sexual harassment at workplace: a case of the United Nations in Kenya' unpublished, University of Nairobi, Nairobi, 2018, 35 and Wasilwa G, 'Sexual harassment of women employees at Kenyatta National Hospital, Nairobi county' county, 10.

¹⁰¹ Section 6 (2), *Employment Act* (No. 11 of 2007).

¹⁰² Code of conduct and guidelines to prevent and address sexual harassment in workplaces, 11.

¹⁰³ <https://www.eeoc.gov/eeoc/history/35th/pre1965/index.html> on 07 January 2020.

¹⁰⁴ <https://www.eeoc.gov/employers/process.cfm> on 07 January 2020.

¹⁰⁵ https://www.eeoc.gov/laws/types/sexual_harassment.cfm on 17 March 2020.

¹⁰⁶ *P O v Board of Trustees, A F & 2 others* (2014) eKLR, 33.

discrimination. Nearly 93% of all charges are resolved through one of these informal methods.¹⁰⁷

A similar commission can be established under Chapter 6 of the Constitution of Kenya. This would provide additional avenues to report sexual harassment incidents without having to approach the court. The resolution of disputes by the commission through mediation will be enforceable as if it were a judgment of that Court in two situations; where it is a court annexed mediation,¹⁰⁸ or where the private mediation agreement is in writing, registered and presided over by an accredited mediator.¹⁰⁹ Given that the commission is a public body and the mediation would not be pursuant to a private agreement, the suitable structure is mediation annexed by the court upon request by the parties through the proposed commission.¹¹⁰ This way the mediation agreement will be enforceable as if it were a judgment of that Court.¹¹¹ Moreover, no appeal lies against such an agreement which supports the finality of the process.¹¹²

Therefore, the adjudication would be impartial and would boost the confidence of victims in the resolution of sexual harassment cases. Additionally, it would prevent retaliatory acts because the identity of the reporter would be kept confidential as is done in the EEOC.¹¹³ This would reduce reluctance in reporting.

Consequently, while litigation may also serve as an external adjudicator, there are certain advantages that arise from dispute resolution through a commission instead. These are

Reduction of chances of judicial bias based on gender perceptions of sexual harassment

Sexual harassment is a problem with a long past but a short history.¹¹⁴ This points to the difficulty in defining what exactly amounts to sexual harassment.¹¹⁵ The difficulty is characterised by existing gender differences on perceptions on what constitutes sexual

¹⁰⁷ Knepper M, 'When the shadow is the substance: judge gender and the outcomes of workplace sex discrimination cases' 36 *Journal of Labour Economics* 3, 2018, 628.

¹⁰⁸ Section 59(B) (1), *Civil Procedure Act* (Act No 10 of 2012); Muigai K, 'Court sanctioned mediation in Kenya- An appraisal' 2018, 4.

¹⁰⁹ Section 59(D), *Civil Procedure Act* (Act No 10 of 2012).

¹¹⁰ Section 59(B) (1) (a), *Civil Procedure Act* (Act No 10 of 2012).

¹¹¹ Section 59(B) (4), *Civil Procedure Act* (Act No 10 of 2012).

¹¹² Section 59(B) (5), *Civil Procedure Act* (Act No 10 of 2012).

¹¹³ <https://www.eeoc.gov/employees/confidentiality.cfm> on 07 January 2020.

¹¹⁴ Rotundo M, Nguyen D, Sackett P, 'A meta-analytic review of gender differences in perceptions of sexual harassment' 86 *Journal of Applied Psychology* 5, 2001, 919.

¹¹⁵ Rotundo M, Nguyen D, Sackett P, 'A meta-analytic review of gender differences in perceptions of sexual harassment' 919.

harassment.¹¹⁶ This difference in gender perceptions was exhibited in a meta-analysis which yielded an overall standardized mean difference of 0.30 which suggested that women are more likely than men to define a broader range of behaviours as sexually harassing.¹¹⁷

Consequently, this disparity in gender perceptions poses a challenge to impartial dispute resolution through litigation. The rationale is that a judge's gender plays a role in the outcome of cases of sexual harassment which poses a risk of judicial bias. The same was affirmed by a study based on judicial bias in decisions on sexual discrimination by courts in USA. It sampled approximately 1,000 workplace sex discrimination cases brought forth by the EEOC between 1997 and 2006.¹¹⁸ Of the cases adjudicated, cases in which female workers allege that they are victims of workplace sex discrimination are 88.8% more likely to succeed when adjudicated by a female judge in comparison to a male judge.¹¹⁹ The outcome is buttressed by an earlier study that revealed that the probability of a plaintiff's success in a sexual harassment case is increased by 20% through the inclusion of one female judge on a three judge appellate panel.¹²⁰

Cumulatively, these results reveal that judicial bias arises based on gender perceptions of sexual harassment where male judges are less likely to find behaviour to amount to sexual harassment than female judges. This is problematic in Kenya where gender perceptions on sexual harassment have also been documented.¹²¹ Such differences may affect judicial impartiality over cases of sexual harassment where there are only 5 female judges out of the 13 in the Employment and Labour Relations court tasked with cases of sexual harassment, as a civil offence, in the workplace.¹²² In the High Court which would preside over sexual harassment as a criminal offence, of the 48 High Court judges only 13 are women.¹²³

¹¹⁶ Rotundo M, Nguyen D, Sackett P, 'A meta-analytic review of gender differences in perceptions of sexual harassment' 914.

¹¹⁷ Rotundo M, Nguyen D, Sackett P, 'A meta-analytic review of gender differences in perceptions of sexual harassment' 918.

¹¹⁸ Knepper M, 'When the shadow is the substance' 624.

¹¹⁹ Knepper M, 'When the shadow is the substance' 658.

¹²⁰ Boyd C, Epstein L, Martin A, 'Untangling the causal effects of sex on judging' 54 *American Journal of Political Science* 2, 2010, 389–411.

¹²¹ Karega 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 Kenyatta University, 2002, 14 — <https://laborrights.org/sites/default/files/publications-and-resources/Kenya.pdf> on 17 March 2020.

¹²² <https://www.judiciary.go.ke/courts/employment-and-labour-relations-court/#judges> on 18 March 2020.

¹²³ Jayachandran S, Kremer M and Shafter J, 'Women judges enabling sustainable development goals: Opportunities, challenges and strategies,' Africa Regional Conference organized by the International Association of Women Judges and Kenya Women Judges Association, Nairobi, 16-20 May 2017, 14-16.

Therefore, the use of a commission would avoid the chances of this judicial bias based on this gender perceptions that are catalysed by an imbalance in judge populations as shown above. This is because of the gender parity that a commission would present in the selection of a panel that is to consider a claim as opposed to the random selection of a judge on litigation.

Reduction of case back log in courts and faster dispute resolution

Furthermore, the use of mediation through the commission as a form of Alternative Dispute Resolution (ADR) would result in the reduction of cases of sexual harassment that end up in court. The same can be seen from the operation of the EEOC where it only initiated suits on 66 cases of sexual harassment out of the 498 charges conciliated on the same.¹²⁴ This amounts to approximately 13% of the cases being litigated with the rest being resolved through alternative forms of dispute resolution such as mediation.¹²⁵

The reduction of case backlog through ADR is in line with the Sustaining Judiciary Transformation (SJT) agenda in which the Judiciary has embraced ADR as an avenue for addressing case backlog in the court system while making justice more accessible.¹²⁶ This is pursuant to Article 159 of the Constitution which mandates the Judiciary to promote alternative mechanisms of alternative dispute resolution in the administration of justice.¹²⁷

Additionally, resolution through mediation facilitated by a commission such as EEOC would reduce the time required to conclude a claim. This is because the average processing time for mediation is 84 days and claims are often resolved within a single mediation session which takes five hours on average.¹²⁸ In comparison, the desirable duration for resolution of a case through litigation in Kenya is one year from the date of filing to the finalisation.¹²⁹

ii. Ratification and domestication of the Convention against Violence and Harassment in the World of Work

The Violence and Harassment Convention 2019 was opened for ratification by the ILO on 21 June 2019.¹³⁰ The convention was as a result of extensive discussions on the violence and

¹²⁴ <https://www.eeoc.gov/eeoc/newsroom/wysk/preventing-workplace-harassment.cfm> on 17 January 2020.

¹²⁵ <https://www.eeoc.gov/employees/mediation.cfm> on 17 January 2020.

¹²⁶ The Judiciary of Kenya, *Sustaining Judiciary Transformation (SJT) a service delivery agenda, 2017-2021*, 2017, 19.

¹²⁷ Article 159, *Constitution of Kenya* (2010).

¹²⁸ <https://www.eeoc.gov/employers/resolving.cfm> on 17 January 2020.

¹²⁹ The Judiciary of Kenya, *State of the judiciary and the administration of justice annual report 2017 -2018*, 2018, 22.

¹³⁰ https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_711891/lang--en/index.htm on 01 December 2019.

harassment in the workplace that culminated in a draft released on March 2019.¹³¹ The objective of this convention is to protect workers and other persons in the world of work from violence and harassment.¹³² The scope of the term harassment includes sexual harassment.¹³³ In providing this protection, the convention mandates parties that are signatories to ensure that they have a reporting mechanism in place within their legal framework.¹³⁴

The convention proceeds to provide a list of mandatory requirements for a reporting mechanism which if implemented in Kenya will increase safeguards for victims when they do report sexual harassment in the workplace. These include; providing dispute resolution mechanisms that are external to the workplace¹³⁵ providing protection against victimization of complainants, victims, witnesses and whistle-blowers through retaliation.¹³⁶

In comparison, the requirements under section 6 of the Employment Act fall short of providing an effective reporting mechanism because of the absence of these key requirements and the effect is the exploitation of these gaps such the retaliatory acts taken against victims and those who report.¹³⁷ Therefore, Kenya as a member state of the ILO should ratify and domesticate the convention in order to fill the legislative gaps, specifically; protection against retaliation and provision of an external reporting mechanism. In this way, the legal framework will provide for an effective reporting mechanism that protects the victim thus reducing barriers to reporting.

iii. *Provide a platform for complainants to openly discuss instances of sexual harassment*

Reporting mechanisms should also include informal mediums of redress that provide the victim with a platform to openly discuss the circumstances surrounding the offence and make it known to the perpetrator that such advances are unwelcome.¹³⁸ This is because victims often consider sexual harassment to be an isolated event targeted only at them instead of an institutional problem as is suggested by the bad apple theory.¹³⁹ Additionally it results in

¹³¹ https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_711891/lang--en/index.htm on 01 December 2019.

¹³² Article 2, *Violence and Harassment Convention*, 21 June 2019, No. 190

¹³³ Article 1 (b), *Violence and Harassment Convention*, 21 June 2019, No. 190

¹³⁴ Article 10, *Violence and Harassment Convention*, 21 June 2019, No. 190

¹³⁵ Article 10 (b) (ii), *Violence and Harassment Convention*, 21 June 2019, No. 190.

¹³⁶ Article 10 (b) (iv), *Violence and Harassment Convention*, 21 June 2019, No. 190.

¹³⁷ *MWM v MFS* (2014) eKLR; *SRM v GSS (K) Limited and another* (2017) eKLR; Wasilwa G, 'Sexual harassment of women employees at Kenyatta National Hospital, Nairobi county' 34; Jacobs S, Brahic B and Olaiya M, 'Sexual harassment in an East African agribusiness supply chain' 10.

¹³⁸ Code of conduct and guidelines to prevent and address sexual harassment in workplaces, 11.

¹³⁹ Lawton, 'The bad apple theory in sexual harassment law,' 819-820.

victims tolerating sexual harassment as a normal component of the working environment as is proposed by the normalisation theory.¹⁴⁰

The success of providing platforms for open discussions surrounding sexual harassment in the workplace was witnessed in 62 flower farms where the medium helped to give a ‘voice’ to marginalised.¹⁴¹ The platform facilitated open dialogue among employees on sexual harassment. The open discussions militated toward eradicating the feeling of isolation that victims of sexual harassment may experience. Not only did the platform show marked results in reducing tolerance of sexual harassment as a part of the work culture in the horticultural sector but also gave victims viable mediums through which they could seek redress.¹⁴²

The scope of this study was limited to instances of sexual harassment whereby there is a sexual harassment policy that provides a reporting mechanism pursuant to section 6(3) of the Employment Act. However, other areas of further research were encountered in the research leading up to the current study. These further areas of research have been informed, in part, by the cases discussed in Chapter 4.1.B. There areas of further research are;

The enforcement of the requirement to have a sexual harassment policy in the workplace is not adhered to in many instances. This results in victims not having recourse to a form of redress within the workplace upon being sexually harassed. This was the case in *CAS v CS Limited* where the employer was found liable not for sexual harassment but instead for the failure to have a sexual harassment policy in place.¹⁴³ Similarly in *MWM v MFS* the employer was found liable for the same reason and this led to Justice O.N Makau stating that *a respondent will not benefit from the failure of a claimant to report the sexual harassment incidence where the respondent fails to provide a mechanism to do so.*¹⁴⁴

Additionally, an employer is only required to have a sexual harassment policy only if they have employed 20 employees or more.¹⁴⁵ This is problematic because a more intimate relationship exists between an employer and employee where there are fewer employees because of the increased likelihood of direct interaction. This is likely to result in sexual harassment since the actions of the employer remain largely unchecked by other colleagues. The same was demonstrated in *NML v Peter Petrausch* where the claimant was one of two

¹⁴⁰ Harker, ‘Normalising sexual violence: Young women account for harassment and abuse’ 339.62

¹⁴¹ Jacobs S, Brahic B and Olaiya M, ‘Sexual harassment in an East African agribusiness supply chain’, 9-10.

¹⁴² Jacobs S, Brahic B and Olaiya M, ‘Sexual harassment in an East African agribusiness supply chain’ 10.

¹⁴³ *CAS v CS Limited* (2016) eKLR.

¹⁴⁴ *MWM v MFS* (2014) eKLR.

¹⁴⁵ Section 6(2), *Employment Act* (No 11 of 2007).

domestic workers employed by the respondent who was a German national. The claimant experienced routine sexual harassment that took a multitude of variations and ended in the termination of her employment because of refusing the advances.¹⁴⁶

¹⁴⁶ *NML v Peter Petrausch* (2015) eKLR.

6.0 CONCLUSION

The study set out to determine whether the structure of the reporting mechanism contributes to the reluctance in reporting that is displayed by victims of sexual harassment in the workplace. Pursuant to this objective, it has examined the effectiveness of the reporting mechanism envisaged by the employment Act through analysing the outcomes of reporting. These outcomes are drawn from an array of case law and studies conducted on sexual harassment in the workplace within Kenya. This has provided a contextualised view of the reporting mechanism and its subject matter.

Results drawn from answers to the research questions have proven the hypothesis by demonstrating that the structure directly increases the reluctance of victims to report incidences in the following ways; victims who reported suffered retaliatory acts by the perpetrators, the internal investigation and adjudication of reports by the employer proved to be subject to influence by the perpetrators either directly or indirectly and the limited scope of avenues to report discouraged victims from reporting the offence because of a lack of confidence in the impartiality of the process.

The study is centrally informed by the dominance feminism theory that was propounded by Catherine Mackinnon to shed light on the nuances of sexual harassment in the workplace. The theory aided the entire study by providing a clear lens to view the offence as well as informing the research questions tackled in each chapter. It exposed sexual harassment as an act of dominance that is fuelled by the power imbalance in the workplace and demonstrated exactly how an employer is ill-suited to handle reports of sexual harassment. Furthermore, the desktop research proved to be adequate and efficient as it provided all the material necessary to complete this study.

Recommendations are drawn from the findings of this study that, if implemented, will promote the confidence in the victims of sexual harassment in the reporting mechanism. These include; increasing the avenues of reporting sexual harassment within the workplace, ratifying and domesticating the Convention against Violence and Harassment in the World of Work and providing a platform for complainants to openly discuss instances of sexual harassment. The study concludes by proposing possible areas of further research that, despite falling outside the scope of this study, will provide more insight into the offence of sexual harassment.

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