

LEGAL PRACTICE MANAGEMENT: ATP 106

LECTURE 5

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SEXUAL HARASSMENT AT THE WORKPLACE

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INTRODUCTION

- Cases of sexual harassment within the work place have been on the rise:
 - When No Truly Means No: What Constitutes Sexual Harassment In Kenya by Christine Odeph written in 2018
 - Why Kenyan Flower Farms Is No Bed Of Roses by Patrick Kibet and Antony Gitonga written on August 9th 2018
 - Sexual Harassment: A Threat to Female Labour in Kenya by Ouma and Muthoni written on May 2nd 2013

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- It is a fallacy to say that only female employees suffer from sexual harassment, male employees can also be sexually harassed.

"Sexual harassment may occur between persons of the opposite sex or same sex. Both male and females can either be victims or the offenders."

United Nations Secretary General's Bulletin on prohibition of Discrimination, Harassment, including Sexual Harassment and Abuse of Authority

- Employers need to:
 - ensure strict implementation of the mandatory legal provisions that curb sexual harassment.
 - implement policies and guidelines.

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Definitions

"Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that tends to create a hostile or offensive work environment."

legal dictionary
"A form of discrimination that violates Title VII of the Civil Rights Act of 1964, which prohibits unfair employment practices and discrimination based on sex (including pregnancy, gender identity and sexual orientation), age (40 or older), color, national origin, race, religion, disability or genetic information. Sexual harassment specifically consists of unwelcome conduct and behavior of a sexual nature that creates an uncomfortable and often hostile work environment."

Equal Employment Opportunity Commission

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"a) Any direct or indirect requests for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express:

- (i) promise of preferential treatment in employment;
- (ii) threat of detrimental treatment in employment; or
- (iii) threat about the present or future employment status of the employee.

b) Any behaviour that is unwelcome or offensive, of a sexual nature that includes physical conduct, display of visual material and communication whether written, verbal or non-verbal and includes electronic material."

Law Society of Kenya, Draft Sexual Harassment and Bullying Policy 2019

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"(1) Any person, who being in a position of authority, or holding a public office, who persistently makes any sexual advances or requests which he or she knows, or has reasonable grounds to know, are unwelcome, is guilty of the offence of sexual harassment and shall be liable to imprisonment for a term of not less than three years or to a fine of not less than one hundred thousand shillings or to both.

(2) It shall be necessary to prove in a charge of sexual harassment that-

(a) the submission or rejection by the person to whom advances or requests are made is intended to be used as basis of employment or of a decision relevant to the career of the alleged victim or of a service due to a member of the public in the case of a public officer;

(b) such advances or requests have the effect of interfering with the alleged victim's work or educational performance or creating an offensive working or learning environment for the alleged victim or denial of a service due to the member of the public from a public office."

Section 23, Sexual Offences Act

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"An employee is sexually harassed if the employer of that employee or a co-worker-

a) Directly or indirectly requests that employee for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express-

- i) Promise of preferential treatment in employment;
- ii) Threat of detrimental treatment in employment;
- iii) Threat about the present or future employment status of employee;

b) Uses language whether written or spoke of a sexual nature"

Section 6(1) of the Employment Act

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"[a] any distinction, exclusion, preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and

[b] such other distinction, exclusion or preference which has the effect of nullifying or impairing the equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with the representative employers' and workers' organization, where such exist, and with other appropriate bodies."

The 1988 General Survey of the Committee of Experts of the International Labour Organisation, conducted on the Application of ILO Convention 111 (Convention Concerning Discrimination in Respect of Employment and Occupation, 1958).

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"A sex-based behaviour that is unwelcome and offensive to its recipient."

The International Labour Organization

• Also see:

○ The Committee Convention Concerning Discrimination in Respect of Employment and Occupation, 1958 which lists examples of sexual harassment that may supplement Section 6 of the Employment Act .

○ P O v. Board of Trustees, A F & 2 others [2014] eKLR

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FORMS OF SEXUAL HARASSMENT

Quid pro quo sexual harassment

- Section 6 of the Employment Act.
- Meritor Savings Bank v. Vinson (1986) 477 US 62.
- P O v Board of Trustees, A F & 2 others [2014] eKLR
- Articles 1, 3 and 5 of the 1948 UN Universal Declaration of Human Rights
- An Outline of Recent Developments Concerning Equality Issues in Employment for Labour Court Judges and Assessors- [ILO 1997]

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Hostile working environment in which the conduct creates conditions that are intimidating or humiliating for the victim.

- To raise an issue of sexual harassment under this sub-heading, one must prove: -
 - Harassment must be severe.
 - ✦ Bundy v. Jackson 641 F.2d 934 (D.C. Cir. 1981)
 - Harassment must create substantial interference.
 - ✦ Harris v. Forklift Systems Inc., 510 U.S. 17 (1993).
 - Reasonable woman test is to be applied.
 - ✦ Robinson v. Jacksonville Shipyards (1991) 1486 M.D. Fla.

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Same-Sex Sexual Harassment.

- Definition of sexual harassment provided by the United Nations Secretary General's Bulletin on prohibition of Discrimination, Harassment, including Sexual Harassment and Abuse of Authority
- Oncale v. Sundowner Offshore Services Inc 523 U.S. 75 (1998)
- Leonid Lenny Melnychenko & others 1 v. 84 Lumber Company 676 US N.E. 2ed. 45 (1997).

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Behaviour that qualifies as sexual harassment

- PHYSICAL: Physical violence, touching, unnecessary close proximity
- VERBAL: Comments and questions about appearance, life-style, sexual orientation, offensive phone calls
- NON-VERBAL: Whistling, sexually-suggestive gestures, display of sexual materials

➤ *What are some examples of sexual harassment?*

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CAUSES OF SEXUAL HARASSMENT

- Socialization
- Power games
- Moral values, divorce and cultural differences
- Credibility and victim blaming
- Aggressiveness and bravado
- Lack of company policy

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EFFECTS OF SEXUAL HARASSMENT

- Emotional issues
- Physical issues
- Professional problems
- Financial problems
- Decreased company productivity
- Lawsuits
- Tarnished reputations

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INGREDIENTS FOR A CHARGE OF SEXUAL HARASSMENT

Constitution of Kenya, 2010

- Chapter 4 of The Constitution of Kenya guarantees rights and freedoms of every person in Kenya
 - Articles 27, 28, 29, 41, 43 and 47 of the Constitution.

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Sexual Offences Act

- The Sexual Offences Act is very clear in its definition of what constitutes sexual harassment.
- Scrutiny of section 23(2) imposes the burden of proof on the alleged victim. What significance does this have?
 - See: section 5 of the Sexual Offences Act

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Employment Act

- Section 6 of the Employment Act is very clear in its definition of sexual harassment.
- Employers need to ensure that adequate policies and guidelines are drafted and implemented.
 - The International Labour Organization sample policy document.
 - CAS v CS Ltd [2016] eKLR - the court found that the employee had been summarily dismissed in contravention of sections 42(1), 44(3) & (4) and 45(1) of the Employment Act. The claimant was awarded compensation of approximately KShs. 422,726.85/=
 - SRM v GSS (K) Limited & another [2017] eKLR where the court held that the process outlined within the business ethics policy was not followed by the employer. Justice Abudha found that the employee had been unfairly dismissed and awarded her compensation of Kshs 5,928,000/=

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DISCRIMINATION IN THE WORKPLACE

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Definitions

"To 'discriminate' against someone means to treat that person differently, or less favorably, for some reason..... employment discrimination because of your race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, disability, age (age 40 or older), or genetic information."

The United States Equal Employment Opportunity Commission

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"distinction, exclusion or preference ... which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation."

The International Labour Organization

- ILO provides further criteria that is incumbent in workplace discrimination, to wit when a person is treated less favorably than others because of characteristics that are not related to the person's competencies or the inherent requirements of the job.
- Also see section 3 of the National Cohesion and Integration Act.

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MANIFESTATIONS AND TYPES OF DISCRIMINATION

Direct or indirect

- Direct discrimination is the treatment of a person less favorably than others in similar circumstances.
 - R. v. Birmingham CC ex parte EOC [1989] AC 1155; [1989] IRLR 173; [1989] AC 1155; 2 WLR 520; 1 All ER 769
- Indirect discrimination is indiscernible and often times inadvertent. It occurs when a specific practice, criterion or norm disadvantages a specific class of individuals.
 - David Wanjau Muhoro v. Ol Pajeta Ranching Ltd [2014] eKLR.

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Positive or negative

- Negative discrimination is unfavorable to a specific class of persons
- Positive discrimination is treatment of a specific class of people more favourably than others also known as affirmative action
 - Article 27(8) of the Constitution.
 - Mary Wangui Gakunju v. City Council of Nairobi [2013] eKLR

➤ *Why try and curb discrimination in the work-place?*

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Types of discrimination.

- Race and / or colour:
 - Section 5(3) of the Employment Act
 - Articles 22 and 23 of the Constitution 2010.
 - David Wanjau Muhoro v. Ol Pejeta Ranching Limited Industrial Court Case No. 1823 of 2011.
 - Charles Muthama v. Wananchi Group (K) Limited Industrial Court Case No. 1343 of 2010. Dr. Samson Gwer and 5 others v. Kenya Medical Research Institute & 3 others Industrial Court Petition No. 21 of 201.
- Age
 - Kinyua Felix v Ministry of Education & 2 others [2021] eKLR

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- HIV / AIDS status
 - BNN v Christopher Mutua Musyoki [2019] eKLR
 - SNW v Asha Gulam [2019] eKLR
 - VMK v Catholic University of Eastern Africa [2013] eKLR
- Disability
 - Section 2, 12(1) & 15(1) of the Persons with Disabilities Act
 - Article 27 & 54 of the Constitution
 - Durcan Otieno Waga v Attorney General [2014] eKLR
- Sex:
 - Articles 27(1), (3) & (5) of the Constitution
 - section 5(3) of the Employment Act
 - Jane Wairimu Macharia v. Mugo Waweru and Associates [2012] eKLR.

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- Nationality:
 - Article 6 of the Migration for Employment Convention (Revised), 1949 (No. 97)
- Sexual Orientation:
 - Section 165 of the Penal Code?
 - EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae) Petition 150 & 234 of 2016 (Consolidated).
- Workers with family responsibility:
 - VMK v Catholic University of Eastern Africa [2013] eKLR,
 - DMV v. Bank of Africa Kenya Limited [2013] eKLR.
 - The United Nations Convention on the Elimination of All Forms of Discrimination Against Women (1979)

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- Trade union membership and/or activities:
 - Article 36 of the Constitution 2010
- Religion:
 - Article 36 of the Constitution
 - Rose Wangui Mamo v. Limuru Country Club [2014] Ekr, Constitutional Petition No. 160 of 2013.
- Political opinion
 - Articles 33, 36 and 38 of the Constitution 2010.
- National extraction

➤ *Where does discrimination occur?*

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HOW TO ADDRESS DISCRIMINATION IN THE WORK PLACE; LEGAL AND POLICY FRAMEWORK

INTERNATIONAL LEGAL FRAMEWORK

- Kenya has ratified to numerous international and regional treaties:
 - United Nations Treaties
 - International Labour Organization (ILO) Treaties
 - Regional Treaties

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United Nations Treaties: -

- Universal Declaration of Human Rights e.g. Articles 1 & 23 (2)
- International Covenant on Civil and Political Rights e.g. Article 26
- International Covenant on Economic, Social, and Cultural Rights (1966) e.g. Article 7
- International Convention On the Elimination of All Forms of Racial Discrimination (1965) e.g. Article 5
- International Convention On the Elimination of All Forms of Discrimination Against Women (1979) e.g. Article 11
- International Convention On the Rights of Persons with Disabilities (2006) e.g. Article 27.

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International Labour Organization (ILO) Treaties: -

- The Equal Remuneration Convention (1951), No. 100 e.g. Article 1
- The Discrimination (Employment and Occupation) Convention (1958), No. 111

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Regional Treaties: -

- These have been adopted under the auspices of the African Union. They include: -
 - African Union Youth Charter (2006)
 - Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2005)
 - Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (1998)
 - African Charter on Human and People's Rights (1981)
 - African Union Cultural Charter for Africa (1976)

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NATIONAL LAWS

The Constitution of Kenya, 2010

- Preamble: lists equality as one of the 6 essential values.
- Article 10: National values and principles of governance.
- Article 20(4): Promotes equality and equity.
- Article 21(3): duty for State actors to address the needs on vulnerable people in society.
- Article 27: Provides for equal protection before the law.
- Article 33: Freedom of expression
- Article 54: Rights of disabled persons
- Article 55: Youth rights (between ages 15 and 35)
- Articles 22 and 23: Procedural aspects for instituting claims under the Bill of Rights

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- Persons with Disabilities Act; Section 15(1)
- The Employment Act; Section 5(3)
- The HIV and AIDS Prevention and Control Act; Section 31(1)
- The National Cohesion and Integration Act; Sections 3 & 7
- The Sexual Offences Act, (2006); Section 23
- Policy Framework
 - Kenya Vision 2030
 - The National Policy on Gender and Development
 - Public Sector Workplace Policy on HIV and Aids

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