

**THE KENYAN SECTION OF THE INTERNATIONAL COMMISSION OF
JURISTS (ICJ-KENYA)**



AFRICAN HUMAN RIGHTS AND ACCESS TO JUSTICE PROGRAM (AHRAJ)

LEGAL OPINION

Internal – James Gondi (Legal Officer - AHRAJ)

CASE 310: LABOUR AND WOMEN'S RIGHTS (UGANDA)

*Grace Kamibanda Maguru VS (1) Kamutumi Fast Foods (U) Ltd AND Akbram Khan Mital CS NO
158/07*

Introduction

The Plaintiff was an employee of Kamutmi Fast Foods (U) Ltd between 1999 and 2005 when she was summarily dismissed after registering complaints of sexual harassment and assault against her managers to her employer and the police. The Second defendant was the plaintiff's immediate boss and in January 2005 initiated sexual advances towards the Plaintiff contrary to company policy and in disregard of the plaintiff's objection. In February of the same year, the plaintiff wrote a comprehensive report of her experiences and submitted it to the human resource and gender officer.

The second defendant disregarded this and proceeded to further assault the plaintiff by attempting to undress her in the course of her duties in the store. The second defendant groped the plaintiff's breast and forcefully kissed her on several occasions. She filed several reports with management until finally resorting to filing a report of indecent assault with the Uganda Police (Kyaka II Police post – *vide* prf-kii/crb 9126/11/05). The complaints and reports were fully documented and are available to the trial attorneys.

Criminal proceedings were brought against the second defendant who, under the protection of the 1st defendant was transferred to Nairobi and later flown to Mumbai, India resulting in the collapse of those proceedings. The present claim is therefore against the company (Kamutumi Fast Foods Ltd) which had employed the plaintiff.

The present opinion is of the view that the actions of both the defendants herein constitute discrimination on the ground of sex in contravention of the national laws of Uganda, its constitution and relevant international treaties to which Uganda is a state party. Further, the circumstances surrounding the dismissal of the defendant and the manner in which the dismissal was carried out is in contravention of Uganda's employment laws, the constitution of Uganda and International Labour Organization (ILO) standards governing the rights of women, and all workers generally.

It is the view of this opinion that the treatment of the defendant constituted employment discrimination on the basis of gender in contravention of the Constitution of Uganda, the Employment Act of Uganda, the Convention on the Elimination of All Forms of Discrimination against Women, the ILO Convention concerning Discrimination in Respect of Employment and Occupation as well as other international instruments, standards, practices and jurisprudence.

The Constitution of the Republic of Uganda

Section 33 (1) of the Constitution of Uganda protects the dignity of women by stipulating that:

“Women shall be accorded full and equal dignity of the person with men”¹

¹ Constitution of the Republic of Uganda (1995) Section 33(1). Available at <http://confinder.richmond.edu>

Further, Section 21 of the same constitution which guarantees ‘equality and freedom from discrimination’ stipulates under sub-section two (2) that:

“**A person shall not be discriminated against on the ground of sex**, race, colour, ethnic origin, tribe, birth, creed, or religion, social or economic standing, political opinion or disability”.²

Constitution of the Republic of Uganda, its supreme law, therefore prohibits discrimination on the grounds of sex and bestows upon women commensurate standing to men in all spheres of life, the workplace included.

The treatment of the Plaintiff (Grace Kamihanda Maguru) at the hands of her employers was clearly in violation of her constitutional rights to non-discrimination on the basis of sex and the right to be accorded equal dignity of the person with men. The respondent’s behavior (failing to protect the plaintiff from sexual harassment) was peculiar to the plaintiff, who was the only woman serving in direct contact with the defendant at management level. It is arguable; therefore, that she was treated as such due to her sex since the same treatment was not meted out on the defendant’s male colleagues. In so doing, the defendants violated the plaintiffs constitutionally guaranteed rights.

Statutes

The Employment Act of Uganda (Act no 6 of 2006) establishes the offence of sexual harassment in consonance with international standards governing workers rights. This is a newly adopted act which replaces the Employment Act of 2000. The 2006 Act forges new rights and preserves some of the existing ones:

“The new rights include: protection from forced labour, protection from discrimination in employment due to “race, colour, sex, religion, political opinion, natural extraction or social origin, the HIV Status or disability which has the effect of nullifying or impairing the treatment of a person in employment or occupation, or preventing an employee from obtaining any benefit under a contract of service” [Section 6 (3)] and **protection from sexual harassment by the employer (Section 7)**. Others are the right to written particulars of the contract (Section 59), *the right to a fair hearing before dismissal (Section 69), the right to reinstatement and/or compensation in cases of unfair dismissal (Section 71)* and remedies of compensation and additional compensation in cases of unfair termination (Section 77 & 78), and severance pay (Sections, 87 to 89)”³

The behavior of both defendants in the present case contravened Section 7 of the Employment Act of Uganda 2006. On the part of the second defendant, the said defendant is culpable under the Penal Code for indecent assault.

² Constitution of the Republic of Uganda (1995) Section 21(2). Available at <http://confinder.richmond.edu>

³ Freedom of Association and Uganda’s New Labour Laws: A Critical Analysis of the State of Workers’ Organizational Rights (John Jean Barya) Human Rights and Peace Centre (HURIPEC), 2007.

More importantly, however, because the present claim is against the company, the management of the company are in breach of the Section 7 of the Employment Act (2007) on account of failing to protect the plaintiff from sexual harassment by the second defendant (a senior manager with the corporation) as per its statutory duty despite several complaints made by the plaintiff to the relevant structures of the company responsible for the protection of its employees in respect of sexual harassment and enforcing company policy and requisite disciplinary mechanisms to end the abuse that the plaintiff was being subjected to.

International Treaties and Instruments

International human rights standards governing the rights of women have established the consideration of sexual harassment against women as amounting to discrimination against women which is proscribed at international law.

Gender Discrimination

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which Uganda ratified in 1985 prohibits all forms of discrimination against women and calls upon state parties to take relevant measures to ensure the same.

Article 5 (a) of the Convention calls upon State parties to:

“to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other **practices which are based on the idea of inferiority or the superiority of either of the sexes** or on stereotyped roles for men and women”.⁴

Article 11 of the same Convention calls on State Parties to take all appropriate measures to

“Eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights.”⁵

In particular, Article 11 (c) protects:

“The right to free choice of profession and employment, the right to promotion, **job security and all benefits and conditions of service** and the right to receive vocational training and re-training, including apprenticeships, advanced vocational training and recurrent training”⁶

⁴ The Convention on the Elimination of All forms of Discrimination against Women (CEDAW) Article 5 (a). Available at <http://www.ohchr.org/english/law/cedaw.htm>

⁵ *Ibid* Article 11 (c)

Reading Article 5 and 11 together and applying the same to the circumstances of the present case reveals specific violations of the Plaintiff's rights under the said convention. Specifically, sexual harassment and unequal treatment based on gender typically involves the exercise of power and authority over women, resulting in the reinforcement of a woman's subordinate status in relation to men.

This is the precise problem that Article 5 aims to address and prohibit by referring to **practices which are based on the idea of inferiority or the superiority of either of the sexes**. By logical abstraction, this applies to the work place which is referred to at article 11 which prohibits all forms of discrimination against women in respect of conditions of service which discrimination is oft triggered by sexual harassment. The rights of the Plaintiff in the above respect have been violated by her employer. The state, judicial arms included, are under an international obligation to preserve and protect the same.

Discrimination against women is also addressed in other international treaties, to varying degrees, including the Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR).

“Other international human rights instruments do not specifically define ‘discrimination against women’. Rather, they mandate equality of treatment between men and women. Under Article 2 of the ICCPR, each state party undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction, the rights recognised in the present Covenant, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁷

Further, Article 3 of the ICESCR requires state parties to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the covenant. Article 18 (3) of the African Charter on Human and Peoples Rights stipulates that the State shall:

“The State shall ensure **the elimination of every form of discrimination against women** and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions”.⁸

Thus, the African Charter reinforces the duties of state parties to ensure the application of anti-discriminatory policies and practices against women as enshrined in conventions such as CEDAW, UDHR, ICCPR and ICESCR.

Gender Discrimination in Respect of Employment

The ILO Convention concerning Discrimination in Respect of Employment and Occupation, 1958 – ILO convention number C111 (ratified by Uganda in 2005) proscribes

⁷ Human Rights Litigation and the Domestication of International Human Rights Standards in sub Saharan Africa. AHRAJ Case Book One (1) Chapter Two by Wachira Maina LL.M at Page 43.

⁸ *Ibid*

discrimination on the basis of sex in relation to employment conditions and practices. Article 11 (1) (a) states that for the purpose of this Convention, the term ‘discrimination’ includes

“Any distinction, exclusion or 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”.⁹

The ILO Resolution on Gender Equality, Pay Equity and Maternity Protection of June 2004 re-stated the same proscriptions on discrimination in its action plan for gender mainstreaming. Further, the ILO Committee of Experts has alluded to a prohibition of sexual harassment by virtue of Convention 111.¹⁰

Uganda has ratified ILO Convention C111 and is under an obligation to adopt legislation, policies and practices which uphold the standards set out in the convention. Through, the Employment Act of 2006 the non-discrimination aspects have been legislated. However, this does not circumvent the opportunity to ask the Court to apply these international standards due to the requisite obligation to uphold them in the promotion and protection of labour rights, particularly the right to not be discriminated in the workplace on the basis of sex.

Case Law

Bundy vs Jackson (1981)

In this case, a hostile working environment alone was for the first time recognized (by US Federal Appeals Court for the District of Washington D.C) as a form of harassment. In *Bundy*, a female employee of the Department of Corrections in Washington D.C was repeatedly invited by her supervisor to describe her sexual experience. When she complained to her senior manager, he took it lightly, saying that the feelings of the supervisor were understandable. The Court upheld Bundy’s charge that the innuendo and implicit threats created an intimidating and hostile atmosphere, and were unlawful, even though she had not suffered any tangible loss, such as the withholding of salary or promotion.

Vinson vs Meritor Bank (477 U.S 57 [1986])

In this case, a trainee teller was repeatedly propositioned by a vice president of the bank. After resisting for some time, she relented for fear of losing her job and was subjected to repeated unwanted sexual relations for four years. In this case, the court did not find it necessary to decide whether a sexual relationship between worker and employer had happened at all. The court held that **a hostile work environment alone was a violation of employment discrimination** contrary to U.S statutes (The Civil Rights Act of 1964)

⁹ ILO Convention 111. Available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C111>

¹⁰ Sexual Harassment in the Workplace: a Report from fieldwork in Thailand (2002). International Labour Rights Fund. Prepared by, Ubon Kompipote. Available at <http://www.laborrights.org/projects/women/thailandreport.pdf>

Porcelli vs Strathclyde Regional Council (1986) ICR 564, Court of Session: First Division

In this United Kingdom (UK) case, sexual harassment in the workplace was established as a type of sexual discrimination prohibited under the Sex Discrimination Act of 1986. Although not specifically mentioned in the Act, the Court of Session declared that sexual harassment may be form of direct sex discrimination.¹¹ In the same case the Court interpreted the Sex Discrimination Act [Section 41(1)] to the effect that an act done by an employee in the course of employment shall be treated as done by his employer as well as by him.

Recommendations

Following the analysis above on the constitution, statute and case law available, it is clear that there are sufficient grounds to begin and sustain an action against Kamutumi Fast Foods (U) Ltd. The said company, being the second defendant's employer (the second defendant having committed direct acts of sexual assault and harassment against the plaintiff) is equally culpable in keeping with the groundbreaking ruling in *Porcelli vs. Strathclyde Regional Council* as seen hereinabove.

The most effective approach would be a civil suit for damages in tort the basis of which would be mental anguish, physical harassment and loss of income and employment caused by sexual harassment. It would also need to be emphasized that the said loss of income and employment were brought about by the summary dismissal of the plaintiff due to the several complaints she made to the company which instead of redressing the matter, sought to protect the second defendant both by helping to relocate him and by dismissing the plaintiff from her employment.

Conclusion

A hostile working environment is sufficient to constitute sexual harassment which in turn is proscribed by the Constitution of Uganda, the Employment Act of Uganda 2006, the Convention on the Elimination of All Forms of Discrimination against Women, the ILO Convention concerning Discrimination in Respect of Employment and Occupation as well as other international instruments, standards, practices and jurisprudence.

Discrimination on the basis of gender is also proscribed by the aforementioned instruments. The Courts ought to uphold the rights of the Plaintiff which were breached by her employer in view of the treaty obligations of the state to uphold the standards set out in the said international instruments and the fact the sections which form the basis of the present claim have been codified into Ugandan law via the Employment Act 2006 and the 1995 Constitution. More importantly, employment discrimination on the basis of gender, in the

¹¹ Sexual Harassment and the Law: the British Experience. Greame Lockwood, Patrice Rosenthal and Alexandra Budjanovcanin Kings College London, University of London. Available at: <http://www.emeraldinsight.com/Insight/ViewContentServlet?Filename=/published/emeraldfulltextarticle/pdf/0100480501.pdf>

form of sexual harassment, is an affront on the dignity of the person in contradistinction with the most accepted international human rights normative framework as enshrined in the Universal Declaration of Human Rights.

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