

Examining the Reporting Mechanism for Sexual Harassment at the Workplace: A Focus on Section 6 of the Kenyan Employment Act

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Abstract

Sexual harassment in the workplace refers to any unwanted sexual request or advances by employers or colleagues. It is prevalent in the Kenyan context. Despite this, many cases of sexual harassment go unreported. This article looks at the factors affecting the reluctance to report sexual harassment in relation to the structure of the reporting mechanism under the Kenyan Employment Act. It is suggested that there exists a nexus between these factors and the structure of the reporting mechanism. This article is informed by the dominance feminism theory which identifies dominance as the basis for sexual harassment. To improve reporting, this article recommends increasing reporting avenues by including a commission and promoting training of employees on sexual harassment. With the exception of case law and statute, much of the information gathered has been sourced from books, papers, case law and published journals.

Key Words: Workplace sexual harassment, Section 6 and Kenyan Employment

I. Introduction

An employee is sexually harassed at the workplace if an employer, his representative or a co-worker makes unwelcome sexual advances or requests.¹

* "The world is a better place thanks to the generosity shared. What makes it even better is people who share their gift of time. To this end, I would like to thank Cecil Abungu for reading through my earliest drafts and providing guidance. Similarly, I would like to thank Ann Kotonya for the persistent and invaluable feedback she provided. To my family. To my mother, thank you for the opportunities you have provided me with that have led up to this. To my sister, thank you for keeping me company in the middle of the night as I typed away."

Additionally, an employee is sexually harassed if the employer, their representative or co-worker shows physical behaviour of a sexual nature that directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee.²

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 percent of the students and 27 percent of the staff had experienced various forms of sexual harassment.³ The prevalence is further highlighted through studies and case law that are discussed in Part III of this article. Sexual harassment in the workplace negatively affects victims as it results in high turnover, absenteeism, low productivity, increased complaints, and legal expenses.⁴ Additionally, victims are likely to report psychological symptoms such as depression and nervousness.⁵

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 set out by the employer. There is no single standard procedure to initiate such a complaint. However, the Act puts adjudicatory and disciplinary power in the hands of the employer upon the complaint being made.¹⁰

Despite the widespread nature of the offence and serious consequences, there is evidence 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 such a mechanism. This influence

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

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

³ 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.

⁴ Koi V *et al*, 'Perceived magnitude of sexual harassment in learning institutions', 67.

⁵ Vijayasiri G, 'Reporting sexual harassment: The importance of organizational culture and trust' 25(1) *Gender Issues*, 43.

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).

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

is due to the possible proximity of the perpetrator to the employer, who has adjudicatory and disciplinary power over the complaints. This may entail retaliatory acts against the victim for reporting in some cases.

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 procedure. However, the policy 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 to this effect. She then reported the matter to the perpetrator's senior. 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.¹¹

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

Consequently, Part I defines workplace sexual harassment and briefly highlights its prevalence in Kenya. Part II advances the dominance feminism theory as a framework within which to understand the problem under study. Part III investigates the reporting mechanism, action taken against perpetrators and outcomes for the victims who do report. This Part, therefore, examines the nexus between the reporting mechanism and redress for victims. Part IV provides recommendations on how this reporting mechanism can be improved in order to promote reporting. Part V provides a conclusion to the study by consolidating the research undertaken as well as the recommendations made.

¹¹ *SRM v GSS (K) Limited and another* (2017) eKLR.

II. Dominance Feminism Theory

The word ‘feminism’ originates from the Latin word *‘femina’* meaning women’s issues.¹² 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 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.¹³ It is an offence motivated by a need to dominate as opposed to a desire for sexual pleasure.¹⁴ The theory is put forward by dominance theorists who concern themselves with male domination.¹⁵ Through this theory, relations in a gendered society reveal a power imbalance that is justified by the differences in genders.¹⁶ 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.¹⁷ In line with this, Catherine MacKinnon, a dominance theorist, posited that difference is the velvet glove on the iron fist of discrimination.¹⁸

Consequently, the theory advances the notion that male and female is not just a distinction of difference but also of power and powerlessness.¹⁹ Thus, to be masculine is to be free whereas to be feminine is to be subjugated.²⁰ 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.²¹ This position is advanced by Pateman who says

¹² Ghorfati A, ‘Feminism and its impact on woman in the modern society’ unpublished, University of Tlemcen, Tlemcen, 2015, 7.

¹³ MacKinnon C, *Sexual harassment of working women: A case of sex discrimination*, 174.

¹⁴ MacKinnon, *Sexual harassment of working women*, 154.

¹⁵ Allen A, ‘Rethinking power’13 (1) *Hypatia*, 1998, 22.

¹⁶ Allen A, ‘Rethinking power’, 22-23.

¹⁷ MacKinnon C, *Feminism unmodified: Discourses on life and law*, 1 ed, Harvard University Press, Cambridge, 1987, 34.

¹⁸ MacKinnon C, *Toward a feminist theory of the state*, 1 ed, Harvard University Press, Cambridge, 1989, 219.

¹⁹ MacKinnon C, *Feminism unmodified*, 123.

²⁰ MacKinnon C, *Feminism unmodified*, 51.

²¹ Pateman, C, *The sexual contract*, 1 ed, Stanford University Press, Stanford, 1988, 182.

that the contract founding the patriarchal society is a social-sexual contract.²² 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.²³ 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 a heterosexual society is not a result of sexual attraction but rather an expression of eroticised dominance.²⁴

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.²⁵ Second, its one-sided approach to power makes it difficult to envision female power within its framework.²⁶ In the first instance, the theory implies that all women are dominated equally by all men.²⁷ 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.²⁸

However, this is not necessarily true as different males have access to different levels of power.²⁹ A factor such as race will determine the form and degree of power a male has over a female.³⁰ 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.³¹ Furthermore, the theory assumes that all women are exposed to the same degree of domination.³² This paradigmatic example of 'woman' does not consider differences in class and racial identity.³³ The failure to consider differences among women and among men consequently limits the understanding of female subordination.³⁴

²² Pateman, C, *The sexual contract*, 2.

²³ Dworkin A, *Intercourse*, 1 ed, The Free Press, New York, 1987, 63.

²⁴ Cooper C, 'A review of sexual harassment of working women', 185.

²⁵ Allen A, 'Rethinking power', 23-24.

²⁶ Allen A, 'Rethinking power', 26.

²⁷ Pateman, C, *The sexual contract*, 219.

²⁸ MacKinnon C, *Toward a feminist theory of the state*, 104-105.

²⁹ Spelman E, *Inessential woman: Problems of exclusion in feminist thought*, 1 ed, Beacon Press, Boston, 1989, 186.

³⁰ Allen A, 'Rethinking power', 23.

³¹ Allen A, 'Rethinking power', 26.

³² Allen A, 'Rethinking power', 32.

³³ Spelman E, *Inessential woman*, 186.

³⁴ Spelman E, *Inessential woman*, 186.

The second ground of criticism is the one-sided approach to the power relations where men are powerful and women powerless.³⁵ This is despite agitation by dominance theorists for women to invoke their own power in order to resist male dominance.³⁶ Consequently, the theory does not provide a framework within which women can develop and exercise their own power.³⁷

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 their own case.

Therefore, it relates to the central claim 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.³⁸

Conclusively, the theory dissuades the reader from the perception of a benevolent employer who is far removed from incidents of sexual harassment and so well-suited to investigate impartially and adjudicate internally over complaints of sexual harassment. By doing so, the theory guides the study in assessing whether the Employment Act's reporting mechanism is effective in deterring workplace sexual harassment.

III. Effectiveness of the Reporting Mechanism

This part investigates the link between the reporting mechanism and the reluctance demonstrated by victims to report incidences of workplace sexual harassment in Kenya. In this way, it examines whether the reporting mechanism in its current state hinders reporting. The analysis has been conducted by reviewing

³⁵ MacKinnon C, *Feminism unmodified*, 51.

³⁶ MacKinnon C, *Feminism unmodified*, 7; 1988, 15.

³⁷ Allen A, 'Rethinking power', 26.

³⁸ Section 2, *Employment Act* (Act No.11 of 2007).

the action taken against the reported perpetrator, the remedies available to the victim and the possible consequences that arise from reporting.

i. Outcomes of using the reporting mechanism

Where an employee believes they have been sexually harassed at their workplace, they are required to report to the employer through the manner prescribed in the policy. Thereafter, if the allegations are found to be true, the employer has discretion in choosing the disciplinary action to be taken against the perpetrator.³⁹ Therefore, the Employment Act entrusts the mandate of receiving, investigating and determining reports of sexual harassment with the employer.⁴⁰

In light of the dominance feminism theory that points to the employer as a person in authority being a likely sexual aggressor, this structure exposes a concern of confidence in the impartiality of the mechanism on the part of the victim. As it is illustrated by the body of case law and literature covered in this part, this concern affects the likelihood of a victim reporting the offence through the internal reporting mechanism.

a. Studies on sexual harassment in the workplace in Kenya

The studies discussed below show the actions taken against the reported perpetrator, the remedies available to the victim and the possible consequences that arise from reporting. They cover a broad spectrum of workplaces in the country including a hospital, a college and the United Nations offices in Nairobi.

In a study carried out in 2012 on the prevalence of sexual harassment within Kenyatta National Hospital, 50 female workers were approached as research participants. From the data collected, sexual harassment in various forms was found to be a frequent occurrence.⁴¹ Additionally, male colleagues were the frequent sexual aggressors and the victims were often junior female staff.⁴² A reporting procedure existed but attempts at reporting such incidents were often met with the threat of dismissal.⁴³ This created reluctance to report such incidents

³⁹ Section 6(3), *Employment Act* (Act No.11 of 2007).

⁴⁰ Section 6(3) (b), *Employment Act* (No 11 of 2007).

⁴¹ Wasilwa G, 'Sexual harassment of women employees at Kenyatta national hospital, Nairobi county' Unpublished, University of Nairobi, Nairobi, 2012, 27.

⁴² Wasilwa *Get al*, 'Sexual harassment of women employees at Kenyatta national hospital, Nairobi county', 27.

⁴³ Wasilwa *Get al*, 'Sexual harassment of women employees at Kenyatta national hospital, Nairobi county', 27.

because of fear of dismissal or other retaliatory acts such as cancellation of leave days.⁴⁴ Consequently, the study exposed the perception of sexual harassment in the private domain and a typical form of male behaviour.⁴⁵ Moreover, some respondents perceived it as a tolerable prerequisite to career progression.⁴⁶ These factors helped create an environment of scanty reporting.⁴⁷ The study exposed the prevalence of workplace sexual harassment as well as various factors that may limit reporting despite the existence of an internal reporting mechanism.

In another study that investigated the magnitude of sexual harassment within the Medical College of Nairobi, the scope of respondents encompassed 356 respondents, including both staff and students.⁴⁸ This analysis will focus mainly on staff because of the dimension of sexual harassment this article focuses on - sexual harassment in an employer-employee relation. Of the responses collected, 27 percent of staff had experienced sexual harassment. At 41 percent, physical sexual harassment was the dominant form of sexual harassment. It was closely followed by non-verbal harassment, at 30.9 percent. Furthermore, only 38 percent of the staff interviewed knew where to report incidences of sexual harassment.⁴⁹ The study provides accurate data illustrating not only the prevalence of sexual harassment but also the most common forms it takes within the field of study. It also reveals another contributing factor to the failure to report.

In yet another study on the prevalence of sexual harassment in the United Nations offices in Nairobi, 78 employees were engaged. Of the 78,94 percent were women.⁵⁰ A majority of the respondents preferred reporting cases of sexual harassment to external bodies such as the police or media, despite the existence of an internal procedure.⁵¹ Furthermore, when asked why they would report to the media, a majority of the respondents stated that the media was more likely to expose the perpetrators and get justice for them than the internal procedure, which

⁴⁴ Wasilwa *Get al*, 'Sexual harassment of women employees at Kenyatta national hospital, Nairobi county', 27.

⁴⁵ Wasilwa *Get al*, 'Sexual harassment of women employees at Kenyatta national hospital, Nairobi county', 30.

⁴⁶ Wasilwa *Get al*, 'Sexual harassment of women employees at Kenyatta national hospital, Nairobi county', 28.

⁴⁷ Wasilwa *Get al*, 'Sexual harassment of women employees at Kenyatta national hospital, Nairobi county', 28.

⁴⁸ Koi *Vet al*, 'Perceived magnitude of sexual harassment in learning institutions', 27.

⁴⁹ Koi *Vet al*, 'Perceived magnitude of sexual harassment in learning institutions', 27.

⁵⁰ Maina L., 'Impact of sexual harassment in the workplace: A case study of the United Nations in Kenya' unpublished, University of Nairobi, Nairobi, 2018, 38.

⁵¹ Maina *Let al*, 'Impact of sexual harassment in the workplace' 33.

they did not have confidence in.⁵² The study also analysed coping mechanisms towards sexual harassment and noted that a majority of the respondents turned to religion to refuse the advances while a smaller percentage kept silent and gave into the sexual advances in exchange for career progression.⁵³ Consequently, this study illustrates, among other things, the preferences in avenues of reporting for victims of sexual harassment as well as the different coping mechanisms adopted in the face of the offence.

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 claims of workplace sexual harassment. While in some of the cases a sexual harassment policy and the 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*, the claimant alleged that her employment was adversely affected by her refusal of the sexual advances of the HR manager. Despite her reporting the offence to the perpetrator's senior through the internal procedure, the form of redress did not stop the adverse treatment she was receiving.⁵⁴ The detrimental treatment came in various forms such as exclusion from trainings and eventually culminated in what the court found to be malicious termination.⁵⁵ The case is crucial to this article because it demonstrates a situation where the perpetrator is also the person in charge of receiving the complaints of sexual harassment according to the reporting mechanism. Consequently, it exposes a shortfall in the internal reporting mechanism, namely that this mechanism may prove ineffective in providing redress where the adjudicator is also the perpetrator. When this situation arose, it created an impasse that necessitated the claimant to approach the court.

Additionally, in *MWM v MFS*, the claimant was employed for 5 years after which her employment became permanent and 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

⁵² Maina L *et al*, 'Impact of sexual harassment in the workplace' 35.

⁵³ Maina L *et al*, 'Impact of sexual harassment in the workplace' 35-36.

⁵⁴ The Managing Director sent an email to the perpetrator as a form of reprimand against the persistent sexual harassment. After this, the perpetrator carried out retaliatory acts.

⁵⁵ (2017) eKLR.

email where she complained. The failure to report the incident by following her employment's internal reporting mechanism 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 incident because of a threat of retaliation since 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.⁵⁶ In the judgement, Justice Makau stated that the respondent will not benefit from a failure by the claimant to report a sexual harassment incident where the respondent has failed to provide a mechanism for doing 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. The case is useful because it highlights factors that contribute to the failure to use the internal mechanism to report sexual harassment. Additionally, it appreciates the power imbalance between the claimant and the perpetrator.

ii. The nexus between the reporting mechanism and reluctance to report

The common thread weaving through the studies and reports is that even when there is an internal reporting mechanism in place, victims of sexual harassment may opt not to use it to report.⁵⁷ The two factors that result in this reluctance to report that have predominantly featured are the fear of retaliation and the lack of confidence in the impartiality of the mechanism.⁵⁸

Against this background, the article posits that these factors are connected to a structural shortcoming of the reporting mechanism. The shortcoming is that the mandate for adjudicating complaints of sexual harassment in the mechanism envisaged rests with the employer.⁵⁹

This shortcoming has been identified as being based on a power imbalance in the relationship between an employer and an employee, which allows the sexual aggressor to influence the reporting mechanism, when it is available, because

⁵⁶ *MWM v MFS* (2014) eKLR.

⁵⁷ Wasilwa G *et al*, 'Sexual harassment of women employees at Kenyatta National Hospital, Nairobi county', 27-30; *MWM v MFS* (2014) eKLR.

⁵⁸ *MWM v MFS* (2014) eKLR. *JRM v G.S.S(K) Limited & another* (2017) eKLR.

⁵⁹ Section 6 (3), *Employment Act* (No. 11 of 2007).

either they are responsible for handling complaints of sexual harassment or they are closely linked to the person who is.⁶⁰ Victims therefore fear facing retaliation because of a lack of confidentiality in the reporting mechanism. Additionally, victims may lack confidence in the outcome of the reporting mechanism because of the possible involvement of the employer as both a perpetrator and adjudicator of the dispute.⁶¹ So, the perpetrator may carry out retaliatory acts as was the case in *SRM v GSS(K) Limited & another* (2017).⁶² Because of the inability of the internal reporting mechanism to provide an adequate resolution in the examples mentioned, victims have had to look to other avenues for resolution of the dispute such as the media and the court system.⁶³

These two factors are inextricable from the position the employer is given in the adjudication of complaints of sexual harassment. Additionally, unsatisfying results from an internal reporting mechanism result in victims' reluctance to report future cases of sexual harassment.⁶⁴ Consequently, the reluctance of victims to report cases of sexual harassment in the workplace is based on the structural shortcomings of the internal reporting mechanism as provided under the Employment Act (2007).

IV. 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.⁶⁵ The problem is very much alive in the Kenyan context as has been demonstrated by the literature covered in this article.

While sexual harassment affects all genders at all positions in the work hierarchy,⁶⁶ the findings in this article suggest that a certain model of sexual

⁶⁰ See *SRM v GSS(K) Limited & another* (2017) eKLR and *MWM v MFS* (2014) eKLR.

⁶¹ Vijayasiri *Get al*, 'Reporting sexual harassment' 54-55.

⁶² *SRM v GSS(K) Limited & another* (2017) eKLR.

⁶³ Maina *Let al*, 'Impact of sexual harassment in the workplace' 33. See also *SRM v GSS(K) Limited & another* (2017) eKLR and *MWM v MFS* (2014) eKLR.

⁶⁴ Vijayasiri *Get al*, 'Reporting sexual harassment' 55.

⁶⁵ Tippet E, 'The legal implications of the Me Too' movement 103 (229) *Minnesota Law Review*, 2019, 23513.

⁶⁶ McLaughlin H, Uggen C and Blackstone A, 'Sexual harassment, workplace authority, and the paradox of power'. 77 (4) *American Sociological Review*, 2012, 626.

harassment is prevalent in the workplace. It is one of male employees dominance over female employees where the former is in a position of authority in the workplace and uses this position to strong-arm the latter.

Through Section 6 (2) of the Employment Act, this model has been coupled with a reporting mechanism that yields excessive power to the employer. This has enabled, in many instances, the same offence that the Act seeks to prevent.⁶⁷ Furthermore, the victim who reports sexual harassment faces retaliatory acts while the perpetrator is often let off with a light warning.⁶⁸ Based on these findings, the study concludes that there exists a nexus between the reporting mechanism and the reluctance to report sexual harassment.

Arising from this, the following are various recommendations on how to help resolve this problem.

i. Increasing 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.⁶⁹ 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.⁷⁰

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.⁷¹ 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.⁷²

⁶⁷ *SRM v GSS(K) Limited & another* (2017) eKLR.

⁶⁸ *MWM v MFS* (2014) eKLR and *SRM v GSS(K) Limited & another* (2017) eKLR.

⁶⁹ International Labour Organisation, Code of conduct and guidelines to prevent and address sexual harassment in workplaces, 2013, 11-12.

⁷⁰ 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,' 10.

⁷¹ Section 6 (2), *Employment Act* (No 11 of 2007).

⁷² Code of conduct and guidelines to prevent and address sexual harassment in workplaces, 11.

A possible external adjudicator to emulate is the Equal Employment Opportunity Commission (EEOC), which is the lead enforcement agency on workplace discrimination in the United States of America (USA).⁷³ It has the authority to investigate charges of discrimination against employers who are covered by the law.⁷⁴ This includes sex discrimination such as sexual harassment.⁷⁵ 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 discrimination. Nearly 93 percent of all charges are resolved through one of these informal methods.⁷⁶

A similar commission can be established under Chapter 6 of the Constitution of Kenya or an Act of Parliament. 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; namely, where it is a court annexed mediation,⁷⁷ or where the private mediation agreement is in writing, registered and presided over by an accredited mediator.⁷⁸

Given that such commission would be 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.⁷⁹ This way, the mediation agreement will be enforceable as if it were a judgment of a court.⁸⁰

Therefore, the adjudication would be impartial and would boost the confidence of victims in the resolution of sexual harassment cases. Additionally,

⁷³ <https://www.eeoc.gov/eeoc/history/35th/pre1965/index.html> on 07 January 2020.

⁷⁴ <https://www.eeoc.gov/employers/process.cfm> on 07 January 2020.

⁷⁵ https://www.eeoc.gov/laws/types/sexual_harassment.cfm on 17 March 2020.

⁷⁶ 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.

⁷⁷ Section 59(B) (1), *Civil Procedure Act* (Act No 10 of 2012); Muigai K, 'Court sanctioned mediation in Kenya- An appraisal' 2018, 4.

⁷⁸ Section 59(D), *Civil Procedure Act* (Act No 10 of 2012).

⁷⁹ Section 59(B) (1) (a), *Civil Procedure Act* (Act No 10 of 2012).

⁸⁰ Section 59(B) (4), *Civil Procedure Act* (Act No 10 of 2012).

such commission would prevent retaliatory acts because the identity of the reporter would be kept confidential as is done in the EEOC.⁸¹ 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 discussed below.

a. 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.⁸² This points to the difficulty in defining what exactly amounts to sexual harassment.⁸³ The difficulty is characterised by existing gender differences on perceptions of what constitutes sexual harassment.⁸⁴ This difference in gender perceptions was exhibited in a meta-analysis, which yielded an overall standardised mean difference of 0.30 that suggested that women are more likely than men to define a broader range of behaviours that are sexually harassing.⁸⁵

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. That study sampled approximately 1,000 workplace sex discrimination cases brought forth by the EEOC between 1997 and 2006.⁸⁶ Of the cases adjudicated, cases in which female workers alleged that they were victims of workplace sex discrimination were 88.8 percent more likely to succeed when adjudicated by a female judge in comparison to a male judge.⁸⁷ 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

⁸¹ See -< <https://www.eeoc.gov/employees/confidentiality.cfm>> on 07 January 2020.

⁸² 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.

⁸³ Rotundo M, Nguyen D, Sackett P, 'A meta-analytic review of gender differences in perceptions of sexual harassment' 919.

⁸⁴ Rotundo M, Nguyen D, Sackett P, 'A meta-analytic review of gender differences in perceptions of sexual harassment' 914.

⁸⁵ Rotundo M, Nguyen D, Sackett P, 'A meta-analytic review of gender differences in perceptions of sexual harassment' 918.

⁸⁶ Knepper M, 'When the shadow is the substance' 624.

⁸⁷ Knepper M, 'When the shadow is the substance' 658.

20 percent through the inclusion of one female judge on a three judge appellate panel.⁸⁸

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.⁸⁹ 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.⁹⁰ In the High Court, which would preside over sexual harassment as a criminal offence, of the 48 High Court judges, only 13 are women.⁹¹

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.

b. Reduction of case backlog 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 courts. 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.⁹² This amounts to

⁸⁸ Boyd C, Epstein L, Martin A, 'Untangling the causal effects of sex on judging' 54 *American Journal of Political Science* 2, 2010, 389–411.

⁸⁹ 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.

⁹⁰ <https://www.judiciary.go.ke/courts/employment-and-labour-relations-court/#judges> on 18 March 2020.

⁹¹ 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.

⁹² <https://www.eeoc.gov/eeoc/newsroom/wysk/preventing-workplace-harassment.cfm> on 17 January 2020.

approximately 13 percent of the cases being litigated with the rest being resolved through alternative forms of dispute resolution such as mediation.⁹³

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.⁹⁴ This is pursuant to Article 159 of the Constitution which mandates the judiciary to promote ADR in the administration of justice.⁹⁵

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.⁹⁶ 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.⁹⁷

ii. Providing a Platform for Complainants to Openly Discuss Instances of Sexual Harassment

Reporting mechanisms should also include informal media of redress that provide the victim with a platform to discuss the circumstances surrounding the offence and make it known to the perpetrator that such advances are unwelcome.⁹⁸ This is because victims often consider sexual harassment an isolated event targeted only at them instead of an institutional problem.⁹⁹ Additionally, this results in victims tolerating sexual harassment as a normal component of the working environment.¹⁰⁰

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 the marginalised in an East African agribusiness supply chain.¹⁰¹ The platform facilitated open dialogue among employees on sexual

⁹³ <https://www.eeoc.gov/employees/mediation.cfm> on 17 January 2020.

⁹⁴ The Judiciary of Kenya, *Sustaining Judiciary Transformation (SJT) a service delivery agenda, 2017-2021*, 2017, 19.

⁹⁵ Article 159, *Constitution of Kenya* (2010).

⁹⁶ <https://www.eeoc.gov/employers/resolving.cfm> on 17 January 2020.

⁹⁷ The Judiciary of Kenya, *State of the judiciary and the administration of justice annual report 2017 -2018*, 2018, 22.

⁹⁸ Code of conduct and guidelines to prevent and address sexual harassment in workplaces, 11.

⁹⁹ Lawton, 'The bad apple theory in sexual harassment law,' 819-820 821.

¹⁰⁰ Harker/Hlavka H, 'Normalising sexual violence: Young women account for harassment and abuse,' 339.

¹⁰¹ Jacobs S, Brahic B and Olaiya M, 'Sexual harassment in an East African agribusiness supply chain', 9-10.

harassment. The open discussions helped eradicate 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 media through which they could seek redress.¹⁰²

V. Conclusion

This article set out to determine whether there is a relationship between the reluctance of victims to report sexual harassment and the reporting mechanism as envisaged under the Employment Act 2007. Pursuant to this objective, it has examined the factors resulting in the reluctance to report and analysed them against the shortcomings of the reporting mechanism under the Kenyan Employment Act. The material is sourced 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 the findings of this article have justified the author's central claim by demonstrating that a nexus exists between the structure of the reporting mechanism and the reluctance of victims to report incidents of sexual harassment. Recommendations that are drawn from the findings of this study, if implemented, may help promote the reporting of sexual harassment incidences in the workplace in Kenya.

¹⁰² Jacobs S, Brahic B and Olaiya M, 'Sexual harassment in an East African agribusiness supply chain', 10.

