A Critical Review of the Unwelcome Element in the Determination of Sexual Harassment in Kenya: Guidance From South Africa

J Gathongo
LLB LLM LLD
Senior Lecturer and Dean, School of Law, University of Embu, Kenya
Research Associate, Faculty of Law, Nelson Mandela University, Port Elizabeth, South Africa
https://orcid.org/0000-0003-1165-2066

SUMMARY

Sexual harassment in the workplace is a burning issue, both in Kenya and South Africa. Both Kenyan and South African labour laws outline the specific elements or prerequisites that must be met for the conduct of the harasser to be considered sexual harassment. One such element is the presence of unwanted or offensive conduct by the harasser. Nevertheless, in Kenya, enforcing this element is still challenging, and there has been a lack of uniformity in the courts over whose viewpoint should determine if the behaviour is unwanted or offensive – that is, whether from the harasser's or the complainant's perspective. This issue is exacerbated by a lack of extensive research in Kenyan employment law on this element. This article presents a critical analysis of the "unwelcome or offensive" element in determining cases of sexual harassment in the Kenyan employment setting using lessons from South African legislation. The results from the analysis indicate that in the Kenyan context harassers often employ this element as a defence to argue that the complainant's behaviour, if examined carefully, demonstrates their acceptance of the harasser's conduct. In essence, this leads courts to scrutinise the behaviour of the complainant for any slight indication that the conduct was unwelcome. The underlying implication is that the complainant is subjected to a trial-like process, diverting attention away from the conduct and behaviour of the alleged perpetrator of the sexual harassment. In navigating such sensitive terrain, there is a need for the Employment Act to be amended and to consider adopting similar tests to those in the South African 2022 Code of Good Practice on the Prevention of Elimination of Harassment in the Workplace.

KEYWORDS: unwanted or offensive conduct, harasser, complainant, sexual harassment

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1 INTRODUCTION

Sexual harassment has been a matter of global concern, particularly following the "Me Too" movement in which several high-profile personalities shared their experiences of sexual harassment in the world of entertainment.[1] It remains a burning issue, both in the Kenyan and South African workplace and is arguably a vice woven into the tapestry of the workplace to the extent that it has become almost invisible owing to its normalisation.

In particular, the problem is very much alive in the Kenyan context and may be attributable to the inadequacies of the existing legal structure, which is primarily dependent on harassed employees voicing complaints about incidents of sexual harassment. Notwithstanding the existence of the current established statutory framework aimed at eradicating sexual harassment in the workplace, this article argues that the Employment and Labour Relations Court has repeatedly made decisions in an inconsistent manner, raising questions whether the Employment Act of 2007 provides a clear and definitive definition of sexual harassment. Over the years, a lack of certainty in the definition of sexual harassment has led to an increased volume of cases filed at the Employment and Labour Relations Court, some going back and forth through the court. This article provides a critical analysis of the Kenyan Employment Act provisions prohibiting sexual harassment in the workplace in Kenya. The article compares similar provisions under South African employment legislation. The objective is to draw significant insights and lessons from South African jurisprudence.

2 THE LEGISLATION THAT PROHIBITS SEXUAL HARASSMENT IN THE KENYAN WORKPLACE

The Preamble to the Kenyan Constitution states that Kenya is founded on the principles of "human dignity, the achievement of equality and the advancement of human rights and freedoms and the rule of law".[2] Sexual harassment in its different forms, be it a *quid pro quo* or sexual favouritism, violates these constitutional rights.[3] The Constitution as the supreme law in Kenya states that any law or behaviour inconsistent with it is to that extent invalid.[4] The equality clause[5] forbids discrimination on a number of listed grounds, including gender and sex, and further encourages the enactment of law preventing and prohibiting unfair discrimination.[6] The Constitution, therefore, does deal with sexual harassment, albeit indirectly, as a form of discrimination based on sex. Other provisions in the Constitution outlaw

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1 Tippett "The Legal Implications of the Me Too' Movement" 2019 *Minnesota Law Review* 23513. See also Ramsini "The Unwelcome Requirement in Sexual Harassment: Choosing a Perspective and Incorporating the Effect of Supervisor-Subordinate Relations" 2014 *Wm & Mary L Rev* and Jackson "Different Voicing of Welcomeness: Rational Reasoning and Sexual Harassment" 2005 *NDL Rev* 752–754.

2 Preamble to the Constitution of the Republic of Kenya, 2010.

3 *Ngunyule v MEIBC* [2023] ZALCJHB par 21.

4 Art 2 of the Kenyan Constitution.

5 Art 27 of the Kenyan Constitution.

6 Art 27(6) of the Kenyan Constitution.

sexual harassment. These are article 28 (the right to dignity) and article 29(d) (the right not to be subjected to torture in any manner, whether physical or psychological), as well as article 31 (the right to privacy).[7] The right to the protection of a person's dignity is a guarantee supporting the right to be free from sexual harassment.

To give effect to the Constitution, a number of statutes have been enacted pursuant to articles 21(2)[8] and 27(6).[9]

3 THE SEXUAL OFFENCES ACT[10]

The Kenyan Sexual Offences Act has addressed the power dynamic between employers and employees extensively by pointing out that incidents of sexual harassment are committed by persons in positions of leadership and authority.[11] This legislation defines sexual harassment as "continuous unwelcome sexual advances, request for sexual favors, lewd verbal or physical gestures by someone in authority".[12] Essentially, this legislation holds that any person who is in a position of authority or holding a public office, who persistently makes any sexual advances or requests that they know, or on reasonable grounds ought to know, are unwelcome, is guilty of the offence of sexual harassment. The spirit of this provision echoes the South African Constitutional Court decision in *McGregor v Public Health and Social Development Sectoral Bargaining Council*,[13] where the court held that the seniority of a perpetrator and disparity in age between perpetrator and complainant are aggravating factors in instances of sexual harassment. This also confirms the approach in *Campbell Scientific Africa v Simmers*.[14]

Nevertheless, the Act has limited itself by neglecting to anticipate incidents of sexual harassment occurring between peers or by a subordinate against a superior, as well as between employees. Consistent with the Labour Appeal decision in *Samka v Shoprite Checkers (Pty) Ltd,*[15] this article opines that sexual harassment is not limited to hierarchical structures and systems. This is because it can be committed by a co-worker or even by

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7 In *Reed v Stedman* (1999) IRLR 299, the court held that "a characteristic of sexual harassment is that it undermines the complainant's dignity at work and constitutes a detriment on the grounds of sex, and that the lack of intent is not a defence".

8 This provision states: "The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43."

9 This provision stipulates: "To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination."

10 3 of 2006.

11 Ss 23 and 24 of the Sexual Offences Act.

12 S 23(1) of the Sexual Offences Act.

13 (2021) 42 *ILJ* 1643 (CC).

14 [2015] ZALAC 51 par 21.

15 In *Samka v Shoprite Checkers (Pty) Ltd* (2020) 41 *ILJ* 1945 (LAC), the Labour Appeal Court held that "the Employment Equity Act applies only to the actions of the employee or the employer. The court held that employers exercise authority over employees only and not over customers, and there is no basis upon which the employer could be held responsible for the actions of third parties."

a subordinate against a higher-ranking employee or superior. It is therefore imperative for Kenyan legislators and policymakers to recognise that the power imbalance inherent in sexual harassment incidents extends beyond positions of authority and power. This would ensure the achievement of a community that acknowledges equality and respects others' dignity. This Act also adopts a criminal-law perspective by decreeing a sanction of no less than three years of imprisonment or payment of 100 000 shillings or more as a fine for anyone declared a sexual offender.[16] Be it a verbal or physical form of indecent behaviour by a person in authority, the act will be punishable if the alleged perpetrator is found guilty.[17] Be that as it may, the Employment and Labour Relations Court has held previously that although this Act provides a remedy to the complainant, "money cannot adequately compensate wounded feelings, but it could reasonably provide a convenient mechanism to assist the person affected in picking up the pieces and moving on with his or her life."[18]

4 EMPLOYMENT ACT, 2007

Section 6 of the Employment Act provides, *inter alia*:

> "An employee is sexually harassed if the employer of that employee or a representative of that employer or a 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 and that by its nature has a detrimental effect on that employee's employment, job performance, or job satisfaction."[19]

Given the existence of these statutes, along with policies developed by employers, it would appear reasonable to believe that sexual harassment would be eradicated in workplaces. However, it is evident that despite these legislative developments, they appear inadequate to effectively address workplace sexual harassment. The legislative regime adopted to deal with this plague has largely remained ineffective. This article provides recommendations that will attempt to fill this cavity.

5 UNPACKING "UNWELCOME" OR "OFFENSIVE" BEHAVIOUR

The crucial factor in identifying sexual harassment is the existence of an unwelcome or offensive element.[20] In nearly all experiences of sexual harassment, the unwelcome or offensive element is an important

16 S 23(1) of the Sexual Offences Act.

17 *G M V v Bank of Africa Kenya Limited* [2013] eKLR.

18 *Ooko v SRM* (2022) KECA 44 (eKLR) par 14.

19 S 6(1) of the Employment Act. See also *JWN v Securex Agencies (K) Limited* [2018] eKLR.

20 6(1)(d) of the Employment Act. "An employee may indicate that the sexual conduct is unwelcomed either verbally or non-verbally. Non-verbal conduct indicating that the behaviour is unwelcomed includes conduct such as walking away or not responding to the perpetrator. Where an employee has difficulty indicating to the perpetrator that the conduct is unwelcomed, such employee may seek the assistance and intervention of another person such as a co-worker, superior, counsellor, human resource official, a family member or friend."

consideration that the courts must take into account when assessing what constitutes sexual harassment.[21] In essence, this implies that the provisions of section 6(1) of the Employment Act may only be invoked if the behaviour of the alleged harasser is considered sexual harassment according to the complainant's perception. It is worth highlighting with regard to this element or requirement that the aspect that is considered "unwelcome" or "offensive" arises from a difference between the complainant's perception of the accused's behaviour as offensive or unwelcome, and the alleged harasser's viewpoint in which such behaviour may be considered appropriate. Ultimately, it is up to the complainant to determine whether or not the behaviour is unwelcome or offensive.[22]

However, the current challenges lie primarily in establishing the criteria for identifying sexual harassment, especially when assessing whether the behaviour of the harasser is deemed unwelcome or offensive from the perspective of the individual alleging they have been harassed. This raises the question of whether the assessment should be based on the subjective viewpoint of the harasser, the objective viewpoint of the harasser, or both combined. Moreover, the investigation into the unwelcome aspect poses practical challenges, as a court primarily scrutinises the complainant for the slightest signal of having welcomed the harasser's actions, rather than assessing the harasser's behaviour to ascertain if it was indeed welcomed.[23]

In practice, it is accepted that it is the duty of the employer or other responsible persons in the workplace to prevent or deter the commission of acts of sexual harassment and to provide the procedure for resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.[24] However, the difficulty with interpreting employment legislation when dealing with instances of sexual harassment is that the complainant bears the burden of determining if the behaviour is unwelcome, unwanted or offensive. This situation poses a particular difficulty and raises the following question: if an employee is subjected to clearly sexually harassing behaviour, for example, but does not express any complaint, does such behaviour automatically become acceptable just because it does not cause obvious or evident upset or distress to the recipient?

In the case of *Lydiah Mongina Mokaya v St Leornard's Maternity Nursing Home Limited*,[25] the court stated: "Cases and instances of sexual harassment are extremely personalized and difficult to proof." Also recently, the Employment and Labour Relations Court in *Ooko v SRM*[26] held that "the unwelcome or unwanted element is essential in cases of sexual harassment and cannot be underestimated". The court further stated that the question as to what constituted unwanted behaviour was not what the court or tribunal

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21 *Ooko v SRM supra* par 9.

22 *Reddy v University of Natal* (1998) 1 BLLR 29 (LAC). See also Du Toit, Godfrey, Cooper, Giles, Cohen, Conradie and Steenkamp *Labour Relations Law: A Comprehensive Guide* (2015) 701.

23 *Ooko v SRM supra* par 10.

24 S 6(2) and (3) of the Employment Act, 2007. See also Fitzgerald "Legal and Psychological Constructions of Women's Resistance to Sexual Harassment" in Mackinnon and Siegal *Directions in Sexual Harassment Law* (2004) 103.

25 [2018] eKLR.

26 *Ooko v SRM supra*.

would or would not find offensive, but whether the individual complainant had made it clear that they found the behaviour offensive and unwelcome. The argument is also supported by the decision in *PO v Board of Trustees, AF*.[27] The Employment and Labour Relations Court emphasised that the presence of behaviour that is "offensive or unwelcome" requires the complainant to inform the accused that the behaviour is inappropriate. In essence, this is because some forms of behaviour may be deemed appropriate, and others may not. Most importantly, the Employment Act requires that the individual alleged to have experienced harassment must give a warning to the alleged harasser to stop the unwanted behaviour.

6 THE TEST FOR SEXUAL HARASSMENT

The significance of the unwanted or offensive component within the framework of the Employment Act, particularly in situations of sexual harassment, justifies the need for a precise definition of this element. Since similar questions are posed, there appears to be a lack of differentiation between guidelines for determining sexual harassment and the test used to assess how the behaviour in question was unwanted or offensive.

This article contends that the courts should not heavily rely on a complainant's subjective views as the only test for determining what constitutes the act of sexual harassment. This is for the simple reason that legislation cannot grant operational legislative authority to private individuals to create laws. The Employment and Labour Relations Court's excessive dependence on a complainant's perspective or sentiments might be interpreted as a disregard for the constitutional duty of the legislature to create laws, or even as a potential cause for legal instability. The legislature is obligated to enact laws that are sufficiently clear and unambiguous, ensuring that everyone fully understands their obligations. Accordingly, the Kenyan legislature should consider an amendment to the current statutory framework to formulate an appropriate test for determining incidents of sexual harassment in employment.

Currently, in order to establish cases of unwanted or offensive conduct, the complainant is duty-bound to provide proof indicating their lack of consent. This is instead of assessing the unwelcome nature of the harasser's behaviour. Within the framework of the Employment Act and the employment setting, requiring proof of no consent redirects attention and focus onto the response of an already devastated individual filing a sexual harassment complaint. The complainant is required to articulate explicitly to the court their perception of what they consider to be unwelcome or offensive. As such, the court is required to enquire whether or not the complainant wanted sexual attention. Consequently, the question that arises for determination is whether the complainant employee asked for it and whether they enjoyed it. Be that as it may, there may still be an ensuing challenge over the difference between the court's characterisation of unwelcome conduct and the complainant's understanding of the same.

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[27] (2014) eKLR par 29.

This article observes that the Employment and Labour Relations Court ought to adopt a test that investigates whether the harasser's behaviour affected the complainant's dignity negatively. This is because the unwelcome behaviour undermines the individual's constitutional right to dignity, and their sense of worth and self-esteem within the workplace. Furthermore, it affects the complainant's social standing, good name, and job security. In addition, this article argues that the court should focus not only on the damage inflicted on the victim owing to unwelcome and offensive conduct but should instead comprehensively and simultaneously holistically assess all relevant circumstances.[28]

Furthermore, as mentioned earlier, the difficulty in interpreting labour laws pertaining to sexual harassment is that the burden of determining whether the conduct is offensive or unwelcome falls on the complainant. For this reason, the Kenyan court is primarily concerned with assessing and analysing the complainant's reactions, attitude and response to the harasser's behaviour, rather than evaluating the behaviour of the harasser in order to decide whether it was welcomed. This presents a significant problem; the Kenyan courts should therefore strive to determine cases of sexual harassment from both a subjective and objective viewpoint. This should be "the rub" of the sexual harassment investigation and inquiry, since the complainant may see the behaviour of a sexual nature as unwanted, based on their subjective experience, while the harasser or other colleagues may perceive the behaviour as being welcomed.[29] Accordingly, the inquiry should seek to determine whether the complainant considered the harasser's behaviour to be unwanted and offensive, which is the subjective test. The inquiry should in addition aim to determine whether the harasser had a reasonable belief that their behaviour was unwelcome, which is the objective test.[30] This article stresses the importance of establishing a clear objective test under the Employment Act. In order for an act of sexual attention to be deemed harassment, the Employment Act specifies that the harasser must have known that their actions were unwanted or offensive.

7 SOUTH AFRICAN LEGAL PERSPECTIVE

In 2021, the Constitutional Court in *McGregor v Public Health and Social Development Sectoral Bargaining Council* emphasised that sexual harassment is the "most egregious kind of misconduct that plagued the workplace".[31] Furthermore, the court astutely remarked that the legal framework established to tackle this prevalent issue has proved largely ineffective.[32]

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28 Jackson 2005 *NDL Rev* 752–754.

29 Monnin "Proving Welcomeness: The Admissibility of Evidence of Sexual History in Sexual Harassment Claims Under the 1994 Amendments to Federal Rule of Evidence" 1995 *Vand L Rev* 1155 1166.

30 Halfkenny "Legal and Workplace Solutions to Sexual Harassment in South Africa (Part 2): The South African Experience" 1996 17 *ILJ* 217 218.

31 *Supra* par 23. See also *Ekurhuleni Metropolitan Municipality v South African Local Government Bargaining Council* (2022) 43 *ILJ* 825 (LAC).

32 *Ekurhuleni Metropolitan Municipality v SALGBC supra* par 13.

Like Kenya, South Africa has adopted several legislative measures to address sexual harassment in the workplace. Legislation and Codes of Good Practice have established accessible processes and advice desks to facilitate the reporting of complaints by complainants. These measures also provide protection against revenge and ensure privacy. In fact, under South African labour law, employees who file complaints may choose to quit and assert that they have been constructively dismissed.[33]

7 1 The Constitution of the Republic of South Africa, 1996

The Constitution of South Africa, like the Kenyan Constitution, is based on tenets such as "human dignity, equality, and the supremacy of the Constitution and the rule of law".[34] Writing in 1989, in its first reported case on sexual harassment, the erstwhile Industrial Court, sounding the alarm that sexual harassment cannot be tolerated, highlighted that

> "[u]nwanted sexual advances in the employment sphere are not a rare occurrence" and it is 'by no means uncommon'.[35] Unfortunately, that truth rings as loudly today as it did then. The only difference between now and then is that today we hold in our hands a constitution that equips us with the tools needed to protect the rights that are violated when sexual harassment occurs. Yet, what this means is that for as long as sexual harassment persists, so the Constitution becomes an eidolon, and its promises of equality and dignity, equally illusive."[36]

In addition, the Constitution, particularly the Bill of Rights, guarantees the protection of the right to equality and condemns all forms of discrimination that are unfair.[37] It further ensures that employees have recourse if they are subjected to unfair labour practices.[38] To give effect to the Constitution, courts have a duty to advance the principles, meaning and goals of the Bill of Rights while carrying out their interpretational functions.[39] Although the obligation to provide a secure and safe work environment is not explicitly stated in the Constitution, it may be inferred from section 24, which states: "Everyone has the right to an environment that does not pose a threat to their health or well-being." Moreover, the Constitution explicitly guarantees the right to security as outlined in section 12, as well as the right to dignity as outlined in section 10.[40] Notably, the Constitution does not contain a

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33 *Mkhutshulwa v Department of Health, Eastern Cape* [2023] 8 BLLR 809 (LC). See also *Centre for Autism Research and Education CC v Commission for Conciliation, Mediation and Arbitration* (2020) 41 *ILJ* 2623 (LC) and Dupper and Strydom *Essential Employment Discrimination Law* (2004) 242.

34 S 1(*a*) to (*c*) of the Constitution of the Republic of South Africa, 1996. See also *Ekurhuleni Metropolitan Municipality v South African Local Government Bargaining Council supra* par 1.

35 *J v M Ltd* (1989) 10 *ILJ* 755 (IC) (*J v M*) 757F–I.

36 *McGregor v Public Health and Social Development Sectoral Bargaining Council supra* par 1.

37 Art 9 of the Constitution.

38 S 23 of the Constitution.

39 S 39 of the Constitution.

40 *Campbell Scientific Africa v Simmers* (2016) 37 *ILJ* 116 (LAC) par 21. See also *Motsamai v Everite Building Products (Pty) Ltd* [2011] 2 BLLR 144 (LAC) par 20 and *Department of*

definition for what is meant by "sexual harassment". Nevertheless, it cautions the courts to uphold the "principles that form the foundation of a transparent and democratic society, which include human dignity, equality, and freedom as outlined in the Bill of Rights".[41] Primarily, sexual harassment in South Africa has been regulated as a form of unfair discrimination, which is prohibited on the grounds of sex, gender and sexual orientation.[42]

7 2 The South African Employment Equity Act 55 of 1998 (EEA), as amended

The purpose of the EEA is to promote equality and fairness in the workplace, in line with the principle of equality enshrined in the Constitution.[43] Harassment in any form is explicitly condemned and discouraged under section 6 of the EEA. According to subsection 3, harassment of a worker is considered unfair discrimination based on any one or more grounds of unfair discrimination mentioned in subsection 1, and is forbidden. Along with that, section 51(1) to (5), read in tandem with section 60 of the EEA, safeguards workers against discrimination perpetrated by any party (including the employer) in response to the exercise of any right granted by the EEA. The aforementioned sections were incorporated to acknowledge the likelihood that some employers (owing to their supervisory and disciplinary powers, along with personal interests) might want to take revenge against employees who report workplace harassment. The decisions in *Christian v Colliers Properties*[44] and *Makoti v Jesuit Refugee Service SA*[45] serve as noteworthy examples in this context.

7 3 The Occupational Health and Safety Act 85 of 1993 (OHSA), as amended

The purpose of OHSA is to broaden the protection, and improve the safety and well-being, of employees. In terms of this Act, the employer is obligated to provide, to the extent reasonably possible, a safe and healthy working environment for workers.[46] Prevention and eradication of sexual harassment in the workplace form an integral part of this safeguard.

Labour v General Public Service Sectoral Bargaining Council (2010) 31 *ILJ* 1313 (LAC) par 37.

41 S 7 of the Constitution.

42 *Solidarity obo B v South African Police Service* (2022) 43 *ILJ* 2869 (LC), *Campbell Scientific Africa (Pty) Ltd v Simmers supra* par 21. See also *Rustenburg Platinum Mines Limited v UASA obo Pietersen* (2018) 39 *ILJ* 1330 (LC): *Motsamai v Everite Products (Pty) Ltd supra* par 19; s 6(1) of the EEA and *Potgieter v National Commissioner of the SA Police Service* (2009) 30 *ILJ* 1322 (LC) par 46.

43 Ss 1 and 9 of the Constitution.

44 [2005] ZALC 56.

45 (2012) 33 *ILJ* 1706 (LC).

46 S 8 of OHSA.

7 4 The Labour Relations Act 66 of 1995 (LRA), as amended

The LRA implements the Code of Good Practice on the Handling of Sexual Harassment Cases[47] (1998 Code) in a manner consistent with the EEA. The LRA provides an additional layer of protection against sexual harassment by stating that if a person is dismissed in response to reporting sexual harassment, the dismissal is considered automatically unfair.[48] Furthermore, according to the LRA, workers have the right to resign and lodge a claim for constructive dismissal under section 186(1)(*e*) should the employer neglect to take action concerning a reported incident of sexual harassment.[49]

7 5 The Protection From Harassment Act 17 of 2011, as amended

This Act seeks to protect victims of harassment, although it does little more than confirm the definition of the term "sexual harassment" in the EEA and the Code. Going further than the EEA and the Code, the Act provides and regulates some other forms of harassment. Notably, before 2011, there were numerous problems with the existing harassment prevention strategies. These included the fact that they did not help financially disadvantaged complainants who had to navigate judicial red tape before they could get a court order to defend their rights.[50] For complainants, the court proceeding was tedious, expensive and laborious.

This legislation was therefore enacted with the primary aim of protecting the rights of victims.[51] The legislation strengthens victims' rights, providing legal recourse to victims of harassment by establishing procedures to ensure that appropriate government agencies fully implement statutory provisions.[52] In addition, the Act was passed because there were increasing difficulties with defining and determining harassment in the South African context and because there needed to be criminal and civil remedies to prevent or mitigate harassment in different kinds of relationships.[53]

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47 GenN 1367 in GG 19049 of 17 July 1998.

48 S 187(1) of the LRA.

49 In terms of s 186(1)(*e*) of the LRA, constructive dismissal is defined to mean that "an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee."

50 Similarly, s 1(viii) of the Domestic Violence Act 116 of 1998 also defines domestic violence to include "(e) intimidation; (f) harassment; and (g) stalking".

51 Preamble to the Protection From Harassment Act.

52 *Ibid*.

53 South African Law Reform Commission "Discussion Paper Project 130: Stalking" (September 2004) https://www.justice.gov.za/salrc/dpapers/dp108.pdf (accessed 2023-11-16).

8 TESTS TO DETERMINE "UNWANTED OR OFFENSIVE" BEHAVIOUR

8 1 The objective test to determine "unwanted or offensive" behaviour

The unwelcome element of conduct was evident in the 1998 Code. This Code defined sexual harassment to mean an "unwanted behaviour of a sexual nature".[54] Sexual behaviour would be considered "unwanted" if "the recipient had made it clear that the behaviour was offensive; and/or if the perpetrator should have known that the behaviour is regarded as unacceptable".[55] The 1998 Code thus supported an objective approach to identifying the unwelcome element when determining whether or not the victim was sexually harassed. The objective approach attempts to determine whether a reasonable individual, in the alleged perpetrator's position, knew or should have been aware that their sexual behaviour was offensive and unwelcome.

8 2 The subjective test to determine "unwanted or offensive" behaviour

The 1998 Code of Good Practice on the Handling of Sexual Harassment Cases was amended by the 2005 Code,[56] which defined sexual harassment to mean "unwelcome conduct of a sexual nature that violates the rights of an employee and creates an obstacle to fairness in the work environment".[57] The 2005 Code seemed to support a more subjective approach when determining the "unwelcome" element of the test, taking into account the complainant's emotional state of mind and the degree of severity and extent of the sexual conduct. In summary, the subjective assessment sought to ascertain whether the alleged sexual harassment victim had, in their own opinion, communicated that the alleged conduct was undesirable, either explicitly or implicitly.

But even though the labour courts in South Africa have consistently employed both objective[58] and subjective approaches to ascertain whether sexual conduct was unwelcome, these approaches have also consistently been in conflict. The court's approach to evaluating the unwelcome

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54 Item 3(1) of the 1998 Code.

55 Item 3 of the 1998 Code.

56 *Amendments to the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace* GN 1357 in *GG* 27865 of 2005-08-04 (2005 Code).

57 Item 4 of the 2005 Code.

58 In *Centre for Autism Research and Education CC v Commission for Conciliation, Mediation and Arbitration supra*, the Constitutional Court advocated for and supported a purely objective approach for cases of racial harassment – that is, focusing on the conduct of the harasser. However, this approach is problematic and could face criticism because it might result in an unfair result and perpetuate the existing state of affairs by condoning and accepting the objectification of women and defining them based only on their sexuality.

component of sexual harassment has lacked consistency. For instance, in *Bandat v De Kock*,[59] it was held:

> "What is clear from … the Code is that central to the existence of sexual harassment is behaviour that must be 'unwelcome'. If the conduct is not unwelcome, it cannot be sexual harassment. The determination of whether behaviour is 'unwelcome' is an objective one, because behaviour that may be subjectively unwelcome to one person may not be unwelcome to another."[60]

Be that as it may, the objective test has faced criticism for endorsing standards of behaviour that have traditionally been favoured by men and are not objectively acceptable. For example, the Labour Appeal Court reached a different conclusion in the case of *Motsamai v Everite Building Products (Pty) Ltd*,[61] where it upheld a subjective interpretation of the test. The Labour Appeal Court determined that "sexual harassment goes to the root of one's being and must therefore be viewed from the point of view of a complainant: how does he/she perceive it, and whether or not the perception is reasonable."[62] The Labour Appeal Court has thus endorsed an approach that combines subjective and objective elements, focusing on the complainant's perceptions and whether such a perception was reasonable.

The subjective approach, similar to the objective approach of the test, exhibits some drawbacks and flaws. This is because conduct that would not ordinarily be deemed sexual harassment according to societal norms may be misconstrued as such by hypersensitive individuals owing to their subjective judgment.[63]

8 3 Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace (2022 Code): Combination of objective and subjective tests to determine the unwanted behaviour

The 2022 Code[64] came into effect on 18 March 2022. It is intended to address the prevention, elimination and management of all forms of harassment that pervade the workplace. It is guided by ILO Convention 190[65] and its recommendations concerning the elimination of violence and harassment in the world of work, the Discrimination (Employment and Occupation) Convention 111 of 1958,[66] and ILO Convention 151[67] relating to occupational health and safety. The 2022 Code stipulates that an

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59 (2015) 36 *ILJ* 979 (LC).

60 *Bandat v De Kock supra* par 72.

61 *Supra.* See also *Campbell Scientific Africa (Pty) Ltd v Simmers supra.*

62 Motsamai v Everite Building Products (Pty) Ltd supra par 20.

63 *Mokoena v Garden Art Ltd* (2008) 29 *ILJ* 1196 (LC) par 42–43.

64 GN R1890 in *GG* 46056 of 2022-03-18.

65 International Labour Organization (ILO) *Violence and Harassment Convention* C190 (2019). Adopted: 21/06/2019. EIF:25/06/2021.

66 ILO *Discrimination (Employment and Occupation) Convention* C111 (1958). Adopted: 25/06/1958; EIF: 15/06/1960

67 ILO *Labour Relations (Public Service) Convention* C151 (1978). Adopted: 27/06/1978; EIF: 25/02/1981.

investigation into sexual harassment must take into concurrent consideration both subjective and objective factors. Item 5.2 of the Code establishes its own rules, tests and guidelines for establishing whether the conduct was unwanted. These include:

a) An employee may indicate that the conduct is unwanted in different ways, including by walking away or not responding to the perpetrator.[68]
b) Previous consensual participation in sexual conduct does not necessarily mean the conduct continues to be acceptable to the employee.[69]
c) Where a complainant has difficulty indicating to the perpetrator that the conduct is unwanted, such complainant may seek the assistance and intervention of another person such as a co-worker, superior, counsellor, human resource official, family member or friend.[70]
d) The fact that the complainant does not indicate that the conduct is unwanted does not entail that there has not been sexual harassment if the conduct is such that the harasser/perpetrator ought to have known it could be regarded as unwanted.[71]

Furthermore, the 2022 Code stipulates that the test for sexual harassment demands a critical assessment of the following inquiry:

a) whether the harassment is based on the prohibited grounds of sex and/or gender and/or sexual orientation;[72]
b) whether the sexual conduct was unwelcome or unacceptable;[73]
c) the nature and extent of the sexual behaviour;[74] and
d) the detrimental effect of sexual behaviour on the employee.[75]

As outlined in the 2022 Code, the determination of whether behaviour qualifies as sexual harassment ought to be conducted objectively, taking into account the point of view of the employee making the allegation. This aligns with the approach taken by Kenya, since the main emphasis of the investigation on harassment is on the effect of the conduct on the employee. However, there may be instances when the complainant's beliefs may not align with the perspective of a "reasonable person" in the complainant's particular position. Under such conditions, an individual or employer accused of harassment may arguably attempt to demonstrate that the complainant's perspective or perceptions do not align with the norms of society, which reflect our fundamental constitutional principles.

What is evident from the Code is that when evaluating the unwelcome, unwanted or offensive element, it is essential to ascertain if the alleged conduct was detested or deemed inappropriate. This formulation of the test

68 Item 5.2.1 of the 2022 Code.
69 Item 5.2.2 of the 2022 Code.
70 Item 5.2.3 of the 2022 Code.
71 Item 5.2.4 of the 2022 Code.
72 Item 5.3.2.1 of the 2022 Code.
73 Item 5.3.2.2 of the 2022 Code.
74 Item 5.3.2.3 of the 2022 Code.
75 Item 5.3.2.4 of the 2022 Code.

is a combination of an objective and subjective test. Accordingly, the behaviour can be deemed unwelcome if the complainant explicitly, implicitly, directly, or indirectly indicated that the conduct was unwelcome. Alternatively, if the behaviour was such that a reasonable person in the same situation would have found it unacceptable, it can also be considered unwelcome. In this regard, it is important to note that the absence of an explicit indication from the complainant that the behaviour is unwelcome does not automatically exclude the possibility of sexual harassment. If the perpetrator should reasonably have considered that the behaviour may be seen as unwanted, it can still be considered to be sexual harassment. In the recent case of *Amathole District Municipality v Commission for Conciliation, Mediation and Arbitration* (*CCMA*),[76] the Labour Appeal Court declared that the determination as to whether behaviour is offensive or unwelcome is based on an objective test.[77] However, despite the Labour Appeal Court's declaration that an objective test should be used, it seems from an analysis of the judgment that subjective factors were also taken into account when reaching its conclusion.

Perhaps a notable deficiency in the 2022 Code is that it extends its protection to employees who were harassed by third parties.[78] This is clearly at odds with the vicarious-liability provisions of the EEA[79] and the interpretation given thereto by the courts. As a sanction or preventative measure, the Code also allows for a perpetrator to be transferred to another department or employer if found guilty.[80] The question must be asked whether this amounts to justice for a victim of sexual harassment and if the employer would not simply be transferring the problem to another department.

8 4 The need to adopt a "compromise test"

In summary, both the subjective and objective tests assess whether sexual conduct has been offensive or unwelcome from the point of view of the harasser or complainant, thus posing challenges for both assessments. To address such challenges, South African employment law has devised a balanced approach that serves as an acceptable compromise between the subjective and objective tests.[81] This test, also known as the "reasonable victim" test, counterbalances the harasser's perspective by examining the complainant's perceptions or emotions, combining the subjective element with the objective element when analysing the conditions surrounding the incident.[82]

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76 (2023) 44 *ILJ* 109 (LAC).

77 *Amathole District Municipality v CCMA supra* par 56.

78 Item 10.3 of the 2022 Code. See also *Future of SA Workers Union obo AB v Fedics (Pty) Ltd* (2015) 36 *ILJ* 1078 (LC).

79 S 60 of the EEA.

80 Item 10.9.3 of the 2022 Code.

81 Botes "Sexual Harassment as a Ground for Dismissal: A Critical Evaluation of the Labour Court and Labour Appeal Courts decisions in Simmers v Campbell Scientific Africa" (2017) (4) TSAR 772.

82 Dupper *et al Essential Employment Discrimination Law* 246.

The primary criticism and detractor of the test is that it specifically targets and extensively probes the complainant's behaviour and actions. The complainant is essentially subjected to a trial-like process that turns on evidentiary issues and the consequence is that the focus shifts away and is no longer on the behaviour of the harasser, which should be the heart of the matter. Consequently, the unwelcome or offensive element represents a "roadblock" for complainants in sexual harassment cases. This obstacle appears to stem from the fact that the inquiry or investigation concerning the unwelcome element never hinges on whether the harasser's conduct was in fact offensive or unwelcome. Instead, the courts scrutinise the complainant's conduct in search of evidence that the harasser's conduct was indeed offensive or unwelcome. When determining whether behaviour is unwelcome or offensive, it is also crucial to evaluate the specific dynamics, as well as the nature, of the relationship between the harasser's conduct and the complainant. This dynamic should be examined not just within the framework of the working relationship, but also on a personal level. It may be that the dynamic provides a valid justification and reasonable explanation for a scenario where there is no complaint about the behaviour, even when the behaviour itself seems to be deserving of a complaint.

9 CONCLUSION

In order to establish if behaviour constitutes sexual harassment according to Kenyan law, the conduct must be classified as "unwelcome or offensive". In most cases, the "unwelcome or offensive" element of the conduct is often evident. Nevertheless, situations may develop when the nature of such "unwelcome or offensive" behaviour is unclear, resulting in courts and employers struggling to determine the most appropriate way to respond to it, and the appropriate standards of assessment. Understanding the standard, test and guidelines for determining "unwelcome or offensive" conduct when analysing cases of alleged sexual harassment would assist employers in enhancing awareness while fostering commitment to eliminate gender-based violence in the workplace.

This article observes that the current regulatory efforts and interventions on sexual harassment under the Employment Act are to a large extent adequate. However, the legislation in question has some notable deficiencies. For instance, if an employee tolerates conduct that clearly and objectively qualifies as sexual harassment without lodging a formal complaint, is that conduct transformed into something acceptable simply because the recipient or victim does not consider it unwanted or offensive? In other words, does the fact that a party may have previously welcomed or participated in the conduct mean that the conduct remains welcome? This article disagrees and contends that the Kenyan legislators may not have kept this in mind. An employee is not precluded from lodging a sexual harassment complaint against a perpetrator when attention becomes unwelcome even if the employee was previously in a relationship with the perpetrator. The Kenyan legislator may draw significant lessons from the South African 2022 Code, which deals specifically with this aspect.

This article argues further that the question of what constitutes sexual harassment should not be defined based on an individual's subjective

feelings or views. This article is unaware of any operational legislature that grants private individuals the authority to make laws. Focusing only on the perspective of a complainant is, at the very least, a failure on the part of a legislature to fulfil its constitutional duty of creating legislation. In the worst-case scenario, this might lead to a state of anarchy and disorder. The harasser's behaviour, when seen objectively, is the most important factor to be investigated and scrutinised. The legislative branch is obligated to enact a law that is sufficiently clear, enabling citizens to understand their obligations.

However, the primary challenge is the Kenyan Employment and Labour Relations Court's highly subjective approach to evaluating what constitutes "unwanted or offensive" behaviour. Being so reliant or dependent on the complaint begs to be challenged. In the case of *Lydiah Mongina Mokaya v St Leornard's Maternity Nursing Home Limited*,[83] the court highlighted that cases of sexual harassment are highly individualised and difficult to prove. While it is important to acknowledge that sexual harassment is a subjective experience, and to take the complainant's perspective into account, it is crucial to avoid relying solely on subjective criteria. This is because the complainant may be excessively sensitive, leading to unfounded allegations of sexual harassment against an alleged harasser. In addition, this might result in liability without fault, which is a major problem when it comes to sexual harassment in the workplace. Moreover, the difficulty with Kenyan courts employing a subjective test is that forms of behaviour that an extremely sensitive individual could perceive as harassment may be identified for disciplinary action. The Employment and Labour Relations Court ought therefore to shy away from embracing this approach.

To navigate this delicate situation, it is necessary to amend the Employment Act and consider implementing the extensive tests and guidelines used by the South African courts and the 2022 Code. In particular, the Kenyan legislature ought to adopt the perspective that sexual behaviour ought to be deemed "unwelcome or offensive" not only when a recipient explicitly expresses offence but also when a perpetrator is aware or should be aware that the behaviour is considered unacceptable. By doing so, the legislators and courts would support a fair and objective approach to the "unwelcome or offensive" component of the sexual harassment test. The objective approach seeks to determine whether a reasonable individual, in the accused perpetrator's situation, was aware or should have been aware that their sexual behaviour was inappropriate.

It is also worth highlighting that, unlike South Africa, Kenya has yet to ratify ILO Convention 190, which aims to eradicate violence and harassment in workplaces.[84] The Preamble to the Convention mandates its parties to foster actively an atmosphere where sexual harassment is completely unacceptable, and emphasises that all individuals involved in the realm of employment must take action against violence and harassment. The Convention calls for comprehensive legislative amendments, primarily because it separates and detaches sexual harassment from unfair

[83] *Supra*.

[84] ILO *Violence and Harassment Convention* C190 (2019). Adopted: 21/06/2019. EIF:25/06/2021.

discrimination and equality. Rather, it places sexual harassment within a wider and more comprehensive framework (which includes workplace bullying) in order to combat different types of workplace violence and harassment. As such, this article recommends that, as South Africa has done, Kenya should move with speed to ratify this important Convention and its accompanying recommendations aimed at preventing sexual misconduct in the workplace.

According to section 23(1) of the Kenyan Sexual Offences Act, sexual harassment is defined as "continuous unwelcome sexual advances, request for sexual favours, lewd verbal or physical gestures by someone in authority".[85] Surprisingly, the Employment Act does not explicitly address the requirement of a "continuous" element to the unwelcome or offensive conduct. Accordingly, the Employment Act being the primary law in employment matters fails to realise that unwelcome or offensive behaviour could be a once-off incident and that continuity is not a prerequisite. This stands in stark contrast to the position under the South Africa LRA and the 2022 Code, where the legal system and courts[86] recognise that unwelcome or offensive behaviour may be a single or one-off occurrence,[87] particularly if it is serious and has a noticeably harmful effect on the person filing the complaint.

Section 6(3)(iii) of the Kenyan Employment Act states: "The employer shall take such disciplinary measures as the employer deems appropriate against any person under the employer's direction, who subjects any employee to sexual harassment." However, several principles are missing from this provision or deserve more attention. First, this Act gives the employer very wide discretion to "take such disciplinary measures as the employer deems appropriate". This is problematic as employers have the discretion to impose lenient sanctions such as written warnings, which are not advisable in sexual harassment cases. Section 6 of the Employment Act, which was developed to eradicate sexual harassment in the workplace, makes no mention of any specific available sanctions in cases of sexual harassment. If sexual harassment, one of the most egregious forms of misconduct to plague the workplace, is to be eradicated, the Employment Act must incorporate a Code and guidelines similar to the 2022 Code under South African law on sanctions – and stricter sanctions for that matter. As the South African Constitutional Court reiterated in *McGregor v Public Health and Social Development Sectoral Bargaining Council*,[88] a strict sanction serves an important purpose in that it:

> "sends out an unequivocal message that employees who perpetrate sexual harassment do so at their peril and should more often than not expect to face the harshest penalty. In fact, incorporating criminal liability may ultimately be needed so that employers finally take sexual harassment seriously."[89]

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85 *JWN v Securex Agencies (K) Limited supra* par 22.

86 *Motor Transport Workers Union obo Zikhali v Izinkobe Construction (Pty) Ltd* (2020) 7 BALR 715 (BCCEI).

87 *Future of SA Workers Union obo AB v Fedics (Pty) Ltd supra* par 44.

88 *Supra* par 49.

89 *McGregor v Public Health and Social Development Sectoral Bargaining Council supra* par 49, citing *Campbell Scientific Africa (Pty) Ltd v Simmers supra* par 35.