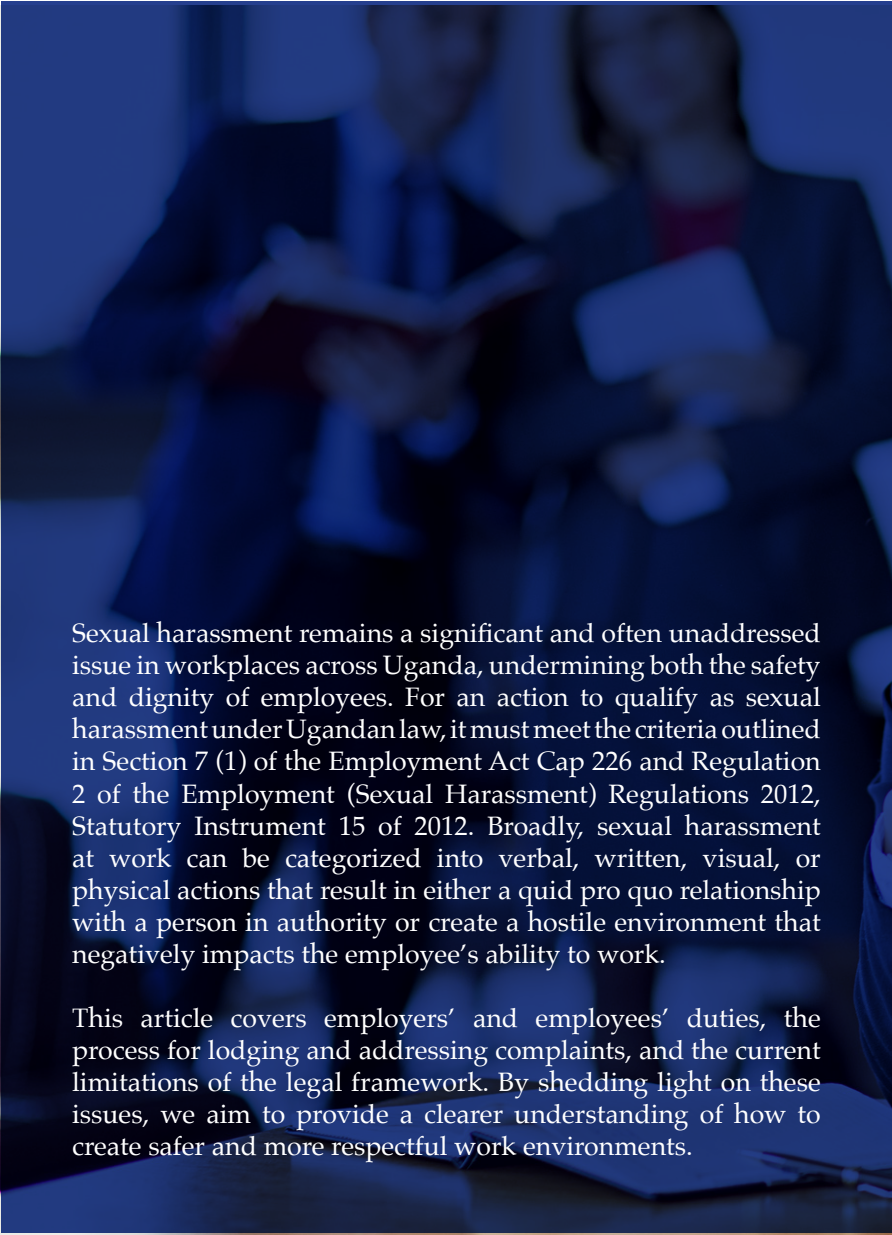




EMPLOYMENT INSIGHTS

Time Out: Addressing Sexual Harassment in work spaces in Uganda.



Sexual harassment remains a significant and often unaddressed issue in workplaces across Uganda, undermining both the safety and dignity of employees. For an action to qualify as sexual harassment under Ugandan law, it must meet the criteria outlined in Section 7 (1) of the Employment Act Cap 226 and Regulation 2 of the Employment (Sexual Harassment) Regulations 2012, Statutory Instrument 15 of 2012. Broadly, sexual harassment at work can be categorized into verbal, written, visual, or physical actions that result in either a quid pro quo relationship with a person in authority or create a hostile environment that negatively impacts the employee's ability to work.

This article covers employers' and employees' duties, the process for lodging and addressing complaints, and the current limitations of the legal framework. By shedding light on these issues, we aim to provide a clearer understanding of how to create safer and more respectful work environments.

Employer's Obligations

The *Employment Act Cap 226 and the Employment (Sexual Harassment) Regulations 2012* place specific obligations on employers with more than 25 employees. These include the requirement to formulate and adopt a written sexual harassment policy, which must be made available to all employees (Regulations 3, 4, and 6). Employers must also identify and designate a person responsible for handling sexual harassment complaints at work (Regulations 8 and 9). Additionally, employers with more than 25 employees are required to establish a sexual harassment committee to receive and investigate complaints (Regulations 10 and 11).

When handling complaints, the sexual harassment committee is mandated to adhere to principles including thoroughness, impartiality, timeliness, gender sensitivity, social dialogue, discretion, confidentiality, and respect for the victim's right to privacy (Regulations 15 and 16). Once a complaint is received, the employer is required to protect the complainant from retaliation and discrimination during and after the investigation (Regulation 17). The complainant should not be subjected to a hostile working environment, as this would undermine their right to dignity.

An employer who fails to fulfill these statutory obligations, such as establishing a sexual harassment policy or committee, or who fails to protect the complainant from retaliation or discrimination, may be liable to a fine not exceeding UGX.120,000 and/or imprisonment for up to three months (Regulation 19).

In Magombe Editor v Tusker Mattresses (U) Ltd, LDR No. 243 of 2015, the Industrial Court of Uganda held that a properly constituted disciplinary committee can handle sexual harassment complaints. In the absence of a sexual harassment policy or committee, the decision of such a disciplinary committee is not rendered illegitimate or illegal. This decision implies that employers with fewer than 25 employees can address sexual harassment complaints through a disciplinary committee, even without a mandated sexual harassment policy or committee.

Obligation to Report “Immediately”

Sexual harassment often occurs in private spaces and may go unnoticed in the workplace. To sustain a successful sexual harassment complaint, it is crucial for the victim to raise a complaint about the perpetrator’s conduct at the earliest opportunity. Bringing the issue to the employer’s attention serves a legal purpose—enabling the employer to eliminate the alleged conduct. This can be done by directly informing the perpetrator that the conduct was unwelcome and must stop or by raising a grievance with senior management. In some cases, the victim may confide in co-workers or friends at work, who should assist in bringing the complaint forward.

The obligation to report “immediately” is a subjective timeline that must consider the power dynamics between the victim and the perpetrator while allowing the employer an opportunity to swiftly address the wrongful conduct. Ugandan jurisprudence lacks case law to provide guidance on what constitutes reporting “immediately.” Therefore, court decisions from nearby jurisdictions, such as South Africa and Kenya, can help interpret this term. In *A.K v Right to Care NPC [2023] ZALCJHB 182*, heard by the Labour

Courts of South Africa, a complaint brought two months after the incident was not considered unreasonably late. Conversely, in *National Union of Metal Workers of South Africa and Another v Passenger Rail Agency of South Africa [2022] 1 BLLR 90 (LC)*, the South African Labour Court deemed a delay of two to three years in reporting acts of sexual harassment as fatal to the applicant’s claim. Since remedies for sexual harassment claims are based on equity, the equitable maxim “delay defeats equity” applies to such scenarios.

Proof of Unwelcome or Unwanted Conduct

To support a sexual harassment claim, the complainant must demonstrate that the conduct was unwelcome and occurred within the employment setting. This requirement is grounded in the principle that “he who alleges must prove.” In *Carolyn Atukunda v Micro Uganda & Emmanuel Mwanja, LDR No. 291 of 2014*, the Industrial Court of Uganda held that under *Section 7 of the Employment Act*, the burden of proving sexual harassment rests heavily on the complainant. The burden of proof is high, based on the preponderance of evidence.

The complainant must provide evidence to show that the conduct was unwelcome, of a sexual nature, and was brought to the employer's attention.

The Industrial Court of Uganda in Magoba Editor v Tusker Mattresses (U) Ltd, LDR No. 243 of 2015, held that an aggrieved employee must prove that the employer or their representative:

- i. Made a request for sexual intercourse, sexual contact, or any other form of sexual activity.
- ii. The request contained a promise of preferential treatment in employment or a threat of detrimental treatment in employment or about the employee's present or future employment status.
- iii. Used language or visual material of a sexual nature.
- iv. Showed physical behavior of a sexual nature.
- v. Each or all of the above actions were unwelcome, offensive, and had a detrimental effect on the employee's job performance or satisfaction.

In Bandat v De Kock and Another [2014] ZALCJHB 342, the South African Labour Court held that central to establishing the existence of sexual harassment is the complainant's ability to demonstrate that the conduct was unwelcome.

Secondly, they holistically examine the work and personal relationship between the complainant and the perpetrator to determine whether the conduct complained of fell within the employment relationship.

In Magoba Editor v Tusker Mattresses (U) Ltd (supra), the court emphasized that the complainant must specify the date and time when the alleged sexual harassment occurred. The court further stated that evidence in the form of text messages, voice recordings, video evidence, or third-party witnesses is crucial to corroborate allegations of sexual harassment in the workplace.

Employer's Liability

In sexual harassment claims, an employer's liability begins after a complaint is raised, as harassment at work is not anticipated or foreseeable by the employer. *In Lapka v Chertof, Case 05 C 668 USDC 30*, the South African Courts held that an employer's liability depends on what it did or did not do after the co-worker's conduct was brought to the employer's attention to prevent further harassment. If an employer fails to take action to prevent further harassment or forces the victim to bear the costs of solving a problem she has reported, the employer may be held liable.

In Liberty Group Ltd v M (2017) 38 ILJ 1318 (LAC), the South African Labour Court stated that once an employer is made aware of an incident of sexual harassment, it must take reasonable and practical steps to eliminate the conduct complained of. In **A.K v Right to Care NPC** (supra), the court opined that a three-month timeline to address the complainant's grievance was prompt action on the part of the employer. Conversely, in **Solidarity Obo B v South African Police Service and Others (P 03/19) [2022] ZALCPE 26**, the South African courts opined that taking two years to investigate the complaint and take relevant action was unreasonably long on the part of the employer.

Failure to address a sexual harassment complaint or creating a hostile work environment that forces an employee to resign can result in liability for the employer due to unfair termination. In **CNR v FITM & Anor [2022] KEELRC 82 (KLR)**, the Kenyan labour court awarded damages to the complainant, who resigned due to the employer's failure to prevent the harassment incident. The court opined that although the claimant ought not to have resigned due to harassment by her supervisor, she was forced to resign, leading to constructive dismissal. The employer's failure to protect the employee from retaliation and discrimination at work resulted in unfair labor practices.

Complaint to Labour Officer

Section 7(2) of the Employment Act and Regulations 12 and 13 of the Employment (Sexual Harassment) Regulations provide procedures for lodging complaints related to sexual harassment with a labor officer, who will hear and decide the matter. The labor officer may investigate the complaint and either resolve it or refer it to a labor commissioner in case of a deadlock (Regulation 13(f)). If the commissioner is unable to resolve the matter, they can refer it to the Industrial Court. Alternatively, a person aggrieved by the decision of the labor officer or commissioner may appeal the decision by lodging a notice of appeal with the Industrial Court within 21 days. The aggrieved party must also provide full information regarding the complaint within 14 days of receiving the notice of appeal.

However, before entertaining a complaint, the labor officer or the Industrial Court will first inquire into whether the conduct was unwelcome and whether a complaint was raised with the employer about the unwelcome conduct. If the complainant failed to make a complaint, they must provide a reasonable excuse for not doing so.

Challenges with Sexual Harassment Legislation in Uganda

There are three main challenges with the sexual harassment legislation in Uganda that hinder effectively addressing sexual harassment in the workplace:

i. Limited Applicability: The law only mandates employers with over 25 employees to adopt and formulate sexual harassment prevention measures, such as the adoption of a sexual harassment policy and the establishment of a sexual harassment committee. This 25-employee threshold excludes small or medium-sized businesses and those operating in the informal sector. While the case of *Magoba Editor v Tusker Mattresses (U) Ltd* suggests that a properly constituted disciplinary committee can address complaints in smaller businesses, this workaround does not fully remedy the lack of a comprehensive framework for all employers.

ii. Narrow Definition of Sexual Harassment: The definition of sexual harassment under *Section 7(1) of the Employment Act* appears to restrict such harassment to scenarios where the acts are perpetrated by the employer, implying a power dynamic. This raises the question of whether the definition under the Employment Act

covers situations where sexual harassment is perpetrated by an employee of the same rank or a subordinate. While the Employment (Sexual Harassment) Regulations do not specifically limit harassment to interactions between an employer and an employee, the Employment Act, being the superior legislation, could create challenges in defining and addressing sexual harassment in the workplace.

Challenges with Sexual Harassment enforcement

i. Lack of Training and Awareness: Many organizations do not provide adequate training on recognizing and preventing sexual harassment. Employees and managers may be unaware of what constitutes harassment or how to handle complaints effectively.

ii. Ineffective Reporting Systems: Many workplaces lack clear, confidential, and accessible reporting mechanisms. Victims may not know where or how to report harassment, or may doubt that their complaints will be taken seriously.

iii. Fear of Retaliation: Employees may fear retaliation, such as job loss, demotion, or hostile work environments, if they report sexual harassment. This fear is particularly acute in regions with weak labor protections.

iv. Precarious Work Conditions:

Workers in precarious employment situations, such as temporary, part-time, or informal work, are often more vulnerable to harassment and less likely to report it due to fear of losing their job or lack of legal protections.

v. Gender Norms and Power Imbalances:

Traditional gender roles and power imbalances in many societies contribute to a culture where sexual harassment is either normalized or ignored, especially in male-dominated industries.

Conclusion

Addressing workplace sexual harassment requires a coordinated approach involving timely reporting by the complainant, clear definitions of unwelcome conduct, and employer obligations to ensure that all parties, including the perpetrator, play an active role. Employers must act swiftly and effectively upon receiving complaints, implement preventive measures, and provide a supportive environment for victims. Complying with statutory obligations and taking proactive steps can foster a safer and more respectful workplace, protecting the dignity and rights of all employees. The ongoing challenge is to ensure that policies are not only in place but actively enforced, creating a culture where sexual harassment is neither tolerated nor overlooked.

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