

THE COMMISSION ON ADMINISTRATIVE JUSTICE

Office of the Ombudsman



**“Hata mnyonge ana Haki”**

**“BEHIND CLOSED DOORS”**

**A REPORT BY THE OMBUDSMAN-KENYA**

**ON**

**A COMPLAINT ON SEXUAL HARASSMENT AT THE HIV/AIDS TRIBUNAL**

**APRIL, 2016**



## Preamble

The Commission on Administrative Justice (Office of The Ombudsman) is a Constitutional Commission established under Article 59 (4) and Chapter Fifteen of the Constitution, and the Commission on Administrative Justice Act, 2011.

The Commission on Administrative Justice (CAJ) has a mandate, inter-alia, to investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct.

In addition to the CAJ's investigative powers under Article 252 (1) (a), Sections 26, 27, 28 and 29 of the CAJ Act gives the Commission powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue Summons and require that statements be given under oath, adjudicate on matters relating to Administrative Justice, obtain relevant information from any person or Governmental authorities and to compel production of such information.

Under Section 31 of its Act, CAJ may investigate an administrative action despite a provision in any written law to the effect that the action taken is final or cannot be appealed, challenged, reviewed, questioned or called in question.

After undertaking its investigations, the Commission is required under Section 42 of its constitutive Act, to prepare a report to the State organ, public office or organization to which the investigation relates. The report shall include the findings of the investigation, action the Commission considers to be taken, reasons whereof and recommendations the Commission deems appropriate.

CAJ may upon an inquiry into a complaint, undertake such other action as it may deem fit against a concerned person or persons where the inquiry discloses a criminal offence as provided for under Section 41 of the CAJ Act.

Section 8 (g) of the CAJ Act gives the Commission power to recommend compensation or other appropriate remedies against persons or bodies to which the Act applies.

Section 42 (4) states; If there is failure or refusal to implement the recommendations of the Commission within the specified time, the Commission may prepare and submit to the National Assembly a report detailing the failure

or refusal to implement its recommendations and the National Assembly shall take the appropriate action.

Further, Article 59(2) (j) of the Constitution of Kenya, 2010 empowers the Commission to report on complaints investigated under paragraph (h) and (i) and **take remedial actions**.

Section 52 (b) and (d) of the CAJ Act 2011, provides that a person who knowingly submits false or misleading information to a member of staff of the Commission commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or imprisonment for a term not exceeding two years or both.

The general layout of the report includes the following:

- Introduction to the investigations
- Investigations process
- List of Interviewees
- Normative framework
- Analysis and findings
- Consequential Observations
- Conclusions and Recommendations

## Introduction

The investigation was triggered by a complaint lodged with the Commission regarding sexual harassment at the HIV/AIDS Tribunal. The Research & Investigations Directorate undertook independent investigations through interviewing various persons who had previously worked at the Tribunal as well as some that are still working there. All those who were interviewed chose to remain anonymous citing fear of intimidation and undisclosed repercussions.

## Investigative Process

The CAJ team held interviews with several persons who were former as well as current employees, interns and members of the Tribunal. The Commission also invited the CEO of the HIV/AIDS Tribunal for an interview vide letter Ref No. CAJ/HIVTRIBUNAL/109/1/14 dated 6<sup>th</sup> October, 2014.

## List of Interviewees<sup>1</sup>

- JW.
- CK.
- LD.
- JS.
- SP.
- Mr. Anyumba Nyamwaya
- CL.

## Statements

- Statement by CK.

## Documents recovered

- Payment vouchers
- Payment schedules
- Imprest warrants
- Letters

## Normative Framework

### ***The Public Officers Ethics Act, 2003***

21. (1) *A public officer shall not sexually harass a member of the public or a fellow public officer.*

(2) *In subsection (1), "sexually harass" includes doing any of the following, if the person doing it knows or ought to know that it is unwelcome-*

*(a) making a request or exerting pressure for sexual activity or favours;*

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<sup>1</sup> Initials used are pseudonyms and do not reflect actual names

(b) making intentional or careless physical contact that is sexual in nature; and  
(c) making gestures, noises, jokes or comments, including innuendos, regarding another person's sexuality.

### **Sexual Offences Act No. 3 of 2006**

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

(2) It shall be necessary to prove in a charge of sexual harassment that—(a) the submission or rejection by the person to whom advances or requests are made is intended to be used as basis of employment or of a decision relevant to the career of the alleged victim or of a service due to a member of the public in the case of a public officer;

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

(c) public from a public office.

### **The Employment Act of 2007**

#### **6. Sexual harassment**

(1) An employee is sexually harassed if the employer of that employee or a representative of that employer or a co-worker—

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

(i) promise of preferential treatment in employment;

(ii) threat of detrimental treatment in employment; or

(iii) threat about the present or future employment status of the employee;

(b) uses language whether written or spoken of a sexual nature;

(c) uses visual material of a sexual nature; or

(d) 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.

*(2) An employer who employs twenty or more employees shall, after consulting with the employees or their representatives if any, issue a policy statement on sexual harassment.*

*(3) The policy statement required under subsection (2) may contain any term the employer considers appropriate for the purposes of this section and shall contain—*

*(a) the definition of sexual harassment as specified in subsection (1);*

*(b) a statement—*

*(i) that every employee is entitled to employment that is free of sexual harassment;*

*(ii) that the employer shall take steps to ensure that no employee is subjected to sexual harassment;*

*(iii) that 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;*

*(iv) explaining how complaints of sexual harassment may be brought to the attention of the employer; and*

*(v) that the employer will not disclose the name of a complainant or the circumstances related to the complaint to any person except where disclosure is necessary for the purpose of investigating the complaint or taking disciplinary measures in relation thereto.*

*(4) An employer shall bring to the attention of each person under the employer's direction the policy statement required under subsection (2).*

### **Analysis and Findings**

The commission received a letter of complaint alleging sexual harassment at HIV/Aids Tribunal **(see Document 1)**<sup>2</sup> and decided to undertake investigations into the allegations.

The following are the findings:

**Ms. JW.** – In her interviews with CAJ investigators, she stated that Mr. Nyamwaya had made inappropriately utterances regarding her manner of dressing. Ms.JW. also stated that Mr. Nyamwaya made inappropriate remarks towards her, to the effect that they (Ms. JW. and Mr. Nyamwaya) needed to be close and to go out together. He further made innuendos regarding his sexual prowess to Ms.

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<sup>2</sup> The document and all subsequent documents have been redacted in order to protect the identities of the witnesses. The original documents are being held in the custody of CAJ

JW. Ms. JW. also stated that Mr. Nyamwaya would look at her entire body in a suggestive manner. Ms. Jane W. mentioned an intern who had been touched by Mr. Nyamwaya and who had complained to several colleagues about the touching. She also reported that the interns at the tribunal would complain of the behaviour of Mr. Nyamwaya telling her that he was harassing them.

**Ms. CK.** – Ms. CK., in her statement, said that on a retreat to Nakuru Mr. Nyamwaya had asked her for sexual favours. Mr. Nyamwaya promised Ms. CK. more allowances if she complied with his requests but she declined. During a meeting in Nyeri, Mr. Nyamwaya Stated the following words to Ms. CK., “hapa Nyeri, kuna baridi sana na blanketi yangu iko Ngong, leo utakuwa blanketi yangu”. **(See Document 2)**

**Ms. LD.** – Ms. LD. stated that she had heard that Mr. Nyamwaya sexually harassed a former employee of the tribunal. Ms. LD. also stated that she had heard rumours of sexual harassment to other female staff but she had never seen any such behaviour from Mr. Nyamwaya herself.

**Mr. JS.** – Mr. JS. stated that he had heard rumours but that they were unsubstantiated. Mr. JS. said that the language used by Mr. Nyamwaya to address staff was sexually abusive, and had told a female member of staff that she could take the role of his wife when they had travelled to Mombasa. He also confirmed that the working environment was not conducive since a specific community had ethnically dominated the Tribunal.

**Ms. SP.** – Ms. SP. is the former employee of the Tribunal who had complained of harassment and inappropriate behaviour by Mr. Nyamwaya She expressed fear and concern that the information she was to share with the Commission would expose her, noting that Mr. Nyamwaya is a long serving public servant who seems to know his way around the system. She was of the opinion that anything could happen to her. She pointed out that Mr. Nyamwaya had made moves on her, stating that he didn't mind her company. Ms. SP. also found Mr. Nyamwaya careless in his talks and failed to gauge his audience. Although she had never made a formal complaint about the matter, she did report to the then PS Health.

The P.S. promised to remove Mr. Nyamwaya from the Tribunal. As far as she was concerned the rest of the complaints were hearsay. Ms. SP. did not want to be involved in the investigation process and requested anonymity. She did not want to write a statement nor allow us to complete an interview schedule.



**Mr. CL.** – Mr. CL. admitted that he had heard several people complaining of Mr. Nyamwaya's conduct in relationships with female officers but he had not been personally approached by any of the complainants.

He also pointed out that he had heard that Mr. Nyamwaya was misusing drivers by visiting clubs until late hours, forcing the drivers to wait outside the clubs overnight. According to Mr. CL., Mr. Nyamwaya is known to be tribalistic and his managerial skills are wanting. Mr. CL. stated that he knew a lady by the name of Christine K. Wambui who had been fired because of a misunderstanding between her and Mr. Nyamwaya on money issues.

However CAJ received a letter written by Mr. Crispin Ref: HAT/ADM/MT/1(68) dated 12<sup>th</sup> August 2014 to Ps Health as follows: Finally, I would like to confirm that we have confidence and trust in the works of Mr. Nyamwaya the tribunal's Secretary and we would like him to continue the good work. Recently I chaired a staff meeting and all staff members were happy with his management style. **(See Document 3)**

**Mr Nyamwaya** – Upon interviewing Mr. Nyamwaya, it was noted that the allegations of sexual harassment may not be far-fetched, however there is no tangible evidence verbally or otherwise that the investigations could hold on to, to declare Mr. Nyamwaya culpable of the allegation.

It was also observed that the interpretation of what constitutes sexual harassment is very subjective and prone to misinterpretation. This was evident from Mr. Nyamwaya's presentation, who had a subjective interpretation of the legal provisions governing sexual harassment in public offices and conduct deemed as sexual harassment, **(See Document 4)**

This was also evident in information gathered through interviews conducted with various identified key informants who could not pin point evidential facts sufficient to sustain criminal culpability on the part of Mr. Nyamwaya. None of the interviewees mention indecent or physical touch by Mr. Nyamwaya. All interviewees confirmed that Mr. Nyamwaya did not pursue any forays to completion. Where interviewees spoke of anything indicative of allegations they used words such as, 'I want to take you out for nyama choma', 'I am going to be your guest when we go out in the field', and general comments about the physical and sartorial appearance of the person.

## Consequential observations

### General fear among Tribunal members, staff and interns

CAJ investigators noted a lot of fear among interviewees including tribunal members, interns and former employees. It was stated by several interviewees that Mr. Nyamwaya has been in public service for a long time and 'he knew his way around'.

It was noted that there were allegations that on several occasions the Senior Officer abused his powers by directing staff to collect imprest for non-existent trips, monies which Mr. Nyamwaya would then take and pay people who are not members of staff of the Tribunal. Copies of payment vouchers/schedules and imprest warrants are available in support of the allegations.

## Conclusions

Most of the interviewees stated that the alleged sexual harassment of staff members and interns at HIV/AIDS Tribunal was hearsay and therefore did not have any tangible evidence to substantiate the allegations.

However CAJ noted that two of the interviewees (Ms. SP and Ms. CK) stated that Mr. Nyamwaya had made inappropriate utterances bordering on **sexual harassment**.

The evidence in this investigation consists of witness statements of direct conversations with Mr. Nyamwaya, general statements of conversations by some witnesses and hearsay statements by other witnesses.

On his part Mr. Nyamwaya during his interview admitted to having made certain jokes to female staff at the Tribunal and considers his behaviour as jovial and jocular.

The definition of sexual harassment under the Public Officers Ethics Act, 2003 is clear and jokes, gestures and comments including innuendos are regarded as sexual harassment.

Upon analysis of the statements made by the witnesses, CAJ determined that though they revealed some form of inpropriety, the statements appear shallow and do not appear to meet the threshold in order to find Mr. Nyamwaya guilty of sexual harassment. The defense that Mr. Nyamwaya raises that he was merely making jokes would not allow him to escape being found culpable on this basis.

## **Conclusion**

Mr. Nyamwaya is found culpable of making inappropriate suggestions with sexual undertones and the defence that Mr. Nyamwaya raises that he was making jokes does not diminish that conclusion.

## **Recommendations**

1. The HIV/AIDS Tribunal should caution Mr. Nyamwaya on his conduct regarding employees of the Tribunal in particular members of the opposite sex. The board should caution and advise Mr. Nyamwaya to cease making jokes, suggestions and comments of a sexual nature to any member of staff or intern.
2. The HIV/AIDS Tribunal should develop and operationalize a policy on sexual harassment in line with section 6 (2) of the Employment Act, 2007.
3. The HIV/AIDS Tribunal should have a complaints management system to facilitate reporting and resolution of complaints from the public and staff.