IN THE NATIONAL INDUSTRIAL COURT OF NIGERIA

IN THE LAGOS JUDICIAL DIVISION

HOLDEN AT LAGOS

BEFORE HER LORDSHIP HON. JUSTICE O. A. OBASEKI-OSAGHAE

DATE: December 19, 2013 SUIT NO: NICN/LA/492/2012

BETWEEN

EJIEKE MADUKA - Applicant

AND

1. MICROSOFT NIGERIA LIMITED

2. MICROSOFT CORPORATION - Respondents

3. EMMAMUEL ONYEJE

4. ADEFOLU MAJEKODUNMI

REPRESENTATION

Fola Adekoya for Applicant.

F.C. Agbu SAN, with him P.C. Achunine, O.C. Igodo, M.S.Umar, J. Oberaifo (Miss), for 1st, 2nd, and 3rd Respondents.

F.A.Dalley, with him Mrs. O.A.Olude, Miss O. Esan, Mrs. T.Y.Olaleye for 4th Respondent.

JUDGEMENT

The applicant commenced this action by way of Originating Motion filed on 26 September 2012 pursuant to Order 2 Rule 1 of the Fundamental Rights Enforcement Procedure Rules 2009, Section 34(1) (a), 42 and 254C (1) (d) (e) (f) (g) of the 1999 Constitution, Articles 2, 5, 15 and 19 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act CAP A9, LFN 2004 and under the inherent jurisdiction of the court. The applicant seeks the following orders:

1. A declarationthat the termination of the applicant's employment by the 1st and 2nd respondents through their agents, the 3rd and 4th respondents, simply because she refused to succumb to the sexual harassment from the 3rd respondent, the ratification of same by the 1st, 2nd , 3rd and 4th respondents and the subsequent conduct of all the respondents constituted a violation of the applicants Fundamental Right to Human Dignity and Freedom from Discrimination as guaranteed by sections 34 and 42 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and Articles 2, 5, 14, 15 and 19 of the African Charter on Human and people's Rights (Ratification and Enforcement) Act, CAPA9, Laws of the Federation, 2004.
2. A declaration that the termination of the applicant's employment by the 1st and 2nd respondents through their agents, the 3rd and 4th respondents simply because the applicant was opposed to the 4th respondent's acts of insider dealings and conflict of  
   interest which itself is a direct contravention of the 2nd respondent's internal policies, the ratification of same by the 1st, 2nd, and 3rd respondents' and the subsequent conduct of all the respondents constituted a violation of the applicant's Fundamental Right to Human  
   Dignity and Freedom from Discrimination as guaranteed by sections 34 and 42 of the Constitution of the Federal Republic of Nigerian, 1999 (as amended) and Articles 2, 5, 14, 15 and 19 of the African Charter on Human and People's Right (Ratification and Enforcement) Act, CAP. A9, Laws of Federation 2004.

3. A declarationthat the termination of the applicant's employment by the1st and 2nd respondents through their agents the 3rd respondent who had failed to desist from acts of assault and continuous sexual harassment of the applicant and also in response to the applicant's opposition to the 4th respondent's acts of insider dealing and conflict of interests, which resulted in retaliatory acts and conducts by the said 3rd and 4th respondents and the ratification of same by the 1st and 2nd respondents and the subsequent conduct of all the respondents constituted a violation of the applicant's Fundamental Rights to Human Dignity and Freedom from Discrimination as guaranteed by sections 34 and 42 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and Articles 2, 5, 14, 15 and 19 of the African Charter on Human and People's Rights (Ratification and Enforcement) Act Cap A9, laws of Federation, 2004.

4. A declaration that the action of all respondents in purportedly terminating the employment of the applicant owing to the applicant’s activities in defending women’s rights within Microsoft West, East and Central Africa Region and the sudden replacement of the applicant with Mr. Peter Evbota- a personal friend of the 3rd and 4th respondents and the ratification of same by the 1st and 2nd respondents and the subsequent conducts of all the respondents constituted a violation of the applicants Fundamental Rights to Human Dignity and Freedom from Discrimination as guaranteed by section 34, and 42, of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and Articles 2, 5, 14, 15 and 19 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Cap A9 Laws of Federation, 2004.

5. General damages in the sum of N100, 000,000= (One Hundred Million Naira Only) against all the respondents jointly and severallyfor the violation of the applicant's Rights as guaranteed under Sections 34 and 42 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and Articles 2, 5, 14, 15 and 19 of the African Charter on Human and People's Rights (Ratification and Enforcement) Act, CAP A9 Laws of the Federation 2004.

6. An Order directing the payment of the sum of N500, 000,000.00 (Five Hundred Million Naira Only) as aggravated and exemplary damages jointly and severally against all the respondentsfor the underserved outrageous and unwarranted sexual harassment, degradation and inconveniences to which the applicant was subjected to by all the respondents.

7. A declarationthat the acts of the 3rd respondent, an agent of the 1st respondent – by incessantly physically assaulting and handling of the applicant's waist against her will and without her consent, constitutes assault, battery and trespass on the person of the applicant.

8. An Orderdirecting that all the respondents jointly and severally pay the cost of this legal action which is =N=1, 000, 000, 00 (One Million Naira Only).

9. AND for such further orders as this Honourable Court may deem fit to       make in the circumstances.

The Originating Motion is supported by a 54 paragraph affidavit sworn to by the applicant to which is annexed 11 exhibits, the applicant’s statement pursuant to order 2 Rule 3 of the Fundamental Rights Enforcement Procedure Rules (FREP) 2009 and the statement on oath of the applicant’s two witnesses. The applicant also filed a further and better affidavit on the 18th February 2013 and a 1st further and better affidavit on the 25th April 2013. Both affidavits were sworn to by Fola Adekoya.

The respondents in reaction all entered conditional appearance. The 2nd respondent filed a notice of preliminary objection on the 25th January 2013, in opposition to the Originating Motion. The applicant responded by filing a counter affidavit to the objection on the 18th February 2013 and a written address in support. The 2nd respondent filed a reply on point of law on 5th April 2013. The 4th respondent also filed a notice of preliminary objection on the 14th November 2012. He deposed to a counter affidavit in opposition to the Originating Motion and filed a written address in support on the 14th November 2012. The applicant responded by filing a counter affidavit and a written address on the 10th January 2013. The 1st, 2nd and 3rd respondents opposed the Originating Motion by each filing a counter affidavit and a written address on the 25th January 2013. The counter affidavits were sworn to by Miss Jegbefume Oberaifo, a legal practitioner in the firm of Lexavier Partners representing the 1st, 2nd and 3rd respondents. The applicant’s reply on point of law to the addresses of the 1st to 3rd respondents is dated 18th February 2013 while its reply to the 4th respondent is dated 25th February 2013. The court directed that the preliminary objections be argued along with the substantive application pursuant to Order VIII Rule 4 of the FREP Rules.

Before I proceed with the facts of this case and the submissions of counsel, I will at this juncture mention a few preliminary issues which came up during the proceedings.

After counsel had concluded arguments, the court discovered that there were material conflicts in the affidavit evidence. Thus the need arose to resort to parole evidence to resolve the conflicts. The court then pursuant to the provisions of Order XI of the FREP Rules and Section 36 (1) of the 1999 Constitution as amended directed the parties to adduce oral evidence. The parties were also ordered to address the court on the mode of commencement by Originating Motion. The resort to parole evidence created a difficulty for the firm representing the 1st, 2nd and 3rd respondents as it found itself in a fix having authorised one of its lawyers to depose to the counter affidavits instead of the parties themselves. The lawyer could not go into the witness stand to give oral evidence because she had deposed to the facts on information. The 1st and 3rd respondents went ahead to file witness statements on oath which they prayed the court to allow. In a considered ruling, the court granted them leave to adopt their witness statement on oath in the interest of substantial justice and the overriding objectives of the FREP Rules. Oral evidence was adduced by the applicant and her witness, the 1st respondent and the 3rd respondent and his witness. The 4th respondent declined to give oral evidence.

The case of the applicant is that she was an employee of the 1st respondent and the Enterprise Marketing Manager having been employed on July 1, 2004 and her employment was subject to, and governed by the world wide policies of the 2nd Respondent which affects all employees, her subsidiaries and affiliates. The applicant states that she was also the Diversity Champion for Women’s Rights in West, East and Central Africa (WECA) for Microsoft World–Wide from July 2008 which involved being an activist for women’s rights and opportunities within the company and across the region. She states that the 1st respondent is the agent of the 2nd respondent, the 3rd respondent is the Country Manager and Chief Executive Officer of the 1st respondent and the 4th respondent her immediate boss. The applicant states that during her employment with the 1st respondent, she served meritoriously and scored very high in her appraisals. That since the 3rd respondent became the Country Manager he consistently and sexually harassed her by tickling her and other female members of staff on the waist whom she named as Mrs Uzo Okpaka, Mrs Uzo Nwani, Mrs Victoria Ndee Uwadoka, Mrs Wasila Mohammed, Lolita Aguele, Paula Wigwe, Awawu Olumide Sojinri, Mrs Ifeoma Chigbo-Ndukwe and Mrs Fatumata Soukouna.

The applicant states that as Diversity Champion of Microsoft WECA, with the role of being an activist for women’s rights, she fought against the 3rd respondent’s acts of sexual harassment by repeatedly warning him to desist from physically handling and fondling her body and that of other female staff as they were acts of sexual harassment, trespass to person and a gross violation and an infringement of her fundamental rights. She states that he disregarded her warnings and reminded her that he is the alter ego of the of the 1st respondent whose actions cannot be questioned and that the 4th respondent is a trusted friend and colleague who will always stand by him; that Industry practices in the information technology allows him to intimidate any subordinate as he pleases. The applicant states that she resisted the 3rd respondent and reported this sexual harassment to the 4th respondent, and the Human Resources Manager of the 1st respondent Siphiwe Sibanda who both did nothing about the reports due to the mutual relationship between them and the fact that they were already aware of these acts of the 3rd respondent.

She states that the unwarranted sexual harassment created an intolerable working environment for her and she had to report to her husband who came to the office to warn the 3rd respondent to desist from his actions. The applicant states that this did not go down well with him and he threatened to retaliate and deal with her. She states that as Diversity Manager she also received complaints from other female members of staff that the 3rd respondent sexually harassed them but that they were afraid to speak up because of the retaliatory consequence of the type that happened to her. That the internal policy designed to prevent such unwarranted sexual harassment was defective in that it never deterred a senior manager from bullying a junior officer into compromising her position.

The applicant states that the 4th respondent was involved in insider dealings contrary to the internal policy of the 1st respondent on procurement and project handling. That in the course of her duties, she had questioned the 4th respondent as to why he as the one in charge of marketing and budgets for the 1st respondent used his influence to award contracts and give price preferences to his wife Mrs Nike Majekodunmi in disregard of the 1st respondents’ policy. The applicant states that the 4th respondent threatened and intimidated her because she was opposed to his insider dealings and that in due course he became her direct boss. She states that she stood her ground against the 3rd and 4th respondents and would not give in to sexual harassment of the 3rd respondent or threats and intimidation of the 4th respondent. She states that on 12 June 2009, the 3rd and 4th respondents informed her that her employment had been terminated with immediate effect and she was forcibly given a letter of Release Agreement to sign. That when she refused to sign it, they threatened to dismiss her and gave her a typed note to the effect that if she failed to sign the Release Letter, they would ensure that she will not be entitled to the gratuitous two months salary.

The applicant states that the 3rd and 4th respondents gave her two copies of the release agreement to sign and return on Monday 15th June 2009 the effective date of her termination in the Release Agreement. When she refused to be coerced into signing, the termination letter was delivered to her house. She states that the Human Resources Manager informed her that the termination was as a result of the directive that came from the 2nd defendant. The applicant states that she sent an email to her superiors and officials within the Microsoft hierarchy about the attempt to force her to sign the release letter. That as all attempts to intimidate and blackmail her into signing the Release Letter failed, the 3rd and 4th respondents wrote another letter of termination to her dated 16th June 2009. The applicant states that before her employment was finally terminated, the 3rd and 4th respondents together with the Head, Human Resources of the 1st respondent devised means of replacing her with one Peter Evbota, a personal friend of the 3rd and 4th respondents who had earlier been laid off as Business Planning Manager. She stated that as soon as her employment was terminated, he was used to replace her as Enterprise Marketing Manager of the 1st respondent on the 16th June 2009 in an announcement made by the 4th respondent. That Peter Evbota was not interviewed for this position which was a violation of the policies of the 1st and 2nd respondent on recruitment of senior employees.

The applicant states that she still had at least fifteen working years ahead in her career but for the wrongful termination of her employment. That as a result of the termination, it will be impossible for her to get employment in the industry because the practice is for technology companies to obtain references from past employers before considering a candidate. The applicant states that the termination of her employment by all the respondents is in response to her warnings to the 3rd respondent to desist from acts of incessant and continuous sexual harassment, and her opposition and warnings to the 4th respondent to desist from acts of insider dealings and conflict of interest. She further states that the termination of her employment in the circumstances amount to acts of retaliation and gender discrimination which in itself is an infringement of her fundamental rights, the respondents having breached her statutory rights to freedom from inhuman treatment and freedom from discrimination as guaranteed under the 1999 Constitution as amended, the African Charter on Human Rights and other International Conventions against gender discrimination.

The applicant states that the ratification of the termination of her appointment by the 2nd defendant is a direct contravention of its internal policies which are to the effect that the 2nd respondent and its subsidiaries or world wide offices have a zero tolerance for retaliatory actions, corruption of the kind practiced by the 4th respondent and any form of sexual harassment or gender discrimination of any kind. She stated that consequent upon the termination of her employment, she wrote a letter to the 2nd respondent through her legal advisers Osioria Okojie & Co informing them of the infringement of her fundamental rights. That the respondents did all of these maliciously and out of spite and disrespect for her person as a woman with the intention of humiliating her and injuring her source of livelihood. She stated that she withdrew the earlier suit she filed at the Lagos State High Court.

In her oral evidence, the applicant told the court that she is 50 years old, that as Diversity Champion, her role is to fight for women conditions in Microsoft. She said she was paid salary in lieu of notice when her employment was terminated. She told the court that the office of the 1st and 2nd respondents is an open plan office with cubicles for the leadership; that the 3rd respondent’s office is partitioned and has a glass door. She told the court that she was sexually harassed multiple times in the open plan office by the 3rd respondent. She said from the inception of his employment, he continually sexually harassed female staff by holding their waists from behind. She told the court that he always took them by surprise and that he fondled her openly. She said her desk was positioned in front of him and she was always on the alert whenever she saw him coming. That as a result he resorted to coming from behind her to fondle and touch her in the open office. She said Wasila Mohammed was in the Lagos office when the respondent was touching her. She told the court she laid a complaint to the 3rd respondent in favour of the women listed and that she was the only one whose employment was terminated. She said the 4th respondent was her immediate boss and was the agent of the 1st respondent. She told the court her employment contract was with the 1st and 2nd respondent. She said she did not agree that the 4th respondent does not have the power to give her the sack because he fired her and gave her the letter.

The applicant called one witness Fatumata Soukouna who swore to a witness statement on oath and adopted same. She stated that she was an employee of the 1st respondent and a colleague of the applicant who was the Diversity Champion for Women’s Rights for the entire Microsoft West, East and Central Africa (WECA) region. She stated that on many occasions she had seen and witnessed the 3rd respondent physically assault and sexually harass female staff including the applicant and even chase them around the office in order to tickle them against their will and consent. She stated that the applicant had to no avail vehemently warned the 3rd respondent against this habit and practice. Under cross examination she told the court that she joined the services of the 1st respondent in March 2008 and left in September 2010. She told the court that she was sexually harassed by the 3rd respondent in the open plan office.

The 1st respondent’s case as deposed to in the counter affidavit is that it reserves the right to hire at will and disengage staff as circumstances demand without giving reasons in appropriate cases. It states that it complied with the employment contract when it terminated her employment on the 16th June 2009 by paying her four weeks salary in lieu of notice totaling N3,437, 266. 90. It denied being privy to the alleged acts of sexual harassment and stated that this was brought to its notice by the applicant’s letter dated 1st July 2009 which was forwarded to it by the 2nd respondent. That it became aware for the first time after the applicant’s employment was terminated that she had made allegations of sexual harassment against the 3rd respondent. The 1st respondent states that the applicant was invited in a letter to her Solicitors to provide facts, details and witnesses to corroborate her allegations of sexual harassment to enable it take action. That it investigated the allegations and discovered that it could not be substantiated. It stated that the applicant’s husband never came to the office nor laid a formal complaint.

The 1st respondent states that the applicant’s employment was terminated because her services were no longer required. It states that the letter of release is one of the modes by which it terminates the employment of those whose services it chooses to dispense with and those who insist on working for it against its will are usually issued a letter of termination. It states that it terminated the applicant’s employment as her employer; and the letter of termination was issued by its Board of Directors and signed by the 3rd respondent. The 1st respondent states that the 3rd and 4th respondents acted on its directives and that many employees were laid off within the same period of downsizing, that an employee’s hard work is not immunity against a sack. The 1st respondent states that Peter Evbota’s employment was not terminated but that he resigned in 2011 after the applicant’s employment was terminated; and it has a right to employ whoever he wishes. That it did not violate the rights of the applicant nor breach its duty of care and protection to its employees. It states that it hires and disengages staff without input from the 2nd respondent and that the 2nd respondent does not ratify its decisions relating to termination of its employees. The 1st respondent states that the expected work life of the applicant is not shortened as a result of the termination of her employment.

The 1st respondent called one witness in support of its case, Helen Anatogu its Legal Manager. She made a witness statement on oath which she adopted. The facts are a replica of the counter affidavit. Under cross examination, she told the court she was employed in January 2012 and was not in the 1st respondent’s services when all the issues happened. She said she had access to records and documents and that some of the facts she deposed to were in policy documents and the code of business conduct while others were on information. She told the court that some of the policies are Microsoft Nigeria Policies, others are Microsoft Group Policies and that they apply to all Microsoft entities regardless of where they are. She said she had not seen the report on the investigation carried out by the 1st respondent on the applicant’s complaint of sexual harassment. She told the court that the Board of Directors of the 1st respondent is made up of three Americans and that the 1st respondent is not an agent of the 2nd respondent. She said she did not know if the 1st respondent has a policy of downsizing, that she has advised on some of the terminations and is aware that the affected staff secured other jobs in blue chip companies.

The 2nd respondent’s case is that it has no contract of employment with the applicant. It denies being privy to the alleged acts or facts of sexual harassment and states that they are within the exclusive knowledge of the applicant and that it never happened in its office. It states that the alleged acts of sexual harassment was brought to its notice by the applicant and that by virtue of its corporate relationship with the 1st respondent, it invited the applicant in a letter to her Solicitor to provide facts, witnesses and details to corroborate her allegations of sexual assault to enable it advise the 1st respondent but she failed to provide the required information. That being domiciled in the United States of America, and a separate legal entity, it is not in a position to investigate allegations or meddle in matters involving the 1st respondent’s employees. It states that it did not direct the 1st respondent to terminate the applicant’s employment neither did it violate the rights of the applicant. It states that it does not owe the applicant a duty of care and protection because she is not its employee. It did not adduce any oral evidence.

A counter affidavit was filed on behalf of the 3rd respondent. He then made a sworn deposition which he adopted and called one witness in support of his case. His case is that he did not violate the applicant’s fundamental rights. He states that by the applicant’s letter of appointment, her employment can be terminated without notice provided she is paid four weeks salary in lieu of notice which the 1st respondent did. He states that he was directed by the 1st respondent to terminate the applicant’s employment which he did within the bounds of his instruction by giving her a letter of Release Agreement which she refused to sign and thereafter he notified her of the termination of her employment by letter dated 16th June 2009. He denies ever harassing the applicant, the women listed by her or any other person whether sexually or in any other manner whatsoever at any time in the open plan office or any place. He denies that the applicant’s husband came to the 1st respondent’s office to give him a warning about acts of sexual harassment. He states that he is aware that making sexual advances to a woman in an office environment or anywhere else is uncultured, puerile and not in keeping with his life style. The 3rd respondent states that the applicant as Diversity Champion of the 1st respondent had direct access to the Human Resources Department of the 1st respondent and she would have reported him.

The 3rd respondent denies ever conspiring with the 4th respondent on any issues relating to the applicant and that joint and separate official dealings with the applicant were on an official basis. He denies threatening to deal with the applicant. He states that in 2009, the 1st respondent restructured its business. That out of the three roles in the applicant’s group, only one remained and based on historical performance and skills, the role was given to Peter Evbota. He states that Peter Evbota was never laid off by the 1st respondent but a number of the employees were laid off. That he never used force or coercion in the discharge of his duties and that the termination of the applicant’s employment was done in full compliance with the terms of her contract of employment and was not as a result of corrupt practices neither was it retaliatory. He said he believes the applicant is angry about her termination and has decided not to let go without a fight.

Under cross examination, the 3rd respondent said he joined the 1st respondent in 2006. He told the court that he worked with the applicant from July 2008 to June 2009. He said he was the Country Manager for the 1st respondent and reported to the Board of Directors. He said he did not know if the Directors are staff of the 2nd respondent. He told the court that some of the policies of the 2nd respondent like Anti-corruption, Standard of Business Conduct are applicable to the 1st respondent. He admitted that there is a Microsoft policy on sexual harassment. The 3rd respondent told the court that the applicant reported to him from August 2008 to January 2009. That thereafter, the 4th respondent became her Manager. He said it would be the responsibility of the applicant’s direct Manager to give performance reviews. The 3rd respondent told the court that at the time the applicant was in the services of the 1st respondent, they worked in an open plan office and he had a glass office. He said he never tickled or touched the applicant from behind. He admitted that given the plan of the office, it was possible to go behind the applicant.

The 3rd respondent said the applicant was affected by downsizing and that positions downsized are eliminated. He said when the applicant left nobody took over her position as it had been eliminated. He told the court that Peter Evbota was Business Processing Manager (BPM) between 2008 and June 2009 and the position was eliminated due to downsizing. The 3rd respondent said he knows Fatumata Soukouna the applicant’s witness. He told the court that he left the services of the 1st respondent in July 2013.

The 3rd respondent called Awawu Olumide Sojunri, a staff of the 1st respondent as his witness. She made a witness statement on oath which she adopted. She states in the deposition that she was a former colleague of the applicant and that her name is listed as one of the females alleged to be sexually harassed by the 3rd respondent in the 1st respondent’s office. That the 3rd respondent has never engaged in any acts of sexual harassment or intimidation towards her nor has he ever fondled any part of her body. She states that since her employment with the 1st respondent, there has not been any complaint of sexual harassment against the 3rd respondent or intimidation of any female member of staff and that he is a responsible and decent man incapable of the acts ascribed to him by the applicant.

Under cross-examination, she told the court that her seat in the open plan office was one of the five tables. She told the court that the table where the applicant’s witness (Fatumata Soukouna’s) sits is the first and is placed near her table; and that from the position where she sits, she can see anything happening to a member of staff. She confirmed that whatever she sees sitting on her table, Fatumata Soukouna will be able to see as well. She told the court that she had never seen the 3rd respondent touch the applicant. She said in 2009 she was on an official Microsoft Company trip in Atlanta USA and the 3rd respondent was also present there in Atlanta. She told the court that he did not tickle her but he touched her and poked her in Atlanta. She told the court that he does it occasionally once in a while in the office. She admitted that she had seen him touch and poke some of her colleagues. She said there was an investigation conducted on sexual harassment by the 2nd defendant and that she took a conference call from America from the staff of the Human Resources of the 2nd respondent. She told the court that the 3rd respondent was not her direct line Manager; that her line Manager is based in South Africa but that she indirectly reports to the 3rd respondent.

The 4th respondent deposed to a counter affidavit. His case is that he was the Manager to the applicant before her employment was terminated by the 1st and 2nd respondent. He denies having any knowledge or involvement in all the allegations of sexual harassment. He also denies the allegations of insider dealings and conflict of interest. He states that under the terms and policies of the 1st respondent, the applicant was obliged to channel complaints relating to insider dealings or conflict of interest to the appropriate Senior Managers but that she never did so. He states that the applicant was fully aware and a party to the discussions between his wife and other members of the 1st respondent who voluntarily expressed interest in the purchase of her products without his involvement or participation. He states that he never at anytime forced the applicant to sign a Letter of Release Agreement and simply served her with a copy of the Agreement in line with the instructions of his employers the 1st and 2nd respondent. The 4th respondent denies that Peter Evbota was his personal friend and states that the employment of Peter Evbota was done in accordance with the employment policy and procedure of the 1st and 2nd respondents.

I now go on to the submissions of counsel and will begin with that of the applicant.

Learned counsel to the applicant raised one issue for determination as follows:

Whether in the circumstances of this case the applicant’s fundamental

Human rights have been breached.

He referred to paragraphs 5, 6, 7, 8, 11, 12, 28, 29 and 36 of the affidavit in support of the Originating Motion and submitted that it is evident that the applicant was employed by the 1st respondent, a subsidiary of the 2nd respondent. He submitted that the contract was to be performed in Nigeria and that the Microsoft Standard of Business Conduct which is a policy document of the 2nd respondent governs employees of the 2nd respondent and her subsidiaries including the applicant and the 1st, 3rd and 4th respondents. He stated that it was evident that the applicant worked with the 1st respondent for a period of 5 years and was Diversity Champion for Women’s Rights in West, East and Central Africa (WECA) for Microsoft World Wide. That she served meritoriously and never received a query or reprimand in the performance of her duties.

Learned counsel referred to paragraphs 13, 14, 15, 16, 17 and 32 of the applicant’s affidavit and submitted that she has shown that the 3rd respondent had consistently, incessantly and severally sexually harassed her despite her repeated warnings. He argued that her refusal to succumb to his sexual harassment resulted in him terminating her employment. That she has also shown in paragraphs 18, 19, 20, 21, 33 and 38 of her affidavit that the 4th respondent abused his office by engaging in acts of insider dealings i.e. sharp practices. He argued that the fact that the applicant was not prepared to compromise her integrity being the head of budget, by engaging in sharp practices was seen as a stumbling block by the 4th respondent resulting in him terminating her employment and the hurried employment of Peter Evbota in disregard to the 1st respondent’s internal policy on recruitment. It was his submission that the applicant in paragraph 34 of her affidavit has shown that there has been an infringement of her Fundamental Rights because of the retaliatory actions of the respondents which is a contravention of the 2nd respondent’s internal policies applicable to all its subsidiaries and world wide offices.

Learned counsel submitted that the applicant is entitled to bring this suit in challenge of the breach of her rights by virtue of section 46 and 254 C (1) (d) & (g) of the 1999 Constitution as altered. He further submitted that the respondents have breached the fundamental rights of the applicant under Sections 34 (1) (a), 42 (1) of the 1999 Constitution and Articles 2, 5, 15 and 19 of the Africa Charter. He submitted that there is an over whelming circumstantial evidence that the applicant’s employment was terminated solely because she refused to succumb to the acts of sexual harassment and threats of the 3rd respondent and intimidation of the 4th respondent. He submitted that a case can be validly proved by circumstantial evidence citing *State v Edobor [1975] 8 -11SC 69, Emeka v State [2001] 14 NWLR (Pt 734) 666, Aiguoreghau v State [2004] 4 NWLR (Pt 860) 367, Akimoju v State [1995] 7 NWLR (Pt 406) 367 Eberechi v State [2009] 6 NWLR (Pt 1138) 431 at 443.* He further submitted that the court can rely on circumstantial evidence to draw inferences as decided in the case of *S.B.W Ltd v C.B.N. [2009] 6 NWLR (Pt 1137) 237.* He argued that the following inferences can be drawn in support; the applicant was employed through a competitive process and found to be best for the job, she put in the best on the job, she was never reprimanded or queried nor told that her job was not satisfactory, her employment was suddenly terminated for no just cause. Learned counsel argued that the conclusion to be reached is that the respondents terminated the applicant’s employment because she refused to succumb to acts of sexual harassment and threats of the 3rd respondent, and intimidation and threats of 4th respondent.

It was the submission of counsel that it is obligatory on all authorities and persons without exceptions to respect a person’s fundamental rights. It was his contention that the conduct of the respondents is retaliatory and amounts to discrimination on account of sex which amounts to inhuman treatment. He referred to the decisions of the Supreme Court of *Canada in**Zarankin v* *Johnson [1984] 5 C.H.R.R. D/2272 at P D/2276* where the court held that “an employer who selects only some of his female employees for sexual harassment and leaves other female employees alone is discriminating by reason of sex because the harassment affects only group adversely”.

He submitted that the court relied on this decision in *Susan Brook v Canada Safeway Limited* where it held that it cannot be said that discrimination is not proven unless all members of a particular class are equally affected.

He referred to the Convention on the Elimination of all Forms of Discrimination against Woman (CEDAW) General Recommendation 19 for the definition of sexual harassment and the Australian Sex Discrimination Act 1984.He submitted that this is a case in which the court should probe the motive of the respondents as motive is relevant in this case by virtue of section 9 (1) & (2) of the Evidence Act. He argued that the motivating factor for terminating the applicant’s employment was her refusal to succumb to the acts of sexual harassment and threats of the 3rd respondent and the threats and intimidation of the 4th respondent. Learned counsel submitted that because the 2nd respondent ratified the actions of the 1st, 3rd & 4th respondent it is clear that the 1st respondent is an agent of the 2nd respondent. It was his submission that the provisions of the 1999 Constitution as amended and the Articles of the African Charter are applicable to master/servant employment relationship.

He submitted that it is trite law that he who hires can fire at will, but when a master fires in circumstances in which it is proved that any of the provisions governing the enforcement of the Fundamental Rights of a person has been breached, such respondents would have committed a wrong and the court under such circumstances would order the payment of damages. Learned counsel argued that it is to this extent that the provisions of the 1999 Constitution as amended and the Articles of the African Charter are applicable to all types of employment in Nigeria citing *Anzaku v Governor of Nasarawa State [2005] 5 NWLR (Pt 919) 448 at 490 para G – A.* He argued that the common law under which the respondents have acted to fire the applicant in its practical application has affected the applicant negatively by infringing on her right of freedom from discrimination on account of gender and sex.

Learned counsel submitted that a party is entitled to general damages if it is established that the party has suffered a wrong or injury. He argued that the applicant is entitled to general damages citing *Gari v Sierafine (Nig) Ltd [2008] 2 NWLR (Pt 1070) 1*. Learned counsel further submitted that exemplary or aggravated damages are awarded as a punitive measure where malice or gross disregard for the law is proved. He urged the court to observe international best practice in awarding aggravated damages. He submitted that a careful consideration of the facts deposed to by the applicant shows that her feelings have been wounded by the respondents as manifested in the assault on her womanhood. He referred to *Sasegbons Laws of Nigeria, Vol 8 para 1258, Halsbury’s Laws of England Vol 12 (1) G.F.K. (Nig) Ltd v NITEL Plc [2009] 13 NWLR (Pt 1164) 344 at 373, Chief Williams v Daily Times of Nigeria [1990] 1* *NWLR (Pt 124) 1,* *Gentner v Stevenson v Cheyney University of Pennsylvania (Civil Action No 94 – 7443), Dessert Palace Inc 259 AND Amber Mccombs v Catharine F. Costa 539 us [2003], Barlington N & SFRCO v White 05 U.S. 259, Amber Mccombs* v *Meijer Inc 395 F. 3D 346.* He finally urged that court to grant all the prayers of the applicant.

On the mode of commencement by Originating Motion raised suo moto by the court, he submitted that the FREP Rules provides in Order 11 Rule 2 that “an application for the enforcement of the Fundamental Right may be made by any originating process accepted by the court.” He submitted that an Originating motion is also a mode of commencement of actions known to this court even though Order 3 Rule 1of the Rules of this court states that an action shall be commenced by way of Complaint. He submitted that the word “shall” is only directory and subject to the overriding mitigating effect of Order 5 Rules (I) and (3) citing Olaniyan v Oyewole [2008] 5 NWLR (Pt 1079), Gambari v Mahmud [2010] 3 NWLR (Pt 1181) 278. He submitted that Rules of Court are to aid the court and not to defeat justice and that any non-compliance by the applicant should be treated as an irregularity. He urged the court to invoke the provisions of Order 5 Rule 3 and direct a departure from the Rules in the interest of justice. He cited *Atamgba v Effimi [2001] FWLR (Pt 58) 1155, U.T.C v Pamotei [1982] 2 NWLR (PT 103) 244. SPDC v Nwakeka [2001] FWLR (Pt 48) 1363.* He submitted that a party is deemed to have waived any objection to non-compliance where he has taken steps. That in the present case, the respondents took steps by filing counter affidavits in opposition to the applicant’s Originating Motion and have waived their right to complain about non compliance with the Rules of Court. He cited *SBS Co Nig Ltd v O.F. Ind. Ltd [2011]3 NWLR (Pt 1235) 456.*

The Learned Senior Advocate of Nigeria (SAN) raised three issues for determination in respect of the 1st respondent:

1. Whether from the facts and evidence before the court, the applicant has established over a preponderance evidence, that her fundamental rights to freedom from inhuman treatment and freedom from discrimination were breached by the 1st Respondent’s termination of the applicant’s employment?
2. Whether having regards to the facts and evidence before the court, the 1st Respondent can be found liable in damages to the applicant for alleged acts of sexual harassment?
3. Whether the applicant is entitled to the award of exemplary and aggravated damages and the costs of this action?

He submitted that the 1st respondent did not breach the applicant’s right to dignity and freedom from discrimination. He argued that from the evidence before the court, the 1st respondent complied with the conditions to be met in terminating the applicant’s employment. He submitted that the applicant has not led any evidence to show that the 1st respondent ratified the alleged acts of sexual harassment, insider dealings and conflict of interest by the 4th respondent; nor has she shown that her activities in defending women’s rights in Microsoft, was the reason for the termination of her employment. He submitted that the right to dignity is the right not to be subjected to torture, degrading or inhuman treatment. He submitted that any holdings suggesting that an employee’s right to dignity and freedom from discrimination can be breached vide the proper termination of her employment in accordance with the employers policies will be against the tide of Nigerian jurisprudence.

The learned SAN submitted that an employer who hires has the right to fire/dismiss an employee at will with or without reason citing *Isheno v Julian Berger (Nig) Plc [2008] All FWLR* *(Pt 415) 1632, Fakuade v O.A.U.T.H [1993] 5 NWLR (Pt 291).* That the applicant cannot complain of the breach of her fundamental rights just because her employment was terminated by the 1st respondent. He argued that though the applicant tried to forge a nexus between the termination of her employment and alleged sexual harassment, it is an attempt to input a motive which the Supreme Court has held to be irrelevant as long as the contract between the parties is complied with. He argued that there are no documents before the court from which an inference as to motive can be drawn. That the alleged motive dwells on speculation which is not in the realm of the court citing *Bamgbeghin & Ors v Oriare & Ors [2009] Pg 32 – 33 (Incomplete Citation), Ikenta Best (Nig) Ltd V A – G Rivers State [2008] 6 NWLR (Pt 1084), Yusuf & Ors v Toluhi [2008] 6 SCNJ 37, Alli v Aleshinloye [2000] 6 NWLR (Pt 600) 177.*

The learned SAN submitted that there is no law currently guaranteeing the fundamental right to employment in Nigeria. That if the court finds the applicant’s fundamental rights were breached because her appointment was terminated, it would mean that an employee has a right to remain in an employers employment forever even against the employer’s will. He submitted that there is no evidence of a nexus between the alleged acts of sexual harassment and the termination of her employment and that circumstantial evidence is not applicable in this case. He argued that in determining the reason for the termination of the applicant’s employment, it is the letter of termination that should be looked at. He submitted that the evidence by the applicant is capable of creating doubts that will make circumstantial evidence unsafe.

The learned SAN submitted that a private employer has the liberty to choose who amongst its employees to lay off without being accused of discrimination. He argued that the applicant has failed to show how her termination was discriminatory especially when other employees were laid off about the same time as the applicant. He submitted that the applicant has failed to show how the termination of her employment amounts to a breach of the Articles of the African Charter. That if the breach of the fundamental rights of employee results in a wrong (tort) as argued by the applicants counsel, then it is the State High Court that has jurisdiction to entertain this matter and not the National Industrial Court. He cited *Ezoma v Oyakhire [1985] NWLR (Pt 2) 195, at 20, Zabusky v Israeli Aircraft Ind [2008] 2* *NWLR 109 at 134 Adelakun v Ecu–line [2006] 12 NWLR (Pt 993) 33 at 52*. He submitted that in the event the court holds it has jurisdiction to entertain torts, it cannot be commenced under the Fundamental Rights Enforcement Procedure Rules.

The learned SAN submitted that the 1st respondent being an artificial person is not capable of sexually harassing a person. He submitted that the 1st respondent can only be vicariously liable for the acts of sexual harassment if the applicant is able to establish that the acts were carried out in the normal course of the 3rd respondents employment citing *Eagle Construction Ltd v Onbugadu [1998] I NWLR (Pt 533) 231*. He submitted that acts of sexual harassment are outside the 3rd respondent’s scope of work and cannot be the basis of the respondent’s vicarious liability in this case citing *R.O. Iyere v Bendel Feed and Flour Mill Ltd [2008] 7-12 SC 151.* He submitted that the 1st respondent was not in breach of its duty of care and protection to the applicant since the applicant was given the opportunity to assist the 1st respondent with the investigation of her allegations. He urged the court to hold that the 1st respondent is not liable to the applicant directly or vicariously for any alleged act of sexual harassment.

He argued that the applicant has not established any entitlement to the award of exemplary or aggravated damages and as such the 1st respondent does not deserve to be punished by the award of same. He submitted that the court must satisfy itself that the 1st respondent is guilty of reprehensible conduct. He cited *Allied Bank Nig Ltd v Akubueze [1997] 6 NWLR (Pt 509) 49, Obinwa v C.O.P [2007] 11 NWLR (Pt 1045) 411 at 426 – 427, Lion Bank (Nig) Plc v Amaikom [2008] AU FWLR (Pt 417) 51, P.I.P.C.S. Ltd v Vlachos [2008] 4 NWLR 9Pt 1076) 1 at 29* and submitted that the principle of exemplary damages is alien to the enforcement of Fundamental Human Rights.

The 2nd respondent’s preliminary objection is praying for an order striking out in its entirety the applicant’s suit against her on the grounds that she is not a proper party not being the employer, that the suit discloses no reasonable cause of action against her and is not justiciable. The objection is supported by a 6 paragraph affidavit and a further affidavit. The learned SAN submitted one issue for the determination of the court: whether the 2nd respondent’s name ought to be struck out from this suit not being a proper party to same. He submitted that the 2nd respondent is not privy to the hiring and disengagement of the applicant and is not the applicant’s employer. It was his contention that the 2nd respondent is not a proper party to this action nor can it be found liable for the alleged breach of the applicant’s right to dignity and freedom from discrimination. He submitted that the court has jurisdiction to entertain disputes between an employer and an employee on the one hand and between employees as long as such disputes relate to employment, and disputes arising from discrimination or sexual harassment at the work place. He argued that the applicant and her witness have deposed to the fact that she was a staff of the 1st respondent. He submitted that this is an admission against the applicant’s interest and needs no further proof. He relied on *section 123 of the Evidence Act 2011, Wema Bank Plc v L.I.T. (Nig) Ltd (2011) 6 NWLR (Pt 1244*) 479, *Okhanaina v P.H.M.B [1997] NWLR (Pt 485) 75* and submitted that the 2nd respondent ought not to be a party to this suit.

The learned SAN submitted that by virtue of the doctrine of privity of contract, a party who is not an employer to an aggrieved employee cannot by law feature in a dispute between that aggrieved employee and his former employer, nor can such a party suffer liability on any matter incidental to the employment contract to which it is not a party. He submitted that parties cannot be dragged into, bound by or affected by contracts to which they are not privies and therefore the 2nd respondent cannot be made a party or be found liable to the applicant. He cited *U.B.A. v Jargaba [2007] vol 43 WRN 1 at 19, Nwuba v Ogbuchi [2008] 2 NWLR (Pt 1072) 471 at 481, Savannah Bank Nig Ltd v S.I.O. Corp* [2001] I NWLR (Pt 693) 212.He argued that the 2nd respondent is a distinct person in law from the 1st respondent and is therefore not a necessary party in this dispute. He submitted that a parent company has a separate legal personality from its subsidiary citing *Union Beverages Ltd v Pepsicola Int. Ltd [1994] 3 NWLR (Pt 330).* He further submitted that this suit discloses no reasonable cause of action against the 2nd respondent. He argued that the applicant is not entitled to seek employment dispute related reliefs from an entity that is not her employer. He submitted that the courts in Nigeria are established to adjudicate on matters between disputing parties by virtue of section 6(6) (b) of the 1999 Constitution as amended. It was his contention that there is no dispute between the applicant and the 2nd respondent citing *Bob Manuel v Briggs [1995] 7 NWLR (Pt 409) 559 at 576, Ogbuechi v Governor of Imo State [1995] 9 NWLR (Pt 417) 53, UBA Plc v BTL Int Ltd [2004] 18 NWLR (Pt 904) 180.* He then urged the court to hold that the 2nd respondent is not a proper party in this action and ought to be struck off the suit.

On the Originating Motion, the learned SAN submitted the following issues for determination:

1. Whether from the facts and evidence before the Court, the 2nd Respondent is a proper party in this action and whether a reasonable case of liability for alleged breach of fundamental rights has been established against the 2nd Respondent?
2. Having regards to the facts and evidence before the court, whether the 2nd respondent can be found liable in damages to the applicant for alleged acts of sexual harassment?

iii. Whether the applicant is entitled to the award of exemplary and            aggravated damages and the costs of this action?

The submissions on the first issue are the same submissions made in the preliminary objection. On the second issue, he argued that its consideration requires a determination of whether the 2nd respondent domiciled in the United States of America can tickle the applicant’s waist in Nigeria, physically handle and fondle the applicant’s body in Nigeria. He argued that an artificial entity cannot sexually harass a person. He argued that the 3rd respondent is the Country Manager of the 1st respondent and not an employee of the 2nd respondent and went on to submit that a company can only be vicariously liable for the acts of its employees and not employees of other entities - citing *Ifeanyi Chukwu (Osondu) Ltd v Soleh Bronch Ltd [2000] 5 NWLR (Pt 656), Eagle Cons Ltd v Ombugadu [1998] INWLR (Pt 533) 231 at 240.* He prayed the court to hold that the 2nd respondent cannot be held liable directly or vicariously since the alleged act of sexual harassment never took place within its precincts and was not committed by the 2nd respondent’s employee.

He submitted that the 2nd respondent does not owe the applicant a duty of care and protection since it is not privy to the employment contract between her and the 1st respondent. He urged the court to hold that the 2nd respondent is not liable to the applicant for any alleged acts of sexual harassment. On the issue of an award of exemplary and aggravated damages and the cost of this action, he submitted that there is no justification for the award. He argued that the financial status of a defendant is not the yard stick for ascertaining whether the 2nd respondent should be punished by the award of exemplary damages. He submitted that the applicant has not established the liability of the 2nd respondent to justify the award of exemplary damages.

The learned SAN raised two issues for determination in respect of the 3rd respondent as follows:

1. Whether from the facts and evidence before the court, the applicant has established over a preponderance of evidence, that the 3rd Respondent is liable for the alleged acts of sexual harassment and the alleged breach of the applicant’s fundamental human rights to freedom from inhuman treatment and freedom from discrimination.
2. Whether the applicant is entitled to the award of exemplary and aggravated damages and the cost of this action?

He submitted that before an act can constitute torture or degrading treatment, it must be in the nature of a physical derogation of the person. He argued that merely terminating the employment of an employee does not amount to degrading or inhuman treatment as the applicant was not forcibly dragged out of the 1st respondents premises. It was his contention that the applicant has not been able to forge a nexus between the termination of her employment, the alleged sexual harassment and a breach of her human rights. The learned SAN submitted that there are no materials before the court from which any inference as to the liability of the 3rd respondent for the alleged acts of sexual harassment can be drawn. He submitted that the burden of proof is on the applicant to establish over a preponderance of evidence that the 3rd respondent harassed her. He cited *Dalhatu v A-G Katsina State [2008] All FWLR (Pt 405) 1651 at 1677, Edwani Nwavu v Chief Patrick Okoye [2008] 7-12 SC 63.* He submitted that the applicant must prove the 3rd respondent harassed her sexually. He cited *Ewo v Ani [2004] 3* *NWLR (Pt 861) 610 at 629, Braimah v Abasi [1998] 13 NWLR (Pt 581).* He argued that in the absence of proof of her allegation of sexual harassment, she cannot prove that her employment was terminated because of her refusal to succumb to sexual harassment as it is merely speculative.

He submitted that speculation is not in the realm of the court citing *Ikenta Best Nig Ltd v A-G Rivers State Supra.* He argued that the applicants complaint about the way and manner her employment was terminated is without legal basis. He argued that putting in ones best at work is not immunity against a sack. The learned SAN submitted that the witness statement on oath of the applicant’s husband is hearsay evidence which is inadmissible as he is reporting what he was told by the applicant and not what he saw. He relied in *section 38 and 115 Evidence Act 2011, Kasa v State [1994 ] and 115* *5* *NWLR Adeleke v Make [2006] 16 NWLR (Pt 1004) 164* and urged the court to discountenance the husband’s deposition as it was not adopted by him. He cited *Dr Funtua v Tijjani [2011] 7 NWLR (Pt 1245) 130 at* *149* in support. He prayed the court to hold that the applicant has not discharged the burden of proof on her to show she was sexually harassed by the 3rd respondent and that her termination was in retaliation. He submitted that the applicant is not entitled to an award of exemplary and aggravated damages and urged the court to dismiss the action.

On the mode of commencement by Originating Motion, learned counsel submitted on behalf of the 1st to 3rd respondents that this action was not properly commenced by Originating Motion and is therefore liable to be struck out. He submitted that by Order 11 Rule 1 of the FREP Rules “an application for the enforcement of fundamental right may be made by an originating process accepted by the court”. He submitted that by Order 3 Rule 1 of the rules of this court an action “shall be commenced by way of Complaint”. He submitted that the word shall is mandatory and Rules of court must be obeyed. He cited *Oforkire v Maduike [2003] 5 NWLR (Pt 812) 166, Owners of MV Arabella v NAIC [2008] NWLR (Pt 1097) 182, National Assembly v C.C.I Co Ltd [2008] 5 NWLR (Pt 1081) 519.* Learned counsel submitted that failure to comply with Order II Rule 1 of the FREP Rules renders the action incompetent and a nullity by virtue of Order IX Rule 1 (i) of the FREP Rules. He submitted that FREP is an integral part of Chapter IV of the 1999 Constitution and then urged the court to strike the out this action for not being properly commenced.

The 4th respondent by his notice of preliminary objection is seeking an order dismissing the suit against him on the following grounds; that there is no privity of contract between the applicant and himself as he is not a party to her contract of employment; that he acted as an officer/agent of the 1st & 2nd respondents and cannot be held liable; that the applicants claim discloses no reasonable cause of action against him. The objection is supported by a 4 paragraph affidavit sworn to by Richard Aghoro. Learned counsel to the 4th respondent raised one issue for determination as follows:

Whether or not the name of the 4th respondent should be struck out as a party to this suit.

He submitted that the cause of action is the aggregate of the facts culminating in a plaintiff’s right to institute an action or make a claim against another person. For the meaning and definition of a cause of action he cited *Shonubi v Onafeko [2003] 12 NWLR (Pt 834) 254 at 266, Idachaba v Ilona [2007] 6 NWLR (Pt 1030) 294, Egbe v Adefarasin, Kolo v F B N Plc [2003] 3 NWLR (Pt 806)234 Bello v A- G Oyo State [1986] 5 NWLR (Pt 45) 828, Ibrahim v Osim [1988] 1 NSCC 1184, Drummond – Jackson v British Medical Association [1970] 1 WLR 688 at 696, Dr Irene Thomas v Revd Olufosoye [1986]1 NWLR 669 at 682.* Learned counsel argued that the applicant’s claim is for damages for alleged wrongful termination of her appointment. He submitted that her contract of employment was regulated by the terms of employment of the 1st and 2nd respondents. He further submitted that the 4th respondent is not a party to the contract of employment and as such cannot be held liable for the alleged breach of contract between the applicant and the 1st and 2nd respondents. He submitted that this action against him amounts to an abuse of court process as the applicant’s affidavit and statement in support of the Originating Motion has not revealed a reasonable cause of action, or allegation of breach of fundamental human rights against the 4th respondent. He cited *New India Assurance Coy Ltd v Odubenyo & Ors [1971] NSCC 262, Ogbebo v I NEC [2005] 15 NWLR (Pt 948) 376.*

Learned counsel submitted that a contract cannot confer enforceable rights or impose obligations arising under it on any person except parties to it as only parties to a contract can sue and be sued. He cited *Dunlop Pneumatic Tyre Coy Ltd v Selfridge Ltd [1915] AC 847, Ilesa Local Planning Authority v Olayide [1994] 5 NWLR (Pt 342) 91, Adebayo v O.A.U.T.C.M.B [20000] 9 NWLR (Pt 585) 606-607*. He submitted that based on the fact that the 4th respondent is merely an employee of the 1st and 2nd respondents and is not privy to the applicant’s contract of employment his name should be struck off this suit citing *UBA Plc v Jargaba [2007] 11 NWLR (Pt 1045), Uwa Printers (Nig) Ltd v Investment Trust Coy Ltd [1988] 3 NSCC 197, Negbenebor v Negbenebor [1971] NSCC 200.* He argued that the 4th respondent was only carrying out the instructions of the 1st and 2nd respondents by serving the applicant with a letter of Release Agreement and he should not be held liable for the out come. Learned counsel submitted that the 4th respondent has been improperly joined in this suit and urged the court to uphold the objection and strike out his name. His submissions in respect of the Originating Motion were essentially the same submissions in support of his objection. He made no submissions on the mode of commencement of the action by Originating Motion.

In response to submissions on the objections by the 2nd and 4th respondents, learned counsel to the applicant argued that any person may be joined as a respondent in any action where the right to a relief is alleged to exist. He raised the question whether a reasonable cause of action has been made out against the 2nd and 4th respondent to warrant them being made parties to this action. He submitted that a cause of action is the entire set of circumstances giving rise to an enforceable claim and consists of the wrongful act of the defendant which gives the plaintiff the cause of complaint and the consequent damage. He cited *Oduntan v Akibu [2000] 7 SC II, Adesokan v Adegordu (1997) 3 NWLR (Pt 493) 251, Dantata v Mohammed [2000] 5 SC I, Julian Berger Nig Plc v Onogui [2001] FWLR (Pt 45) 602, Shell B.P Petroleum Deve Co v Onasanye [1976] 6 SC 89, Ogunsanya v Dada [1992] 4 SCN 162.* He submitted that the 2nd respondent is a party to the applicant’s contract of employment. He referred to the Release Agreement, paragraphs 19, 20, 21, 22 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36, 39, and 40 of the applicants affidavit and paragraph 3 of the counter affidavit of the applicant and submitted that the suit raises the fundamental issue of gender discrimination, infringement of rights, retaliatory behavior, insider dealings and conflict of interest against the 2nd and 4th respondents.

He submitted that they are necessary parties whose presence would assist the court in the effectual and complete resolution of this suit. He argued that from the facts deposed to in the applicant’s affidavit, further and better affidavit together with all the documents exhibited, a cause of action has been disclosed against the 2nd and 4th respondents. Hecited *Oladele v Akintayo [2000] 24 WRN 171, Ige v Farinde [1994] 7 NWLR (Pt 354) 42 at 64 -65, In Re Yusuf Faleke. Mogaji [1986] 2 SC 431 at 449 [1986] I NWLR (Pt 19) 759, Yakuba v Kogi State [1995] 8 NWLR (Pt 414) 386.* Learned counsel further submitted that the 1st respondent is an agent of the 2nd respondent and has at various times represented the 2nd respondent as its holding company as evidenced in the exhibits. He argued that this is a proper case to lift the veil of incorporation. Arguing in the alternative, he submitted that the veil is already lifted by the 2nd respondent as it held itself out as the controller of the 1st respondent. He urged the court to dismiss the objections as it is an attempt by the 2nd and 4th respondents not to answer to the legal wrong done to the applicant.

Replying on point of law, the learned SAN submitted that an agency relationship can only arise where the agent has been conferred with express or implied authority to act for the principal in certain situations citing *Edward Okwejiminor v Gbakeji [2008] 5 NWLR (Pt 1079) 223 – 224, Ukpanah v Ayaya [2011] I NWLR (Pt 1237) 61.* He submitted that no ostensible authority was conferred on the 1st respondent by the 2nd respondent. He argued that the fact that the Release Agreement stated that the 1st respondent was entering into the agreement both for itself and as agent for its holding company is not sufficient to deduce an agency relationship. He cited *Niger Progress Ltd v N.E.L Corp [1989] NWLR (Pt 107), Osigwe v PSPLS Management Consortium [2009] 3 NWLR (Pt 1128) 378 at 404.* Heargued that the reliefs sought do not make it imperative and necessary for the 2nd respondent to be part of this action. He submitted that the dictum in the case of *Yakubu v Kogi State Supra* cited by the applicants counsel is only applicable when a party was involved in acts that culminated into the cause of action. He submitted that the 2nd respondent is not a necessary party to this suit and urged the court to uphold the objection.

In his reply on point of law to submissions made by the respondents on the Originating Motion, learned counsel to the applicant submitted that by the international labour conventions ratified by Nigeria, labour legislation and human rights conventions applicable in Nigeria, the employer has a duty to provide a conducive environment for its workers, and also to ensure that they are protected from any form of harassment by individuals who have the opportunity to engage in it in the work place. He cited *Budge v* *Thorvaldson Care Home Ltd [2002] M.H.R.B.D No* *1,* *Anzaku v Milad* *Nassarawa State [2005] 5 NWLR (Pt 919) 448, Go Kidz Go v Boundouane EAT (Empoyment Appeal Tribunal) 10th September 1996* and referred to the CEDAW General Recommendation 19. He submitted that a female employee is entitled to a work environment free of sexual harassment. That sexual harassment is discriminatory when a woman is justified in believing that her refusal of such conduct may disadvantage her in her employment. He submitted that it is discrimination based on sex when a person makes advances and touches the body of another person and dismisses her from the job when she complains of his behavior. He relied on the case of *YEE ( Gcb Marketing place Restaurat) v Mcclean [2005] ABQB 470 ( The Alberta Court of Queens Bench) and Quebec (Commisssion des droits de la personne et des droits de la Jeunesse) caisse Populair Desjardins d’Amqui [2003] QCTD P.105*

Learned counsel submitted that circumstantial evidence could be used to draw relevant inference of the culpability in the respondents and further submitted that motive is relevant in the case by virtue of section 9(1) & (2) of the Evidence Act. He further submitted that the respondents right to terminate at will the employment of the applicant is subject to her fundamental right citing L.C.R.L. v Mohammed, [2005] (Pt 104) 185, Ihezukwu v Unijos [1990] 3 W SCC 80, *Ransome – Kuti v A-G Federation [1985] 2 NWLR (Pt 6) 211 at 229, F.R.N v Ifegwu [2003] 15 NWLR (Pt 842) 113, Menakaya v Menakaya [2001] 16 NWLR (Pt 738) 203.* He submitted that the applicant is a woman and has been discriminated against by the respondents citing *Muojekwu v Ejikeme [2000] NWLR (Pt 657) 402, Augustine Nwafor Mojekwu v Caroline Okechukwu Mojekwu [1977] NWLR (Pt 512) 263.* He argued that the applicant has been able to show that her rights have been infringed and she therefore has the locus standi to file this suit. He cited *Ojukwn v Ojukwu [2000]11 NWLR 99 (Pt 677) 65, Lawal v Salawu [2002] 2 NWLR (Pt 752) 687, ANPP v ROASSD [2005] 6 NWLR (Pt 920) 140 at 181* and submittedthat the applicant has proved by her affidavit evidence against the 1st and 2nd respondent that they both participated in the inhuman treatment and human degradation of the applicant. He then urged the court to grant the reliefs sought by the applicant.

I will begin this Judgement with the mode of commencement and then with the objections by the 2nd and 4th respondents before I proceed to the substantive application. In ascertaining the justiceability or competence of a suit commenced by way of an application under the Fundamental Rights (Enforcement Procedure) Rules (FREP), the Court must ensure that the enforcement of the fundamental rights under Chapter IV of the Constitution is the main claim and not the ancillary claim. See the case of *West African Examination Council v. Akinola Oladipo Akinkunmi* [*2008] Vol 7 M.J.S.C 103.* In this instance, the enforcement of the applicant’s fundamental right to human dignity and freedom from discrimination is the main claim as sought in relief 1 and the ancillary claims.

The law is settled that the FREP Rules constitute the only procedure for securing the enforcement of fundamental rights as decided by the Supreme Court in *Raymond Dongtoe v Civil Service Commission of Plateau State [2001] NWLR (Pt 717) 132 at 153.* Order II Rule 2 provides that the application may be made by any originating process accepted by the court. Order 1 Rule 3(2) of the Rules of this court provides that originating process means “a complaint or any other court process by which a suit is initiated”. A complaint is not the only mode of commencement of actions accepted in this court. See the National Industrial Court Practice Directions July 2012. Where a complaint is filed, it is to be accompanied by the statement of facts which are the pleadings. Order II Rule 3 and 4 of the FREP Rules specify that the application shall be supported by affidavit, and not pleadings. Therefore, this application cannot be made by way of complaint. It can be commenced by either Originating Summons or Originating Motion which are usually accompanied by affidavit. Either of these is a process by which an action can be commenced and accepted by the court. I hold that there has been compliance with the FREP Rules by the applicant in commencing this action by way of Originating Motion.

The 2nd respondent has argued that it is not a proper party to this suit not being the applicant’s employer; that it has a separate legal personality from the 1st respondent and does not even do business in Nigeria. The question which arises is whether on the facts of this case the 1st and 2nd respondents are co-employers of the applicant. The principle of the primacy of facts in determining the employment relationship must be applied in this instance. The applicant’s letter of employment was written by the 1st respondent Microsoft Nigeria on 21st June 2004. The letter which sets out the terms of the Release Agreement written to the applicant by the 4th respondent on 12th June 2009, and signed by him states that “ The company is entering into this Agreement both for itself and as agent for its holding company, subsidiaries, shareholders, directors, officers and employees”. The letter written on August 6th 2009 by A.O. Aponmade & Co, Solicitors to the 2nd respondent and on its behalf, to the applicants Solicitor Osiora Okojie, Esq is reproduced as follows:

Dear Sir,

Re: TERMINATION OF EMPLOYMENT OF MRS EJIEKE MADUKA AT MICROSOFT NIGERIA OFFICE.

Our letter dated July 14 2009 in response to yours dated July1st refers.

Our client, Microsoft Corporation (Microsoft) has instructed us to express her appreciation to Mrs Maduka for bringing the serious matters contained in your aforementioned letter to her attention and wishes to inform Mrs Maduka that she has launched confidential, internal investigations to determine the veracity of the claims against Mrs Maduka’s former colleagues and if warranted to take appropriate action in accordance with her internal policies and local law. She hereby invites Mrs Maduka to cooperate in the investigations and supply any information or witness contact details.

Without prejudice to the ongoing investigations, our client wishes to state that she made a bonafide offer to Mrs Maduka for a better severance package than what is provided in her employment contract when our client decided that Mrs Maduka’s services were no longer required. However, Mrs Maduka summarily refused the offer; fully aware that the alternative would be a termination of her employment in strict accordance with her employment contract. Consequently, claims of blackmail in this context are malicious and tendentious.

We hope you will advise your client to cooperate with ours in establishing the truth of the allegations and be guided by law as our client reserves the right to seek any remedy available in law to prevent and if necessary seek compensation for publication done in violation of the rule of law.

Thanks.

Best Regards

For: A.O.Aponmade & Co

Meg Duruzor

From the contents of this letter and the Letter of Release Agreement, I find that the 1st respondent is the agent of the 2nd respondent and that the 2nd respondent is a co-employer of the applicant. The courts have in appropriate cases upheld the fact of co-employer status between two employers in relation to an employee. See *Onumalobi v NNPC and Warri Refining and Petrochemical Company [2004] 1 NLLR (Pt 2) 304* where the Court of Appeal held both the parent company and the subsidiary as employers of the appellant*, Union Beverages Ltd v Pepsi Cola International Ltd [1994] 3 NWLR (Pt 330)* which approved the English case of *DHN Food Distribution Ltd v Lardin Borough of Tower Hamlets [1976] 3 AER 46.* In light of the evidence before the court, I hold the 2nd respondent to be a co-employer of the applicant. A cause of actionhas been disclosed against the 2nd respondent by the applicant. I therefore hold that the 2nd respondent is a necessary party to this suit to enable the court effectually and completely adjudicate upon and settle all the questions involved. See *Green v Green [1987] 3 NWLR (Pt 61) 480, Peenok Invest Ltd v Hotel Presidential Ltd [1982] 12 SC 1.*

The applicant has alleged that her opposition and warnings to the 4th respondent to desist from insider dealings and conflicts of interest, together with her report to him that she was being sexually harassed by the 3rd respondent made him engineer the termination of her employment, coerce her into signing a release agreement and replace her with Mr. Peter Evbota a personal friend of both him and the 3rd respondent. There is evidence before the court of one invoice emanating from the 4th respondent’s wife Mrs Nike Majekodunmi to the 1st respondent in respect of Christmas Hampers. There is also before the court the Microsoft Standard of Business Conduct which has a provision against conflict of interest and insider dealings. However, there is no evidence that the 4th respondent threatened the applicant and engineered the termination of her employment as a result of her warnings to him to desist from actions that result in conflict of interest; neither is there any evidence that it was her report to him that she was being sexually harassed by the 3rd respondent that made him engineer the termination of her appointment and replace her with Peter Evbota. Rather, the evidence is that the 1st, 2nd & 3rd respondents terminated her employment.

The 4th respondent is an employee of the 1st defendant who is the disclosed principal. He is not a party to the contract of employment between the applicant and the 1st and 2nd respondents. He is therefore an agent of a disclosed principal who merely carried out the instructions of his principal to sign the letter of Release Agreement. The 3rd respondent as Country Manager is his boss. It is the law that an agent of a disclosed principal cannot be sued or joined in a suit for the wrongs of his principal where the principal is disclosed. See *Qua Steel Products Ltd v Akpan Bassey [1992] 5 NWLR (Pt 239) 67 at 69, Niger Progress Ltd v North East Line Corporation [1989] 3 NWLR (Pt 107) 68*. Consequently, I hold that the 4th respondent is not a proper party to this suit as his presence is not necessary for the effectual determination of this action. His name is hereby struck off this suit.

The allegation of assault and continuous sexual harassment is principally against the 3rd respondent. The Labour Law in Nigeria as at now has no specific provision for sexual harassment in the work place, except for the Third Alteration Act 2010 that grants this Court jurisdiction over it. I am not aware of any Nigerian decision that has given a judicial definition of the term sexual harassment. It is therefore not unexpected that there is a dearth of decisions in the field of sexual harassment in employment in Nigeria. Internationally, new laws have come into force to prohibit the practice of sexual harassment in the workplace. This case has been fought by the applicant’s counsel using foreign case law, international conventions and international best practices. I must commend his industry. The learned SAN on the other hand has restricted his submissions to common law principles. Section 254C-(1) (f), (g), (h), of the 1999 Constitution Third Alteration Act 2010 has conferred this court with jurisdiction to entertain the following matters:

Notwithstanding the provisions of section 251, 257,272 and anything contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the National Industrial Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters-

(f) relating to or connected with unfair labour practice or international best practices in labour, employment and industrial relation matters;

(g) relating to or connected with any dispute arising from discrimination or sexual harassment in the workplace;

(h) relating to, connected with or pertaining to the application or interpretation of international labour standards;

Section 254C-(2) also empowers the court as follows:

Notwithstanding anything to the contrary in this Constitution, the National Industrial Court shall have jurisdiction and power to deal with any matter connected with or pertaining to the application of any international convention, treaty or protocol of which Nigeria has ratified relating to labour, employment, workplace, industrial relations or matters connected therewith.

Having been so empowered, I shall have recourse to international conventions particularly the United Nations Convention on The Elimination of All Forms of Discrimination against Women (CEDAW) and ILO Discrimination ( Employment and Occupation) Convention 1958 No 111 which have been ratified by Nigeria and are in force for construing the fundamental rights of the applicant expressly guaranteed in the 1999 Constitution as amended which embodies the concept of freedom from discrimination and the right to dignity. CEDAW defines discrimination as:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural civil or any other field.

CEDAW General Recommendation Number 19 of 1992 defines sexual harassment to include:

such unwelcome sexually determined behavior as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting or promotion, or when it creates a hostile working environment.

The applicant alleges that the 3rd respondent had consistently and sexually harassed her by tickling her on the waist and fondling her body in spite of her clear objections. She has alleged that he also did this to other female members of staff employed by the 1st respondent. The 3rd respondent has denied this. Now, the 2nd respondent’s Anti –Harassment & Anti- Discrimination Policy and Complaint Procedure which is in evidence as exhibit FA1, states that “harassing, discriminatory, retaliatory or intimidating conduct on the basis of sex, sexual orientation, gender identity or expression is prohibited and will not be tolerated”. It goes on to stipulate as follows:

sexually harassing conduct is unwelcome verbal or physical conduct that is sexual in nature or that is directed at a person because of his or her gender. Types of sexually harassing conduct may include:

* Explicit or implicit pressure for submission to unwelcome conduct as a condition for employment or employment benefit such as promotions or pay increase, or withholding such employment benefits if the employee rejects the unwelcome conduct.
* Creation or perpetration of a hostile, intimidating or offensive work environment, or unreasonable interference with an employees work performance through unwelcome verbal or physical conduct such as:

Making sexual advances to an employee or another person;

Touching an employee or another person in an unwelcome way;

Making sexual comments or inappropriate jokes;

Viewing, downloading, or sharing sexually explicit pictures, calenders, bitmaps, or cartoons; or

Hiring vendors for entertainment at team events that involve sexually explicit or otherwise offensive attire or behavior.

The complaints procedure is for a person to notify “your manager of the behavior, or your manager’s manager or your Human Resources representative

* Your notification may be either verbal or in writing; and you are encouraged but not required to identify the offensive behavior to the person engaging in the behavior and request that it stop.”

From the evidence given by the 1st respondent’s witness and the 3rd respondent, this policy is applicable to the 1st respondent and is in line with CEDAW General Recommendation 19. The evidence of the applicant’s witness Fatumata Soukoura is that on many occasions she witnessed the 3rd respondent physically assault and sexually harass the applicant and other female staff including herself. That he would even chase them around the office in order to tickle them against their will and consent. The 3rd respondent’s witness Awawu Olumide Sojunri denied on oath that the 3rd respondent sexually harassed the applicant, herself or any other female staff. Under cross examination, she told a different story. Her evidence under cross examination is reproduced as follows:

In the open office, my seat is one of the five tables. Fatumota Soukouna’s table is the first table. It is near to me. I can see from where I sit if anything happens to a member of the staff. If I see a thing, Fatumota will see it too. No, I did not swear to an affidavit at the High Court. The lawyers called me as a witness. The 3rd respondent is not my direct line Manager, My direct line Manager is Mrs Heidi Christodolu and is based in South Africa. I indirectly report to the 3rd respondent. I have never seen the 3rd respondent touch the applicant. There was an investigation conducted on sexual harassment by the 2nd respondent. I don’t remember who the members of the committee were. I took the conference call from the staff of the Human Resources in the 2nd respondent in America. I was asked if I was sexually harassed by the 3rd respondent. In 2009, I was in Atlanta USA with the 3rd respondent on an official Microsoft Company trip. The 3rd respondent touched me and poked me in Atlanta. He does it occasionally once in a while in the office. Yes, I have seen him touch and poke some other colleagues of mine.

I found this witness to be very evasive in her answers. She had to be reminded that she was under oath. Her name was mentioned in the applicant’s affidavit as having been touched and tickled by the 3rd respondent, yet she denied it. She gave false information to counsel who swore to the affidavit and she was not truthful in her witness deposition. She has given inconsistent material evidence on oath. By her own testimony, Fatumata Soukouna, the (applicant’s witness) and herself could from their seats see the things going on in the office. Fatumata Soukona saw the 3rd respondent touch and tickle the applicant several times in the office and other female staff. It follows that this witness saw it as well but denied it in her deposition. I find that she is not a witness of truth. I therefore reject her evidence that she did not see the 3rd respondent touch the applicant. See *Ayanwale v Atanda [1988] 1 NWLR (pt 68) 22 at 24, Chinwedu v Mbamali [1980] 3-4 SC 31.*

From the evidence before me, the 3rd respondent as Country Manager is the Chief Executive Officer of the 1st respondent. He is a hierarchical superior to the applicant and the overall boss of the 1st respondent. The 1st respondent’s employees are subordinate officers to him whether they are male or female and by virtue of his position, he is in a position of authority over them. I believe the applicant and her witness that she was consistently tickled and touched by the 3rd respondent against her will and in spite of her protests. The 3rd respondent was doing this within the apparent scope of authority entrusted to him by the 1st and 2nd respondents. I find that in spite of her objections, the 3rd respondent persisted with his objectionable behavior thereby creating a ‘hostile working environment sexual harassment’ for the applicant who was the Diversity Champ for Woman’s Rights in West, East and Central Africa (WECA) for Microsoft World–Wide. This is certainly a humiliating and degrading treatment to the applicant, who is a married woman. It strikes at the very core of a woman’s dignity and sense of self worth.

CEDAW General Recommendation Number 12 of 1989 recognizes sexual harassment as violence against women. The actions of the 3rd respondent amount to sexual harassment within the definition and meaning of the 1st and 2nd respondent’s anti–harassment & anti-discrimination policy and CEDAW General Recommendation 19 of 1992. I find from the evidence that the applicant was sexually harassed and threatened by the 3rd respondent in the normal course of his duties in the office of the 1st respondent and I so hold. Sexual harassment which she suffered is an affront to the dignity of her person and is a breach of Section 34 (1) (a) of the 1999 Constitution as amended and Articles 2 and 5 of the African Charter which provides that:

Section 34 (1) Every individual is entitled to respect for the dignity of his person, and                    accordingly-

(a) no person shall be subject to torture or to inhuman or degrading           treatment.

Article (2) Every individual shall be entitled to the enjoyment of the rights and                  freedoms recognized and guaranteed in the present Charter without                  distinction of any kind such as race, ethnic group, colour, sex, religion,                  political or any other opinion, national and social origin, fortune, birth or                 other status.

(5) Every individual shall have the right to the respect of dignity inherent in a

human being and to the recognition of his legal status. All forms of exploitation, and degradation of man particularly slavery, slave trade, torture, cruel inhuman or degrading punishment and treatment shall be prohibited.

I therefore hold that the 3rd respondent breached the applicant’s fundamental right to freedom from degrading treatment. The applicant has alleged that the motivating factor for the termination of her employment was her refusal to succumb to the acts of sexual harassment, intimidation and threats of the 3rd respondent. She has also alleged that the 1st and 2nd respondents ratified the conduct of the 3rd respondent and that it amounts to acts of retaliation and gender discrimination which is an infringement of her fundamental rights. CEDAW General Recommendation 19 of 1992 referred to above also states that the conduct of sexual harassment is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting or promotion, or when it creates a hostile working environment. Article 1 (a) of ILO Discrimination (Employment and Occupation) Convention No111 is reproduced as follows:

1 For the purpose of this Convention the term discrimination includes--

1. any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

The interpretation and meaning of CEDAW General Recommendation 19, ILO Convention No111, and the 1st and 2nd respondent’s anti-harassment and anti-discrimination policy is that sexual harassment is a form of discrimination based on gender. It has the effect of cancelling equality of opportunity and treatment at the work place. In the leading Canadian case of *Janzen v Platy Enterprises Ltd [1989] 1 SCR 1252* the court held that sexual harassment was a form of sexual discrimination banned by the human rights statutes in all jurisdictions in Canada. The Supreme Court of India in *Vishaka and Others v State of Rajasthan and Others 13 August 1997, [1997] 6 SCC 241* stated thus: “Gender equality includes protection from sexual harassment and the right to work with dignity, which is a universally recognized basic human right”. In applying these two instruments and the 1st and 2nd respondent’s anti-harassment and anti-discrimination policy, I find that the 3rd respondent sexually harassed the applicant because she is a woman; if not for her sex, her participation in sexual activities would not have been solicited. Her fundamental right against discrimination has been violated. Section 42 of the 1999 Constitution as amended and Articles 15 and 19 of the African Charter on Human and Peoples Rights (Ratification and Enforcement Act) which the applicant alleges were breached are reproduced as follows:

Section 42: A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person –

1. Be subjected either expressly by, or in the practical application of any law in force in Nigeria or any executive or administrative action of the government to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinions are not made subject to;

Articles 15 and 19 of the African Charter provides:

(15) Every person shall have the right to work under equitable and

satisfactory conditions and shall receive equal pay for equal work.

(19) All people shall be equal. They shall enjoy the same respect and shall have

the same rights. Nothing shall justify the domination of some people by

another.

The learned SAN submitted that an employer who hires has the right to fire/dismiss an employee at will with or without reason and that the applicant cannot complain of the breach of her fundamental rights just because her employment was terminated by the 1st respondent. He argued that any holdings suggesting that an employee’s right to dignity and freedom from discrimination can be breached vide the proper termination of her employment in accordance with the employer’s policies will be against the tide of Nigerian jurisprudence. Now, the Court of Appeal in *Anzaku v. Gov. Nassarawa State [2005] 5 NWLR (Pt 919) 448 at 490,* has held that Section 42 of the 1999 Constitution seeks to protect a citizen of Nigeria “against the application of any law in force in Nigeria”. The Court Of Appeal has taken a firm stand on discrimination on account of sex in *Moujekwu* v *Ejikeme [2000] 5 NWLR (Pt 657) 402 and Mojekwu v Mojekwu [1997] 7NWLR (Pt 512) 283.*

In the process of terminating the applicant’s employment, it was the duty of the 1st and 2nd respondents to take utmost care to ensure that her fundamental right to freedom from discrimination and degrading treatment was not violated. The duty of the Court to prevent a breach of the fundamental rights of citizens as guaranteed in the 1999 Constitution as amended is heightened by Nigeria’s Obligation to abide by and apply International Conventions which it has ratified and International Labour Standards. In the circumstances of this case where the applicant was sexually harassed and threatened by the 3rd respondent, coerced by him (unsuccessfully) to sign a letter of Release Agreement which states:

We hereby confirm your desire to resign out of your current post as Product Marketing Manager Nigeria effective as of 15 June 2009. The company is entering into this Agreement both for itself and as agent for its holding company, subsidiaries, shareholders, directors, officers and employees;

And she, immediately informing the 2nd respondent’s officers by email that she was being forced into signing this letter of Release, the next day her employment suddenly terminated, the letter of termination signed by 3rd respondent, I find that she has reasonable grounds to believe her objection to his sexual advances led to the loss of her job in line with CEDAW General Recommendations 19 and the anti-harassment and anti-discrimination policy of the 1st and 2nd respondents. Applying all of the International Instruments referred to above, and the 1st and 2nd respondent’s anti-harassment and anti-discrimination policy, I hold that the applicant’s appointment was terminated by the 1st, 2nd and 3rd respondents as a result of her refusal to succumb to sexual harassment which is a retaliatory action and against the 1st and 2nd respondents anti-harassment and anti –discriminatory policy. This is a breach of her fundamental rights of freedom from discrimination and degrading treatment guaranteed in Sections 42 and 34 of the 1999 Constitution and Article 15 and 19 of the African Charter.

The 1st respondent has stated that it was not only the applicant’s employment that was terminated, that others were also affected as it was restructuring and down sizing at the time. There is no evidence of downsizing or restructuring at the material time before the court; neither are the names of the other employees who were also affected by the exercise before the court. The evidence before the court is that it was only the applicant who was affected. I do not find any evidence that the sudden replacement of the applicant with Peter Evbota is a breach of the 1st defendant’s recruitment policies or in furtherance of gender discrimination. There is also no evidence that the termination was as a result of the applicant’s activities as Diversity Champion for the Rights of Women (WECA) Microsoft Worldwide. The applicant has given evidence that she notified the Human Resources Manager and her immediate boss Mr Adefolu Majekodunmi of sexual harassment by the 3rd respondent but they did nothing about it. The 1st respondent has told the court that it only became aware that the applicant had made allegations of sexual harassment against the 3rd respondent after her employment was terminated and that it investigated the allegations and discovered that they could not be substantiated. The Investigatory Report has not been placed before the court neither has it been seen by its Legal Manager who gave evidence. I therefore do not believe that the 1st respondent conducted any investigation after it became aware of the allegations more so with the 3rd respondent still functioning as Country Manager. I find that the 1st respondent has not implemented the sexual harassment policy.

The 2nd respondent on becoming aware launched an investigation in the United States of America. This is confirmed by the 3rd respondent’s witness. There is no evidence that the applicant was invited or interviewed in respect of her allegations when the investigation commenced, neither is there any evidence of the outcome of the investigation. Indeed the 2nd respondent in its counter affidavit deposed to the following facts: that being domiciled in the United States of America, and a separate legal entity it is not in a position to investigate allegations or meddle in matters involving the 1st respondents employees; that it did not direct the 1st respondent to terminate the applicant’s employment; that it did not violate the rights of the applicant and does not owe her a duty of care and protection because she is not its employee. This I find to be completely at variance with its Solicitors letter earlier reproduced above and is indicative that the 2nd respondent did not tell the truth on oath. I find that by the inaction and silence of the 1st and 2nd respondent, they both tolerated and ratified the 3rd respondent’s conduct which is against their policy of prohibition and non tolerance of sexual harassment, gender discrimination and retaliatory action. I hold that they are both in breach of their duty of care and protection to the applicant and are vicariously liable for the acts of sexual harassment carried out by the 3rd respondent within the apparent scope of authority they entrusted to him. See *Karibian* *v Columbia University 14 F.3rd 733 (2nd Circuit, New York, 1994),* *Eagle Construction Ltd v Onbugadu [1998] I NWLR (Pt 533) 231.*

The Applicant has asked for an award of general damages and exemplary and aggravated damages. Exemplary damages are awarded in very restricted and enumerated situations as a punitive measure where malice or gross disregard for the law is proved - see *Chief Williams v. Daily Times of Nigeria [1990] 1 NWLR (Pt. 124) 1, G.F.K.I. (Nig.) Ltd v*. *NITEL Plc (2009) 13 NWLR (Pt.1164) 344 at 373*. The applicant’s fundamental rights have been violated. Her pride, dignity and sense of self worth have been injured by the actions of the respondents. I think an award of general damages which she is entitled to will meet the justice of this case. She has deposed to the fact that her annual base pay is N13,225,000.00 (Thirteen Million, Two Hundred and Twenty Five Thousand Naira).This has not been denied by the respondents. Consequently, and on the authority of section 19 (d) of the National Industrial Court Act, 2006, I make an award of general damages in favour of the applicant as follows: each of the respondents is to pay the applicant, the sum of N13,225,000.00 (Thirteen Million, Two Hundred and Twenty Five Thousand Naira) which represents her annual base pay for sexual harassment and a breach of her fundamental human rights.

I hereby declare and make the following orders:

1. The termination of the applicant's employment by the 1st and 2nd respondents through their agent, the 3rd  respondent, simply because she refused to succumb to the sexual harassment from the 3rd respondent, the ratification of same by the 1st, 2nd , 3rd respondents and the subsequent conduct of the respondents constitutes a violation of the applicants Fundamental Right to Human Dignity and Freedom from Discrimination as guaranteed by sections 34 and 42 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and Articles 2, 5, 14, 15 and 19 of the African Charter on Human and people's Rights (Ratification and Enforcement) Act, CAPA9, Laws of the Federation, 2004.
2. The termination of the applicant's employment by the 1st and 2nd respondents through their agent the 3rd respondent who had failed to desist from acts of assault and continuous sexual harassment of the applicant which resulted in retaliatory acts and conducts by the 3rd respondent and the ratification of same by the 1st and 2nd respondents and the subsequent conduct of all the respondents constitutes a violation of the applicant's Fundamental Rights to Human Dignity and Freedom from Discrimination as guaranteed by sections 34 and 42 of he Constitution of the Federal Republic of Nigeria 1999 (as amended) and Articles 2, 5, 14, 15 and 19 of the African Charter on Human and People's Rights (Ratification and Enforcement) Act Cap A9, laws of Federation, 2004.
3. The acts of the 3rd respondent, an agent of the 1st and 2nd respondent – by incessantly handling the applicant's waist against her will and without her consent, constitutes assault and trespass on the person of the applicant.
4. Each of the respondents (1st, 2nd and 3rd ) is to pay to the applicant the sum of N13,225,000.00 (Thirteen Million, Two Hundred and Twenty Five Thousand Naira) as general damages for the violation of the applicant's rights as guaranteed under Sections 34 and 42 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and Articles 2, 5, 14, 15 and 19 of the African Charter on Human and People's Rights (Ratification and Enforcement) Act Cap A9, Laws of the Federation, 2004.
5. The 1st and 2nd respondents are to immediately implement the sexual harassment policy to prevent a recurrence of a hostile working environment sexual harassment in the 1st respondent.
6. Cost of N30,000.00 is to be paid to the applicant by each of the respondents.
7. The sums are to be paid within 30 days.

Judgement is entered accordingly.

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Hon Justice O.A.Obaseki-Osaghae