



**Maiyo v Kenya Commercial Bank & another (Cause 632 of 2019)  
[2024] KEELRC 26 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 26 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 632 OF 2019  
L NDOLO, J  
JANUARY 25, 2024**

**BETWEEN**

**EVELYNE CHEROTICH MAIYO ..... CLAIMANT**

**AND**

**KENYA COMMERCIAL BANK ..... 1<sup>ST</sup> RESPONDENT**

**KEVIN ASWANI ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant in this case, Evelyne Cherotich Maiyo was an employee of the 1<sup>st</sup> Respondent, Kenya Commercial Bank. The Claimant’s last station was Kitale Branch where she worked as a Teller. The 2<sup>nd</sup> Respondent, Kevin Aswani was the Claimant’s immediate supervisor at Kitale Branch.
2. In her Memorandum of Claim dated 17<sup>th</sup> September 2019, the Claimant makes allegations of unlawful termination, sexual harassment and discrimination.
3. The Respondents filed a Memorandum of Response and Counterclaim on 28<sup>th</sup> May 2020. In response, the Claimant filed a Reply dated 10<sup>th</sup> December 2020.
4. The matter proceeded to full trial where the Claimant and the 2<sup>nd</sup> Respondent testified on their own behalf. In addition, the Claimant called Justus Wanjau Njue and the Respondents called four witnesses; Hillary Sitienei, Edwin Odhiambo, Lilian Kagwiria and Christine Jerotich Mutai.

**The Claimant’s Case**

5. The Claimant states that she was employed by the 1<sup>st</sup> Respondent on 9<sup>th</sup> June 2009. At the time of leaving employment, she earned a monthly salary of Kshs. 133,000.
6. The Claimant claims to have suffered social stress occasioned by acts and/or omissions of the 1<sup>st</sup> Respondent’s officers, including sexual harassment by the 2<sup>nd</sup> Respondent, bullying and coercion,



causing her to write a one sentence letter dated 20<sup>th</sup> May 2019, intimating her intention to resign from employment.

7. The Claimant lists the following particulars of sexual harassment by the 2<sup>nd</sup> Respondent:
  - a. Caressing and/or touching the Claimant's thigh;
  - b. Uttering emotionally offensive and suggestive words about the Claimant's anatomy;
  - c. Soliciting and explicitly demanding sex with thinly veiled threats of dire consequences if the Claimant refused to succumb;
  - d. Humiliating the Claimant by overtures, threats and advances;
  - e. Subjecting the Claimant to needless internal memos, telephone calls and text messages outside working hours, with threats that she either gives in to his sexual demands or he gets his way using and/or abusing his office as Cash Manager.
8. The Claimant further cites the following particulars of bullying and intimidation:
  - a. Discrimination by the 2<sup>nd</sup> Respondent who indirectly told her that she was unable to perform her duties;
  - b. Favouring the Claimant's colleagues while blowing issues raised by the Claimant out of proportion;
  - c. Embarrassing the Claimant in front of customers.
9. The Claimant sought to recall the resignation by an email sent on 21<sup>st</sup> May 2019. However, by a letter of even date, the 1<sup>st</sup> Respondent accepted the resignation. She now seeks the following remedies:
  - a. A declaration that the termination of her employment under the guise of acceptance of resignation was un-procedural, unlawful, unjustified and unfair;
  - b. Reinstatement or in the alternative:
    - i. 1 month's pay in lieu of notice.....Kshs. 133,000
    - ii. 12 months' salary in compensation.....1,596,000
    - iii. Gratuity @ 15 days' salary for each year of service.....665,000
    - iv. Damages for unlawful termination
    - v. General damages for sexual harassment and discrimination
    - vi. Certificate of service
    - vii. Costs plus interest

### **The Respondents' Case**

10. In their Response and Counterclaim filed in court on 28<sup>th</sup> May 2020, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents admit that the Claimant was an employee of the 1<sup>st</sup> Respondent but state that she voluntarily resigned from her position vide letter dated 20<sup>th</sup> May 2019, which resignation was accepted on 21<sup>st</sup> May 2019.
11. The Respondents further state that by an email dated 21<sup>st</sup> May 2019, the Claimant purported to rescind her resignation and by a letter dated 4<sup>th</sup> June 2019, the 1<sup>st</sup> Respondent informed the Claimant



- that her request to revoke the resignation had been declined. The Respondents maintain that by the time the email seeking to rescind the resignation was received, the Claimant's resignation had already been accepted.
12. The Respondents deny the particulars of sexual harassment, bullying and intimidation set out by the Claimant.
  13. The Respondents aver that on 23<sup>rd</sup> April 2019, the Claimant received instructions from the Acting Manager, Service Quality and Compliance (MSQC) on her duties, which she ignored. The 2<sup>nd</sup> Respondent therefore issued a show cause letter to the Claimant.
  14. The Claimant responded to the show cause letter by her memo dated 23<sup>rd</sup> April 2019 by which she raised allegations of sexual harassment against the 2<sup>nd</sup> Respondent. On 30<sup>th</sup> April 2019, the MSQC wrote to the Claimant asking her to provide further information on the allegations raised in her memo of 23<sup>rd</sup> April 2019.
  15. The Respondents state that the Claimant did not respond to the letter of 30<sup>th</sup> April 2019 and on 7<sup>th</sup> May 2019, a meeting was held at the Branch Manager's office. The Claimant is said to have requested for more time to avail documentation to support her allegations. According to the Respondents, it was agreed that the Claimant would comply by close of business on 11<sup>th</sup> May 2019.
  16. The Respondents aver that the Claimant sought more time by an undated letter received by the Branch Manager on 11<sup>th</sup> May 2019. By a subsequent letter dated 13<sup>th</sup> May 2019, the 1<sup>st</sup> Respondent advised the Claimant to forward documents in support of her allegations of sexual harassment by close of business on 22<sup>nd</sup> May 2019, failing which the Bank would take disciplinary action against her.
  17. On 20<sup>th</sup> May 2019, the Claimant tendered her resignation, which was accepted by the 1<sup>st</sup> Respondent on 21<sup>st</sup> May 2019.
  18. The Respondents term the allegations of sexual harassment made by the Claimant as a diversionary tactic to avoid culpability for her act of insubordination on 23<sup>rd</sup> April 2019.
  19. The 1<sup>st</sup> Respondent accuses the Claimant of failing to give the requisite resignation notice and therefore claims by way of Counterclaim, the sum of Kshs. 133,000 being one month's salary in lieu of notice.
  20. On his part, the 2<sup>nd</sup> Respondent takes issue with allegations made against him by the Claimant in her memos dated 23<sup>rd</sup> April 2019 and 16<sup>th</sup> May 2019, addressed to him and the MSQC respectively and copied to the Branch Manager, Shop Steward, Regional Business Manager and HR Relations.
  21. The 2<sup>nd</sup> Respondent states that as a result of the said memos, he has been injured in his reputation and has been brought into public scandal, odium and contempt.
  22. Arising from the foregoing, the 2<sup>nd</sup> Respondent seeks general and aggravated damages from the Claimant. He further pursues an order compelling the Claimant to publish an apology in two newspapers of nationwide circulation.

### **Findings and Determination**

23. There are four (4) issues for determination in this case:
  - a. Whether the Claimant has made out a case of constrictive dismissal;
  - b. Whether the Claimant has proved a case of sexual harassment and discrimination;
  - c. Whether the Respondents have established a proper Counterclaim against the Claimant;



d. Whether the Claimant is entitled to the remedies sought.

### **Constructive Dismissal?**

24. On 20<sup>th</sup> May 2019, the Claimant wrote the following terse letter to the Respondent:

“Dear Sir/Madam,

Ref: Resignation

I hereby submit my resignation from KCB Group Ltd with effect from 20<sup>th</sup> May 2019 to pursue other interests

Yours Sincerely,

(signed)

Everlyne C Maiyo”

25. The Claimant changed her mind and on 21<sup>st</sup> May 2019 at 10.18 am she sent the following email to xxxxxxnyo@kcb.co.ke, HREmployeeRelationsWellnessDepartment@kcb.co.ke:

“Dear Mary,

Our previous conversation on 13<sup>th</sup> may 2019 at HR refers.

As discussed my separation is currently ongoing as well as issues at the branch in regards to insubordination and sexual harassment. I have since responded to the memos as demanded by the management but still pushed to provide more evidence even after my responses via memos and an email to you.

I have had meetings with the BM Hillary Sitienei and MSQC..Mr Raymond Tuitoek and in those meetings I didn't get help, but intimidation whereby the BM said in cases that involved a manager and a clerk, managers always win.

I brought an issue to the management but end up being victimized and intimidated, did I make a mistake to report such an issue? Why am I being victimized and intimidated?

What do you do when a distressed staff approaches you as management with their issues?

I feel my case was not handled professionally by the management and being a woman who is vulnerable and unheard I was compelled to resign from my job.

I wish to withdraw my resignation and my grievances heard

Regards,

Everlyne Cherotich Maiyo”

26. Mary Gikonyo <xxxxxxxnyo@kcbgroup.com> responded to the Claimant's email on 22<sup>nd</sup> May 2019 at 10:20 am as follows:

“Everlyne,

Thank you for your email.

I have referred your case to Bramwel of Employee Relations for further guidance.

Regards,



Mary Gikonyo

Senior HR Advisor Retail & Mortgages”

27. The Court did not see any feedback from Bramwel, either to Mary Gikonyo or to the Claimant.
28. By a further email addressed to Russo, Paul xxxxxx@kcbgroup.com on 23<sup>rd</sup> May 2019 at 10:13, the Claimant wrote:

“...I hereby humbly request your office to hear my case where the management compelled me to resign after reporting a sexual harassment against the cash manager with them. I have been pressured to provide proof/evidence to my claims through memos and our several meetings with the BM and MSQC yet I’m the complainant.

I came to HR in person on 13<sup>th</sup> may 2019 and explained everything to Mary Gikonyo, including my separation process which is not yet finalized but when I returned to the branch I was served with memos and told I MUST provide the evidence in less than a week or else the bank will take severe disciplinary action against me.

I sent an email to Mary Gikonyo after my meetings with the DCIO and CCIO Trans nzoia county in regards to access to my inbox messages and telephone conversation.

At the moment im not at work and The SQC and the BM Kitale Branch are pressurising me through phone calls to sign the acceptance letter yet my case which i feel was not handled professionally has not been heard.

I kindly request to have an appointment with you in regards to the same.

Thanks and Regards,

Everlyne c. Maiyo”

29. Despite the Claimant’s persistent plea for hearing of her complaint of sexual harassment, there appears to have been no substantive response from the Bank. The only response came by letter dated 4<sup>th</sup> June 2019 stating as follows:

“Dear Evelyne,

Re: Revocation of Resignation Letter

This has reference to your resignation letter dated 20<sup>th</sup> May 2019, the acceptance letter dated 21<sup>st</sup> May, 2019 and your email received on 23<sup>rd</sup> May 2019 revoking your resignation from employment.

We wish to advice that your request to revoke your resignation from employment has been declined.

The acceptance letter dated 21<sup>st</sup> May 2019 therefore still stands.

We take this opportunity to thank you for the services you have rendered to this Bank and wish you success in your future endeavors.

Yours sincerely,

(signed)

Lilian Kagwiria



Employee Relations Manager”

30. The Claimant accuses the 1<sup>st</sup> Respondent of ignoring her complaint of sexual harassment by the 2<sup>nd</sup> Respondent and instead pushing her out of employment through intimidation. The Claimant therefore lays a claim of constructive dismissal against the 1<sup>st</sup> Respondent.
31. In her written submissions dated 13<sup>th</sup> November 2023, the Claimant relied on the following definition of constructive dismissal from *Black’s Law Dictionary (Ninth Edition)*:

“A termination of employment brought about by the employer making the employee’s working conditions so intolerable that the employee feels compelled to leave.”
32. The Claimant further cited the Court of Appeal decision in *Coca Cola East & Central Africa Limited v Maria Kagao Ligaga* [2015] eKLR where it was held that:

“In constructive dismissal, the issue is primarily the conduct of the employer and not the conduct of the employee-unless waiver, estoppel or acquiescence is in issue. Conduct by an immediate superior or supervisor may be enough to justify constructive dismissal.”
33. On their part, the Respondents relied on the decision in *Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited* [2014] eKLR where Rika J expressed himself as follows:

“...At the heart of constructive dismissal is breach of the duty of trust and confidence. The employer’s behaviour must be shown to have destroyed or seriously undermined trust and confidence. In the English Employment Rights Act 1996 and the South African Labour Relations Act Number 66 of 1995, constructive dismissal occurs when an employee terminates the contract under which he is employed, with or without notice, in circumstances which he is entitled to terminate it without notice, by reason of the employer’s conduct. Although the Court is not bound by this definition, the two Statutes conform to the definition of the term given by most labour and employment law publicists.”
34. The Claimant’s woes began with an instruction issued to her by the 2<sup>nd</sup> Respondent on 23<sup>rd</sup> April 2019, requiring her to shift from the main Teller Line to the Advantage Banking Suite, because the assigned Teller had not reported to work.
35. The Claimant told the Court that she declined to move to the Advantage Suite because she had worked in that station the previous week. According to the Claimant, the 2<sup>nd</sup> Respondent’s instructions ran counter to the rotation practice at the Kitale Branch. The Claimant’s account in this regard was corroborated by the 1<sup>st</sup> Respondent’s witness number 3, Edwin Odhiambo.
36. The Claimant accused the 2<sup>nd</sup> Respondent of targeting her unfairly because she had declined his sexual advances. The Claimant’s allegations of sexual harassment by the 2<sup>nd</sup> Respondent were documented in her communication to Bank officials, including the Kitale Branch Manager, Hillary Sitienei who described himself as the Human Resource Representative at the Branch level.
37. From the evidence on record, Sitienei appears to have taken sides with the 2<sup>nd</sup> Respondent, who was a Manager at the Branch. I say so because upon being made aware of the Claimant’s complaint against the 2<sup>nd</sup> Respondent, Sitienei did not investigate the matter. Instead, he put pressure on the Claimant to provide evidence to support her complaint, even going as far as threatening the Claimant with disciplinary action.



38. The Court saw several correspondences between the Claimant and Sitienei and it is evident that the management at Kitale Branch chose to lump together the alleged insubordination by the Claimant and her complaint of sexual harassment by the 2<sup>nd</sup> Respondent.

39. On 13<sup>th</sup> May 2019, Sitienei wrote to the Claimant as follows:

“We make reference to your letter received on 11.5.2019 where you requested more time to respond to memo dated 30.4.2019.

We note that the letter did not specify what more days you require. Also, note that on 7.5.2019 you requested more time from the undersigned and the MSQC and you assured that the evidence will be provided by 11.5.2019. Request for more time up to 11.5.2019 was granted.

We wish to remind you of your letter dated 23.4.2019, item (c) where you reported sexual harassment claim against Kevin Aswani. You clearly stated that you have documentation (texts and reported calls) to support your claim.

This letter serves to advise you that you have until the close of business on Wednesday the 22<sup>nd</sup> May 2019 to provide the evidence failure to which the bank will take severe disciplinary measures against you.

Sincerely

(signed)

Hillary Sitienei

Branch Manager”

40. The stance taken by Sitienei in this matter was confounding. Being the overall Manager at the Branch and in his own words, the Human Resource Representative at the Branch level, he ought to have taken a neutral position and more importantly, initiate objective investigations into the very serious allegations made against the 2<sup>nd</sup> Respondent by the Claimant. In my view, Sitienei failed the fairness test and instead turned the tables against the Claimant.

41. Section 6 of the *Employment Act* requires every employer with at least at least twenty employees in post to issue a policy statement on sexual harassment. This provision sets out the minimum ingredients of the policy statement, including a reporting mechanism, confidentiality and the employer’s commitment to take disciplinary action against any person under its direction, who subjects any employee to sexual harassment.

42. The Court was told that the 1<sup>st</sup> Respondent had a sexual harassment policy in place. But it is not enough to have a policy; the employer must make it work. The Claimant’s witness, Justus Wanjau Njue, a former employee of the Bank told the Court that the policy at the Bank did not work. Seeing how the Claimant’s case was handled this testimony appears to have some truth.

43. The Claimant’s complaint was ignored at every turn and in the end, she was turned into a villain and forced out of employment. In the backdrop of the foregoing findings, I have no difficulty in reaching the conclusion that the Claimant’s resignation was not voluntary. What is more, even after the Claimant changed her mind and sought to recall the resignation, the Bank shut that door as well.

44. The parties expended a lot of time arguing about the time when the Claimant’s resignation was received at the 1<sup>st</sup> Respondent’s Head Office. In my considered view however, this case does not turn on the time



of receipt of the resignation letter nor the intervening period before the acceptance thereof. The critical question is why the Bank did not accede to the Claimant's request for re-opening of her case, in light of the very serious allegations of sexual harassment made by the Claimant against a senior Bank official.

45. I have evaluated the actions taken by the Bank with regard to the Claimant's case and have reached the unavoidable conclusion that there was a well calculated move by Bank officials to obscure the Claimant's complaint of sexual harassment.
46. Being a fairly junior banker and faced with a tirade of demands for evidence by seniors Bank officials, on whose shoulders fell the responsibility to investigate her complaint, the Claimant stood nil chance of survival; she therefore had no choice but to resign.
47. In the result, I find and hold that the Claimant has proved a case of constructive dismissal as defined in law.

### **Sexual Harassment and Discrimination?**

48. It is on record that the Claimant's complaint of sexual harassment was not addressed as required. As a result, the Claimant was denied the opportunity to prove her allegations.
49. In her pleadings and submissions, the Claimant subsumed an allegation of discrimination with her complaint of sexual harassment. She however did not adduce any evidence to support the allegations of discrimination.
50. The claims under this head were therefore not proved and are disallowed.

### **The Respondents' Counterclaim**

51. In their Counterclaim against the Claimant, the Respondents seek the following:
  - a. 1 month's salary in lieu of notice;
  - b. General damages;
  - c. Aggravated or exemplary damages;
  - d. An order compelling the Claimant to publish an apology in two newspapers of nationwide circulation.
52. Having found in favour of the Claimant on the limb of constructive dismissal and in light of the finding that the 1<sup>st</sup> Respondent failed to investigate the Claimant's claim of sexual harassment against the 2<sup>nd</sup> Respondent, all the limbs of the Counterclaim fail and are disallowed.

### **Remedies in Favour of the Claimant**

53. The Claimant seeks reinstatement as a primary remedy. However, in view of the time lapse post separation, reinstatement would not be an appropriate remedy.
54. Instead, I award the Claimant twelve (12) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of serve and the 1<sup>st</sup> Respondent's mishandling of her case, with specific focus on the failure to investigate her complaint of sexual harassment against the 2<sup>nd</sup> Respondent.
55. I further award the Claimant one (1) month's salary in lieu of notice.
56. The claim for gratuity was not supported by any evidence and is therefore disallowed.



- 57. Finally, I enter judgment in favour of the Claimant as follows:
  - a. 12 months' salary in compensation.....Kshs. 1,596,000
  - b. 1 month's salary in lieu of notice.....133,000
  - Total.....1,729,000

58. This amount will attract interest at court rates from the date of judgment until payment in full.

59. The Claimant is also entitled to a certificate of services plus costs of the case.

60. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 25<sup>TH</sup> DAY OF JANUARY 2024**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Muchiri for the Claimant

Mr. Gakungu for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

