



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 41 OF 2018

JACKSON MURITHI KIURA.....CLAIMANT

VERSUS

FAMILY BANK LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The issues in dispute, as stated by the Claimant in his Memorandum of Claim dated 15th January 2018, are unlawful and unfair termination of employment and payment of terminal dues. The Respondent filed a Memorandum of Reply on 26th April 2018 to which the Claimant responded on 20th June 2018.
2. The matter was heard before me with the Claimant testifying on his own behalf and the Respondent calling its Human Resources Business Partner, Joseph Gitau Karanja. Both parties further filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent on 21st July 2014, in the position of Manager, at the Respondent's Kenyatta Avenue Branch, Mombasa. He was confirmed on 21st January 2015, with a starting salary of Kshs. 200,000.
4. The Claimant further states that on 8th August 2016, he was summoned to a meeting where he was forced and/or compelled to draft a resignation letter.
5. The Claimant avers that the forced resignation amounted to unlawful and unfair termination of his employment. He therefore claims the following:
 - a) One month's salary in lieu of notice.....Kshs. 200,000
 - b) 12 months' salary in compensation.....2,400,000
 - c) Costs plus interest

The Respondent's Case

6. In its Memorandum of Reply dated 25th April 2018 and filed in court on 26th April 2018, the Respondent admits having employed the Claimant in the position of Manager at its Kenyatta Avenue Branch, Mombasa effective 21st July 2014.
7. The Respondent further admits that the Claimant was confirmed on 21st January 2015 at a starting monthly salary of Kshs. 200,000.
8. The Respondent denies that the Claimant was summoned to a meeting at which he was forced and/or compelled to draft a resignation letter.
9. The Respondent maintains that the Claimant voluntarily resigned from employment when he submitted a resignation letter dated 10th

August 2016 to the Respondent's Director of Human Resources, which letter was formally accepted by the Respondent on the same date.

10. The Claimant was advised that he would be paid two months' salary in lieu of notice, upon successful completion of clearance with all departments and hand over of the duly completed clearance form to the Respondent's Human Resource Department. The Respondent adds that at no time was the Claimant coerced, forced or compelled to draft a resignation letter.

11. The Respondent reiterates that the Claimant's resignation from employment was voluntarily done and adds that his final dues were computed and paid to him.

12. The Respondent denies the Claimant's entire claim and puts him to strict proof.

Findings and Determination

13. There are two (2) issues for determination in this case:

- a) Whether the Claimant has made out a case of unlawful termination of employment;
- b) Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

14. The Claimant claims to have been coerced and/or compelled to resign from his employment with the Respondent. While denying this claim, the Respondent asserts that the Claimant voluntarily resigned from employment.

15. The Respondent produced a resignation letter dated 10th August 2016 written by the Claimant as follows:

"Dear Sir,

RE: RESIGNATION FROM EMPLOYMENT

I wish to officially notify your office of my decision to resign from my current job as Branch Manager of Mombasa Jomo Kenyatta Branch. I wish to give my two months notice as required commencing from 11th August 2016. I also wish to bring to your attention that I have 15.5 leave days unutilised.

Yours faithfully,

(signed)

Jackson Murithi Kiura"

16. The Claimant alleges that he wrote two resignation letters on the same day. He produced his own version which is addressed to the Director, Human Resource as follows:

"Dear Sir,

RE: RESIGNATION FROM EMPLOYMENT

I refer to the meeting held in your office on 08th August 2016 and further to your advice, I therefore wish to officially notify you of my decision to resign from my current job as a Branch Manager of Mombasa Jomo Kenyatta Branch. I wish to give my two months notice as required commencing from 11th August 2016. I also wish to bring to you (sic) attention that I have 15.5 leave days unutilized.

Yours Faithfully,

(signed)

Jackson Murithi Kiura"

17. The significant addition in this letter is the mention of a meeting held on 8th August 2016, during which the Claimant claims to have been advised to resign. The Claimant told the Court that the Respondent rejected this letter and asked him to write another one omitting mention of the said meeting.

18. The Respondent denied that there was any such meeting and claims that the only letter received was the one it had exhibited which makes no reference to any prior meeting.

19. Whether there was a meeting or not is not the issue. What is in issue is whether the Claimant has demonstrated evidence of coercion to resign from his position as Branch Manager at the Respondent's Kenyatta Avenue, Mombasa Branch.

20. In his witness statement filed in court on 19th January 2016, the Claimant states that in the year 2016, the Respondent's bank business was declining due to an adverse business environment. The Claimant further states that the Respondent assigned the business decline to him and therefore forced him to resign.

21. In the submissions filed on behalf of the Claimant on 17th November 2021, the issue of constructive termination was introduced.

22. In addressing the issue of constrictive dismissal, the Court of Appeal in its decision in *Coca Cola East & Central Africa Limited v Maria Kagai Lugaga [2015] eKLR* stated:

“The key element in the definition of constructive dismissal is that the employee must have been entitled to or have the right to leave without notice because of the employer's conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer's behaviour towards him was so unreasonable that he could not be expected to stay-this is the unreasonable test. The second interpretation is that the employer's conduct is so grave that it constitutes a repudiatory breach of the contract of employment-this is the contractual test.”

23. My understanding of the foregoing definition of constructive termination is that the termination of employment is precipitated by the conduct of the employer. In the present case, the Claimant complains of constructive termination but does not cite the action by the employer which caused the constructive termination. All the Claimant states is that he was coerced to resign but does not provide the particulars of coercion.

24. By his own statement, the Claimant occupied a senior position within the Respondent's establishment and therefore had the capacity to take issue with the conduct of his employer at the time of resignation. He failed to do so and his present claim is evidently an afterthought.

25. Flowing from the foregoing, I find and hold that the Claimant has failed to prove a case of constructive termination and he is therefore not entitled to compensation.

26. From the evidence on record, the Claimant was paid two (2) months' salary in lieu of notice and the claim for notice pay is therefore misplaced.

27. In the end, the Claimant's entire claim fails and is dismissed.

28. Each party will bear their own costs.

29. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF JANUARY 2022

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JUDGE

Appearance:

Mr. Onduso for the Claimant

Miss Kaguri for the Respondent