



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 949 OF 2011

PATRICIA WANGUI.....CLAIMANT

-VERSUS-

STANDARD CHARTERED BANK.....RESPONDENT

JUDGMENT

Introduction

1. The claim was initially instituted by way of a Memorandum of Claim dated 9th July, 2011 and subsequently amended by an Amended Memorandum of Claim filed on 2nd May, 2014. The Claimant contended that the Respondent constructively terminated her services of employment. The claim is therefore brought to compel the Respondent to pay the Claimant terminal benefits as outlined in the aforementioned Amended Memorandum of Claim, being:

- a) Award terminal dues as per Appendix 14;
- b) Maximum compensation for constructive termination and discrimination at Kshs. 10,000,000; and
- c) Costs.

2. The respondent filed defence on 18th July, 2011 the Respondent denying that it wrongfully terminated the Claimant's employment and averred that the Claimant resigned on her own volition. The Respondent therefore prayed for suit to be dismissed with costs.

3. The matter was heard on diverse dates in 2014, 2016 and 2018 when the Claimant testified on her own behalf as Cw1 and the Respondent called Samuel Kamau and Evans Munyori to testify on its behalf as RW1 and RW2 respectively.

Claimant's case

4. The Claimant testified that she was employed by the Respondent as a temporary Administrative Assistant for a salary of kshs 54600 per month from 1st February, 2006. In May 2007 she started bleeding while in the office and was taken to Aga Khan Hospital where she was admitted and thereafter put on bed rest until she delivered on 17.8.2007. She resumed duty on 18.10.2007 and she was appointed Administrative Assistant in Human Resource, Consumer Banking. In May 2009, she was transferred to Moi Avenue Branch as Personal Financial consultant but on arrival there she was placed at the Inquiries Desk as Inquiries Clerk. She further testified that by the letter dated 13.10.2009 she was appointed Customer Experience Officer, which is the job of Inquiries Clerk. She was trained for the job and worked until 2010.

5. On 24.5.2010, her doctor confirmed that she was fatigued and recommended that she be given light duty in view of previous pregnancy. She then send the doctor's letter to the HR manager through her Branch Manager and she was told to wait until 24.6.2010. She contended that the job was strenuous and she again started bleeding while at work and reported to the Operations Manager. Thereafter she went to Aga Khan where she was given a sick off due to the miscarriage.

6. She resumed duty on 12.7.2010 and verbally requested to be moved to a less strenuous position but there was no response given and she continued working. In August 2010, she was called to the office by her line manager Mr. Samuel Kamau who told her that her performance rating for January – June 2010 was 4B meaning that she was not meeting any of her targets. She explained that such low rating was the first in her tenure but denied ever being served with any warning concerning her performance.

7. She further testified that on 31.8.2010 at 4.30 pm, her Branch manager, M/s Stella called to his office where she found her with the Branch Operations Manager Mr. Diano Gitau, Branch Service Manager Mr. Samuel Kamau and Floor Service Manager Amise Bida. That at the meeting, Stella told her that she should stop pretending that she had a miscarriage, that anybody can have a miscarriage, that the executive

Director consumer Banking had seen her talk to some client in an unpleasant way, and that she had delayed sending debit card application forms to the valuers. She denied any knowledge of the alleged confrontation with the client and contended that the delay in sending the card application forms was because she was hospitalised.

8. Cw1 further testified that she was never notified of any hearing before the Branch manager called her to the office. After the said meeting she fell sick again on 16.9.2010 and went to Aga Khan Hospital and she was given 2 weeks' sick off. Before the sick off ended, she was called to the office by the branch Manager and served with a warning letter which was strange because ordinarily, a warning letter is generated by the HR manager after a hearing. The letter gave her 5 days to appeal but she did not appeal because she was still on her sick off.

9. She further testified that after the warning letter, she left the employment because she was swinging into depression due to the hostile work environment. That she had a miscarriage on 24.6.2010, was demoted and rated 4B from March to August 2010. That she was also denied the benefits for clerks under the CBA including leave allowance and overtime pay because on average she was working from 8 am to 8 pm. She however admitted that she was not unionizable employee.

10. On cross examination, Cw1 stated that Administrative assistant is a fully trained secretary and does not perform clerical duties. She however admitted that under paragraph 13 of her letter the CRO could assign other duties to her. She contended that since 2006 when she joined the bank she had no history of poor performance and contended that her problems were due to the pregnancy complications. She admitted that she signed the letter dated 13.10.2009 and the job description appointing her to the position of Customer Experience Officer without any protest.

11. She further stated that she learnt the clerical duties on the job from her colleagues but contended that as Administrative Assistant she was in the management. That as an Inquiry Clerk he did paper work and attended to customer complaints in paper form and answered phone calls but the doctor recommended for a less strenuous work environment. She contended that she requested the HR for transfer to another less strenuous job as per the doctor's recommendation but the same was ignored and she had miscarriage. As a result, she went on a sick off for 2 weeks and resumed work on 12.7.2010. She further contended that although she accepted the new banking duties, she did not have any banking experience.

12. Cw1 admitted that on 18.8.2010, she was called from her desk by Branch Service Director Mr. Kamau and the Director Operations to discuss a complaint by a customer who had accused her of poor service. She further admitted that she gave her explanation about what had happened after which she signed an admission that she was moody. She further contended that she was not aware of any complaints from the customer until she was invited to a hearing to discuss her performance with her new branch manager M/s Stella Kibego on 31.8.2010. She however explained that she was not aware the discussion of her performance that day was a disciplinary hearing.

13. Cw1 further admitted that after resigning from the respondent she never got another job until April 2013 when she was employed by Heifer International till August 2015. That thereafter she got her current job in Magnet Ventures in October 2017. She contended that her resignation was not voluntary but forced to do so before her normal retirement age by being given clerical work.

Defence case

14. Rw1 is the respondent's Manager Financial Crime Compliance but previously he was the Branch Service Manager Moi Avenue. He testified that the claimant was attached in the branch from 31.7.2009 to 30.10.2009 as a learning opportunity for the role Personal Financial Consultant- Service and thereafter she was appointed Customer Experience Officer from 15.10.2009 reporting to him directly. That she was given the job description and given on- the job training through the respondent's performance appraisal system.

15. Rw1 further testified that in the mid- year performance appraisal for the period January to June 2010, the claimant was rated 4B meaning that improvement was required as a result she was placed under a performance improvement plan (PIP) in July and August 2010 but she never improved. That in June 2010 she spoke to her colleagues Anisa and Isaac in a rude tone in front of a client. That again on 18.8.2010, she bypassed a client and went away keeping her waiting for long and when she returned she gave no apologies.

16. Rw1 further testified that due to the claimant's declining performance, she was invited to a meeting to discuss the same after which she was given a verbal warning, which she acknowledged in writing. That despite her poor performance, she was allowed to continue in her job until 1.11.2011 when she tendered her resignation and the same was accepted by the letter dated 3.11.2011. He denied that the claimant was constructively dismissed through the resignation. He contended that the claimant resigned voluntarily and denied that due to hostile working condition. He denied that the claimant was discriminated on the basis of pregnancy or ill health. He further contended that the claimant was never denied sick off and she was always given time to see her doctor and recuperate.

17. On cross examination, Rw1 contended that he was the claimant's supervisor at Moi Avenue branch. He admitted that there was HR reorganization that led to the claimant's position being abolished and a position was created for her like many others who were also affected. He further contended that when the offended client reported to him, he called the claimant but she refused to apologise. He maintained that the meeting on 31.8.2010 was meant to help the claimant to improve her performance. He concluded by stating that as the claimant's supervisor he was always available to explain and guide her on any difficult issues.

18. Rw2 is the respondent's Head of HR in Kenya and East Africa. He testified that the claimant joined the respondent on 1.2.2006 as an Administrative Assistant Band 9. That she held a Diploma in business Management and skills in typing and short-hand writing. She worked in office of the Managing Director & the CEO up to 1.11.2007 when she was appointed Administrative Assistant-Consumer Banking in the same position, answering to the HR- Consumer Banking, and she accepted the appointment.

19. He further testified that in 2009, there was a business reorganization by which all HR services were centralized and as a result the claimant's position Administrative Assistant- Consumer banking was eliminated. She was then deployed as Personal Finance Consultant-

service (PFC) at Moi Avenue branch from 31.7.2009 and thereafter appointed as Customer Experience Officer at the same branch. That she was given job description and accepted the appointment. That thereafter she was taken through orientation program for 3 months to equip her for the role followed by staff training programme in October 2009. He contended that the claimant also went through and received on-the job training by the respondent.

20. Rw2 further testified that the claimant was rated 3B, in a performance appraisal for 2009 done March 2010, which was satisfactory. However in the appraisal for January to June 2010, the claimant was rated 4B, which led to her being placed under PIP in July and August 2010 but it yielded minimal changes. That on 18.8.2010, a meeting was held for the claimant to give explanation on an incidence of poor customer service and it was decided that she should give a written explanation by 20.8.2010. That again, she was called to another meeting on 31.8.2010 to discuss her various performance and poor service delivery after which she was given a verbal warning, receipt of which she acknowledged.

21. Rw2 denied that the claimant was discriminated on the basis of pregnancy or subjected to any harassment and contended that she never raised any complaint on the same until after her resignation. He admitted that the claimant had pregnancy complications while at work in 2007 and she was rushed to hospital and received support including total bed rest from May to July 2007. That in June 2010, had a sad and tragic incidence but the respondent accorded her the necessary support and gave her sick leave as per the bank's policy. He further contended that between June and August, the claimant was given a chance to apply for various jobs in the company but she failed in the interviews. He however denied that any knowledge of any strain caused to the claimant's health by her duties.

22. He further denied that the claimant was constructively dismissed through hostile working conditions and contended that she resigned voluntarily on 1.11.2011. He explained that despite the claimant's poor performance, she was never terminated but instead she was given opportunity to improve but she chose to resign. He further explained that the respondent has high standard of values and work ethics, and she carries out all its activities professionally and according to these guidelines. He concluded by stating that the claimant was paid her terminal dues after the resignation and described her claim as without merit²³. On cross examination, Rw2 admitted that when the claimant was working under him at the respondent's Head Office, there was no complaints against her, and she left after staff reorganization in 2009. He further admitted that he never participated in any proceedings that led to the claimant leaving her job. He however contended by virtue of his position that he was privy to all evaluations done to employees. He explained that the evaluation is done on a scale of 1-5 and 4 is a rating that require improvement and that is why the claimant was placed on PIP.

Claimant's submission

24. The claimant submitted that she was summarily dismissed by the respondent in 2010 by being subjected to intolerable conditions of work that culminated into her resignation. The said conditions included arbitrary transfers to strenuous roles, and impugned rating and unfair disciplinary proceedings during her ill health, which led to psychological, emotional and physical effects that resulted to a miscarriage. She maintained that her resignation was not voluntary bullying and intimidations by the employer. She relied on *Coca Cola East & Central Africa limited v Maria Kagai Ligaga*[2015] eKLR and *Henry Ochido v NGO coordination Board* [2015] eKLR among other precedents to fortify her submissions.

Respondent's submissions

25. The respondent submitted that the claimant has failed to prove the two ingredients of constructive termination including repudiatory breach of contract, and/or conduct that created intolerable working environment or undermined trust and confidence that made it difficult for the claimant to continue working. She contended that the all the appointments and deployment to the various positions she served were with her consent and that she was treated with care and accorded the necessary support. She therefore maintained that the claimant has not proved that there was repudiatory breach of her contract of service, or history of hostile treatment. She relied on *Coca Cola East & Central Africa limited v Maria Kagai Ligaga*[2015] eKLR and *Milton M Isinya v Aga Khan Hospital Kisumu* [2017] eKLR to support the foregoing submission.

26. She further submitted that the claimant had performance problem citing her January – June rating of 4B which led to be placed under a PIP in July and August 2010 but still failed to improve. She further cited the incidence in June 2010 where the claimant addressed her colleagues in a rude tone in presence of client and the matter was reported to the Branch Operations Manager. She also cited the incidence where on 18.8.2010 the claimant bypassed a client and delayed her and gave no apology but instead addressed her rudely. She therefore contended that despite the said incidences of poor performance, the respondent merely discussed improvement with the claimant and never took any disciplinary action against her save for a verbal warning but she resigned. In conclusion she contended that there was no wrongful action done by her that would have forced the claimant to resign.

27. On the reliefs sought, the respondent submitted that the Claimant is not deserving of any of the prayers sought in the Amended Memorandum of Claim because she resigned on her own volition and was paid her terminal dues. She contended that compensation can only be granted where there is a finding of unfair termination unlike the facts of this case. She however urged this court to grant the minimum compensation should the need arise and relied on *John Muia Mbuta & another v Rakim Rajan t/a Smokey's Bar & Restaurant* [2016] eKLR and *Benard Mutunga Kiio & Charles Mutuku Mbatha v Kenya Aerotech Limited* [2015] eKLR where Mbaru J, and Wasilwa J respectively granted the Claimants three (3) months' salary in compensation after finding that the Claimants had been unfairly terminated.

28. As regards the claim for overtime, the Respondent submitted that the Claimant held a managerial position at grade 9 and was thus not a member of the Union or entitled to benefits set out in the Collective Bargaining Agreement such as overtime and lunch break allowance. She further contended that the Claimant was not a clerk and argued that her salary was above that of clerical staff.

29. On the claim for anticipatory pension, the Respondent submitted that the Claimant is not entitled to anticipatory pension rights. She observed that the Claimant admitted in her testimony that after resigning from the Respondent, she was employed in two other companies being Magnet Ventures and an NGO. She relied on the Court of Appeal decision in *Elizabeth Wakanyi Kibe v Telkom Kenya Ltd* [2014] eKLR to fortify the submission that the claimant is not entitled to anticipatory pension rights. She therefore prayed for the suit to be

dismissed with costs.

Analysis and determination.

30. After careful consideration of the pleadings, evidence and the submissions presented by both sides, there is no dispute that the claimant was employed by the respondent up to 1.11.2011 when she resigned. The issues for determination are :

- a) Whether the resignation was voluntary or constructive termination.
- b) If the answer to (a) above is constructive termination, whether the same was unfair and unlawful.
- c) Whether the reliefs sought should be granted.

Voluntary resignation or constructive termination

31. The claimant contended that she was summarily dismissed by the respondent in 2010 by being subjected to intolerable conditions of work that culminated into her resignation. The said conditions included arbitrary transfers to strenuous roles, and improper rating and unfair disciplinary proceedings during her ill health which led to psychological, emotional and physical effects that resulted to a miscarriage. She therefore urged that her resignation was not voluntary but the result of bullying and intimidations by the employer.

32. The respondent denied the alleged constructive termination and maintained that the claimant resigned voluntarily from her job on 1.11.2011. She contended that despite the incidences of poor performance outlined in evidence by Rw1 and Rw2, the respondent merely discussed improvement with the claimant and never took any disciplinary action against her save for a verbal warning. That for over a year down the road, the claimant continued working until 1.11.2011 when she served a resignation letter. She further contended that the claimant has not proved the ingredients of constructive termination including repudiatory breach and/or wrongful action done by her that forced the claimant to resign.

33. It is now trite that constructive termination of an employee's employment occurs where by conduct the employer commit a repudiatory breach of the employment contract, or creates a hostile working environment that makes it impossible for the employee to continue working, but forces him to resign. In **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR**, the Court of Appeal, cited with approval the definition of constructive dismissal by **Lord Denning MR** in **Western Excavating (ECC)Ltd v Sharp [1978] ICR 222 or [1978] QB 761** where he held as follows:

“The key element in the definition of constructive dismissal is that the employee must have been entitled or have the right to leave without notice because of the employer’s conduct....whenever an employee alleges constructive dismissal, a court must evaluate if the conduct of the employer was such as to constitute a repudiatory breach of the contract of employment.”

34. After careful consideration of the evidence tendered by both sides, I regret to say that the claimant has not proved on a balance of probability that she was forced to resign by the wrongful conduct on the part of the respondent that fits within the description of repudiatory breach of the employment contract or intolerable working environment. She was appraised as per the respondent's HR policy and placed under a PIP, she was given sick leave and the necessary welfare support. That despite repeated incidences of poor performance and even misconduct of acting with unapologetic rudeness to colleagues and clients, she was only given a verbal warning and allowed to continue working for over a year down the road before resigning. In addition, I find the alleged forced resignation through redeployment devoid of merits because she admitted in evidence that she accepted the same and the job descriptions by signing. In any case, if the said redeployment in 2009 was equal to constructive termination, the time taken before tendering the resignation on 1.11.2011 was too long. The employer's conduct that amounts to constructive termination must be one that cannot be tolerated by the employee for such a long period of 2 years. Consequently, I return that the claimant resigned from her job voluntarily.

Unfair termination

35. In view of the foregoing finding that the claimant resigned from her job on her own volition, I do not see the need of answering the issue whether or not she was unfairly and unlawfully terminated.

Reliefs

36. Flowing from the finding that it is the claimant who resigned voluntarily, the issue of compensation for unfair termination does not arise and as such, the prayer for compensation is dismissed. Likewise, the prayer for overtime pay is dismissed because the claimant admitted that she held a management position and that she was never a member of the trade union which had negotiated that benefit to her members. Finally the claim for anticipatory pension is dismissed because it is not tenable in law and also because the termination was caused by the claimant's resignation.

Conclusion and disposition

37. I have found that the contract of service herein was not constructively terminated by the respondent but it is the claimant who voluntarily resigned. I have further found that in view of the said resignation, the claimant is not entitled to the reliefs sought. Consequently, I dismiss the suit with no costs.

Dated, Signed and Delivered in Open Court at Nairobi this 8th day of March, 2019

ONESMUS N. MAKAU

JUDGE