



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 131 OF 2011

BETWEEN

MONICA SANG.....CLAIMANT

VERSUS

HABIB BANK LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Nyaberi & Company Advocates for the Claimant

Karing'u & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed her Statement of Claim on 3rd February 2011. She avers that she was employed by the Respondent Bank on 22nd October 2007, as a Grade Officer 3. She was confirmed after 10 months of probation, becoming a Treasury Back Office Officer.
2. She went on Christmas vacation and was due to report back on 28th December 2010. She was not able to travel back, due to transport problems. She communicated her inability to her Supervisor. Upon return to Nairobi, she fell ill on 29th December 2010 and visited her Doctor.
3. She reported on 30th December 2010. She was issued a warning letter regarding her lateness/absenteeism. She also received an e-mail instructing her she would not be assigned any more work, until further notice.
4. On 3rd January 2011, the Respondent harassed the Claimant by asking her to resign, when the Claimant mentioned she intended to institute legal proceedings against the Respondent for issuing the Claimant an unwarranted warning letter. The Claimant was not assigned any work until 6th January 2011. She underwent psychological trauma, requiring medical attention.
5. She was discriminated against. Employees with less professional and academic credentials were placed in higher positions than the Claimant. She was paid less salary than other Employees in her grade. She was required to do reconciliation of accounts weekly, while other Officers in other Branches did so, on monthly basis. She was granted loan against pension contribution in December 2009, for only Kshs. 36,500. Her Office was located near the waste disposal site. The Respondent failed to provide her with suitable and safe work environment, which resulted in Claimant developing health complications. Her medical cover was insufficient to cover medical costs.
6. On 20th January 2011, the Respondent terminated Claimant's contract through notice pay equivalent of 1 month salary. She was not given an opportunity to defend herself. She prays for Judgment against the Respondent in the following terms:-
 - a) Wages for loss of earnings for a period of 27 years before attaining the mandatory retirement age of 55 years, which the Claimant would have been entitled to, by virtue of her employment with the Respondent.

- b) Damages for discrimination in respect of promotion, and denial of commensurate remuneration for the Claimant as Officers of Claimant's rank.
- c) Damages for mental and/or emotional torture and harassment from 30th December 2010 to 6th January 2011.
- d) Special damages for health complications occasioned on the Claimant due to working in an unclean, unhealthy and unsanitary environment.
- e) Interest thereon.
- f) Costs.
- g) Any other suitable relief.

7. The Respondent filed its Statement of Response on 7th February 2011. It is conceded that the Claimant was employed by the Respondent Bank. She was confirmed as Officer Grade 3, not as Treasury Back Office Officer. She was confirmed after 6, not 10 months, on 23rd April 2008. She made a request for 2 days of leave to be taken on 28th and 29th December 2010. The request was refused as she had exhausted her annual leave entitlement for the year 2010. She nonetheless kept off on the 2 days. She sent a text message to the Respondent through a strange number saying *"hello, can't make it there, i no matatu Monica."* There was no further communication. She changed her story saying that she had fallen sick and was seen by a Doctor on 29th December 2010. She had forwarded suspect receipts indicating she was in Nairobi on 28th December 2010 receiving treatment. On realizing the contradiction in her narrative, she forwarded a note from a medical facility in Kangemi, alleging she was treated there on 29th December 2010.

8. The Respondent issued her a warning due to the sensitivity of her work. She was not to be assigned duty pending investigation. She was given an opportunity to defend herself on 3rd January 2011. She did not do so. She shouted at the Country Manager in front of staff challenging him to sack her, before storming out. She was not sick and did not suffer any emotional distress. She was not discriminated against. She received salary increments every year, which was commensurate with her performance and position. Weekly accounts reconciliation was a matter of policy. Loans were given in accordance with laid down policy. Medical cover was adequate and supplemented by National Hospital Insurance Fund. Termination was in accordance with the terms and conditions of employment. The Respondent prays for dismissal of the Claim with costs.

9. The Claimant gave evidence way back in the year 2011, before Hon. Judge I.E.K Mukunya. The Respondent was heard 7 years later on 16th October 2018, during the Court's service week at Nairobi. The matter was last mentioned before the Deputy Registrar, Hon. Ngumi, on 20th November 2018 when Parties confirmed filing of their Submissions.

10. In their oral evidence, the Parties restated the contents of their Pleadings and Submissions, which are summarized at paragraph 1 to 8 of this Judgment.

The Court Finds: -

11. The Parties are in agreement that the Claimant was an Employee of the Respondent Bank. It is agreed termination was at the instance of the Respondent. The circumstances surrounding termination are largely undisputed. The Claimant has not asked the Court to declare that termination was unfair and/ or unlawful. She does not seek remedies under Section 49 of the Employment Act. Her claims are mainly about anticipatory salaries, damages for discrimination, damages for mental torture, and special damages for health complications.

12. She asked to go on annual leave of 2 days falling within the yuletide season, on 28th and 29th December 2010. She did not have any outstanding annual leave days. Her application was denied. She nonetheless defied her Employer and opted to stay home on the 2 days. To justify her absence, she gave unconvincing tales about missing matatus and her sudden illness, and treatment at backstreet clinics. The Court is persuaded that the Respondent would have valid reason to terminate Claimant's contract under Section 44 [4] of the Employment Act. She was insubordinate, and absented herself from her appointed place of work, without the leave of the Respondent, or lawful cause.

13. She was given an opportunity to explain her position, but opted to compound her offence, by giving unlikely reasons, and by being downright rude to her Superiors.

14. She has not established on what ground, she should be granted anticipatory salaries over a period of 27 years. Her contract does not indicate in any case, that she was to retire at the age of 55 years. It does not say that 55 years is the age of mandatory retirement. The Claimant has not brought to the attention of the Court, any clause in her contract, wage instrument, law or policy, which set her retirement age at 55 years. The prayer for anticipated salaries, even had the Claimant shown termination was unfair and unlawful, is baseless.

15. Her allegations about discrimination are equally without foundation, and appear to have been made on the heat of the moment of termination.

16. There are no details of other Employees, who were promoted or paid higher salaries than the Claimant discriminatively. There are no comparators. No names are given, no salaries or grades relating to discrimination are given. There is no evidence that the Claimant was made to do account reconciliation weekly while others did so monthly. What would the Bank gain by asking the Claimant to reconcile accounts outside the Bank's work policy? Again where are the comparators? The Claimant makes another generalized allegation about discrimination in accessing loan facilities. She has not given to the Court details of the rules and regulations governing such facilities. She refers to unnamed Employees who were granted better loan terms.

17. There is no evidence to support her generalized allegations about discrimination. Her prayer for damages based on discrimination is declined.

18. She was absent without leave or lawful cause. The requirement by the Respondent, that the Claimant explains her absence, and the actions taken against the Claimant by the Respondent, cannot be said to have amounted to emotional torture and harassment. She did not expect the Respondent to welcome her back with open arms, and do nothing, after the Claimant had defied Respondent's instructions, and taken leave on 28th and 29th December 2010. She not only defied the Respondent; she lied to the Respondent soon thereafter. Banks offer essential services, and some Employees of the Banks are normally called to work, even during the yuletide season. The Claimant ought not to have defied her Employer by extending her Christmas break. There is no evidence of emotional torture. If the Claimant went through any degree of stress, it was entirely of her own making. The Respondent acted within the discretion of any Employer, encountered with employee hardheadedness. There is no support for the prayer for damages for mental torture.

19. The Claimant alleges she worked in an unclean, unhealthy and unsanitary work environment. She asks the Court to award her special damages for health complications occasioned to her.

20. She has not brought before the Court evidence of unclean, unhealthy and unsanitary work environment. The dumpsite she alleges was next to her Office was explained persuasively by the Respondent, to have been no more than a small place, where shredded papers were thrown. The Claimant has not brought medical evidence showing she fell ill, by working next to shredded papers. There is absolutely no case established, that the Claimant was in any way exposed to hazardous working environment, and fell ill as a result of such exposure, warranting damages of any nature.

21. Special damages sought, in any event, have not been specified. The prayer is declined.

22. The Claim on the whole has no merit.

IT IS ORDERED:-

[a] The Claim is rejected.

[b] No order on the costs

Dated and signed at Mombasa this 22nd day of January 2019.

James Rika

Judge

Dated, signed and delivered at Nairobi this 1st day of March 2019.

Nelson Jorum Abuodha

Judge