



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1965 OF 2013

SORA GOLOMPO FAYO.....CLAIMANT

VERSUS

AFRICAN BANKING CORPORATION.....RESPONDENT

JUDGMENT

Introduction

1. Sora Golompo Fayo was an employee of African Banking Corporation having been employed on 28th March 2011, in the position of Chief Manager. He brought this claim seeking compensation for unlawful termination of his employment. The Respondent filed a Response on 20th February 2014.

2. At the trial, the Claimant testified on his own behalf and the Respondent called its Head of Human Resources, Lucy Wariara Ng'ethe. Both parties also filed written submissions.

The Claimant's Case

3. The Claimant was employed by the Respondent as Chief Manager at a monthly salary of Kshs. 360,000 effective 28th March 2011. He states that he was to work for a period of 12 years up to normal retirement age. His employment contract was however terminated prematurely. He avers that the termination was unlawful and unfair and claims the following:

- a) The sum of Kshs. 57,368,000 being salary for 12 years
- b) Costs plus interest

The Respondent's Case

4. In its Response dated 20th February 2014 and filed in court on even date, the Respondent admits having employed the Claimant as Chief Manager, Change Management and Alternative Channels. The Respondent however denies the Claimant's assertion that he was to work for 12 years up to normal retirement age and adds that the Claimant's employment was regulated by his letter of appointment dated 28th March 2011.

5. The Respondent further states that the Claimant was to take up his appointment on 30th April 2011 but he did not do so until 15th August 2011. He was to serve a probationary period of six months, during which period either party could terminate the employment contract by giving one month's notice or paying one month's salary in lieu thereof. The Claimant's contract was also regulated by the

Respondent's Service Rules and Regulations as well as the Employment Act, 2007.

6. The Respondent denies the Claimant's claim for unlawful termination and states that the Claimant voluntarily resigned from his employment. The Respondent accepted the Claimant's resignation by letter dated 24th February 2012 and on 28th February 2012, it received a letter from the Claimant applying to revoke his resignation letter dated 14th February 2012. The latter letter was backdated to the date of the letter of resignation. The Respondent did not act on nor accept the Claimant's letter of revocation of resignation as it had been overtaken by events.

7. The Respondent avers that prior to tendering his resignation letter, the Claimant had been accused by a workmate of sexually harassing her. Upon receipt of the sexual harassment complaint, the Respondent's Group Head of Human Resource met both the Claimant and the Complainant, at which meeting the nature of the complaint was explained to the Claimant who gave his own explanation. The two were asked to put their respective positions in writing. The Complainant complied but the Claimant did not cooperate. The Claimant was given an opportunity to record a statement which he declined to do. Instead, he tendered a resignation letter which was duly accepted.

Findings and Determination

8. From the pleadings and evidence placed before the Court, the following two (2) issues emerge for determination in this case:

- a) Whether the Claimant voluntarily resigned or was unlawfully terminated;
- b) Whether the Claimant is entitled to the remedies sought.

Resignation or Unlawful Termination?

9. In his testimony before the Court, the Claimant stated that he was harassed and frustrated by the Respondent's Chief Executive Officer, causing him to resign. He told the Court that he wrote his resignation letter in the morning of 14th February 2012 and in the afternoon of the same day, he wrote another letter revoking the resignation.

10. The Claimant's letter of resignation states as follows:

"Dear Sir,

RE: RESIGNATION

Please accept this letter as my notice of resignation, effective 14th February 2012. This letter marks the beginning of my one month notice.

Kindly compute my dues and deductions as is the normal practice and procedure.

I am grateful for the rewarding employment I've had with ABC Bank and wish all the staff members and various partners well.

Yours Sincerely,

Sora G. Fayo

(Signed)

11. The Respondent accepted the Claimant's resignation by letter dated 24th February 2012. It would appear however, that on the same day he wrote the resignation letter, the Claimant changed his mind and

wrote another letter revoking the resignation and asking to be confirmed. In his sworn testimony, the Claimant gave the time gap between the two letters as morning and afternoon of the same day.

12. The Respondent produced documentary evidence showing that the Claimant's letter revoking the resignation was received by the Bank on 28th February 2012. This would have been after acceptance of the resignation by the Respondent. In the absence of any evidence to the contrary, the Court reached the conclusion that at the time the Claimant's latter letter was received by the Respondent, the resignation notice had taken effect. The Claimant could not therefore unilaterally revoke it without concurrence by the Respondent.

13. The Claimant pursued the line that he was forced to resign owing to frustrations at the work place. If proved, this would have amounted to constructive termination or discharge which occurs where an employer deliberately creates a hostile work environment in order to force a resignation.

14. In the South African case of *Pretoria Society for the Care of the Retarded v Loots [1997] 6 BLLR*, it was held that constructive termination or discharge occurs where an employer creates a situation in the workplace which renders the continuation of employment so intolerable that the employee has no other option but to resign.

15. An employee alleging constructive termination must prove it. In the instant case, the Claimant did not plead any specific acts by the Respondent which forced him to resign. In any event, if the Claimant's testimony were to be believed, he changed his mind on the same day and sought to revoke the resignation. This begs the question as to what corrective measures were taken within the day to reverse the alleged frustrations. Neither the resignation letter nor the revocation thereof made mention of either the frustrations or any corrective measures. The Court was therefore unconvinced by the Claimant's allegations in this regard.

16. Overall, the Court finds that the Claimant voluntarily resigned from his employment and his claim for unlawful termination is baseless and unsustainable. In the course of these proceedings, both parties sought to introduce issues regarding the Claimant's performance and conduct. However, no evidence was led on these issues and the Court did not make a finding thereon. What is more, these were not the real issues before the Court and a finding either way would not alter the final verdict.

17. Ultimately, I find the Claimant's entire claim unmeritorious and proceed to dismiss it with costs to the Respondent.

18. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF JANUARY 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 2ND DAY OF FEBRUARY 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Ratemo for the Claimant

Mr. Obura for the Respondent