



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 1003 OF 2014

JOYCE SANG.....CLAIMANT

v

SUMARIA INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

1. This Cause was heard on 6 May 2016 when Nzioki wa Makau J took the evidence of Joyce Sang (Claimant).
2. The Judge also took part of the evidence-in-chief of Akshay Shah, Managing Director of Sumaria Industries Ltd (Respondent) on 16 May 2016 and on 19 December 2017.
3. This Court took the last part of the evidence on 11 February 2019 (Nzioki wa Makau J having been transferred from the station).
4. The Claimant filed her submissions on 21 February 2019 while the Respondent filed its submissions on 13 March 2019.
5. The Court has considered the pleadings, evidence and submissions and isolated the Issues for determination as examined herein under.

Whether Claimant was forced to resign

6. The Claimant has anchored her claim on constructive dismissal.
7. The doctrine of *constructive dismissal* was discussed in detail in the case of *Western Excavating ECC Ltd v Sharp* (1978) 2 WLR 344. The Court discussed the rival tests and ended up endorsing the *contract test*.
8. The test, essentially as to what amounts to *constructive dismissal* as endorsed in the authority is that the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.
9. From this test, the duty the Court is called upon to do is to look at the conduct of the Respondent which might have led to the Claimant leaving.
10. In the instant case, the Claimant resigned through a letter dated 26 March 2014 and the Respondent *signified* acceptance of the resignation through a letter dated 27 March 2017.
11. The resignation letter however did not set out any reasons which prompted or led to the resignation.
12. In Court, the Claimant testified that she was prompted to resign because of *assault, harassment and mistreatment* by the Respondent's Chief Finance Officer.
13. On the particulars/circumstances leading to the resignation, the Claimant stated that the Chief Finance Officer collided into her in a

doorway scattering the items she was carrying and that she made a formal complaint through email about the harassment to the Managing Director on 21 March 2014 (he was out of the country).

14. When the Managing Director returned he invited the Claimant for lunch (on 25 March 2014) in a club where he asked her about the complaint. The Claimant stated she was uncomfortable discussing the issue in a club but nevertheless the Managing Director asked her to explain after which he told her the Respondent did not require her services anymore.

15. According to the Claimant, the Managing Director then asked her to resign immediately and dictated what was to be put in the resignation letter and also directed that she then prepares to handover. She wrote the resignation letter the next day.

16. The Respondent's witness admitted receiving the email complaint from the Claimant while he was out of the country.

17. According to the witness, when he returned, he interviewed 2 witnesses to the alleged assault as well as the Claimant.

18. On why the interview with the Claimant was in a club, the witness explained that the Respondent had *open plan offices*, and therefore there was need for privacy.

19. Responding to questions as to whether the Claimant was forced to resign, the witness stated that he did not force the Claimant to resign, and further stated that he informed the Claimant that her contract which was ending in about 3 months would not be renewed, and therefore she had the option to resign with a soft landing.

20. The Court has before it exclusive narrations as to whether the Claimant was forced out or not.

21. The Claimant held the position of Head of Human Resource Management, Africa and was reporting to the Managing Director.

22. It can be inferred from the high position that the Claimant was well grounded in human resources practice and the basics of employment law.

23. The Claimant did not give any tangible reason why she did not set out in the resignation letter the *real reasons* for the resignation, that is that she was being forced out.

24. The Court finds that curious for a person holding such an office.

25. The Claimant also did not clearly explain what action/conduct of the Respondent's Managing Director or the Chief Finance Officer was a *significant breach going to the root of the contract*.

26. The altercation or doorway collision with the Chief Finance Officer was a one of occurrence and there was no evidence of prior bad blood. There was no evidence that the Chief Finance Officer had exhibited any untoward behaviour against the Claimant or threatened her with any disciplinary action previously.

27. After the separation, the Claimant even attended a staff party held in her honour on 3 April 2014. This was not consistent with an employee forced to resign.

28. The Court finds that the Claimant failed to demonstrate to the required standard that this was a case of *constructive dismissal*.

Gratuity for 2 years

29. The Claimant sought Kshs 714,050/- on account of *gratuity*.

30. The contract provided for *service pay* and the Respondent offered to pay *service pay* at the rate of 15 days' pay for each year worked, totalling Kshs 302,812/-

31. The Respondent contended that the same was paid to the Claimant's bank account with other dues through an affiliate, Grant Thornton.

32. The Claimant while denying payment stated that she would have to check with her bank.

33. The Court is satisfied that any gratuity due was paid to the Claimant through one of her bank accounts.

Balance on terminal dues

34. Claimant claimed Kshs 91,693/- being balance on terminal dues.

35. Having claimed this is a *balance*, an inference can be drawn that the Claimant was paid and received her terminal dues (Respondent produced a cheque paid to the Claimant for a similar amount).

36. However, without an evidential foundation as to what comprised the balance of terminal dues, the Court is unable to find for the

Claimant under this head of claim.

March 2014 salary

37. The Respondent produced evidence to show that Kshs 246,925/- was transferred to the Claimant's bank account. Nothing therefore turns on the claim.

Damages for breach of contract

38. The Court has found there was no *constructive dismissal* and the question of damages or compensation for unfair termination of employment does not arise.

Conclusion and Orders

39. From the foregoing, the Court finds no merit in the Cause and orders it dismissed with no order as to costs.

Delivered, dated and signed in Nairobi on this 22nd day of March 2019.

Radido Stephen

Judge

Appearances

For Claimant Ms. Wambui instructed by Muganda, Macheru & Co. Advocates

For Respondent Mr. Waweru/Mr. Nganga instructed by Taibjee & Bhalla Advocates

Court Assistants Lindsey/Sikulu