



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 388 OF 2014

KENYA HOTELS & ALLIED WORKERS UNION.....CLAIMANT

Vs

MARA SIRIA t/a SAFARI CAMPS (K) LTD.....RESPONDENT

JUDGMENT

1. The Kenya Hotels & Allied Workers Union (Union) commenced legal proceedings against Mara Siria t/a JPR Safari Camps (K) Ltd (Respondent) on 22 August 2014 and the issue in dispute was stated as *unlawful/unfair dismissal of Vitalis Lukwa Mujalwa* (Grievant). Union's documents were filed together with the Memorandum of Claim.
2. The Respondent filed its Memorandum of Reply on 24 September 2014 through Hamilton Harrison & Mathews Advocates, and this prompted the Union to file what it called an Affidavit in Reply to Respondent Memorandum.
3. Konosi & Co. Advocates filed a Notice of Change of Advocates to come on record for the Respondent and on 18 May 2015, it filed its list of documents.
4. The Cause was heard on 18 May 2015 and on 26 January 2016. The Union's submissions were filed on 26 February 2016 while the Respondent filed its submissions on 24 March 2016 (the Court will not consider the evidence sneaked in through the Union's submissions, as such practice is not anchored in any known law or practice and traditions of this Court despite one document appearing to be very material to determination of one of the issues raised).
5. The Court has considered the pleadings, testimony/evidence and the submissions, and adopts the issues as identified by the parties in the submissions.
6. Save for language the issues are, *whether the Grievant was dismissed or resigned, and if the Grievant was dismissed, whether the dismissal was unfair and appropriate remedies, if the dismissal was unfair.*

Whether Grievant was dismissed/resigned

7. The Grievant's case as presented in the pleadings was that the Respondent's Director Peter Bonheim forced him to resign on 23 March 2014, but that an attempt to resolve the dispute around 1 April 2014 aborted when they disagreed on the question of terminal dues and the Respondent ended up dismissing him through a letter dated 1 April 2014.
8. The Respondent's pleaded case was that the Grievant was not forced to resign; his voluntary resignation was not accepted and that he was summarily dismissed on 1 April 2014.
9. In testimony, the Grievant stated that the Director asked him to resign after a meeting held on 23 March 2014 to discuss some alleged fraudulent receipting and that he wrote the letter. The Director then told him that he would be paid his dues in Nairobi. They exchanged email communication but when he went to collect the dues, the computations were not correct and he submitted his own computations but no agreement was reached hence he reported to the Union.

10. The Respondent's second witness, the Camp Manager stated that a meeting was held on 23 March 2014 and the Grievant admitted that he billed a guest an amount not reflected in the receipt issued after which the Grievant wrote a resignation letter and took it to him. He forwarded the resignation letter to the Director after which he did not see the Grievant again.
11. The Director who was the third witness confirmed that a meeting was held on 23 March 2014 to get explanations from the Grievant on the fraudulent receipting and that before he left for Nairobi, the Camp Manager informed him that the Grievant had taken to him a resignation letter and left.
12. He further stated that the Grievant emailed the Respondent's Accountant on 29 March 2014 and a meeting was agreed for 1 April 2014 in Nairobi.
13. When the Grievant was shown the computations of his terminal dues he rejected the same and that this is what necessitated the summary dismissal of the Grievant.
14. The facts as narrated by the parties are not so dissimilar.
15. The Grievant wrote a resignation letter on 23 March 2014. The Respondent in its dismissal letter indicated that it was refusing to accept the resignation. The reason for the refusal, from the testimony was the disagreement on dues.
16. The crucial questions, in my view are whether the Grievant was forced to resign to bring the dispute to the ambit of constructive dismissal, and whether an employer can refuse to accept an employee's resignation.

Was resignation voluntary/constructive dismissal

17. The Grievant contended he was forced to resign. The question of whether there was a valid or legal resignation becomes implicated.
18. This Court had occasion recently to examine the test for a valid resignation in *Nancy Jesang Sorgor v Kenya Women Finance Trust* (2015) eKLR.
19. The Court observed thus in a decision from South Africa, *Quinn/Singlehurst Hydraulics (SA) Ltd* (2005) 6 BALR 673, the test was stated thus the test for determining whether an employee resigned or not is that an employee has to, either by word or conduct, show a clear and unambiguous intention not to go on with his contract of employment in that he has to act in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfill his part of the contract.

In *Southern v Franks Charlesly & Co.* (1981) IRLR 278 and *Sovereign House Security Services Ltd v Savage* (1989) IRLR 115, the Court of Appeal (England) held that words used by an employee when resigning should be unambiguous.

20. The words used by the Grievant in his resignation letter are unambiguous.
21. Nevertheless, the Court must examine the circumstances surrounding the resignation to establish whether the Grievant has brought himself within the test of constructive dismissal.
22. The test for constructive dismissal was set out in *Western Excavating ECC Ltd v Sharp* (1978) 2 WLR 344, and it states 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.
23. In the instant case, the Grievant did not establish that the Respondent intended not to be bound by an essential term of the contract and/or how the Respondent had made the work environment intolerable for him.
24. What most probably happened is that the Grievant being confronted by the allegations of

- fraudulent receipting on 23 March 2014 felt the heat and made a decision to resign on the spur of the moment. Those circumstances cannot amount to the Respondent indicating it was no longer intent on being bound by the contract.
25. Of course, the Court is alive to the fact that a resignation in the spur or heat of the moment may not terminate the employment relationship if the employee has a second thought later on, but there is no suggestion here that the Grievant sought to change his mind.
26. The Court reaches a conclusion that the Union has not established that the Grievant was forced to resign or that this was a case of constructive dismissal.

Can an employer refuse to accept a resignation?

27. The present case goes beyond what the Court addressed in the *Sorgor* case as it requires a determination whether an employer can refuse to accept a valid resignation.
28. Because the Court has not found any domestic case in point on the question, it is appropriate to resort to comparative jurisdictions.
29. In *African National Congress v Municipal Manager, George Local Municipality & Ors* (2010) 3 BLLR 221 (SCA), it was held by the Supreme Court of Appeal that resignation must be effective immediately or from a specific date, and being a unilateral legal act, does not need to be accepted by the intended recipient to be effected. It must however be unequivocally communicated to the other party.
30. In *Mafika v SA Broadcasting Corporation Ltd* (2010) 5 BLLT 542, the Labour Court South Africa held that a sms sent by an employee of her unambiguous notice of resignation could constitute written notice. It was further irrevocable from the moment the intention came to the employer's attention.
31. The Grievant's resignation letter indicated that it was effective 23 March 2014 and failing mutual agreement, it was not open to the Respondent to purport to refuse it and then proceed to summarily dismiss the Grievant.
32. The Court having reached the above conclusions is of the view that the other issues identified for determination are moot save for the question of appropriate remedies/orders.

Appropriate remedies

1 month pay in lieu of notice

33. The Grievant having resigned is not entitled to pay in lieu of notice.

Salary for March 2014

34. The Respondent admitted that it is willing to pay the Grievant wages up to date of resignation which it computed as Kshs 49,772/00.

Pro rated leave

35. The Respondent admitted that the Grievant had 11 pending leave days at time of separation which it had computed as Kshs 14,068/50.

Leave travelling allowance

36. Regulation 10 of the Regulation of Wages (Hotel and Catering Trades) Order, Legal Notice No. 34 of 1974 and Legal Notice No. 173 of 1981 have made provision for leave travelling allowance.
37. Without determining whether the Grievant is entitled to benefit from the said regulation considering his position, the Court is of the view that he ought to have been paid leave travelling allowance which the Court allows in the sum of Kshs 16,000/- as pleaded.

Overtime

38.The Grievant was entitled to time off in lieu of extra time worked beyond the contractually agreed working hours.

Compensation

39.With the conclusion that the Grievant resigned, he is not entitled to compensation in terms of section 49(1) of the Employment Act, 2007.

40.Before concluding, the Court wishes to thank the parties' representatives for their industry, courtesy and well researched submissions.

Conclusion and Orders

41.The Court finds and holds that the Grievant voluntarily resigned and was not unfairly terminated and therefore the heads of relief dependent upon unfairness of termination of employment are dismissed.

42.However, the Court finds and holds that the Grievant is entitled to and awards him entitlements accruing out of the employment relationship

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|---------------------------------|----------------|
| i. Salary March 2014 | Kshs 49,772/- |
| ii. Pro rata leave | Kshs 14,068/50 |
| iii. Leave travelling allowance | Kshs 16,000/- |

TOTAL **Kshs 79,840/50**

43.Because there was no indication that there is a formal industrial relationship between the Union and the Respondent, the Court orders that each party bear its own costs.

Delivered, dated and signed in Nakuru on this 6th day of May 2016

Radido Stephen

Judge

Appearances

For Union Mr. Simiyu, Deputy Secretary General, Kenya Hotels & Allied Workers Union

For Respondent Mr. Konosi instructed by Konosi & Co. Advocates

Court Assistant Nixon