



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

CAUSE NO. 364 OF 2013

PAUL CHITECHI MWARO.....CLAIMANT

v

SASINI LIMITED.....1ST RESPONDENT

KIPKEBE LIMITED.....2ND RESPONDENT

JUDGMENT

1. Paul Chitechi Mwaro (Claimant) was employed by Sasini Ltd (1st Respondent) as a Security Officer through a letter dated 25 May 2010 and deployed to Kipkebe Limited (2nd Respondent).
2. On 28 June 2013, the Claimant tendered his resignation which he purported to cancel through a letter dated 4 July 2013. The 1st Respondent accepted the resignation through a letter dated 1 July 2013, but received by the Claimant on 5 July 2013.
3. On 24 October 2013, the Claimant commenced legal action against the Respondents and the issue in dispute was stated as *unfair termination of the Claimant*.
4. The Claimant alleges that he was forced to resign after unsubstantiated allegations were leveled against him.
5. The Respondents filed a Response on 27 May 2014 and the Cause was heard partly by Ongaya J on 28 July 2014, and myself on 8 December 2014.

Claimant's case

6. The Claimant testified and stated that the 1st Respondent employed him effective 1 June 2010 as a security officer and that on 24 May 2013 he asked for 5 days leave which was granted.
7. On resumption of duty from the 5 days leave on 4 May 2013, and after the morning call up, the General Manager called him and instructed him to go back on 26 days leave which he had not applied for.
8. The Claimant also stated that on 24 June 2013, while still on leave, the General Manager called him through the secretary and directed him to the 1st Respondent's head office in Nairobi for a meeting, which he did on 27 June 2013.

9. In Nairobi, he met the 1st Respondent's Managing Director, Human Resources Manager and the General Manager of the 2nd Respondent. During the meeting, the Managing Director told him that he did not have the right attitude and that the General Manager had raised several issues against him such as using the Respondent's vehicle to go bars.

10. While still at the meeting, the General Manager told him he did not trust him and therefore he could not have him as a security officer, after which the Managing Director told him to resign or he would be dismissed. He thus wrote a resignation letter.

11. The Claimant further stated that after writing the resignation letter he sought advice and wrote a letter cancelling his resignation which he delivered to the Human Resources office in Nairobi, but that on 5 July 2013, the 1st Respondent gave him a letter dated 4 July 2014 accepting his resignation.

12. The Claimant asserted that he could not have resigned voluntarily because he had loans and young children.

13. The Claimant admitted owing the Respondents and a Saccho some money and stated that he was not paid the dues indicated in the letter accepting his resignation.

14. In cross examination, the Claimant stated that he wrote the resignation letter in Nairobi, due to the events of 27 June 2014.

Respondents' case

15. The Respondents pleaded that the Claimant's resignation was voluntary and it also counterclaimed against the Claimant for some Kshs 128,242/-.

16. The Respondents called their Human Resources & Administration Manager to testify.

17. She stated that the 2nd Respondent is a fully owned subsidiary of the 1st Respondent.

18. She also stated that the Claimant voluntarily resigned through a letter dated 28 June 2013, and that prior to the resignation, the Claimant had been summoned to Respondents Nairobi office on 27 June 2013 over his performance. During the meeting, discussions were held over theft of fuel from the Respondent's premises and Claimant's unauthorized use of Respondents' vehicle.

19. She further stated that the vehicle assigned to the Claimant had been seen several times parked outside bars and that they left the Claimant's case for review at a later date, but on 28 June 2013, the Claimant gave her a resignation letter and the resignation was accepted through a letter dated 1 July 2013.

20. The witness denied receiving the letter cancelling the resignation.

21. She also stated that the Claimant owed the Respondents Kshs 13,025/- being management staff subscriptions and a Saccho loan of Kshs 115,217/-.

22. The Claimant filed his submissions on 19 January 2015, while the Respondents filed their submissions on 11 February 2015 (instead of before 6 February 2015- the explanation being that the Claimant served his submissions late).

Issues for determination

23. After considering the pleadings, evidence and submissions, the Court has identified the issues for determination as, *whether the Claimant resigned voluntarily, the effect of the withdrawal of the resignation, whether the Claimant owes the Respondent any monies and appropriate relief*

Whether resignation was voluntary

24. It is not disputed that the Claimant tendered a letter of resignation on 28 June 2013, and the resignation was preceded by a meeting involving the Respondents senior managers and the Claimant.

25. The resignation letter clearly stated that it was due to unsubstantiated allegations leveled against the Claimant by the General Manager of the 2nd Respondent.

26. The letter is equally clear that the Claimant was requested to resign by the Managing Director of the 1st Respondent during the meeting held on 27 June 2013.

27. From the evidence tendered in Court and the contents of the letter, the Court has no hesitation in finding that the resignation was not voluntary. The Claimant was inveigled by the Respondents senior management into resigning. The Claimant was pressured to resign on threat of dismissal and this pressure was the operative cause of the resignation.

28. This was a case of constructive dismissal.

Withdrawal of resignation letter

29. The Claimant's evidence was that he withdrew the resignation after taking advise, through a letter dated 4 July 2013. He stated that he delivered the letter to the 1st Respondent's Human Resources office. But he did not give the name of the person he gave it to.

30. The Respondents' Human Resources Manager denied seeing the letter.

31. The Claimant's advocate wrote to the Respondents on 8 July 2013 informing them of the Claimant's withdrawal of his resignation. The Respondents letter of reply dated 9 July 2013 did not deny or even make a response to the withdrawal of the resignation.

32. The parties did not cite to me any local judicial precedent on the issue of withdrawal of a resignation notice by an employee.

33. For myself, I would endorse as applicable in our jurisdiction the holding in *Harris & Russel Ltd v Slingsby* (1973) IRLR 221, that it is not open to a party who has given a notice determining a contract to withdraw the notice unilaterally before it expires. The other party should agree to the withdrawal of the notice.

34. The unaccepted withdrawal was therefore of no legal consequence.

Whether Claimant owes Respondent any money/counterclaim

35. Although the Claimant had denied owing the Respondent/Saccho any money in the Reply to Counter Claim, during his testimony he admitted owing the Respondents/Saccho monies but he could not tell the exact amounts.

36. On the basis of the admissions, the Court finds that the Claimant owes the Respondents/Saccho Kshs 128,242/-.

Appropriate relief

Pay in lieu of Notice

37. The Claimant sought Kshs 127,200/40 under this head of claim.

38. The Respondents had indicated in the letter accepting the resignation that the Claimant would be paid 3 months pay in lieu of notice.

39. This was in consonance with a term of the contract of employment.

40. The Court has also reached the conclusion that the Claimants resignation was not voluntary.

41. He would be entitled to Kshs 127,200/40 under this head.

Damages for unfair termination

42. Having found that the Claimant was forced to resign, he is entitled to compensation for unfair termination/wrongful dismissal. The Claimant served the Respondent for about 3 years.

43. Considering the length of service, the Court would award the Claimant the equivalent of 5 months gross pay as compensation. The compensation is assessed as Kshs 212,000/-.

44. It is regrettable that the Claimant did not file written submissions as had been agreed and directed at the close of hearing. No explanation was offered.

45. For this, the Court will decline to award costs of the Cause to the largely successful Claimant in the Cause and the Respondents in the Counterclaim.

Conclusion and Orders

46. The Court finds and holds that the resignation of the Claimant was not voluntary and therefore he was constructively dismissed and awards him and orders the Respondent to pay him

a. 3 months pay in lieu of notice Kshs 127,200/-

b. 5 months wages as compensation Kshs 212,000/-

TOTAL Kshs 339,200/-

47. Because the Respondents counterclaim has succeeded, the sum of Kshs 128,242/- should be deducted from the sum awarded.

48. Each party to bear own costs.

Delivered, dated and signed in Nakuru on this 20th day of February 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Kavangi instructed by Lutta & Co. Advocates

For Respondent Mr. Ashitiva instructed by Nyachae & Ashitiva Advocates