



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Cause 11 of 2012**

**MATHEW KIPCHUMBA KOSKEI.....CLAIMANT**

**V**

**BARINGO TEACHERS SACCO.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 17<sup>th</sup> May, 2013)

**JUDGMENT**

The claimant Mathew Kipchumba Koskei filed the memorandum of claim on 06.11.2012 through B.O Akang'o Advocates. The claimant is praying for judgment against the respondent for:

- a) Damages for unfair or wrongful dismissal from employment.
- b) Costs and interest on principal sum awarded from the date of filing till payment in full.
- c) Any other relief the honourable court may deem fit to grant in the circumstances of the case.

The respondent filed the statement of response on 27.11.2012 through Onkoba and Company Advocates and prays that the claimant's claim be dismissed with costs.

The case was heard on 23.04.2013 and 09.05.2013. The claimant gave evidence to support his case and the respondent's (currently known as Boresha SACCO) Chief Executive Officer Moses Chebor gave evidence to support the respondent's case.

It is not in dispute that the respondent employed the claimant as a teller on permanent basis from 2009 until 18.06.2012 when the respondent dismissed the claimant on allegations of theft. By the letter dated 9<sup>th</sup> November, 2011, the claimant was suspended from work. The letter addressed to the claimant and being appendix C on the memorandum of claim stated as follows:

**“Dear Sir,**

**RE: SUSPENSION/ INVESTIGATION**

**It has come to the knowledge of the Board/Management that there are transactions done by yourself that require thorough investigations and clarification. To facilitate the investigation, you are to remain suspended for three (3) months from duty with half salary as per CBA. This is effective from 10<sup>th</sup> November, 2011.**

**Reasons are as follows:**

- 1. Loss of Kshs.400, 000 or thereabout to a member who was assisted to get Salary Payments twice.**
  
- 2. Misuse of other Tellers' Rubber-stamps which is construed to mean concealing payments.**
  
- 3. Failure or deliberate neglect on signing payment slips/vouchers.**

**You will be invited in writing to meet the Board and explain the same any date of November and December, 2011. For this reason, always keep your phone active to be in touch. Be warned not to interfere with investigations in any way.**

**You are required to Handover all the SACCOs property in possession and your work to the Managers Musa Kangoswo and Ambrose Chepkwei.**

**By copy of this letter, the Union Shop stewards and Branch Secretary are notified to confirm the facts before you appear before the Board.**

**Yours faithfully,**

**Signed**

**Moses Chebor**

**CHIEF EXECUTIVE OFFICER**

**BY ORDER OF THE BOARD”**

The claimant wrote undated statement of facts attached to the memorandum of claim and addressed to the respondent with copies to the union representatives. In the statement, he stated that he had taken the money alleged to be missing with an intention of returning the same upon his borrowing a loan. ,With regard to allegations on the use of other tellers’ stamps, he stated in the statement that a teller leaves the stamp in his or her till once is through with the day’s work and the following day, another teller uses the same stamp so that individual staff did not have personal stamps because, all stamps bear the society’s name and logo. For the allegation on the negligence in signing of vouchers, he stated in the statement that he was not aware because no one had asked him about the same.

In his evidence, the claimant stated that he was on suspension for three months. He recalled a customer by the name Jepchirchir Kiptoo. She transferred her account from the respondent’s Mogotio Branch to Kabarnet Branch. The claimant testified, and the respondent’s witness confirmed, that upon transfer of the account like in Jepchirchir’s case, the respondent was to close the customer’s initial account at Mogotio. The claimant was based at the Mogotio Branch and he testified that in this case he did not know what happened and the initial Mogotio account was never closed consequential to Jepchirchir’s transfer of the account. The claimant stated that it was not his duty to close the account but it was the duty of the accountant called Linet Chelimo to close it down. It is from that account that was not closed that the missing money had been withdrawn.

The claimant told the court that before the hearing of his disciplinary case before the board, he met his father in-law and the union officials who advised him that he should admit the accusations so as to protect his job. So he appeared before the board with union officials and admitted the charges as advised. On that basis, the board decided to dismiss him as per the letter of 9.02.2012 being appendix C2 on the memorandum of claim. The letter addressed to the claimant stated as follows:

**“Dear Sir**

**RE: TERMINATION OF SERVICE**

**Subsequent to your suspension from duties on 9<sup>th</sup> November, 2011, the Board/Management gave you opportunity to defend yourself against the three counts you were accused of:**

**1. Loss of Kshs.400, 000 from a member’s account which was the property of the SACCO.**

**2. Misuse of Tellers' Rubberstamps.**

**3. Negligence in signing payment slips/vouchers.**

**In your defence before the Board and union representatives you admitted withdrawing the money without authority with the hope of replacing when you borrow loan and asked for leniency.**

**Verdict: The Board on 26<sup>th</sup> January, 2012 examined the documentary evidence and resolved on summary dismissal for you. The damage to Society's property, stealing by servant is actionable in a court of law. The summary dismissal is based on clause 15(c) and (e) of the terms and conditions of service and section 44 of the Employment Act.**

**You are therefore given fifteen (15) days to refund the amount – Kshs. 400,000(Four hundred thousand) you withdrew from account No. 5042056501 and Kshs.12,0000 you failed to deposit. Should other amounts come up, in the accounts of Kiram Academy, then we will not hesitate to take action. Full statement is herewith attached.**

**In addition, SACCO loan MUST be repaid immediately, statement attached.**

**You are asked to surrender all the Society's property that may be in your possession including any documents.**

**On summary dismissal, there are no benefits except your own contributions to the pension scheme and N.S.S.F. The Society's contribution to pension shall be used to settle your Liabilities to the Society.**

**Signed**

**BARINGO TEACHERS SACCO SOCIETY LTD**

**Chief Executive Officer"**

The claimant appealed against the dismissal by his letter dated 17.02.2012 being appendix C3 on the memorandum of claim. He requested that his appeal be considered because the decision to dismiss had been arrived at due to logistics related to factual representation. The appeal was heard on 1.06.2012 and the decision by the board conveyed by the letter of 18.06.2012 being appendix C5 on the memorandum of claim and also attached on the memorandum of response addressed to the claimant and stating, thus:

**“Dear Sir,**

**RE: SUMMARY DISMISSAL**

**Thanks for coming on 1<sup>st</sup> June, 2012 for hearing of your appeal against termination of service.**

**Your presence was heard and considered as you explained:**

- 1. That you were misadvised to lie to the Board by accepting that you stole SACCO funds with intention of refunding when given loans.**
- 2. You blame others for not checking your work.**
- 3. That you are sorry for not signing some vouchers and**
- 4. That you disconnect yourself from the allegations.**

**RESOLUTION**

**The Board discussed your points of appeal and resolved:**

- 1. That you should be reported to Law Enforcers for thorough investigation.**
- 2. That the SACCO should seek justice for the stolen money.**
- 3. That the summary dismissal given to you stands for gross misconduct, negligence and stealing from your employer.**
- 4. That the law will take its course to determine justice for all.**

**Yours faithfully,**

**Signed**

**Moses Chebor**

**CHIEF EXECUTIVE OFFICER,**

**FOR THE BOARD”**

The respondent's witness confirmed that the disciplinary process was undertaken in accordance with the rules of natural justice through the steps as shown by the correspondence between the parties. The witness stated that the respondent had complained to the police upon the claimant failing to pay the money as per the board's decision. Accordingly, criminal charges had been preferred against the claimant as per the charge sheet produced and marked exhibit R1 in these proceedings. The criminal charges included stealing by servant contrary to section 281 and forgery contrary to section 349 of the Penal Code relating to the account of Jepchirchir Kiptoo, the respondent's customer. The respondent had discovered the loss of the money in issue following closing accounts done prior to 18.06.2012. There were also complaints by the respondent's client known as Graham Academy whose client parent had deposited school fees in the Academy's account maintained with the respondent but the deposit had not been credited by the claimant as expected. The claimant admitted the accusation before the board and before the trade union representatives. The respondent's board, the witness stated, found the claimant guilty of very gross misconduct and decided to dismiss him summarily. The witness stated that a total of Ksh.446, 800 was lost as attributed to the claimant's gross misconduct. The witness admitted that the claimant was arrested about 18.12.2012 long after he had filed his claim in the Industrial Court. The criminal complaint had been reported to the police in July, 2012 and it had taken time to commence the criminal case because relevant investigations were underway.

The issues for determination in this case are three:

1. Whether the dismissal should be stayed in view of the criminal proceedings preferred against the claimant.
2. Whether the respondent unfairly terminated the claimant's employment.
3. Whether the claimant is entitled to the remedies as prayed for in the memorandum of claim.

On the first issue, it was submitted for the claimant that if the alleged misconduct by an employee amounts to a criminal offence in the opinion of the employer and the employer opts to make a complaint to the criminal justice agencies, the employer should not proceed with the administrative disciplinary procedure until the conclusion of the criminal proceedings. In this case, the criminal proceedings commenced long after the dismissal and it was submitted that the criminal proceedings were calculated to intimidate the claimant for filing the claim in the Industrial Court. The claimant's counsel also submitted that criminal and civil proceedings were parallel and could proceed simultaneously. Counsel for the respondent submitted that it was prudent for the claimant to stay the proceedings in this court pending the outcome of the criminal court.

The court has considered the submissions made for the parties and is of the opinion that whether an employer stays or proceeds to conclude administrative disciplinary proceedings with respect to alleged misconduct subject to criminal process is a matter of prudence to be decided either way by the employer. The court holds that in such circumstance, the employer is not necessarily exercising an election; the employer is not faced with the option of administratively deciding the case or preferring a criminal complaint whose outcome binds the employer's decision in view of the allegations of misconduct leveled against the employee. In any event, the power to prosecute for an alleged criminal offence is primarily vested in the state by the Constitution and the employer has no direct influence over the exercise of the power by the state.

However, in employment disciplinary cases where the criminal element exists in the opinion of the employer, the employer has an election to conduct the investigations using the internal administrative systems or to report to the relevant criminal justice agency and in which event the agency's findings would be binding upon the employer in that matter as was held to be the position in the judgment in the case of **Patrick Njuguna Kariuki –Versus- Del Monte (K) Limited, Cause No. 9523 of 2011**, where this court stated, **“The memo of suspension dated 9.11.2009 had the effect of the Respondent electing to have the allegations against the Claimant investigated by the state through the criminal case number 1134 of 2009 in which the Claimant was one of the accused persons. By making the election, the Respondent was thereby precluded from internally concluding the Claimant's disciplinary case and the Claimant had a legitimate expectation that the Respondent would determine his fate taking into account the outcome of the proceedings in the criminal case. The criminal case found that the Claimant was innocent as charged and the judgment was delivered on 24<sup>th</sup> February, 2011 long after the Respondent had dismissed the Claimant with effect from 12.11.2009 and by the letter dated 12.11.2009. The court finds that on 12.11.2009 the Respondent did not have the benefit of the state's investigation report or findings as was to be determined in the criminal case so that the test for gross misconduct as founded on the pending investigations was not capable of being proved by the Respondent at the time of the termination. The Respondent having failed to prove the reason for dismissal of the Claimant on 12.11.2009, the court finds that the termination was unfair under the provisions of Section 43 of the Act; the reason for termination of the contract of employment at the time of the termination cannot be matters that the Respondent can be said to have genuinely believed to exist to justify the termination of the employment.”**

Nevertheless, such circumstances have never ceased to occasion complex considerations that must be taken into account to ensure that justice is done in every individual case. It is the opinion of the court that the following general principles would apply in assessing the individual cases:

- a) Where in the opinion of the employer the employee's misconduct amounts to a criminal offence, the employer may initiate and conclude the administrative disciplinary case and the matter rests with the employer's decision without involving the relevant criminal justice agency.
- b) If the employer decides not to conclude the administrative disciplinary case in such matters and makes a criminal complaint, the employer is generally bound with the outcome of the criminal process and if at the end of the criminal process the employee is exculpated or found innocent, the employer is bound and may not initiate and impose a punishment on account of the grounds similar to or substantially similar to those the employee has been exculpated or found innocent in the criminal process.

c) If the employer has initiated and concluded the disciplinary proceedings on account of a misconduct which also has substantially been subject of a criminal process for which the employee is exculpated or found innocent, the employee is thereby entitled to setting aside of the employer's administrative punitive decision either by the employer or lawful authority and the employee is entitled to relevant legal remedies as may be found to apply and to be just.

d) To avoid the complexities and likely inconveniences of (a), (b) and (c) above, where in the opinion of the employer the employee's misconduct amounts to a criminal offence, the employer should stay the administrative disciplinary process pending the outcome of the criminal process by the concerned criminal justice agency. In event of such stay, it is open for the employer to invoke suspension or interdiction or leave of the affected employee upon such terms as may be just pending the outcome of the criminal process.

Taking into account the foregoing principles, to answer the first issue for determination whether the dismissal should be stayed in view of the criminal proceedings preferred against the claimant, the court finds that the dismissal needed not to be stayed and it was open for the respondent to make the criminal complaint before or after the dismissal. Further, the court finds that the outcome of the criminal proceedings may have consequences upon the parties one way or the other within the framework of the principles set out earlier in this judgment. Thus, the criminal court order may constitute a basis for a fresh suit. Thus section 4(4) of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya envisages actions based on judgments and depending with the outcome of the case in the Industrial court and the criminal case, the judgment in the criminal case could be a basis for a new cause of action. The section states:

**“4.(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”**

Accordingly, a party to the terminated employment relationship adversely affected by the termination prior to the decision in the criminal case would be entitled to urge their rights through an appropriate suit based on the judgment in the criminal case.

The second issue for determination is whether the respondent unfairly terminated the claimant's employment. A termination is unfair if there was no notice and hearing as provided for in section 41 of the Employment Act, 2007; or the reason for termination is not valid as envisaged in section 43 of the Act; or the reason for termination is any of the reasons which do not constitute fair reasons for termination as enumerated in section 46 of the Act. The court has considered the evidence and finds that the respondent did not act in contravention of any of the cited sections of the Act.

The claimant's counsel did not dispute that notice and hearing were accorded to the claimant. However, he submitted that the reason for termination in this case was that the claimant was involved in financial impropriety at the workplace and which allegation the respondent had failed to ascertain. It was submitted that the respondent had failed to show that one, money was lost, and two that the loss was attributable to the claimant. The respondent's counsel submitted that the respondent leveled charges against the

claimant, the claimant had proper notice and he appeared before the respondent's board in presence of union officials and admitted the charges. Accordingly, counsel for the respondent submitted that there was no need for evidence by the respondent in view of the claimant's own admission.

The court considers that the charges leveled against the claimant were very serious. He knew that the disciplinary proceedings had serious consequences on his employment and livelihood. The respondent had already decided to suspend the claimant from duty. The suspension was a clear indicator of the gravity and seriousness the respondent attached to the alleged misconduct at hand. The claimant did not establish the nexus and usefulness of the justification of the alleged seriousness he attached to the obviously misleading advice he said was given by his father-in-law and the union representative. In the opinion of the court, the two did not bear a duty of care to advise the claimant in a matter the claimant obviously knew he had to put forward his best effort in self defence and exculpation.

The court finds that at the time of termination, on account of the claimant's own voluntary admission before the respondent's board, the respondent genuinely believed or had very good ground to believe that the claimant was guilty of the misconducts as charged. The court finds that on the standards of section 43 of the Employment Act, 2007 the termination was fair and lawful.

Finally, on the third issue for determination, the court finds that the claimant is not entitled to the remedies as prayed for because, as the court has already found, the termination of his employment was not unfair.

In conclusion, judgment is entered for the respondent against the claimant for dismissal of the memorandum of claim with costs.

**Signed, dated and delivered** in court at **Nakuru** this **Friday, 17<sup>th</sup> May, 2013**.

**BYRAM ONGAYA**

**JUDGE**