



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 75 OF 2007

JARED OSANO ATANCHA.....APPELLANT

-VERSUS-

KISII FARMERS CO-OPERATIVE UNION LIMITED.....RESPONDENT

JUDGMENT

(Being an appeal from the Judgment and Decree of Hon. C.G. Mbogo(Senior Principal Magistrate) dated 26th April, 2007 in KISII CMCC.NO. 985 OF 2005)

By a plaint dated 30th November, 2005, and received in court on 1st December, 2005, the appellant impleaded the respondent for an order lifting his suspension and reinstatement thereof in his employment with the respondent with full benefits for the period he was under suspension. In the alternative, he impleaded that the respondent be compelled to pay him all benefits including damages for wrongful suspension and defamation. He also prayed that the costs of the suit be provided for.

Apparently, the suit was informed by the fact that at all material times, prior to the suit, the appellant had been an employee of the respondent as secretary/manager until about 19th November, 1999 when he was suspended. The suspension according to the appellant though unlawful was never lifted nor was he paid ½ salary as required. Because of the suspension, the appellant suffered defamation of character as well as loss and damage.

The suit was defended. In its statement of defence dated 6th December, 2005 and filed in court on 7th December, 2005, the respondent averred that, the subject constitute a dispute within the meaning of section 76 of the **Co-operative Societies Act**. Accordingly the court lacked jurisdiction to hear and determine the suit. In any event the suit was time barred. Otherwise it denied that the appellant was its employee and that the suspension, if any, was wrongful. The appellant had infact been dismissed by his employer which was an affiliate of the respondent. Thus the plaint as drawn was bad in law and disclosed no reasonable cause of action against it.

The hearing of the case commenced before **C.G. Mbogo**,SPM on 2nd November, 2006. The appellant testified that he was employed by the respondent on 1st December, 1988 as Secretary/Manager and issued with a letter of appointment dated 21st November, 1988. He worked for the respondent without incident until 20th November, 1999 when the general manager served him with a letter of suspension. Before the suspension, he had not been reprimanded at all. He was by then earning Kshs. 7000/= . He had not been paid the salary for the month of February, 1996. He was entitled to travelling and subsistence allowance,

accommodation, medical allowance for himself and family plus leave allowance. He had never received any letter summoning him to appear before the respondent to defend himself. Up to the time he was testifying, he had not received any letter terminating his services despite his several attempts to resolve the matter.

On 6th February 2001 the respondent's General Manager assaulted him when he went to discuss the issue. He was also beaten by the watchman. It was also his case that he had never been questioned by the police or arraigned in court over the allegations raised in the suspension letter. Therefore the suspension was irregular as he was neither given any hearing nor paid half salary and there was no time limit for the suspension. He further testified that his character had suffered as he had been called a thief. He could not be employed anywhere while on suspension. He was forced to vacate his post of Executive Secretary of Solar International whose headquarters were in Sacramento upon being suspended.

On cross-examination, he stated that he was employed by the respondent after attending an interview at Kenyoro Farmers Co-operative Society Limited because Kenyoro is a centre for the people from the area. On being shown the muster roll from Kenyoro Farmers Co-operative Society for the month of October, 1998, he admitted that his name appeared therein. He however denied having received the salary indicated in the master roll. He also admitted that his name appeared in the minutes of Kenyoro Farmers Co-operative Society Limited where he was listed as the Secretary/Manager. He denied having ever retained 100,000/= shares and funds belonging to Nyosia Farmers Co-operative Society Limited and which was the reason for his suspension. He admitted that in his letter in response to the letter of suspension he had apologized over the sum of Kshs. 130,000/= belonging to Nyosia Farmers Co-operative Society Limited retained by coffee Board for shares he and his family were to buy in a proposed Farmers Coffee Bank. He admitted that the dismissal letter dated 11th April, 2000 clearly showed that he had admitted to have taken the money. He denied having given the Ministry of Labour wrong information. He further admitted that the respondent was justified in sacking him.

Ambrose Onserio Mariga testified on behalf of the respondent. He was the farm manager. His evidence was that the appellant's name appeared in the records of Kenyoro Farmers Co-operative Society as a Secretary Manager and his salary was 4,233/= per month. He was therefore its employee and not the respondent's. The appellant had embezzled Kshs. 130,000/= and was minuted. The appellant had been requested to explain in writing about the money he stole from the society. He added that there was no document signed by the appellant to show that he is the one who transferred the money to the coffee farmers bank.

Written submissions were subsequently filed. The appellant's submissions were that the evidence on record showed that the appellant was the employee of the respondent. He further submitted that being the case, the dismissal letter from Kenyoro Farmers Co-operative Society was of no relevance to this suit. He further submitted that the appellant's suit was not statute barred. Relying on the case of **Charles Kariuki Wambugu-vs- The Kenya National Library Services Board in HCCC.NO. 2013 of 1989**, he submitted that the appellant's suspension was wrongful, and/ or irregular and/or illegal. He further submitted that in the premises the appellant ought to be awarded Kshs. 847,000/= being salary arrears at the rate of Kshs. 7000/= from February, 1996 to March, 2007, a total of 121 months.

For the respondent, it was submitted that the appellant was never an employee of the respondent but had been employed by Kenyoro Farmers Co-operative Society Limited, that his dismissal from employment was in any event justified and finally that the suit was statute barred.

The learned magistrate having carefully evaluated the evidence on record, the pleadings as well as the respective written submissions came to the conclusion that the appellant had not proved his case on a balance of probabilities against the respondent. In the circumstances, he dismissed the suit with costs to the respondent.

That dismissal triggered this appeal. A total of 13 grounds were advanced in support of the appeal. These were:-

- “1. That the learned magistrate erred in law and infact when he gave judgment against the appellant and in favour of the respondent against the weight of the evidence on record.***
- 2. That the learned trial magistrate erred in law and infact when he held that the appellant was not an employee of the respondent herein who had actually given him the letter of appointment and/or employment which was never denied.***
- 3. That the trial magistrate erred both in law and in fact when he held that the appellant had been served with the dismissal letter when there was no proof that he was ever served with any letter of dismissal by the respondent who actually employed him.***
- 4. The Hon. learned magistrate erred in law and infact when he held that the two separate companies were one and the same as he held that the one could give a letter of employment/appointment and the other would dismiss when there was no evidence to the effect as no memorandum and articles of association of the two separate companies were produced to proof the same.***
- 5. That the learned trial magistrate erred in law and infact when he admitted secondary evidence of the respondent by admitting photo copies purportedly certified by the respondent itself when primary evidence could have been very much available with the respondent and no reasons were given as to why the primary evidence was not produced.***
- 6. That the learned trial magistrate erred both in law and infact when he admitted hearsay evidence that the respondent and Kenyoro farmers cooperative society limited were one and the same without looking at the articles and memorandum of association of the companies (the respondent and Kenyoro)***
- 7. That the learned trial magistrate erred in law and infact when he held that the appellant was present in a meeting which discussed his dismissal without any proof/signature of the appellant to proof that he attended the same.***
- 8. That the learned trial magistrate erred in law and in fact when he held that the appellant had been properly dismissed when the respondent admitted in its defence that the appellant was still under suspension which was a clear deviation from the trite law that a party is bound by his own pleadings.***
- 9. That the learned trial magistrate erred in law and in fact when he upheld the evidence by the respondent that the appellant was properly dismissed when he failed to appreciate as to what was the outcome of the investigation of events leading to the suspension of the appellant.***
- 10. That the learned trial magistrate erred in law and infact when he held that the appellant knew of the circumstances leading to his dismissal when there was no evidence to proof that the appellant had ever signed any paper and/or document connecting him to the transfer of the money. DW1 told the honourable court that there was no evidence the effect but the honourable magistrate held that the appellant is the one who misappropriated the alleged funds.***
- 11. The learned trial magistrate erred in law and in fact by not directing himself to the evidence by DW1 that DW1 himself was employed by the respondent as secretary manager.***
- 12. That the learned trial magistrate erred in law and infact by not considering the evidence in DMFI 5 which was a refund dated 12th December 1999 while the PH No.3 which was written on 19th November, 1999 long after the refund was made without the appellant’s knowledge***
- 13. That the learned trial magistrate erred in law and infact when he admitted all the defence exhibits which were all manufactured by the defendant and certified by the same without any authority or at all.....”.***

When the appeal came up for directions on 30th November, 2010, **Mr.Minda** and **Mr. Nyatundo**,

learned counsel for the appellant and respondent respectively agreed to canvass the appeal by way of written submissions. They subsequently filed and exchanged the same which I have read.

This is a first appeal. On the authority of among other decisions **Selle .v. Associated Motor boat Company Limited, (1968) EA 123** this court has the duty of re-evaluating the evidence, assess it and make its own conclusions without overlooking those of the trial court and also bearing in mind that unlike the trial court it neither saw nor heard the witnesses.

The facts in this appeal are really not in dispute. They are infact admitted. Those admitted facts are that Kenyoro is a Co-operative society and a member of the respondent. The appellant's name appears in the muster roll of Kenyoro, the appellant dishonestly and unlawfully appropriated to himself Kshs. 130,000/=. The appellant complained of his unlawful dismissal to the labour officer, Kisii, the appellant received a letter of dismissing him, all the correspondence from the respondent to the appellant was on respondent's letter head which also contains the names of all its affiliate primary society including Kenyoro. It thus appears that the respondent merely oversaw managerial duties for its affiliate primary societies which included the appellant's employer-Kenyoro.

The learned magistrate decision turned on whether or not the appellant was an employee of the respondent or Kenyoro Farmers Co-operative Society Limited. The trial court came to the conclusion based on the evidence on record and relevant documentation that indeed the appellant was an employee of Kenyoro as opposed to the respondent.

Having exhaustively re-evaluated and reconsidered the evidence on record, I do not think that the learned magistrate can be faulted for reaching that decision. The appellant's letter of appointment indicates that he had infact applied for employment to Kenyoro. He attended the interview by and at Kenyoro. In the letter of suspension, the respondent recommended to Kenyoro to sack the appellant. If indeed the appellant was an employee of the respondent why would it have recommended to Kenyoro to dismiss him from employment rather doing it itself. It could have sacked the appellant itself. It is quite clear to me that the appellant was an employee of Kenyoro which was an affiliate of the respondent and the respondent merely oversaw managerial duties over it. It is Kenyoro which ought to have been sued by the appellant for unlawful dismissal for it was the one and not the respondent which dismissed the appellant subsequent to the initial suspension. The muster roll from Kenyoro confirmed that the appellant was its employee. Even the appellant's own complaint to the District Labour office, Kisii suggests that he knew his employer to be Kenyoro and not the respondent.

I do not think that the appellant was truthful and candid. As correctly observed by the trial magistrate, the appellant appeared to deliberately withhold vital evidence from the court regarding the sequence of events leading to his dismissal. Indeed he even claimed that he had yet to be sacked. However, this assertion cannot be true because he did admit in his evidence under cross-examination that the sum of Kshs. 130,000/= was at the centre of the dispute. This is the money that he irregularly transferred to an unregistered coffee bank for purposes of buying shares for himself and his family. He even wrote a letter apologizing for the act aforesaid. The dismissal followed a meeting at Kenyoro and the appellant was in attendance. Pressed further he conceded that infact the respondent was justified in sacking him. Thus the appellant was clearly aware of not only his dismissal but also the circumstances leading to his dismissal.

The upshot of all the foregoing is that the appellant responded to a vacancy at Kenyoro. He sat for the interview thereat. Being successful he was employed and referred to the respondent in its administrative role over the said Kenyoro. It is this Kenyoro which ought to have been sued by the appellant. There is no suggestion that it was not a legal entity capable of suing or being sued. It bears no logic that the appellant would successfully make an application for employment to a particular body, attend its interview and then claim not to have been employed by such body. The issue of applying for employment to Kenyoro itself indicates clearly that it was Kenyoro that had advertised for the vacancy and was inviting candidates to apply and that is exactly what the appellant did. The address of the appellant was c/o Kenyoro Farmers Co-operative Society Limited suggesting that indeed Kenyoro was a legal entity. If the respondent was interested in employing the appellant why would it have required an affiliate society

to carry out interviews, application e.t.c. The appellant having applied, interviewed and finally dismissed by the Kenyoro cannot be said to have sued the respondent as the correct party. The respondent was wrongly sued therefore.

The appeal lacks merit. Accordingly it is dismissed with costs to the respondent.

Judgment dated, signed and delivered at Kisii this 31st March, 2011.

ASIKE-MAKHANIDIA
JUDGE