



**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI.**

**(Coram: Charles P. Chemmutut, J.**

**A.K. Kerich & S.M. Maithya, Members.)**

**CAUSE NO.6 OF 1999.**

**KENYA UNION OF COMMERCIAL, FOOD & ALLIED WORKERS.....Claimants.**

**v.**

**SHERIA CO-OPERATIVE SAVINGS & CREDIT SOCIETY LTD.....Respondents.**

**Issue in Dispute:**

**“Dismissal of Joseph Rwamba Mureithi” (hereinfter called the grievant).**

Agapio Muriuki for the Claimants (hereinafter called the Union).

M. Onyango (Mrs.), Executive Officer, F.K.E., for the Respondents (hereinafter called the Society).

**A W A R D.**

The Notification of Dispute, Form ‘A’, dated 25<sup>th</sup> May, 1998, together with the statutory certificates from the Labour Commissioner and the Minister for Labour under Section 14(9)(e) and (f) of the Trade Disputes Act, Cap.234, Laws of Kenya (which is hereinafter referred to as the Act), were received by the Court on 1<sup>st</sup> February, 1999. Mr. Muriuki submitted his memorandum on 17<sup>th</sup> March, 1999, while Mrs. Onyango filed her reply statement on or about 7<sup>th</sup> May, 1999; and the dispute was heard on 13<sup>th</sup> July, 1999.

The parties have a valid recognition agreement and have also entered into several collective agreements which regulate the terms and conditions of service of the unionisable employees. Admittedly, the grievant was employed by the Society on 15<sup>th</sup> July, 1992 as an Accounts Clerk, and his duties were, among others, to effect recoveries of loan repayments and to collect shares from members. According to Mrs. Onyango, the grievant was warned twice, i.e. on 26<sup>th</sup> September 1994 and on 21<sup>st</sup> April, 1995, for unsatisfactory performance of work, and on 2<sup>nd</sup> May, 1995 he was suspended from duty for engaging in fraudulent activities. The letter of suspension reads *in extenso* as follows:-

**‘RE: SUSPENSION:**

1. You are no wonder aware of a syndicate involving our former Accountant/Manager Mr. Thiongo, which has frauded (read defrauded) society funds.
2. On 19<sup>th</sup> April 1995, Mr. Thiongo sent you a note through one Serah Ndirangu in which he implicated you in the syndicate, you are no doubt that all along you have been a strong member of the “Society Funds Fraud Syndicate” through you so called

“School of thought” (copy of the note attached).

3. Indeed on 21<sup>st</sup> April 1995, the Central Bank Anti-Fraud Police picked you for questioning in respect of your “School of thought to fraud society funds. You were questioned until Tuesday the 24<sup>th</sup> April 1995, when you were released. Surprisingly, you did not report on Duty on 26<sup>th</sup> and 27<sup>th</sup> April 1995.

4. Because of the foregoing, the Central Management Committee at its Meeting held on 27<sup>th</sup> April 1995 directed that you be suspended from duty immediately. During the period of suspension you will not visit our society office without express authority from the Hon. Treasurer. You will be expected to report to Hon. Treasurer every Wednesday 9.00 a.m. in Room 82 High Court Building Nairobi.

Yours faithfully.

(sigd.)

SILLAS P.N. BWIRE

HON. SECRETARY.’

In his reply thereto the following day, i.e. on 3<sup>rd</sup> May, 1995, the grievant vehemently denied the alleged fraud against him (see Union Apps. 1,2,3 and 4). He was, however, summarily dismissed from employment on 5<sup>th</sup> July, 1995 for “gross negligence in failing to ensure recoveries of members’ loans” and poor work performance. The letter of summary dismissal reads in full as hereunder:-

‘RE: SUMMARY DISMISSAL.

We refer to our letter SCSCS/2014 dated 2.5.95 suspending your from Duty and your subsequent replies on the same dated 2.5.95 and 3.5.95.

The subject was brought up at the Central Management Committee Meeting of 29<sup>th</sup> June 1995 with a view of determining your future employment with the society. Having considered your explanation, the Central Management Committee found you guilty of gross negligence in failing to ensure recoveries of members loans.

Arising from the foregoing, its the decision of the Central Management Committee that you be summarily dismissed with effect from 27.4.95.

By a copy of this letter the Hon. Treasurer is requested to calculate your April 1995 dues less any liabilities owed by you with the Society. Its unfortunate that your work performance has been below expected standards hence this action however, we wish you all the best in your future endeavours elsewhere.

Yours faithfully.

(Sigd)

SILLAS P.N. BWIRE

HON. SECRETARY.’

The Union approached the Society for an amicable settlement of the matter, but no compromise was reached. On 11<sup>th</sup> August, 1995, the Union reported a formal trade dispute to the Minister for Labour and Human Resource Development in accordance with Section 4 of the Act. The Minister accepted the dispute and appointed Mr. P.N. Wamoto of Nairobi Central Labour Office to act as the Investigator; and, on the basis of his investigation, the Minister released his report to the parties on 27<sup>th</sup> February, 1998, wherein he found and recommended as follows:-

‘FINDINGS.

..... there is no dispute as to the time Mr. Mureithi was employed nor about his duties with the society. He had a relatively clean employment record with only one warning for failing to feed a member's loan. This however had lapsed for purposes of this dispute.

..... Mr. Mureithi was picked for interrogation by officers of the Central Bank of Kenya Anti-fraud Unit on suspicion that he was involved in a fraud syndicate. The officers set him free for lack of evidence. Those involved in the syndicate namely the Manager, Accountant and another person were arraigned in Court and subsequently convicted.

..... though initially suspended for being part of the syndicate, police investigators cleared his name and apprehended the culprits. This ought to have been sufficient reason to lift the suspension. Surprisingly the management's dismissal was based on an alleged negligence of duty. They however failed to show the alleged negligence and in any case this would have warranted at most a warning letter. In view of the above, the dismissal was found to be wrongful as it was not based on good faith.

#### RECOMMENDATION.

..... Mr. Mureithi's dismissal was harsh and ought to be set aside. I therefore recommend that it be reduced to normal termination and he be paid all terminal dues to in accordance with the parties Collective Bargaining Agreement and an additional four months compensation for suffering a wrongful dismissal.'

The Minister finally appealed to the parties to accept the recommendation as a basis of settlement of this matter. The Union accepted the recommendation, but the Society rejected it on the ground that the findings and the recommendation were biased.

Mr. Muriuki submitted that the grievant was simply implicated because Mr. Thiong'o wrote a letter, through Serah Ndirangu, with the words "school of thought". He was picked up on suspicion of involvement with a fraud syndicate and interrogated by the Central Bank Anti-Fraud police, but there was no evidence to implicate or connect him with the so-called "syndicate". Hence he was released to resume his duties. Mr. Muriuki maintained that the grievant did not commit any offence worth the name to warrant a summary dismissal.

For these reasons, Mr. Muriuki prayed that an award be made or entered in terms of the Minister's recommendation.

In reply, Mrs. Onyango submitted that the function of the Society is to mobilise savings from and to give loans to its members; and, in order to achieve its objectives and keep its members, it must be capable to efficiently disburse and to recover loans from its members. Therefore, the nature of its operations requires committed, trustworthy and diligent staff. She averred that in a period of two years and nine months when the grievant was employed by the Society, he was surcharged on 20<sup>th</sup> September, 1994 for gross negligence of duty in occasioning loss of income to it by failing to feed members' loans; and he was subsequently suspended for suspicion of fraudulent activities against funds of the Society. Thus, in view of his bad record, the grievant was unable to carry out his duties as an Accounts Clerk and his activities were inconsistent with the work he was employed to do. The grievant also violated the terms of his suspension because he visited the Society's offices on several occasions against para.4 of the conditions of his suspension.

Mrs. Onyango submitted further that although the grievant was arrested for interrogation in connection with fraudulent activities and subsequently released, the cause of his dismissal was not due to the arrest but due to his gross negligence of duty which cost the Society huge sums of money in lost interest, as well as embarrassment and the inconvenience caused to it and the members by his actions and failure to recover loans in time. The Society was, therefore, justified in summarily dismissing him from employment as he was guilty of gross misconduct.

In the circumstances, Mrs. Onyango prayed that the demand by the Union be rejected and the action or decision taken against the grievant by the Society be upheld.

The short question that arises for determination is whether the summary dismissal of the grievant as aforesaid was justified; and if not, what relief, if any, is he entitled to. The grievant was suspended as aforesaid on account of fraudulent activities, but he was summarily dismissed from service on 5<sup>th</sup> July 1995, with retrospective effect from 27<sup>th</sup> April 1995, for a totally and entirely different offence, i.e. "gross negligence in failing to ensure recoveries of members' loans", for which he was not suspended or given an opportunity to meet the charge or defend himself or be heard.

The two ingredients of fraud are deceit and actual or possible injury by infringement of some legal right. Thus, the expression "defraud", involves two elements, namely, deceit and injury to the person deceived. The charge of fraud is, therefore, inherently a very serious charge, irrespective of the fact whether as a result of the charge the employee is likely to gain very small or large amount. The gravity lay in the very nature of the charge.

It is an elementary principle of law that when fraud or forgery is alleged, complete particulars or full facts must be given. It is no use or excuse to say that 'You are aware of a syndicate.....which has frauded society funds' or '..... he implicated you in the syndicate' or....'you have been a strong member of the "Society Funds Fraud Syndicate"' e.t.c., without giving the particulars of the fraud. As stated hereinabove, the Society suspended the grievant for involvement in fraudulent activities, particulars of which were not given, while in its letter of summary dismissal, he was accused of negligence, for which he was not suspended or given an opportunity to be heard or defend himself. In the circumstances, the grievant was placed in a very difficult situation in which it was impossible for him to make out any defence or to know which charge he was facing.

The rule of *audi alteram partem* (no man shall be condemned unheard), which is one of the elementary justice, only requires that a man shall not be subject to final judgment or to punishment without an opportunity of being heard. It is, therefore, clear that the summary dismissal of the grievant was wrongful, perverse, vindictive and capricious because he was punished for an offence, without being accorded an opportunity to meet it or defend himself.

Accordingly, I uphold the Minister's recommendation, and order that the grievant be paid his terminal dues pursuant to the terms of the collective agreement between the parties in force at the material time.

I sought or consulted, considered and accepted the advice or opinion of the Members of the Court in coming to this decision.

**DATED** and delivered and signed at Nairobi this 5<sup>th</sup> day of August, 2004.

Charles P. Chemmutut,

**JUDGE.**