



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**  
**AT NAIROBI.**

(Coram: Charles P. Chemmutut, J.,

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

**CAUSE NO.72 OF 1998.**

**TRANSPORT & ALLIED WORKERS' UNION.....Claimants.**

- v -

**KENYA AIRWAYS LTD.....Respondents.**

**Issue in Dispute:-**

**“Dismissal of Ms. Philis Nyawira Karoki” (hereinafter called the grievant).**

**Simon Mbusia for the Claimants (hereinafter called the Union).**

**Kiragu Kimani, Advocate, of Hamilton, Harrison & Mathews, Advocates, for the Respondents (hereinafter called the Company).**

**A W A R D.**

On 1<sup>st</sup> July, 1998 the Minister for Labour referred this dispute to the Court for consideration and determination under powers vested in him by Section 8 of the Trade Disputes Act, Cap.234, Laws of Kenya (which is hereinafter referred to as the Act); and his reference, together with the statutory certificates from the Labour Commissioner and the Minister himself under Section 14, subsection (9)(e) and (f) of the Act, were received by the Court on 3<sup>rd</sup> July, 1998. The dispute was then listed for mention on 15<sup>th</sup> July 1998, when Mr. Mbusia and Mr. John Tito, who appeared for the parties respectively, were directed to submit or file their respective written memoranda or statements on or before 31<sup>st</sup> July and 14<sup>th</sup> August, 1998, and the dispute was fixed for hearing on 22<sup>nd</sup> September, 1998. The Union belatedly submitted their memorandum on 3<sup>rd</sup> August, 1998. On 22<sup>nd</sup> September 1998, the learned counsel for the Company, Mr. Kimani, applied for adjournment of the dispute on the ground that he received instructions while proceeding on annual leave; and in the circumstances, the reply statement was not ready but the same would be filed in a week. Despite objection by Mr. Mbusia for the Union, the application for adjournment was granted and the dispute was rescheduled for hearing on 9<sup>th</sup> March 1999. Meanwhile, the Company filed their reply statement

on 28<sup>th</sup> September 1998. The case was heard on 9<sup>th</sup> March, 28<sup>th</sup> July, 16<sup>th</sup> September 1999, 14<sup>th</sup> April, and 29<sup>th</sup> May 2000, and final submissions were made on 21<sup>st</sup> July, 2000. The Union called the grievant (C.W.I) to testify on her own behalf, while the Company examined Messrs. Henry Ambundo (R.W.I), Calleb Ochieng (R.W.2) and Daniel Mutichiro (R.W.3).

Admittedly, the grievant was employed by the Company as a cleaner on 1<sup>st</sup> August, 1988, and was confirmed as such on 1<sup>st</sup> November, 1988 (Union App.A). She was later promoted to a Cabin Grooming Assistant, whose duties included ensuring that the aircrafts were safe and clean, loading and off-loading cabin operational materials or items and ensuring that any unused materials or items were off-loaded and prepared for re-use, e.t.c.?? She was summarily dismissed from employment on 13<sup>th</sup> November, 1995 allegedly for converting Company property into personal use without authority (Union App.C). The letter of summary dismissal reads *in extenso* as follows:-

“RE: SUMMARY DISMISSAL.

Following the incident of 7<sup>th</sup> November, 1995 whereby you converted Company property into personal use without authority, it has been decided that you be summarily dismissed from the services of the Company with effect from 13<sup>th</sup> November, 1995. Upon the normal clearance from the Company, you will be paid the following:-

1. Salary and allowances upto and including 13<sup>th</sup> November, 1995.
2. Your 8 days earned leave as at 13<sup>th</sup> November, 1995.
3. Your own contribution to the provident fund in accordance with the rules of the schemes.

(Sigd.)

OLTETIA ole SAPAI

MANAGER PERSONNEL SERVICES.”

The parties attempted to resolve the matter at their own level but failed. Consequently, the Union reported a trade dispute to the Minister for Labour, who took cognisance of the dispute and appointed Mrs. B.W. Mwai of Ministry of Labour Headquarters to act as the Investigator. On the basis of the investigation report, which was released to the parties on 3<sup>rd</sup> April, 1997, the Minister found, *inter alia*, that the two (the grievant and a colleague, Mrs. Risper Sarah Oduba, who is not a party to this case) put the items in a Kenya Airways carrier bags but not in their personal bags and then headed towards the Catering Office, Unit 3, and, therefore, they had, not taken them outside their working premises; that though forbidden most of the staff do remove items on board aircrafts and use them in the offices, and that, although the grievant had contravened company staff rules, the decision to dismiss her from service was extremely harsh, considering that she had served the Company for 8 years with a clean or unblemished record. The Minister, therefore, recommended that the dismissal be set aside and the grievant be reinstated to her former position with a warning letter.

Finally, the Minister appealed to the parties to accept the recommendation as a basis of settlement of this dispute (Union App.D.). The Union accepted the recommendation, but it would appear that the Company rejected it. Hence this dispute for consideration and determination.

It is common ground that on 7<sup>th</sup> November, 1995, the grievant and her colleague, Mrs. Risper Sarah Oduba, were assigned to clean aircraft, KQ, 103, and in the process of their duties they collected assorted items, i.e. cans of fanta sodas, pieces of lux soaps, packets of tea leaves, pieces of sweets, apple, a set of tooth picks, tins of Nescafe coffee and tissue papers. They put them in Kenya Airways plastic bags; and while on their way to the Catering Office in Unit 3, they met the Security Officer, Mr. Joel Ndambuki, on the apron who allegedly asked them to give him some sugar, tea leaves and coffee for use in the Security Office. The ladies declined on the ground that they were taking the items to the Catering Office for safe keeping. Having failed to get what he wanted, the Security Officer accused the ladies of theft of the items, and consequently took them to the Senior Security Officer, Mr. Calleb Ochieng to record their statements. It is alleged that a Security Officer, Mr. Karanja, wrote the statements on their behalf and forced them to sign, without giving them an opportunity read the same.

Mr. Mbusia laid emphasis on the internal memo, dated 9<sup>th</sup> November 1995, from the Head of Inflight Services, Mrs. Susan A. Macharia, to the Manager Personnel Services, Mr. Oltetia ole Sapai (Union App.E.), and argued that the grievant neither stole nor converted, but only removed the assorted items from the aircraft, KQ 103, with authority, for safe keeping in the Catering Office. He contended that the alleged misconduct of theft of assorted items constituted a criminal offence, and since the matter

was not reported to the Airport Police nor the grievant taken to Court for criminal proceedings against her, the summary dismissal was, therefore, wrongful and amounted to victimisation of the grievant. Mr. Mbusia wondered why the Security Officer, Mr. Karanja, had to write a statement for the grievant (Union App.B.), contrary to a circular, titled “ Disciplinary Procedure”, which was issued on 3<sup>rd</sup> May 1994 by the Head of Personnel and Manpower Development to all Managers, wherein he directed them, *inter alia*, to “obtain statement from the affected staff (accused)” in matters of disciplinary procedure (Union App.F.). In the circumstances, he submitted, Mr. Karanja doctored the grievant’s statement, and for this reason Mr. Mbusia urged the Court to find that the decision to dismiss the grievant was too harsh in view of the fact that she had worked for the Company with a clean or unblemished record for 8 years.

In her testimony, the grievant (C.W.I) vehemently and persistently denied that she intended to steal or convert the items for her personal use, but only to take them to the Catering Officer in Unit 3 for safe keeping. She also complained that she was denied an opportunity to write her own statement while at the Security Office, and that she was not even allowed to read the hand-written statement by Mr. Karanja at the time of signing it.

Mr. Mbusia finally prayed that the Minister’s findings and recommendation be upheld.

In reply, the learned counsel for the Company, Mr. Kimani, resisted the demand on the grounds (i) that the grievant removed the items from the aircraft without permission or authority, (ii) that she voluntarily admitted in her statement having stolen the said items, (iii) that she violated the Company’s staff rules and the collective agreement between the parties, and (iv) that her appeal against her summary dismissal was found unsatisfactory.

In a nutshell, the witnesses for the Company deponed in their affidavits and oral evidence that the grievant and her colleague, Mrs. Risper Sarah Oduba, were, in terms of their duties, only required to clean the interior of the aircraft and dress it for the next flight, while the employees of NAS were responsible for loading and off-loading of any consumables. Mr. Henry Ambundo (R.W.I.) said that on that particular shift the grievant and her said colleague were only required to collect the headphones from the first class cabin and they ought not to have removed the items out of the aircraft. He stated further that the ladies admitted having removed the items from the aircraft and apologised for doing so. Mr. Calleb Ochieng (R.W.2) testified that on 7<sup>th</sup> November 1995, at about 10.00 a.m., the Security Officer, Mr. Joel Ndambuki, took to him the grievant and Mrs. Risper Sarah Oduba, who were carrying two Kenya Airways plastic bags containing the said items; and on enquiry in the presence of their supervisor, Mr. Mutichiro, (R.W.3), they admitted that they removed the items from the aircraft, and were taking them to the office for their own use. He requested Mr. Laban Karanja to record their statements and that no threats were used on them to obtain the same. Mr. Ochieng stated further that the grievant and her said colleague admitted that they had made a mistake by removing the items and apologised. On security, he said that it would have been possible to get the items out of the airport because security was quite lax. Mr. Daniel Mutichiro (R.W.3) deponed that on the material day, i.e. 7<sup>th</sup> November 1995, at about 9.00 a.m., Mr. Ochieng (R.W.2) called him to his office where he found both the grievant and her colleague, Mrs. Risper Sarah Oduba, recording their statements on the matter. He was shown the said items, which were found in their possession, and on enquiry as to how they came to possess them, they admitted that they removed them from the aircraft and asked for pardon.

In the circumstances, Mr. Kimani urged the Court to find that the reasons for the grievant’s summary dismissal were valid and justified, and that the Company did not resort to unfair labour practice or victimisation when they decided to dismiss her. He, therefore, prayed that the dispute be dismissed.

There is no dispute in this case that on 7<sup>th</sup> November 1995, the grievant and her colleague, Mrs. Risper Sarah Oduba, removed the said items from the aircraft, KQ 103, and the only question for consideration is whether they intended to steal or convert the same to their own use as alleged, or whether they intended to take them to the Catering Office in Unit 3 for safe keeping. It is clear that when the grievant and her colleague were on their way from the aircraft to the Catering Office, they were confronted by

Mr. Joel Ndambuki on the apron, who arrested and took them to Mr. Calleb Ochieng (R.W.2) for further action; and in her statement which was recorded by Mr. Laban Karanja, the grievant stated, *inter alia*, as follows:-

“..... while on board I picked and removed the following items without permission of anybody for my own use

..... I put them in a K/Airways polythene paperbag.

When I was taking them away into our office to use them I was confronted by security of K/Airways. He told me that I have done wrong to do that. I agreed; I have done wrong and asked the security personnel to forgive me. He told me that before he forgives me he had to take me before his immediate boss of which he did.....”.

From the foregoing, the grievant did not categorically and specifically admit that she had stolen or converted the items to her own use, and the apology did not amount to unequivocal admission of theft or conversion. There were two possibilities: one possibility was that the grievant and her colleague, Mrs. Risper Sarah Oduba, would have taken the items to the Catering Office for safe keeping, and the other possibility was that they would have stolen or converted them to their own use. As both positions were equally possible, the position favourable to the grievant should have been followed. The grievant and her friend were intercepted by Mr. Ndambuki on the apron; and as the offence had not been completed, it can only be said in the circumstances that they probably had an intention either to steal or convert the items to their own use. But in law an intention to commit an offence *per se* does not amount to misconduct unless the offence is committed completely. I have, therefore, no doubt in my mind that, on the assessment of the evidence and the facts on the record, this was not a fit case to hold the grievant guilty of the alleged offence.

The grievant was summarily dismissed from employment seven (7) years ago; and this being the case, coupled with the uncordial relations between her and the management of the Company, I am unable to reinstate the grievant to her former job as recommended by the Minister for Labour. But in my considered view, however, the grievant is entitled to normal termination of service, with full terminal benefits and compensation for loss of employment.

Accordingly, I AWARD and ORDER that the summary dismissal of the grievant be reduced to normal termination of service and she be paid all her terminal benefits, including her own and the Company's contributions to the Provident Fund Scheme, in terms of the parties' collective agreement in force at the material time. In addition, the grievant be paid compensation equivalent to twelve (12) months' salary for loss of employment, based on her last salary when she was summarily dismissed from employment.

Both members of the Court are in full agreement with this decision.

**DATED** and delivered at Nairobi this 9<sup>th</sup> day of October, 2002.

Charles P. Chemmutter,

**JUDGE.**