



**IN THE COURT OF APPEAL**

**AT NYERI**

**SITTING IN NAKURU**

**(CORAM: G.B.M. KARIUKI, SICHALE & KANTAI, JJ.A.)**

**CIVIL APPEAL NO. 355 OF 2013**

**BETWEEN**

**MOSES KAUNDA VERNON ..... APPELLANT**

**VERSUS**

**SIMA CO-OPERATIVE SAVINGS &**

**CREDIT SOCIETY LIMITED.....RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Nakuru (Byram Ongaya, J.) dated 26<sup>th</sup> July, 2013*

**in**

**Industrial Cause No. 176 of 2013)**

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**JUDGMENT OF THE COURT**

The appellant **Moses Kaunda Vernon**, was employed by the respondent, **Sima Co-operative Savings & Credit Society Limited** as its manager on 28<sup>th</sup> June, 2003. Terms and conditions of service were contained in a document called “Terms and Conditions of Service” signed by the appellant on the date of appointment. He worked in that capacity but his employment was suspended by a letter dated 26<sup>th</sup> July, 2012 because it was alleged that he had misappropriated funds amounting to Shs.178,200/= belonging to the respondent. Disciplinary proceedings followed and the respondent having found the appellant guilty of misappropriation of funds and breaching a loan policy which it was his duty to manage and implement terminated his services by a letter of 20<sup>th</sup> May, 2013.

Those are the background facts that led to the litigation that was filed at the Industrial Court of Kenya at Nakuru in **Cause No. 176 of 2013**. The appellant prayed in that cause for that court to find that the termination of his employment was unfair; that the respondent be ordered to reinstate him to his position as manager; that the respondent be stopped from acting on the termination letter and in the alternative that the appellant be paid all his benefits together with compensation for unfair termination of employment. The respondent denied the claim through a Memorandum of Defence filed in that court.

A hearing took place before **Byram Ongaya, J.** who in a judgment delivered on 26<sup>th</sup> July, 2003 found that termination of employment was proper and the claim was dismissed. That is what has provoked this appeal based on five grounds of appeal contained in the Memorandum of Appeal drawn by the appellant's lawyers **M/S Kiplenge and Kurgat Advocates.**

In sum the appellant is dissatisfied with the lower court's judgment because according to him his case had been proved to the required standards; that the evidence produced was sufficient to enable the trial Judge to reach a different finding; that the learned Judge erred in holding that the appellant had admitted the charges that were levelled against him; that the learned Judge erred in not finding that the appellant's dismissal was unfair and contrary to the Employment Act and finally that the learned Judge erred in law in finding that the appellant's dismissal was fair which is contrary to the evidence produced as well as provisions of law. We are therefore asked to set aside that judgment and make an order for the appellant to be reinstated to his former employment or in the alternative that the appellant be paid damages for unlawful dismissal.

The appeal came up for hearing before us on 25<sup>th</sup> April, 2017 when **Mr. Biko**, learned counsel, appeared for the appellant while learned counsel **Miss Jenniffer Wachira** appeared for the respondent. Mr. Biko submitted that the appellant was exonerated on allegations of misappropriation of funds. According to learned counsel in view of that finding the original suspension should have been lifted and no other allegation could have been made against the appellant. Mr. Biko further submitted that the reasons given in the termination letter were different from the reasons given in the suspension letter and that it was contrary to law for the respondent to terminate the appellant's employment on allegations of certain breaches of the appellant's duties discovered when he was on suspension.

Ms. Wachira for the respondent in opposing the appeal submitted that the respondent had proper reasons to terminate the appellant's employment. Learned counsel submitted that the respondent had followed the relevant disciplinary processes and that breaches of a loan policy had been found and this entitled the respondent to terminate the appellant's employment. Learned counsel cited various case law and asked us not to interfere with the discretion of the trial Judge who had the advantage of hearing the case and seeing the witnesses to reach the decision that he did. Learned counsel also thought that the Memorandum of Claim had no specific prayers that should have been granted and for all this we should dismiss the appeal.

In a brief reply Mr. Biko thought that the issue was not whether disciplinary processes took place but that after the original allegation was found to be incorrect the respondent could not terminate the employment of the appellant for any other reason. According to counsel there was a wrong committed by the respondent and the appellant was entitled to a remedy.

We have considered the whole record, submissions made and the law and have taken the following view of this appeal.

The appellant testified before the trial Judge and so did the Chairman of the respondent.

The letter of 25<sup>th</sup> July, 2012 suspending the appellant from employment stated amongst other things that the appellant's employment was being suspended because there were concerns relating to a cheque for Shs.178,200/= which had been signed by the relevant signatories but the payee had been left blank and it was supposed to be for a certain purpose but that the relevant officers of the respondent had instructed the appellant not to bank the same. Contrary to this instruction the appellant endorsed his name on the cheque, banked it and drew the funds which he applied to various activities. The respondent was then to investigate this issue through its disciplinary committee. The appellant was summoned to a meeting on 11<sup>th</sup> May, 2013 where he was asked to defend himself on the issue of the said cheque. Between the time of his suspension and that meeting various other issues had been discovered as related to the appellant's employment. The appellant was heard at that meeting and on the allegation of misuse of his office as regards the cheque he banked and drew the funds without authority the committee found that this was an act of fraud. There was another allegation of a double withdrawal of some money amounting to Shs.26,000/= and it was found by that committee that the appellant had committed fraud by taking that money and using it himself. It was also found that the appellant had misused his office by advancing

himself loans beyond an agreed maximum and that the appellant had not provided security for the same and that he had also used his office to advance various employees of the respondent loans which they were either not entitled to or exceeded their maximum limits or were advanced without relevant security. It was therefore found by the committee that the appellant was unfit to continue in his office and his services were terminated. The learned trial Judge considered those facts and he considered the evidence tendered by the appellant and that of the respondent and he reached the decision that we have already stated.

We are conscious of our duty as a first appellate court to reconsider the evidence, to re-analyse the same so as to reach our own conclusions and drawing our own inferences of facts. We do so conscious that we have not had the advantage the trial Judge had of hearing and observing the witnesses as they testified. We must therefore give the learned Judge's conclusions a measure of respect but are at liberty to depart from the learned Judge's findings if the evidence on the whole compels us to reach a different conclusion – see **rule 29** of the **Court of Appeal Rules** and for a judicial enunciation of the principles governing the role of a first appellate court - see the celebrated case of **Selle v Associated Motor Boat Company Limited and Others [1968] E.A. 123.**

As we have already stated the letter of suspension stated that there were concerns about a cheque which the appellant had received but which he was told not to bank but that he had contrary to instructions entered his name as payee and drew funds on the same. In a notice to show cause that followed dated 5<sup>th</sup> May, 2013 the appellant was informed that disciplinary measures were being considered which may lead to termination of employment and the grounds for the same were stated to be involvement in fraud involved in the said cheque; secondly double withdrawal of a sum of Shs.26,000/= and drawing Shs.29,000/= for petty cash; colluding with another employee to apply for school fees in the name of a person who was not entitled to the same and unapproved salary advances to various persons including himself. It was also stated that the appellant had contravened a loaning policy by approving loans more than the maximum allowed. He was therefore asked to show cause why his services should not be terminated.

At the subsequent management committee meeting which was held on 11<sup>th</sup> May, 2013 the appellant attended and was given an opportunity to defend himself. The committee heard the case put up by the appellant and found him guilty of all the allegations that had been laid against him. His services were subsequently terminated on 11<sup>th</sup> of May, 2013 where it was stated that he would receive amongst other entitlements two months salary in lieu of notice. The learned Judge analyzed that evidence and found that the appellant had himself admitted that he had breached the loaning policy by awarding to himself loans beyond his entitlement and also giving loans to other employees as we have already stated beyond their entitlement. The learned Judge found that rules of natural justice were followed because the appellant was accorded an opportunity to defend himself. The learned Judge therefore found that the only breach that the respondent committed was to suspend the appellant from employment on 25<sup>th</sup> July, 2012 and not resolve the issue until termination that took place vide the letter of termination on 5<sup>th</sup> of May, 2013. The learned Judge was not happy that the matter took so long to resolve and ordered that the appellant be paid salary for the period that he was on suspension up to the date of termination of employment. Apart from that the learned Judge found that the respondent was entitled to terminate the appellant from employment.

We have considered the way the learned Judge dealt with the facts that were presented before him and are of the considered view that the learned Judge cannot be faulted for the conclusions that he made. The respondent was entitled after suspending the appellant to conduct further investigations and to act on what was unearthed by those investigations. The respondent in carrying out those investigations discovered that the appellant had misused his office to award himself loans which he was not entitled to and for which he did not provide any or any sufficient security. The investigations also revealed that the appellant as manager of the respondent instead of carrying out his duties as required had abused his office by advancing loans to employees who were not entitled to those loans or awarding to those employees loans beyond the maximum amount allowed. The appellant was recalled and asked in a show cause letter to explain why he had not carried out his duties as required. At the meeting which was attended by various persons including an officer from the Ministry of Co-operatives the appellant was asked to

explain his conduct and why his services should not be terminated. The explanations he gave were found to be unsatisfactory and the committee resolved to terminate his services. Due process was followed all along. The decision to terminate the appellant from employment was made on valid grounds and the learned Judge was right to dismiss the claim. We can see no merit in this appeal which we accordingly dismiss with costs to the respondent.

**Dated and Delivered at Nakuru this 31<sup>st</sup> day of May, 2017.**

**G.B.M. KARIUKI SC**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original*

**DEPUTY REGISTRAR**