



**IN THE COURT OF APPEAL**

**AT NYERI**

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

**CIVIL APPEAL NO. 91 OF 2016**

**BETWEEN**

**PITYNASE MUTHONI KIRIGU.....APPELLANT**

**AND**

**THE BOARD OF MANAGEMENT, CHOGORIA**

**GIRLS' BOARDING PRIMARY SCHOOL.....RESPONDENT**

***(An appeal from the Judgment of the Employment & Labour Relations***

***Court of Kenya at Nyeri (Ongaya, J.) dated 14<sup>th</sup> October, 2016***

***in***

***E.L.R.C. Cause No. 326 of 2014)***

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**JUDGMENT OF THE COURT**

The appellant, Pitynase Muthoni Kirigu, was employed as an Account's Clerk by the respondent, The Board of Management, Chogoria Girls' Boarding Primary School in 1987. She worked in that capacity until 2013 when she was suspended from employment. This was after an audit was carried out by the School's Audit Unit of the Ministry of Education, Science and Technology which found that a sum of Kshs. 1,188,679/- had been misappropriated and stolen from the school's accounts. The Board of the respondent summoned the appellant and her colleague, one Nanise Kaari, to a meeting on 14<sup>th</sup> March, 2013. It had been found that the appellant and her said colleague had illegally printed Receipt Books which they used to misappropriate school funds. Summoned to that meeting and as shown in Minutes recorded by the Principal of the school, Mrs. Florence Kimathi, and confirmed by the chairman, the appellant and her colleague readily admitted stealing the money, begged for forgiveness and requested to be allowed to continue in employment and be allowed ten years to pay the stolen money.

In a letter of the said date (14<sup>th</sup> March, 2013) addressed to the Board of the respondent, the appellant admitted that she had stolen the money and agreed to pay half of the sum and requested to be allowed to pay the same in ten years time. When she was unable to pay the said amount, the Board of the respondent dismissed her from employment summarily.

In an amended Statement of Claim filed at the Employment and Labour Relations Court at Nyeri, the appellant stated in the material part that she had been employed by the respondent; that she had been sent on compulsory leave by a letter dated 17<sup>th</sup> January, 2013; that she was suspended from employment by a letter dated 4<sup>th</sup> April, 2013 on allegations that she should pay a sum of kshs 594,339.50 which she said she had not stolen; that but she had not since been paid her salary; that the respondent acted contrary to the law in dismissing her from employment and made various prayers in the said statement of claim.

The respondent filed a defence and counterclaim. It was stated in that defence that the appellant had defrauded the respondent of money which she had admitted stealing and requested to be allowed to pay back; that the appellant had been given an opportunity to pay back but had not done so and therefore, her services had been summarily terminated. The respondent in the counterclaim asked for judgment for the said sum of 594,339.50.

The matter was heard by Byram Ongaya, J., who in a judgment delivered on 14<sup>th</sup> October, 2016 found the claim to have no merit, dismissed it and entered judgment for the respondent as per the counterclaim. Those findings provoked this appeal in which 7 grounds of appeal are set out in the Memorandum of Appeal drawn for the appellant by her Advocates M/s Mugambi and Company. The first ground was abandoned at the hearing of the appeal. The rest of the grounds fault the learned trial Judge for finding that the appellant's employment was constructively terminated; that the learned Judge erred in finding that the said termination was not unfair; that the learned trial Judge erred in not finding in favour of the appellant on the grounds set out in the prayers in the memorandum of claim and that the learned Judge erred in entering judgment for the respondent on the counterclaim; and that the learned Judge based his findings on issues not supported by evidence.

Learned counsel Mr. S. Nzaku, appeared for the appellant at the hearing of the appeal while learned counsel Mr. Kiautha Arithi, appeared for the respondent. Both parties had filed written statements and at the said hearing, learned counsel highlighted the same. According to Mr. Nzaku the respondent breached procedure in terminating the appellant's employment where no misconduct had been proved. According to counsel, the appellant did not receive the letter dismissing her from employment, and that this issue had not been considered by the learned trial Judge.

Mr. Arithi for the respondent in opposing the appeal supported the learned trial Judge for finding that termination was constructive after the appellant failed to pay the money that she had undertaken to pay. Learned counsel also submitted that the learned trial Judge was entitled to enter judgment on the counterclaim as the sum claimed had been admitted by the appellant.

We have considered the record of appeal, the submissions made and the law and have taken the following view in this rather straightforward matter. In evidence before the learned trial Judge, the appellant denied authoring the letter dated 14<sup>th</sup> March, 2013 where there was admission of fraud. We have looked at that letter. It is handwritten and bears a signature and a national identification number. The appellant admitted that the national identification number on the letter was her identification card. In other parts of the evidence and in cross-examination, the appellant changed her story and admitted having authored the letter but claimed that she did so under duress of Board Members of the respondent.

The Minutes of the Executive Meeting of the respondent held on 14<sup>th</sup> March, 2013 which was attended by the appellant and her colleague Nanise Kaari on invitation by the Board, both the appellant and her colleague are reported verbatim to have readily admitted stealing the money, asking for forgiveness, and offering to pay half the stolen amount each. The learned trial Judge examined that evidence and the said letter which amounted to a confession and accepted that the appellant had readily admitted stealing the money from the respondent.

The learned trial Judge did not err in that finding. The totality of that evidence showed that the appellant and her colleague had printed illegal Receipt Books which they used to collect money on behalf of the respondent which money they converted to their own use. The respondent's witnesses who testified before the learned trial Judge stated *inter alia* that the respondent, a school, was run on strict Christian values

and that this was the sole reason why the respondent did not report the matter to the police but instead allowed the appellant and her colleague an opportunity to repay the stolen money. The appellant did not repay and it was the evidence of the Principal of the respondent, Mrs. Kimathi, that at the time of hearing, Nanise Kaari was repaying her part of the money but that the appellant had not repaid any part of the money despite being given an opportunity to do so at her own request.

The appellant is lucky that the respondent did not report the matter to the police as it would appear that there was overwhelming evidence against the appellant that would have led to a conviction in court.

The appellant stole money from her employer, the respondent. This was an act of gross misconduct and the respondent was entitled, as it did, to summarily terminate the appellant's services.

On the issue of constructive termination as found by the learned Judge, the respondent's Principal, Mrs. Kimathi, testified *inter alia* that on instructions of the respondent's Board where she sat and served as secretary, she wrote a letter terminating the appellant's services; that her secretary delivered that letter to the appellant in person but that the appellant had refused to sign for it. That part of evidence was not challenged in any serious way during the hearing. On the strength of that evidence, we would differ from the holding of the learned Judge on the constructive termination of the appellant from employment. The appellant's employment was terminated when she failed to pay the stolen funds as she had begged the respondent to allow her to do. There are Minutes of the Board of the respondent held on 4<sup>th</sup> February, 2014 where it was resolved that the services of the appellant and her colleague be terminated forthwith. Those Minutes were followed by a letter the next day on 5<sup>th</sup> February, 2014 under the hand of the Principal of the respondent to the appellant stating *inter alia* that she had been dismissed from employment with loss of benefits.

According to the said witness Mrs. Kimathi, her secretary telephoned the appellant who visited the school and received the letter which she refused to sign for. That was sufficient evidence on the issue of receipt of the letter. On the whole evidence where the appellant had readily admitted stealing money from the respondent which she had undertaken to pay back and failed to do so, the appellant was not entitled to the reliefs set out in the claim before the trial court. The trial court was entitled, as it did, to find against the appellant and we have reached the same determination as the trial court did.

The trial court was entitled in the face of admission by the appellant that she had stolen money, which she asked to be allowed to pay back by instalments, to enter judgment for the respondent on the counterclaim which was proved to the required standard.

On the whole, this appeal has no merit and we accordingly dismiss it with costs to the respondent.

***Dated and delivered at Nyeri this 20<sup>th</sup> day of September, 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**