



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: VISRAM, KARANJA & KOOME, JJ.A)**

**CIVIL APPEAL NO. 348 OF 2013**

**BETWEEN**

**MOBILE LINK (K) LIMITED ..... APPELLANT**

**AND**

**TABITHA MASEGE ..... RESPONDENT**

*(An appeal from the Judgment of the Industrial Court of Kenya at Nairobi (Nduma, J.) dated 9<sup>th</sup> May, 2013*

*in*

*Industrial Cause No. 1554 of 2010.)*

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**JUDGMENT OF THE COURT**

1. Before us is a first appeal against the decision of the Industrial Court (now known as the Employment and Labour Relations Court). **Tabitha Masege's** (the respondent) services were terminated by the appellant. She had challenged the lawfulness or fairness of her termination under **section 35 (4)** of the **Employment Act**. In the end, the trial court awarded damages in her favour. Accordingly, our primary role as a first appellate court is namely, to re-evaluate, re-assess and re-analyze the evidence before the trial court and draw our own conclusions. See **Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2 EA 212.**

2. The respondent was employed on 1<sup>st</sup> December, 2000 as a cashier by Mobile ya Wananchi (K) Ltd which she claims is one and the same as **Mobile Link (K) Limited** (the appellant). Mobile ya Wananchi (K) Ltd changed its name and is operating in the appellant's name. It is for that reason she was never given a fresh appointment letter by the appellant. However, the appellant maintains that it is distinct from Mobile ya Wananchi (K) Ltd and it was incorporated on 19<sup>th</sup> January, 2006 and begun operations in December, 2006. It engaged the respondent in January, 2007 and not in 2000 as alleged. Be that as it may, the respondent rose up the ranks and she became the manager of the appellant's Mombasa branch.

3. In line with her responsibility as a manager on 21<sup>st</sup> November, 2009 she was entrusted with capital of Kshs.1,421,425 for the branch in question. It appears an audit which the parties refer to a stock take was conducted in August, 2010 which revealed that an amount of Kshs.441,510.50 was unaccounted for. It is

on that basis that the appellant vide a letter dated 28<sup>th</sup> September, 2010 asked the respondent to give an explanation for the discrepancy. The letter read in part:-

***“We have recorded some discrepancies in your branch’s capital and the company needs an explanation of the same.***

***Enclosed is a copy of our stock take report which has formed the basis of our query of the discrepancies raised.***

***...you have an explanation to give to the company which we demand within the next three (3) working days...”***

4. By a letter dated 30<sup>th</sup> September, 2010 and a reminder dated 6<sup>th</sup> October, 2010 the respondent requested the appellant to furnish her with the stock take report in question because the initial letter dated 28<sup>th</sup> September, 2010 did not contain the same. According to her, the appellant did not respond. She later learnt that the appellant’s director namely, Mr. Issa Ahmed had on 27<sup>th</sup> September, 2010 written an email to the effect that:

***“We are hereby requesting removal of one of our agents who does stock collection at our branch in Mombasa. Her name is Tabitha Masenge... She is no longer authorised to collect stock or transact any business on our behalf.***

***Kindly inform the relevant parties.”***

On top of that she was barred access to her office and her office keys were taken away from her. To her, this amounted to unfair dismissal or termination of her services. Subsequently, she filed suit in the Industrial Court seeking several orders.

5. In response to the suit, the appellant maintained that the respondent was served with the stock take report and she failed to account for the money in question. Consequently, her termination was valid. In addition, the appellant counterclaimed for the said amount of Kshs.441,510.50.

6. Upon considering the evidence before him, the trial Judge in an award dated 9<sup>th</sup> May, 2013 found that the respondent had been unfairly terminated. As a result, he issued the following orders:-

***1) Unpaid salary for August and September, 2010 in the sum of Kshs. 57,944;***

***2) Unpaid NSSF deductions in the sum of Kshs. 10,000;***

***3) One month salary in lieu of notice in the sum of Kshs. 28,972;***

***4) 8 months gross salary (at the rate of Kshs. 28,972 per month) totalling to Kshs. 231,776 as compensation for unfair dismissal;***

***5) Costs of the suit.***

7. It is that decision that has provoked the appeal before us wherein the appellant complains that the learned Judge erred in law and fact by:-

***a) Misdirecting himself that the respondent was employed by the appellant on 1<sup>st</sup> December, 2000 contrary to the evidence on record.***

***b) Dismissing the counterclaim which was not defended.***

***c) Failing to appreciate that investigation, arrest and charging of the respondent with a criminal***

*offence was within the realm of the police and not the appellant.*

*d) Failing to appreciate that the respondent was lawfully terminated under Section 44 of the Employment Act.*

*e) Awarding Kshs. 10,000 as unpaid NSSF deductions.*

*f) Failing to consider evidence adduced by the appellant.*

8. The appeal was disposed by written submissions and oral highlights by the parties' respective counsel. Ms. Thiong'o together with Mr. Kassiui appeared for the appellant while Mr. Mokaya appeared for the respondent.

9. Ms. Thiong'o faulted the learned Judge for not appreciating that the appellant could not have employed the respondent in the year 2000 because it was non-existent then. It was clear from the record that the respondent had been employed by a distinct entity. By finding that the appellant had not given an explanation of how the respondent's employment was transmitted from Mobile ya Wananchi (K) Ltd. to itself, the learned Judge erroneously shifted the burden of proof to the appellant. The onus lay with the respondent to establish its case. In any event, the appellant could not be bound by a contract made before its incorporation. In buttressing that line of argument reliance was placed on ***Kelner vs. Baxter [1866] LR 2CP 174*** where Eric CJ held:-

***“ ... I agree that if Gravesend Royal Alexandria Hotel Co. had been an existing company at this time, the persons who signed the agreement would have signed as agent of the company. But, as there was no company in existence at the time, the agreement would be wholly imperative unless it were held to be binding on the defendants personally.”***

She submitted that the appellant's obligations thus arose after the year 2006 and before then the respondent wasn't its employee.

10. Mr. Kassiui argued that the fact that the respondent was never charged with a criminal offence or prosecuted did not by itself render the reason for her termination invalid. This is because of the different standard of proof applicable in civil and criminal proceedings. Besides, the appellant was justified in summarily dismissing the respondent who had failed to account for the missing money. He also criticized the learned Judge for dismissing the counterclaim which at its best was never challenged or traversed by the respondent.

11. Mr. Mokaya contending that the appellant had not observed procedural fairness stated that the appellant had failed to furnish the respondent with information, *to wit*, the stock take report to enable her respond to the allegations against her.

Furthermore, her services were terminated before she was given an opportunity to defend herself. As far as he concerned, there was no valid reason for the respondent's termination and all there was were mere allegations which were not proved. He supported the findings by the learned Judge and urged us to dismiss the appeal.

12. We have considered the record, submissions by the respective parties as well as the law. Under **section 47 (5)** of the ***Employment Act*** the burden of proving that the dismissal was wrongful rests on the employee, while the burden of justifying the grounds of wrongful dismissal rests on the employer. Consequently, as noted by this Court in ***Iyego Farmers Co-operative Sacco vs. Kenya Union of Commercial Food and Allied Workers [2015] eKLR***, whenever an issue of wrongful or unfair dismissal arises, the court looks at the validity and justifiability of the reasons for termination and also interrogates procedural fairness.

13. The right to a fair hearing is a fundamental aspect of the rule of law which is encapsulated in the *audi alteram partem* rule (no person should be condemned unheard) and founded on the well-established

principles of natural justice. It is this right that the legislature secured under **section 41** of the **Employment Act** which stipulates: -

“41

**1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**

**2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”**

14. To begin with, it is not clear whether or not the respondent was furnished with stock take report which was the basis of the allegation against her. It seems that from the letters dated 30<sup>th</sup> September, 2010 and 6<sup>th</sup> October, 2010 the respondent requested the appellant to furnish her with the same. This Court in **County Assembly of Kisumu & 2 Others vs. Kisumu County Assembly Service Board & 6 Others [2015] eKLR** while discussing what a proper notice should contain expressed;

**“Whereas the right to a fair hearing varies from one case to another depending on the subject of the matter in issue, its irreducible minimum is now well settled. In granting that right, the court or the administrative body or person concerned should not make it a charade by taking perfunctory actions for the sake of running through the motions to be seen to have complied with it. The person charged is entitled to what, in legal parlance is referred to as the right to “notice and hearing.” That means he must be given written notice which must contain substantial information with sufficient details to enable him ascertain the nature of the allegations against him. The notice must also allow sufficient time to interrogate the allegations and seek legal counsel where necessary.”** Emphasis added.

15. Further, our perusal of the record reveals that the respondent’s services were terminated before she was given an opportunity to defend herself. This is evidenced by the appellant’s email dated 27<sup>th</sup> September, 2010 to the effect that the respondent was no longer authorised to act for it coupled with the fact that she was locked out of the office when she received letter dated 28<sup>th</sup> September, 2010 asking her to explain the discrepancy in the capital. For the above reasons we concur with the learned Judge that there was no procedural fairness.

16. However, we depart with the learned Judge when it comes to whether there was a valid reason for the respondent’s termination. It is not in dispute that the respondent was entrusted with capital of Kshs.1,421,425 for the Mombasa branch. The same was confirmed by an acknowledgement note she had executed on 26<sup>th</sup> November, 2009. Equally, it was not challenged that out of the said capital that an amount of Kshs.441,510.50 was unaccounted for. In our view, the respondent being the manager at the material time was accountable for the same. Her failure to ensure proper utilization of the same went to the core of her contractual relationship with the appellant and warranted her dismissal. In expressing ourselves in the above manner we are guided by this Court in **Judicial Service Commission vs. Gladys Boss Shollei & Another [2014] eKLR** wherein while discussing what constitutes valid or fair reason(s) for termination, the Court quoted with approval the following passage from the Canadian Supreme Court decision in **Mc Kinley vs. B.C.Tel. (2001) 2 S.C.R.:-**

**“Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More Specifically the test is whether the employee’s dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just**

***cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer."***

17. We find that the aforementioned reason justified the respondent's termination notwithstanding that she had not been charged with a criminal offence. Courts have on numerous occasions re-echoed the principle that professional disciplinary proceedings are distinct from the criminal proceedings even if they emanate from the same set of circumstances. Towards that end, this Court has crystalized the above position in a number of its pronouncements. To mention but a few *Attorney General & Another vs. Andrew Maina Githinji & Another [2016] eKLR*, *Judicial Service Commission vs. Gladys Boss Shollei & Another (2014) eKLR*, *Teachers Service Commission vs. Joseph Wambugu Nderitu [2016] eKLR* and *Kibe vs. Attorney General [2003] eKLR*. In *Attorney General & Another vs. Andrew Maina Githinji & Another (supra)*, Waki, J.A approved the sentiments of the then Industrial Court in *David O. Owino vs. Kenya Institute of Special Education [2013] eKLR* thus,

***"...an acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer for the reason that a criminal trial and an internal disciplinary proceeding initiated by an employer against an employee are two distinct processes with different procedures and standard of proof requirements. While an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee going against the outcome does not by itself render the employer's decision wrongful or unfair."***

18. On damages, we take cognisance that an appellate court can only interfere with quantum of damages issued by the trial court in exceptional circumstances. As succinctly put by Kneller J.A in his own words in *Kemfro Africa Ltd. vs. Lubia & Another (No.2) 1987 KLR 30:-*

***"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of damages."***

19. As to when the respondent was employed by the appellant, it is not in dispute that the letter of her appointment on 1<sup>st</sup> December, 2000 is from Mobile ya Wanachi (K) Ltd. We take note of a letter dated May 2008 from the appellant indicating in clear terms that the respondent had been in its employment for the last seven years. It read in part:-

***"RE: TABITHA MASEGE***

***This is to confirm that the above mentioned person has been working with us for the past seven years. She had served previously as a cashier and is currently our branch manager."***

The totality of that letter confirms the respondent's position that not only was Mobile Wananchi (K) Ltd the appellant's predecessor but that both companies were one and the same. We agree with the observations of the learned Judge that in as much as the appellant argued that it employed the respondent in January, 2007 it failed to produce a letter of appointment to that effect.

20. Based on the foregoing we like the learned Judge are satisfied that the respondent's employment with the appellant begun from 1<sup>st</sup> December, 2000 to 28<sup>th</sup> September, 2010 when her services were terminated. In its own pleadings, the appellant admitted that it had only remitted the respondent's NSSF contribution from 2007 to 30<sup>th</sup> September, 2010. Therefore, the respondent's allegations that the appellant had failed to remit a sum of Kshs.10,000 between 2001 and 2004 was proved and the learned Judge was correct in granting the same. Equally, we find that the respondent had proved she was entitled to unpaid salary of August and December, 2010 as well as one month's salary in lieu of notice.

21. With regard to the compensation for unfair termination, we find that 8 months gross salary was on the higher side taking into account that the termination was rendered unfair due to procedural unfairness. Otherwise, there was a valid reason for the respondent's dismissal. We therefore set aside the said award and substitute it with compensation of 4 months' salary.

22. Last but not least, being convinced that there was a valid reason to terminate the respondent on account of the missing capital, we hold that the appellant had established its counterclaim to the required standard. Therefore, we set aside the order dismissing the counterclaim and substitute it with an order allowing the counterclaim in the sum of Kshs.441,510.50.

23. The upshot of the foregoing is that the appeal succeeds to the extent herein above stated. For the avoidance of doubt the judgment of the lower court is hereby set aside and substituted with the following orders.

(a) The respondent is awarded:

(i) Unpaid salary for August and September, 2010 in the sum of Kshs.57,944/=;

(ii) Unpaid NSSF deductions in the sum of Kshs.10,000/=;

(iii) One month salary in lieu of notice in the sum of Kshs.28,972/=;

(iv) Compensation for unfair termination at the rate of 4 months' gross salary, that is, 28,972 x 4= Kshs. 115,888/=.

(b) The appellant's counter-claim against the respondent succeeds, and the appellant is awarded the sum of Kshs. **441,510.50/=**.

(c) We order each party to bear its costs both in the lower court and in this appeal.

**Dated and delivered at Nairobi this 1<sup>st</sup> day of December, 2017.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

I certify that this is a  
true copy of the original.

**DEPUTY REGISTRAR**