



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MWILU & OTIENO-ODEK, J.J.A.)

CIVIL APPEAL NO. 245 OF 2010

BETWEEN

JAMES NJUGUNA MUCHIRI.....APPELLANT

AND

ARMED FORCES CANTEEN ORGANIZATION (AFCO).....RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Hon. Lady Justice R. N. Sitati) dated 17th December 2009

in

NRB. H.C.C.C. No. 1263OF 2005)

JUDGMENT OF THE COURT

1. The appellant, **JAMES NJUGUNA MUCHIRI**, was an employee of the respondent **ARMED FORCES CANTEEN ORGANIZATION (AFCO)** from 1st March 1983. At the material times in this suit, the appellant was Manager of the respondent's establishment known as **AFCO R/No.017 at Embakasi Garrison** in the City of Nairobi. Among his duties, the appellant was to receive cash from sales of the respondent's goods in the AFCO shop.
2. Between 6th October 2001 and 26th November 2001, the appellant received a sum of Kshs.1,010,854/80 on behalf of the respondent which sum he failed to account for. The respondent contends that the appellant unlawfully and without authority converted the sum to his own use. After conducting an audit, on 3rd December 2001, the respondent suspended the appellant from employment. On the same day, the appellant was arraigned in court in **Nairobi Criminal Case No. 2801 of 2001** charged with theft by servant. He was acquitted on 23rd June 2005. Upon acquittal, on 9th September 2006, the respondent terminated the appellant's contract of employment. At the time the appellant was arraigned before court, his monthly salary was Kshs.26,455/=.
3. To recompense the respondent for the loss of Kshs.1,010,854/80, the appellant repaid a sum of Kshs.690,854/80 leaving an outstanding balance of Kshs.320,000/=.
4. By an amended plaint dated 19th September 2007, the appellant filed suit against the respondent

seeking the following reliefs:

- “a) a declaration that the termination of his employment was wrongful and unlawful;*
- b) general damages for unlawful and wrongful termination of services;*
- c) accumulated salary arrears at the rate of Kshs.26,455/= per month from December 2001 until June 2006 when his employment was terminated;*
- d) one month salary in lieu of notice;*
- e) terminal benefits/severance pay for the period worked at the rate of Kshs.26,455/= per year from 1983 to 2006 and*
- f) interest on the sums claimed”*

5. The respondent denied liability to the appellant and counterclaimed the sum of Kshs. 320,000/= together with interest thereon from 26th November 2001 being the balance of the sum of Kshs.1,010,854/80 that the appellant unlawfully and without authority converted to his own use; the respondent averred that the termination of the appellant’s contract of employment was lawful as he was guilty of gross misconduct that led to loss of money entrusted to his custody and watch.

6. In his reply to defence and defence to the counterclaim, the appellant contended that he was never suspended from employment and his monthly salary was stopped without prior notification; that he admitted to the respondent that the money got lost or was stolen while in his custody and he agreed to repay the same so as to keep and retain his employment with the respondent; he denied ever converting the respondent’s money to his own use; he admitted that the sum of Kshs.1,010,854/80 got lost while in his custody but denied benefitting from the said sum; that the sum of Kshs.690,854/80 he repaid to the respondent was made under duress, undue influence and coercion so as to retain his employment.

7. Upon hearing the parties, the trial court dismissed the appellant’s suit in its entirety and entered judgment for Kshs.320,000/= against the appellant as per the counterclaim together with interest thereon at court rates from 26th November 2011 until payment in full. Costs were awarded to the respondent.

8. In dismissing the appellant’s suit, the trial judge at paragraph 18 of the judgment expressed herself as follows:

“...Counsel for the defendant has urged that the plaintiff is not entitled to any of the reliefs sought first because the termination was lawful and secondly because the reliefs are untenable. After considering the submissions, the pleadings and the law, the court finds that the termination of the plaintiff’s services was neither unlawful nor wrongful. The defendant applied Clause 8 of the Letter of Appointment issued to the plaintiff in 1983 to terminate the plaintiff’s services. The plaintiff held not only a sensitive position within the defendant company but the position was also senior position with much responsibility especially in matters of financial management. The plaintiff handled a reasonable amount of money on behalf of the defendant. The defendant’s expectation was that the plaintiff would honestly and diligently do his work so as to safeguard the defendant’s interest. The plaintiff failed to do so and covered up the losses until they were discovered by the defendant during an audit which was ordered when the defendant noticed that the money from the operations of the plaintiff’s canteen was not flowing as usual. The plaintiff made efforts to repay the money but out of the total of Ksh. 1,010,854/80, he could not pay Ksh. 320,000/= which amount the defendant has counterclaimed against the plaintiffs.....It is my view that the mere fact that the plaintiff was acquitted did not mean that the money had not got lost. And in any event, the trial court in the criminal case said that the plaintiff should have been dealt with

departmentally.....The plaintiff herein has also asked to be paid general damages for the unlawful and wrongful termination of services plus accumulated salary arrears from December 2001 to June 2006 at the rate of Ksh. 26,455/= per month. The Plaintiff also asked for terminal benefits/severance pay for the period worked at the rate of Ksh. 26,455/= from the year 1983 to 2006. Similar issues arose in the case of Kenya Ports Authority -v- Edward Otieno, Civil Appeal No. 120 of 1997 (Msa) and in Rift Valley Textiles Limited -v- Edward Onyango Oganda , Civil Appeal No. 27 of 1992. In the instant case ... the plaintiff is not entitled to any of the reliefs sought in the plaint even if the termination of his services was found to be wrongful. The only amount he would be entitled to would be one month's salary in lieu of notice namely Ksh. 26,455/=. To pay the plaintiff his salary up to the time of retirement would be tantamount to reinstating the plaintiff to his employment when it has already been found that his services were lawfully terminated.”

9. Aggrieved by the judgment and decree of the trial court, the appellant has lodged the instant appeal on the following grounds:

“(i) The learned judge erred in failing to appreciate that the appellant was wrongfully and unlawfully dismissed from employment;

(ii) The judge erred in failing to appreciate that the appellant was entitled to accumulated salary arrears for the period December 2001 to June 2006;

(iii) The judge erred in failing to appreciate that no suspension notice had been served on the appellant before the filing of the suit;

(iv) The judge erred in failing to appreciate that the appellant was entitled to terminal benefits/severance pay for the years worked from February 1983 to June 2006;

(v) The judge erred in delivering a judgment that was contrary to the weight of the evidence and the pleadings on record.”

10. During hearing, learned counsel Mr. Miriti E. Kaburu appeared for the appellant while learned counsel Mr. S .M. Keyonzo appeared for the respondent.

11. Counsel for the appellant submitted that the trial court erred in failing to enter judgment for the appellant for accumulated salary arrears; that the appellant was never given a suspension letter and he came to learn of the suspension during trial court; that the appellant never knew his services had been terminated until when the respondent filed its list of authorities at the High Court; that at no time did the respondent's Board pass or make a resolution that the appellant be dismissed from employment; that whereas the appellant was charged with a criminal offence he was acquitted and subjecting the appellant to disciplinary proceedings before the respondent's Board after acquittal amounts to unfair treatment and double jeopardy. Counsel emphasized that the appellant never admitted to converting the sum of Kshs.1,010,854/80 to his own use; that the appellant took loans and borrowed money from friends and made effort to repay Kshs.690,854/80; that the repayment was not done voluntarily but was under duress, undue influence and coercion with a view to retaining his employment. Counsel urged this Court to find the appeal has merit and allow it.

12. The respondent in opposing the appeal submitted that the appeal had neither substance nor merit except as relates to one month salary in lieu of notice; that the learned judge established as a fact that the appellant had received both the suspension and termination letters; that the appellant had the responsibility to look after the respondent's money and he admitted loss of the money and made repayment of Kshs.690,854/80 leaving a balance of Kshs.320,000/= which the respondent counterclaimed and obtained judgment for together interest thereon. It was submitted that the trial judge did not err in law in failing to award salary arrears to the appellant. Counsel emphasized that the termination of the appellant's contract of employment was lawful due to gross misconduct.

13. This is a first appeal and it is our duty to examine the grounds of appeal, analyze and re-assess the evidence on record and reach our own conclusions. (See **Selle -vs- Associated Motor Boat Co. [1968] EA 123**); see also (**Abdul Hameed Saif vs. Ali Mohamed Sholan (1955) 22 E. A. C. A. 270**).

14. We remind ourselves the dicta in **Mwangi - v- Wambugu (1984) KLR 453** that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings.

15. The issue for our consideration in the instant appeal is whether the trial judge erred in law in dismissing the appellant's claims in their entirety or whether there are some claims by the appellant that ought to have succeeded. This begs the question whether the trial court arrived at a decision against the law and weight of evidence on record.

16. It is the appellant's contention that termination of his employment was wrongful and unlawful because he was never given a letter of suspension or termination and that he never derived any benefit from the sum of Kshs. 1,010,854/80 that was lost.

17. The respondent contends that the suspension and termination of the appellant's employment was lawful as he was in breach of his contract of employment and guilty of gross misconduct and liable to summary dismissal; it is contended that the appellant wrongfully and unlawfully caused the respondent to lose Kshs.1,010,854/80 of which he repaid Kshs.690,854/80 leaving an outstanding balance of Ksh. 320,000/=.

18. In our view, an employee who is entrusted with cash or money commits gross misconduct if he/she cannot satisfactorily and credibly account for the monies entrusted under his watch, care and custody. Theft, fraud, deliberate falsification of records and serious negligence which cause unacceptable loss are examples of gross misconduct. (See **Butterworths, Employment Law: Practice, Procedure and Precedents, 5th Ed. Lexis Nexus, at page 51, Item. 2.23**).

19. In the instant case, the appellant received on behalf of the respondent the sum of Kshs.1,010,854/80 and failed to account for the same. It is immaterial whether the appellant derived any direct or indirect benefit from the monies received and lost; it is also immaterial whether he was acquitted of the criminal charge of theft by servant; what is material is that as an employee, the appellant failed to account for the sum of Kshs.1,010,854/80 that had come into his care, custody and watch. Failure to account for money received amounts to gross misconduct which may entitle an employer to terminate an employee's contract of employment summarily and without notice.

20. In the persuasive Industrial Court of Kenya **Cause No. 837 of 2011** between **Miriam Siwa v. Post Bank Limited [2014] e-KLR**, it was held that the claimant's contract of employment was terminated for a fair and valid reason. The claimant was a Bank Manager exercising supervisory role over several branch managers. The Bank lost money through fraudulent transactions involving the branch managers. The court held that the claimant had failed to exercise her supervisory role properly, which resulted in huge financial loss occasioned to the employer. It was held there that the employer was justified in holding her accountable and lawfully terminated her contract of employment. In the case of **National Union of Mineworkers and Another and the Commission for Conciliation Mediation and Arbitration, Case No. JR 2512 of 2007**, the court observed that an employment relationship can only exist in an atmosphere of trust and an employee acting in good faith. In this case, when the respondent lost property due to the actions of the claimant, the court held that it was proper to take disciplinary action and summarily dismiss her.

21. In the instant case, there was breach of trust on the part of the appellant; the confidence reposed on the appellant by the respondent was violated. The appellant never disclosed the loss of Kshs.1,010,854/80; it was the respondent's audit that revealed the loss. On a balance of probabilities, it is doubtful that the appellant was not aware of the loss of Kshs.1,010,854/80; the respondent within a short while noticed that money from the operations of its canteen was not flowing as usual and conducted

an audit; the audit revealed the loss. Without hesitation, we uphold the finding by the trial court that the respondent's termination of the appellant's contract of employment was neither wrongful nor unlawful; we affirm the finding that the appellant is not entitled to general damages or compensation for the termination of his employment.

22. A claim by the appellant is that he is entitled to one month's salary in lieu of notice for termination. The respondent conceded that the appellant was not given notice to terminate his employment and that one month's salary in lieu of notice ought to have been paid. The trial court at paragraph 20 of the judgment held that the appellant would be entitled to Kshs.26, 455/= being one month's salary in lieu of notice. However, in the final decree, no sum is awarded for salary in lieu of notice and we find that the learned judge erred in failing to award the appellant one month's salary in lieu of notice. Accordingly, we hereby enter judgment for the appellant against the respondent in the sum of Kshs.26,455/= being one month salary in lieu of notice. The said sum to attract interest at court rates from June 2006 till payment in full.

23. The next issue for our consideration is whether the appellant was entitled to terminal dues and retirement benefits. The trial court at paragraph 21 of the judgment expressed itself th us:

“At the hearing, DW1 Cletus Edison Wesimikha Lyambila told the court during cross-examination that the plaintiff would still be paid terminal dues from the date of employment to the date of termination. DW1 also said that retirement benefits are payable for part of the period of employment, but that is a matter that is between the plaintiff and the defendant and the court will not make a finding on it.”

24. Excerpts from the testimony of *DW1 Cletus Edison Wesimikha Lyambila* on the issue of retirement benefits is as follows:

“After termination, we forwarded our notification to our Pension Broker to conferring cessation of Mr. Muchiri as an employee of AFCO. We did so on 15th June 2006 after completing the form. We asked the Pension Brokers to compute Mr. Muchiri's dues. Mr. Muchiri has not collected his dues which are subject to Muchiri's liabilities to AFCO.”

25. Both DW1 and the trial court appreciated that pension and terminal benefits were due to the appellant. However, the trial court did not enter judgment for the pension and terminal benefits stating that this was a matter between the appellant and the respondent and the trial court would not make a finding on it. With due respect, we differ with the trial court. In the amendment plaint dated 19th September 2007, the appellant made a specific claim for terminal benefits for the period worked from 1983 to 2006. It is the duty of a trial court to consider and determine the issues disputed in the pleadings. The trial court erred in failing to determine if the appellant was entitled to terminal dues and retirement benefits. This was not a matter to be left for the parties as it had been pleaded and canvassed during hearing.

26. In **Kenya Ports Authority -v- Edward Otieno, Civil Appeal No. 120 of 1997**, this Court stated that an employee is entitled to retirement benefits. In the case of **Director of Pensions -v- Cockar (2000) 1 EA 37** it was stated that to deprive a person who is eligible to a pension that pension is an injudicious and arbitrary exercise of discretion.

27. The appellant in his written submissions before the trial court submitted that the pension due is Kshs.634,920/= made up of 24 years multiplied by Ksh. 26,255/=. The respondent through DW1 conceded that the appellant was entitled to his pension dues and that the same had been computed by its Pension Brokers. Accordingly, we hereby find and hold and declare that the appellant is entitled to his terminal and retirement benefits from 1983 to June 2006. The respondent is to compute and pay the benefits in accordance with the lawful formula and criteria. The terminal and retirement benefits shall attract and accrue interest thereon at court rates from June 2006 until payment in full. The respondent shall deduct and set off from the terminal/retirement benefits the sum of Kshs.320,000/= being the judgment sum entered as per the counterclaim.

28. A significant ground of appeal is whether the trial court erred in not awarding the appellant accumulated salary arrears for the period December 2001 to June 2006. The appellant was suspended from duty on 3rd December 2001 and terminated from employment in June 2006. What was the status of the appellant during this period? Was he an employee of the respondent and if so, was he entitled to payment of his monthly salary? In other words, is an employee on suspension entitled to monthly salary?

29. Several facts on record lead us to conclude that between December 2001 and June 2006, the appellant was an employee of the respondent. First, he was suspended from duty and suspension is not termination of employment. Second, the Board of the respondent met and deliberated on the appellant's conduct; the Board would not have met to discuss a person who was not an employee of the company. Third, the respondent by writing the letter of termination acknowledged the fact that they were terminating the appellant who was its employee; by this letter, the Board impliedly, if not expressly, was admitting that there was an employer-employee relationship between the parties. Based on these facts, we hereby find that during the period 3rd December 2001 and June 2006, the appellant was an employee of the respondent; we find and hold that he was an employee on suspension. We are of the considered view that the trial court erred in failing to consider and determine the status of the appellant and his entitlements for the period 3rd December 2001 and June 2006. We further find that the appellant is entitled to his appropriate dues for the said period and enter judgment for the same.

30. The next issue is whether an employee on suspension is entitled to monthly salary. For a public officer, an employee on suspension or interdiction is entitled to half pay during the period of suspension. In the private sector, a suspended employee's entitlement to monthly salary is subject to the terms of his/her contract of employment and the relevant employment law. The starting point is to consider whether there is a contractual provision that deals with suspension with or without pay either as an express or implied term. If no such provision is available, then so long as the employee is ready and willing to work, he is entitled to payment during the period of suspension. (See **Butterworths, Employment Law: Practice, Procedure and Precedents, 5th Ed. Lexis Nexus, Item 5.11 at page 186**).

31. Suspension is always as a rule on full pay unless the employee agrees to suspension without pay. In the persuasive South Africa case of **Sappi Forests (Pty) Ltd v CCMA & others (2008) 17 LC 1.11.83, reported in [2009] 3 BLLR 254 (LC)**, Judge Pillay stated that "the position at common law has always been that an employer who suspends an employee without pay commits a breach of the contract of employment. An employer may suspend an employee without pay if the employee so agrees, or legislation or a collective agreement authorizes the suspension." In the case of **Mabitsela v SAPS (2004, 8 BALR 969)** the employee, a policeman, was suspended without pay pending a charge of murder. The police regulations do allow for such suspensions to be without pay. Mabitsela claimed that his suspension was unfair because he had been on unpaid suspension for five months. The arbitrator found that the suspension itself was fair, but that it had been unfair to implement the suspension without pay. These persuasive cases illustrate that even where regulations allow employers to suspend employees without pay; this may still be found to be unfair.

32. In the Canadian case of **Cabiakman V Industrial Alliance Life Insurance Co. [2004] 3 S.C.R. 195 SCC 55**; the facts were as follows:

"Gilbert Cabiakman ("Cabiakman") was a sales manager at Industrial Alliance Life Insurance Co. ("Industrial Alliance"). Three months after Cabiakman was hired, he was arrested and charged with conspiracy to extort money. Once Industrial Alliance got wind of these charges, it suspended Cabiakman because of the connection between the nature of the charges and Cabiakman's position. Cabiakman had been on an indefinite suspension without pay for two years while the charge was pending. After Cabiakman was acquitted of all charges, he was reinstated in his position at Industrial Alliance. Cabiakman commenced proceedings against Industrial Alliance for lost wages during the period of suspension and for moral and punitive damages. The Supreme Court of Canada ("SCC" or "Court") upheld the decision of the Quebec Court of Appeal that ruled that Industrial Alliance was not justified in suspending Cabiakman without pay and awarded him \$200,000 in damages. However, the SCC affirmed the

employer's right to suspend an employee for administrative reasons. The court stated that employer conducted itself properly, however, since the suspension remained administrative in nature at all times, there was no reason to refuse Cabiakman's salary as he remained available to work."

33. The emerging principle from the persuasive authorities is that there is no inherent right to suspend an employee without pay; any power to do so must arise from the terms of the contract. Unless stipulated to the contrary in a legal instrument, an employer acts lawfully by suspending an employee with pay. (See **Butterworths, Employment Law: Practice, Procedure and Precedents**, 5th Ed. Lexis Nexus, Note 7 at page 28).

34. In the instant case, the appellant was not a public officer and hence his entitlement to monthly salary during suspension is governed by his contract of employment and employment law. The appellant, having continued to be an employee of the respondent between 3rd December 2001 and 15th June 2006, is entitled to his monthly salary. Despite the gross misconduct, the respondent made a deliberate decision not to terminate the appellant's contract of employment till June 2006. Choices have consequences and the respondent must take responsibility for its actions or inactions. Accordingly, we enter judgment in favour of the appellant against the respondent for the accumulated monthly salary arrears at the rate of Kshs.26,455/= per month for the period 3rd December 2001 to June 2006. The said sum to accrue interest at court rates from the date of judgment of the trial court on 17th December 2009 till payment in full.

35. Our final analysis leads us to the persuasive case of **Raphael Juma Juma - v-Armed Forces Canteen Organization (AFCO), Nairobi Industrial Cause No. 1070 of 2012**. The claimant, **Raphael Juma Juma**, was employed by the Respondent AFCO as an audit clerk effective 5th July 2000. On 28th May 2001, he was suspended without pay on allegations of fraud. The claimant was charged with stealing and making a document without authority contrary to **Sections 275 and 357(a)** of the Penal Code. He was acquitted on 3rd October 2006. He lodged a claim against the respondent AFCO seeking a declaration that his termination from employment was wrongful and unlawful; he sought general damages and terminal benefits. The trial court considered the circumstances surrounding the claimant's suspension and eventual dismissal and arrived at the conclusion that there was a valid reason to terminate the claimant's employment. The court dismissed the claim for unfair termination, but held that the claimant was entitled to his benefits under the Staff Pension Scheme.

36. Guided by our analysis of the evidence on record and the various decisions cited, it is our finding that this appeal partly has merit and is partially successful. The appeal is allowed in the following terms:

- a. *Judgment be and is hereby entered in favour of the appellant against the respondent in the sum of Kshs.26,455/= being one month salary in lieu of notice. The said sum to attract interest at court rates from 15th June 2006 till payment in full.*
- b. *Judgment be and is hereby entered in favour of the appellant against the respondent for the accumulated monthly salary arrears at the rate of Kshs.26,455/= per month for the period 3rd December 2001 to 15th June 2006. The said sum to accrue interest at court rates from 15th June 2006 till payment in full.*
- c. *We hereby declare that the appellant is entitled to terminal and retirement benefits from 1983 to 15th June 2006 and we accordingly enter judgment for the appellant against the respondent for the terminal/retirement benefits. The terminal and retirement benefits shall attract and accrue interest at court rates from 15th June 2006 till payment in full.*
- d. *The respondent shall deduct and set off from monies due to the appellant the sum of Kshs. 320,000/= and interest thereon at court rates from 26th November 2001 as per the judgment of the trial court.*

e. *Save as stated in (a) (b) (c) and (d) above, the judgment of the trial court is hereby confirmed and upheld in all other respects.*

37. This appeal having partially succeeded, we order that each party is to bear his/its costs both at the High Court and in this appeal.

Dated and delivered at Nairobi this 29th day of January, 2016.

W. KARANJA

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR