



IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI.

(Before: Charles P. Chemmutut, J.,

A.O. Wafual & J.M. Kilonzo, Members).

CAUSE NO. 97 OF 2006.

KENYA UNION OF DOMESTIC, HOTELS,

EDUCATIONAL INSTITUTIONS, HOSPITALS & ALLIED WORKERS.....Claimants.

v.

MOI UNIVERSITY.....Respondents.

Issue in Dispute:-

“Wrongful dismissal of Mr. Tom Eshitemi Mapesa”

(hereinafter called the grievant).

Mr. Wokabi Murage, Legal Officer, for the Claimants (hereinafter called the Union).

Mr. Harrison O. Okeche, Senior Executive Officer, F.K.E., for the Respondents (hereinafter called the University).

A W A R D.

The parties raised a Notification of Dispute, Form ‘A’, on 20th March, 2006, under Section 14(7) of the Trade Disputes, Act, Cap. 234, Laws of Kenya (which is hereinafter referred to as the Act); and the same, together with the statutory certificates from the Labour Commissioner and the Minister for Labour pursuant to sub-section (9)(e) and (f) of the said Section, were received by the Court on the 27th September, 2006. The dispute was then listed for mention on 17th October, 2006, when Mr. S.N. Mwari appeared for the Union, but there was no appearance for the University. Notwithstanding the non-appearance of the University’s representative, however, the parties were directed to submit or file their respective written memoranda or statements on or before 17th November, and 15th December, 2006, and the dispute was fixed for hearing on 8th February, 2007. The parties were also duly notified of this arrangement. Mr. Mwari S.Njiru for the Union belatedly submitted his memorandum on 23rd November, 2006, and Mr. Harrison O. Okeche also belatedly file his reply statement thereto on 17th

January, 2007. The case was heard as aforesaid, i.e. on 8th February, 2007.

The Union is registered as such under Section 11 of the Trade Union Act, Cap. 233, Laws of Kenya, while the University is a public University charged with the function of providing, directly or in collaboration with other institutions of higher learning, facilities for university education, including technology, professional education and research. When this dispute arose, the parties had a valid recognition agreement and have also entered into and signed some collective agreements between themselves.

The grievant was employed by the University on 30th September, 1987 as a Sports Attendant, Scale I, at a salary of K.£ 558 per annum (see University Ann. I). He was later promoted to the post of Stores Clerk, Scale 2, at a salary of K.£ 750 per annum, and further to a Junior Cashier, Scale III, at a salary of K.£ 960 per annum; and his duty as a Junior Cashier included collecting money paid by students to the University (see University Anns. 2 and 3). The grievant was, however, summarily dismissed on 2nd February, 1999 for failing to account for, or surrender to, the University Kshs.179,300/= which he collected from students. The letter of summary dismissal reads *in extenso* as follows:-

“RE: SUMMARY DISMISSAL.

It has been reported to this office that between 11th January, 1999 and 22nd January, 1999 you failed to surrender to the University revenue collected from students amounting to Kshs. 179,300.00 (One Hundred Seventy Nine Thousand, Three Hundred only) for banking.

This amounts to gross misconduct and negligence of duty in accordance with the Memorandum of Agreement between Moi University and KUDHEIHA Workers Clause 6g(iii) and (vii).

It has therefore been decided that you be dismissed with immediate effect. Please arrange to clear with the University and also the Moi University Savings and Credit Society Ltd. Clearance forms can be obtained from Personnel Registry.

On behalf of the University, I thank you for the services rendered while in the University employment.

Yours sincerely,

(Sgd.)

DR.J.K.KOECH

For: CHIEF ADMINISTRATIVE OFFICER.”(see Union App. I and University Ann 4.)

The grievant appealed against his summary dismissal but his explanation was found unsatisfactory as he persisted in not surrendering or accounting for the said revenue which he collected from students. In the meantime, the matter was reported to the police and the grievant was arraigned in the Senior Resident Magistrate’s Court at Eldoret under Criminal Case No. 433 of 1999, for stealing by servant, contrary to Section 281 of the Penal Code, Cap 63, Laws of Kenya. On 17th February, 2000, he was acquitted of the charge under Section 210 of the Criminal Procedure Code, Cap. 75, Laws of Kenya, on the ground that “the prosecution failed to offer evidence against the accused (see Union App. 3).” The Union approached the University for an amicable settlement of the matter, but no compromise was reached. Consequently, the Union reported a formal dispute to the Minister for Labour in accordance with Section 4 of the Act. The Minister accepted the dispute and appointed Mr. P.W. Mafura of Eldoret Labour Office to act as the Investigator; and on the basis of the investigation report, which was released to the parties on 11th August, 2004, the Minister found and recommended as follows:-

“FINDINGS.

..... Mr. Tom Mapesa was employed by Moi University on 30th September, 1987, as a Sports Attendant. He was eventually appointed a junior cashier.

.... Mr. Mapesa was entrusted to collect revenue and school fees from students. Events leading to his dismissal were that on 20th July, 1994 he failed to surrender an amount of Kshs.6,599.50 as expected. Further it emerged that between 11th and 21st January 1999 he again failed to surrender an amount of Kshs.179,300.00 due for banking and this was the last straw that let to his dismissal. However, in an attempt to punish and possibly recover the money due to the University, the management had Mr. Mapesa arrested and arraigned to court over the offence. But at the same time they took the unprecedented step of dismissing Mr. Mapesa while his case was still going on in the Court of law. Yet by a strange twist of fate and what might appear to be lack of interest and enthusiasm in following up the case, the accused was acquitted due to the complainant’s failure to produce the relevant documents to sustain and secure judgment against Mr. Mapesa. This for all practical purposes was punishing the accused twice for the same offence under the law. It surely negated the application and rule of natural justice. The management ought to have pursued one line of disciplining Mr. Mapesa. The acquittal from the court presupposed that Mr. Mapesa was innocent under the law.

Having gone this far, the management should have known better and done the obvious, either reinstate Mr. Mapesa or terminate him and pay his dues according to the parties Collective Bargaining Agreement.

RECOMMENDATION.

..... I recommend that Mr. Mapesa's dismissal be reduced to normal termination and he be paid according to the parties' Collective Bargaining Agreement."

The Minister finally appealed to the parties to accept the recommendation as a basis of settlement of this dispute. The Union accepted the recommendation, and the University also accepted it on condition that the said misappropriated amount of Kshs. 179,300/= by the grievant be accounted for by and recovered from him (see Union App. 2 and University Anns. 5 to 16). Hence this dispute for adjudication and determination.

Mr. Murage submitted that the University, in violation of the principles of natural justice, denied the grievant a chance to be represented by the Branch Secretary and other representatives of the Works Committee as provided for under Clause 9(a) of the parties' collective agreement, but kept on calling him to account and/or remit the said amount without giving him an opportunity to be heard. He pointed out that it was difficult for the grievant to account for the revenue he received from students without the documents which were in the possession of the University administration. Mr. Murage accused the University administration of instigating the arrest of the grievant but failed to pursue the matter in Court, resulting in his acquittal as stated hereinabove.

In conclusion, Mr. Murage urged the Court to find that the dismissal of the grievant was unlawful and prayed that he either be reinstated immediately; or, in the alternative, the summary dismissal be reduced to normal termination and he be paid all his terminal dues and compensation for loss of employment.

Mr. Okeche strongly opposed the demand on the ground that the grievant was given an assignment to collect money from students between 11th and 21st December, 1999, which he did and issued receipts Nos. 927,931,940,994,996,943,949,955,958,990 and 947, but he did not care to remit the money collected from the students and also ignored to account for it to-date. The grievant was given adequate time to be heard and requested on more than one occasion to account or surrender the revenue he had collected from students, but he has to-date failed, ignored and/or refused to account for the same. Therefore, the summary dismissal of the grievant for gross misconduct and negligence of duty under Section 17 of the Employment Act, Cap. 226, Laws of Kenya, and Clause 6(g) (iii) and (iv) of the parties Collective Agreement, was lawful, fair and reasonable and should be upheld. Mr. Okeche contended further that the fact that the grievant was acquitted in the criminal case for lack of evidence due to failure by the prosecutor to produce or tender the same did not mean that the grievant was innocent. He averred that the grievant did not deserve any relief or reinstatement or reduction of the summary dismissal to normal termination because the offence he committed was grave and if condoned it would send wrong signal or message to his colleagues and the general University fraternity. The grievant eroded his integrity and the University had lost faith and confidence in him.

Accordingly, Mr. Okeche prayed that the demands by the Union be rejected and urged the Court to uphold the action taken by the University administration against the grievant.

In this case, the grievant was entrusted with the duty of collecting fees from students and other revenues, and there is no dispute that he actually collected the said amount, i.e, Kshs. 179,300/=, from the students, but failed to account for it despite being requested on several occasions by the University administration to do so. The University initiated disciplinary proceedings against the grievant, but he did not account or surrender the money presumably on the ground that to do so would prejudice him in the decision of the criminal case then pending in Court. The grievant was, however, consequently acquitted by the Criminal Court as stated at pages 5 hereinabove. The Union, therefore, contended that the action taken by the University was vitiated, in that the University had not waited till the trial in the Criminal Court was over, and that the principles of natural justice required that the University should at least have waited for the decision of the Criminal Court before taking disciplinary action. We do not agree. In *Delhi, Cloth & General Mills Ltd. V. Kushal Bhan, (1960) 19FJR 183: 1961 PLC 412*, the question before the Supreme Court was whether the employer could proceed with the domestic enquiry while the criminal proceedings were pending. The Supreme Court (**Wanchoo J.**) observed at page 185 as follows:-

"it is true that very often employers stay enquiries pending the decision of the Criminal Trial Court and that is fair, but we cannot say that the principles of natural justice require that an employer must wait for the decision at least of the Criminal Trial Court before taking action against an employee We may, however, add that if the case is of grave nature or involves questions of fact and law, which are not simple, it would be advisable for the employer to wait the decision of the Trial Court, so that the defence of the employee in the criminal case may not be prejudiced. The present, however, is a case of a very simple nature and so the employer cannot be blamed for the course adopted by him."

On merits, the present case is very simple indeed. The grievant actually collected the said amount from the students but he never remitted it to the University administration. He was given ample opportunity to account for it but he refused, neglected or simply ignored to seize the opportunity. Hence his dismissal. It cannot, therefore, be contended that under such circumstances the University should have waited for the decision of the Criminal Court before taking action against the grievant. In any case, the acquittal of the grievant was not an "honourable acquittal," but because, either through sheer negligence or forgetfulness or oversight, the prosecutor failed to tender or produce evidence against him. The expression "honourable acquittal" is not defined anywhere. It should, therefore, bear the same meaning as it conveys in its ordinary and

natural sense. Its ordinary meaning is that it has been found that the person concerned had been accused of the offence maliciously and falsely, and that after his acquittal no blemish whatsoever attaches to him. In cases where the benefit of the doubt is given to an accused or where he is acquitted because the parties have compromised, or because the parties, on account of some extraneous influence, have resiled from their statement, or because one party or its representative, as in this case, failed to tender or produce evidence against the accused, then in spite of the acquittal the person concerned cannot be deemed to have been "honourably acquitted". This expression is not recognized in the Code of Criminal Procedure. There only the word "acquittal" is used. It is, therefore, obvious that it is not the function of the Criminal Court to declare that the person concerned has been honourably acquitted or not.

For the foregoing reasons, we take great exception to the findings and recommendation of the Minister, and uphold the action taken by the University administration against the grievant. The demand is, therefore, rejected in toto as untenable.

DATED and delivered at Nairobi this 28th day of March, 2007.

Charles P. Chemmutut, MBS.,

JUDGE.

O.A Wafula,

J.M. Kilonzo,

MEMBER.

MEMBER.