CRIMINAL CHARGES DO NOT PREVENT EMPLOYERS FROM CONCLUDING INTERNAL DISCIPLINARY PROCESSES

East African Portland Cement Company Limited v Ndauti & 4 others

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Background

The dispute arose following the discovery of significant financial irregularities within the Appellant's Finance Department in 2012. Internal investigations revealed that numerous fraudulent receipts had been generated and posted into the company's accounting systems, namely the JDE system and the General Ledger. The irregular transactions involved substantial sums, running into hundreds of millions of shillings.

The 1st to 4th Respondents were accountants and accounts assistants whose duties included updating receipts and reviewing bank reconciliations. The 5th Respondent was employed as a debtor's clerk. The investigations indicated that fraudulent receipts had been posted without proper validation, bank reconciliations containing suspicious entries had been reviewed and approved without detection, and in one instance, system credentials had allegedly been shared to facilitate the generation of fraudulent receipts.

In April 2012, the Respondents were interdicted to allow investigations to proceed. They were issued with show cause letters detailing the allegations and were given seven days within which to respond. Written explanations were submitted. In some cases, additional or amended allegations were subsequently communicated and further responses were provided.

Upon completion of the investigations, the Respondents were invited to attend disciplinary hearings. Their written and oral representations were considered by the disciplinary committee. The committee recommended summary dismissal and criminal prosecution. On 20 May 2013, the Respondents were summarily dismissed from employment. They were thereafter arrested and charged before the Principal Magistrate's Court at Mavoko in connection with the same alleged fraudulent transactions.

The Respondents filed claims before the Employment and Labour Relations Court challenging their dismissal. The trial court found that the employer had not established sufficient and justifiable grounds in respect of some of the Respondents and further held that the dismissals were procedurally unfair. The court set aside the dismissals and converted them into suspensions pending the hearing and determination of the criminal proceedings.

The Appellant appealed that decision to the Court of Appeal.

1. Can an Employer Summarily Dismiss an Employee While Criminal Charges Are Ongoing

The Court of Appeal addressed whether the existence of pending criminal proceedings barred the Appellant from summarily dismissing the Respondents.

It affirmed that internal disciplinary proceedings and criminal prosecutions are distinct processes, each governed by different objectives, procedures and standards of proof. An employer is not required to await the outcome of criminal proceedings before taking disciplinary action, nor is the employer required to prove misconduct beyond reasonable doubt.

The central question in an employment dispute is whether the employer had valid and justifiable grounds for dismissal and whether a reasonable employer, faced with the same facts, could have made the decision to dismiss.

In this case, investigations revealed substantial financial loss arising from the generation and posting of fraudulent receipts into the company's accounting systems. The Respondents held sensitive positions within the Finance Department, and the alleged irregularities were directly connected to their duties. In those circumstances, the Court held that the employer was entitled to take appropriate steps to safeguard its operations and financial integrity where it had reasonable and justifiable grounds to believe that misconduct had occurred.

The subsequent arraignment of the Respondents before the criminal court did not invalidate the disciplinary process or render the employer's decision premature. The existence of ongoing criminal proceedings does not bar an employer from summarily dismissing an employee, provided the dismissal is supported by valid and justifiable grounds.

2. What Amounts to "Adequate Time" to Prepare for a Disciplinary Hearing?

The Court of Appeal next examined whether the Respondents had been afforded sufficient time to prepare for the disciplinary hearings.

Although the Respondents contended that the notice convening the hearings was too short, the Court considered the broader context. The Respondents had been interdicted in April 2012 and issued with detailed show cause letters. They were given seven days to respond and did so. In certain instances, additional or amended allegations were later communicated, and further responses were provided. The invitation to attend the disciplinary hearing referred to "offences already communicated," linking the hearing to earlier correspondence.

By the time the hearings were convened in May 2013, more than one year had elapsed since the initial interdictions. The Court held that the Respondents had long been aware of the nature and substance of the allegations and had already responded to them. In those circumstances, they had been afforded sufficient time and opportunity to prepare and present their defence. The process could not be characterised as an ambush.

3. Whether the Employer Complied with the Right to be Accompanied under Section 41

The Court then considered whether the Appellant complied with section 41 of the Employment Act.

Section 41 requires that, before termination for misconduct, an employer must explain the reasons for the contemplated termination to the employee in a language understood and allow the employee to be accompanied by another employee of their choice. The employer must also hear and consider any representations made.

Although the Court was satisfied that the Respondents were aware of the allegations and had been given an opportunity to respond, it found no evidence that they had been informed of their right to be accompanied by a fellow employee during the disciplinary process. There was also no evidence that termination was explained to them in the presence of another employee prior to the issuance of termination letters.

The Court held that notwithstanding the existence of substantive grounds for dismissal, the termination was procedurally unfair.

4. Whether the Trial Court Converted the Dismissal into a Suspension Pending the Criminal Proceedings

The Court further considered whether the trial court properly converted the dismissals into suspensions pending the determination of the criminal case.

It observed that converting a dismissal into a suspension effectively amounted to reinstatement. Before ordering reinstatement, a court must consider the statutory factors set out under section 49(4) of the Employment Act, including the circumstances of the termination, the extent to which the employee contributed to the termination, and the practicability of reinstatement.

The Court found that the trial court had not adequately considered these factors. The allegations concerned substantial financial loss arising from fraudulent transactions within the Finance Department, where the Respondents held sensitive positions. In such circumstances, reinstatement, even in the form of suspension, was neither appropriate nor practical. Suspension pending criminal proceedings would have resulted in indefinite operational uncertainty and financial burden, particularly given the inherently uncertain duration of criminal proceedings.

Accordingly, the Court held that the trial court had improperly exercised its discretion and set aside the order converting the dismissals into suspensions.

Conclusion

This decision reinforces several important principles for employers:

1. Ongoing criminal proceedings do not prevent an employer from proceeding with and concluding internal disciplinary processes, provided there are valid and justifiable grounds for dismissal.
2. What constitutes adequate time to prepare for a disciplinary hearing must be assessed in context, including prior communication of the allegations and the opportunities afforded to the employee to respond to the allegations
3. Strict compliance with section 41 of the Employment Act, particularly the employee's right to be accompanied, is mandatory and cannot be treated as a procedural formality.
4. Courts will closely scrutinise orders of reinstatement or suspension, especially in cases involving significant financial loss and employees occupying sensitive roles.

The decision makes it clear that the existence of criminal charges does not strip an employer of the authority to act. An employer is not required to wait for the outcome of a criminal trial before concluding its internal disciplinary process. What matters is whether there are valid and justifiable grounds for the action taken.

At the same time, the case serves as an important reminder that even where serious misconduct is alleged and substantial loss has occurred, procedural fairness remains critical. An employer may have strong substantive grounds, but failure to comply strictly with statutory requirements particularly under section 41 of the Employment Act, can render a dismissal procedurally unfair.

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