



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 1046 OF 2006

GLORIA A. N. TAABU.....PLAINTIFF

VERSUS

NAIROBI EVANGELICAL GRADUATE SCHOOL OF THEOLOGY..... DEFENDANT

JUDGMENT

1. The Plaintiff in a plaint dated 26th of September 2006 prays for judgment to be entered against the defendant for;
 - a. General damages for libel and unlawful dismissal
 - b. Exemplary and aggravated damages for malicious libel.
 - c. An order requiring the Defendant to retract the said publication in a similar manner and tender a written unconditional apology to the Plaintiff.
 - d. Special damages of Kshs. 278,330/-
 - e. Costs and interest on (a), (b) and (d) at court rates.
2. The Plaintiff claims that the Defendant without any justification cause and/or grounds maliciously and wrongfully summarily dismissed her from her duties
3. That the Defendant persistently refused to furnish her with a written contract of employment and was inexplicably reluctant to negotiate a definite annual salary increment scale and payment schedule as promised by the Defendant.
4. That the Defendant maliciously and falsely published a damaging termination letter to the Plaintiff that wreaked of defamatory innuendo and statements, including the outrageous claim that the Plaintiff had stolen or misappropriated monies in the sum of Kshs. 1,083,997/- belonging to the Defendant. That the said defamatory claim is clear in the express words and in the spirit of the letter dated August 9th 2006 and in specifically in the following words in paragraph 2 of the said letter:

“... Being the person in charge of the entity at the time, the management has ascertained that you are personally responsible , and therefore has no alternative but to summarily dismiss you and demand the full payment of the amounts of Kenya Shillings 1, 083, 997/-..”
5. The Plaintiff claims that the said words were published and uttered by the Defendant when it was aware that she was never at any time” in charge of the entity “known as NEGST or any part nor was she the accounting officer for the Defendant institution. She claims that the words in their natural and ordinary meaning meant and were understood to mean that, she is a thief, a schemer and conniver, corrupt and unreliable. The plaintiff has particularized malice at paragraphs 13 a-f.
6. The plaintiff’s claim for special damages for Kshs. 278,300/- is made up as follows;

- a. Three (3) months unpaid salary @ Kshs. 37,095/- per month= Kshs. 131,285/-
- b. One month's unpaid salary in lieu of notice....Kshs.37095/-
- c. 9 months salary arrears (September 2005-May 2006)@ 8095= Kshs. 72,855/-
- d. Severance pay@ 15 days each completed years @ 2 years= Kshs. 37,095/-

7. The defendant filed its defense and counter-claim on the 8th of November 2006. The Defendant denies the Plaintiff's claim that it maliciously and wrongfully terminated the Plaintiff's employment as alleged insisting that it acted within the law and denied defaming the Plaintiff. It claims that the Plaintiff was accorded a chance to defend herself. It claims that the Plaintiff did not suffer any damages as alleged adding that the words published were not defamatory but were published on an occasion of qualified privilege as between employer-employee on the conduct of an employee all having a common interest to protect the Defendant and recover its assets and that the Defendant was under a legal and moral duty to publish the words complained of.
8. In its counter-claim the Defendant claims as against the Plaintiff a sum of Kshs. 1, 083,997/- broken down as follows;

- a. Money obtained on account of inflated purchase Kshs. 609756.00
- b. Unaccounted for income from airtime sales....Kshs 474,241/-.

9. The defendant has particularized the Plaintiff's negligence and fraud at paragraphs 3 a-v in its counter-claim.

10. This suit was partly heard by Justice Aroni, I took over the matter during the defense hearing.

11. This is the Plaintiff's evidence. The Defendant employed her in early 2004 as a hospitality supervisor. Her duties included working under an operator to guide cooking, receiving and settling guests, room cleaning and laundry. On the 30th May 2006 she was given a letter informing her that she was being sent on compulsory leave. The Deputy Vice-Chancellor Finance and Administration told her that they were restructuring work and that they would call her back. After 30 days leave she went back and the head of finance asked her to resign she declined to do so. Thereafter she was dismissed from work and in the said dismissal letter they were demanding Kshs. 1,083,997/- from her. She denied stealing the said money nor was it her duty to account. She was not charged in any criminal court. Before her leave she had not been paid her salary for 3 months. Her salary then was Kshs. 37,095/-. She had claimed the said arrears in writing. From September 2004 to September 2005 her salary was Kshs. 29,000/-, and thereafter it went up to Kshs. 37,095/-. Prior to the problem she had raised issues of being paid overtime for at times they worked for 18 hours. She was not paid maternity leave. During her employment she raised issues of money cheques and pricing that was not consistent. One Karen took meals to her house and did not pay. She was not given any appointment letter despite asking for one. She received money and handed over to accounts department to be banked. She believes she was dismissed for telling the Defendant what to do.

12. She stated that the dismissal letter was defamatory as it means she was a thief and not honest. She has not been able to get employment for when she is asked for a recommendation letter she cannot produce the dismissal letter. She applied for a post with the Anglican Church as a mother's union coordinator, they followed up and when they learnt of her dismissal she missed the job. She handed over formally to Mrs. Florence Msagha when she received her letter of compulsory leave.

13. In cross-examination the plaintiff testified that before September she was paid per day, then she was paid Kshs. 29,000/- per month before the upgrade to Kshs. 38,000/-. She was in charge of the cafeteria but she did not purchase directly. That purchases was a process, the Chef did the request, it went to her for approval and then it went to the director in charge and when he approved they would make the request from the department. She was not in charge of the storage. The storekeeper was under her and the sales were done by another director. That at one time the director hired his sister to work and she reported to her. The lady received money and did not account for it. She was not in charge of selling airtime. She was not aware of any shortage of airtime or inflated purchases at the cafeteria until she got the letter neither was she aware of transactions not receipted. She wrote cheque books and she used the petty cash for float or in case of emergency at night or weekend, plus there was no limit on how much she could spend. She was not aware of investigations she was told they are restructuring.

14. The defendant called two (2) witnesses namely; Peter Muroncia and Thomas Ondigi.
15. Peter Muroncia a Manager in charge of Human Resource and Administration with Africa International University formerly NEGST adopted his statement dated the 26th of February 2014. In it he states as follows the Plaintiff was their employed as Hospitality Supervisor in charge of its guest house and cafeteria in the Institute for Study of Africa Realities (I.S.A.R). The plaintiff received and held money from the sale of food, airtime and other items at the facility on account of the Defendant. He enumerated her duties at the institution at paragraph 3 of his statement. That the plaintiff's hand over notes (exhibit 11) showed a breakdown of the airtime she gave to Millicent Akinyi and the balance of the stock, that she handed over cash of Kshs. 185,200/- to the accounts department on the 31/5/2006, she held US dollars 150, she had coins and notes as petty cash, she held receipt books and cheque books, that the hand over notes showed the extent of the Plaintiff's duties.
16. That overtime the Defendant noted that ISAR guest house was making losses despite the increased patrons. The Defendant hired the services of Thomas & Associate to conduct an investigative audit into the facility. The Plaintiff was then sent on suspension to allow the investigation. It was not because of her hostility towards Karen Hill or restructuring. The auditor conducted investigations on the invoicing, receipting, petty cash, procurement, stock control and accommodation. The auditor gave a detailed report dated the 28/7/2006 (pages 22-43 of Defendant's documents). It was discovered that the Plaintiff in procuring food for the facility inflated the costs above the market prices (page 10 of report). She was engaged in false and fraudulent accounting where she altered entries in receipt books, used receipts books and plucked receipts from other receipts books (pages 11 &12 of the report). Airtime worth Kshs. 474,241/- had been lost (pages 12 of report). There were many failures on her part in the running of the facility which resulted in a loss of Kshs. 1,294,149/- (pages 13 of report).
17. That the report was discussed with the Plaintiff prior to its conclusion and the Defendant sought the Plaintiff's explanation of the issues noted which touched on her conduct but she could not give a reasonable explanation but instead she sought to blame other people that her responses when questioned was evasive, dilatory and she feigned ignorance. That the Plaintiff was combative, uncooperative and refused to answer the actual issues put to her with the result that the audit report was concluded on 28/7/2006 and submitted to the Defendant for action and after considering the report it was decided that the Plaintiff be dismissed.
18. That the Defendant was not malicious nor did the Plaintiff avail any witness to show that the dismissal letter was published as alleged and that the said letter merely gave reasons for her dismissal, the letter was addressed to the Plaintiff and copied to the other officers of the Defendant on a need to know basis; that the letter carried the reasons for her dismissal and the issues were discussed with her prior to dismissal; that the loss the institution incurred was true and actual as per the report; that the Plaintiff was in breach of her fiduciary duties and in exploitation of trust and negligent, abdication of her responsibilities to the Defendant failed to keep proper books of accounts, or fully account to the Defendant and fraudulently derived unauthorized benefits from her office leading to summary dismissal.
19. That the Plaintiff derived, took and obtained unauthorized benefits from the Defendant to the tune of Kshs. 1, 083,997/- as follows;
 - a. Money obtained on account of inflated purchase Kshs. 609756.00
 - b. Unaccounted for income from airtime sales.....Kshs 474,241/-.
20. That the Plaintiff was paid her salary up to and including May 2006, her salary was not raised to Kshs. 29,000/- to 37095/- as she alleges thus no arrears accrued. That no pay is due to her for the period after 30/5/2006 since she was sent on disciplinary suspension as provided for in the administrative manual of NEGST.
21. In cross -examination Mr. Muroncia stated that he was employed by the defendant in 2011. He got the evidence from their staff records. That due process was followed before her termination. The ISAR accounts were the responsibility of the Plaintiff and that she was the final person to deal with finances. That the subject of audit report was the Plaintiff's area of operation. He is not aware if the Plaintiff was interviewed by the auditors but he knows that she appeared before the officers. The Plaintiff was not given a notice to show cause letter. The Plaintiff was responsible for the

collection but did not take the cash to the bank. He was not aware of any letter of appointment. The audit report is signed at the executive summary part. He does not know if the Plaintiff's issues with Karen Hill were investigated. He has no idea if they issued a certificate of service to the Plaintiff.

22. He reiterated his evidence in chief in re-examination.

23. Mr. Thomas Chungi Ondigi testified as follows; Their firm was contracted by the Defendant to establish why they had losses, to check their internal control and that all expenses had been properly incurred. They also investigated the procurement and provided a report on the 28th July 2006. They could not establish the exact loss suffered as a result of the plucked receipts books. They noticed the prices were higher so they went to check the prevailing market price in addition they compare the prices with other institutions they were auditing e.g. Ishale Gardens, Homecare, Lukenya Gateways, Midlands Hotel etc. The loss was Kshs. 609,756/- and Kshs. 474,241/- for airtime.

24. In cross-examination Mr. Ondigi explained how a client engaged their firm and how they started the audit process. That they met with the person in charge of the finance department Florence who was their contact person. He did not interact with the person in charge of ISAR as she was on leave and he did not find it necessary to meet her as the questions they had were answered by the management. Most of their work was with the documents they had. He concluded that there were inflated prices. He did not mention any name in the report. He investigated the systems but not individuals. Procurement was done over the telephone and when the goods were delivered they were paid either by petty cash or cheque. The signatories were more than one person.

25. In re-examination Mr. Ondigi testified that their audit was not to incriminate the Plaintiff, there was no problem with the cheque payments, there was concern with the petty cash which was maintained by the cateress and that they made their recommendations.

26. I have carefully considered the pleadings, the evidence adduced, the written submissions and the relevant law. The issues for determination are as follows;

- i. Whether the plaintiff was unlawfully dismissed from her employment?
- ii. If so is she entitled to her claim as of Kshs. 278,330/-.
- iii. Whether the dismissal letter was defamatory to the plaintiff?
- iv. If so is she entitled to damages for libel, exemplary and aggravated damages for malicious libel?
- v. Is the defendant entitled to the amount claimed in the counterclaim?

27. Was the plaintiff unlawfully dismissed from her employment?

It is not in dispute that the plaintiff worked as a hospitality supervisor with the defendant. The plaintiff though employed was not given any letter of employment. Her duties were set out in the advert document no. 7 in the plaintiff's bundle. According to the plaintiff all was not well at her place of work and that she was dismissed without being given a hearing. It is evident that just before the plaintiff was sent on compulsory leave the defendant decided to do an audit. The plaintiff was sent on compulsory leave and later dismissed. It her evidence that she was not given a hearing during the said investigation and that she is not liable. Her evidence that she was not given any hearing during the investigations was confirmed by Mr. Ondigi who prepared the audit report. It has been submitted that under section 42 (2) of the Employment Act a termination of employment is unfair if the employer fails to prove that the reason for termination is valid and that the termination on fair reason. I do agree with the defendant's submissions that the law applicable is that of the Employment Act Cap. 226 (now repealed). Section 17 (c) of Cap. 226 permitted an employer to dismiss an employee on grounds that the employee willfully neglected to perform any work which was his duty to have performed, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly.

28. I have considered the events that led to the dismissal of the Plaintiff. On being sent on compulsory leave she was not told why she had to go on compulsory leave. It's her evidence that she sought to know the reasons but she was not given. There is no evidence that she was served with a letter to show cause by the defendant. The defendant talked of having meetings with her. Dw1 referred to the plaintiff's letters to show that they had meetings with her. The minutes of the said meeting

were not tendered by the defendant to show what transpired during the said hearing. The plaintiff testified that she was being pressurized to resign she exhibited a letter dated 23rd July 2006 addressing the said issue. The dismissal letter states that she was being held responsible as the person in charge of the entity. The audit that was done as per Mr. Ondigi did not involve an individual but a system. Was it the plaintiff who set up the systems? The defendant did not prove this? So was the plaintiff to bear the whole burden. For her to be held personally responsible. The plaintiff should have been given a chance to respond to any query the auditor had, I find that the defendant has failed to prove that she was given a fair hearing. In my view from what the plaintiff has exhibited I find that she was not given a fair hearing and her summary dismissal was unlawful.

29. Is she entitled to her claim as of Kshs. 278,330/-?

The plaintiff claims that at the time she was dismissed she was earning Kshs. 37095/-. In law it he who alleges who must prove. The plaintiff did not exhibit any salary voucher. The defendant did. The salary voucher for March 2005 shows that her salary was Kshs. 29000/- and not 37095/-. She claims 3 month unpaid salary. In her letter dated 17th August 2007 she was claiming her salary for June and July. Having found that she was unlawfully dismissed I find that she is entitled to her salary for June and July. It appears she could have been paid her salary for May as the letter dated 17/8/2007 specifically addresses her salary for June and July. I therefore award her two (2) months unpaid salary at Kshs. 29000/- plus one month's salary in lieu of notice at Kshs. 29000/-. Having not proved that her salary was increased to Kshs. 37095/- I find that her claim for 0 months salary arrears fails. The letter she exhibited in her documents was not signed and cannot be relied on to prove that she was not paid the said salary.

30. On her claim severance pay I find that the plaintiff is not entitled to the said sum as she was not declared redundant. Severance pay is payable to an employee who has been declared redundant under section 40 of the Employment Act. This claim therefore fails. Out of her claim of Kshs. 278,330/- the plaintiff has proved a sum of kshs. 87,000/- .

31. Whether the dismissal letter was defamatory to the plaintiff?

I have considered the contents of the dismissal letter. It is addressed to the plaintiff and copied to officers employed by defendant and the defendant's lawyer. For the said words in the publication to amount to defamation the plaintiff must prove the elements of the tort of defamation which are; that the words must be defamatory, the words must refer to the plaintiff and the words must be malicious. The words must be defamatory in that they must tend to lower the plaintiff's reputation in the eyes of right-minded persons, or must tend to cause him to be shunned or avoided. The burden of proof is upon the person alleging that the said words to be defamatory to show that a reasonable man would have understood them as such. The letter states the reasons for her dismissal, she was being held personally liable for the loss of kshs. 1,083,997/- being the person in charge of the entity. The plaintiff did not prove that the letter was published to any potential employer. I agree with the defendant that the in the absence of evidenced of publication the claim must fail. The letter was copied to persons within the defendant's employment on need to know basis. They were persons who needed to know that her services had been terminated. The letter was not published to 3rd parties outside the organization. In my view the plaintiff's claim for libel fails. I therefore enter judgment for the plaintiff against the defendant in the sum of kshs. 87000/-. She is awarded interest on the said sum from the date of filing suit until payment in full. She is also awarded costs of the suit.

32. Is the defendant entitled to the amount claimed in the counterclaim?

The defendant evidence was that the plaintiff was held liable for the loss incurred. Mr. Ondigi testified that their firm was contracted by the Defendant to establish why they had losses, to check their internal control and that all expenses had been properly incurred, they also investigated the procurement. He was categorical that they were not contracted to investigate an individual. I have read the report and the observation made on the internal system that was in place then. The report does not state that it's the plaintiff who came up with the system. The report revealed the weakness

within the system. It was not his evidence that the plaintiff plucked the receipts. If indeed the plaintiff was to blame for the loss of receipts books, cash and airtime sales why wasn't she charged, further why did the defendant not address the specific losses to her? The audit revealed loss but was she entirely to blame? She gave a detailed hand over report. It was upon the defendant to prove against her notes that the loss was actual. She handed over what she had in her possession. More investigation was needed to hold her liable. It was upon the defendant to show that the loss incurred can be specifically attributed to the plaintiff alone or as a head of department. In my view the defendants claim against the plaintiff fails in this regard. The defendant counterclaim is dismissed with costs to the plaintiff.

Orders accordingly.

Dated signed and delivered this *15th* day of *January* 2015.

R.E. OUGO

JUDGE

In the presence of;

.....**For the Plaintiff**

.....**For the Defendant**