REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 201 OF 2012

RUTH NJIRU JAMES ……..PLAINTIFF

VERSUS

1. NJOROGE NDIRANGU)

2. MUNDIA GATERIA)

3. KEN M. THAIRU)

4. PUBLIC SERVICE CLUB)…….....……DEFENDANTS

JUDGMENT

By a lengthy and detailed plaint dated 2nd May 2012 and filed in court on 3rd May 2012, the plaintiff **Ruth Njiru James** sued the defendants herein **Njoroge Ndirangu, Alvin Giteria , Ken M. Thairu** in their capacity as Chairman, Treasurer and Secretary respectively, being the officials of the Executive Committee of the 4th defendant Public Service Club, a public unincorporated body. She sought general damaged for alleged defamatory materials both written (libel) and (slander) allegedly uttered against her, the subject of the suit, together with costs and interest on damages and costs, and further or other relief with the inherent jurisdiction of the tribunal.

According to the said plaint, the plaintiff Ruth Njiru James was at all material times to this suit employed by the defendants as an assistant club accountant/ IT Administrator charged with the responsibility of making entries on a daily basis into the club books of bills of sales and transactions of the club's stock of food, liquor and beverage sold by the club's barmen to its customers. The said plaint alleges that on or about 18th April 2011, the defendant's in the presence of Joyce Kariuki and Sarah Ndambiri the 3rd defendant tapping on a pile of member's books uttered words directed at the plaintiff, which words were defamatory as contained in paragraph 6 of the plaint.

It was the plaintiff's assertion that in their natural meaning the words as uttered and published on the undated write up of "theft cases" and on summary dismissal letter dated 5th May 2011 served on the plaintiff on 11th May 2011at 1.25pm, meant and where understood to mean that the plaintiff had been unfaithful in the performance of her duties with the public service club as an assistant/accountant IT Administrator and had, over a period of more than a year stolen unquantified and or unquantifiable sums of money belonging to the Public Service Club and as consequence she had to pay the ultimate price by summary dismissal from employment and lose her benefits including salary for days worked.

The plaintiff alleged that the said words were calculated to disparage and they did disparage and injure her credit, character and reputation and in her said career and she has been brought into hatred and ridicule and has thereby been unable to obtain alternative employment.

She therefore claimed damages against the defendants jointly and severally for the said libel and defamation and that despite demand the defendants had refused and ignored or failed to honour her demand.

The plaintiff took out summons to enter appearance on 7th May 2012 and on 10th May 2012, the said summons together with the plaint and other accompanying documents were served upon the defendants by Fredrick N. Wamalwa Advocate by his own affidavit of service sworn on 14th September 2012 under Order 5 Rule 15(1) of the Civil Procedure Rules. On 15th May 2012 the defendants through the firm of Njoroge Wachira & co. Advocates filed a Notice of Appointment of advocates followed by the Memorandum of Appearance on 31st May 2012. No defence was filed to counter the allegations leveled against the defendants by the plaintiff.

On 27th August 2012 the plaintiff sought for judgment in default of defence through a request dated 15th August 2012 under Order 10 Rules 4,5,6 of the Civil Procedure Rules, which interlocutory judgment was formally entered against the defendants on 17th October 2012 by the Deputy Registrar Hon F. Wangila. The plaintiff therefore set down her suit for formal proof hearing for 17th November 2014. When the matter came up for hearing before me on 17th November 2014, having satisfied myself that a regular interlocutory judgment had been entered against the defendants and their advocates having been served with a hearing notice for formal proof hearing on 29th November 2013 over one year earlier as shown by the acknowledgement stamp by the said advocates at 1.49 pm on 29th November 2013, and affidavit of service sworn by F.N. Wamalwa and filed in court on 14th November 2014, I allowed the plaintiff to proceed and formally prove her claim and for assessment of damages.

The plaintiff testified and called one other witness Mr Humprey Maina Gatururi who was her former workmate at the Public Service Club before she was summarily dismissed following the allegations that she had colluded with other employees to steal money from the club. He had also left employment and was a local farmer in Muranga.

In her sworn testimony, the plaintiff adopted her statement recorded and filed in court together with her plaint which statement was adopted as her evidence in chief besides her oral testimony. The same was with her witness statement.

But before delving into the depths and widths of the plaintiff's testimony in court in support of her claim, I must stop to ask myself 2 questions that are very striking with this claim as filed. The questions which, if answered in the negative will determine the claims at a preliminary stage and therefore there would be no use for me to waste judicial time determining the merits and demerits of the claim herein against the defendants as presented.

Was the plaintiff's suit filed within the statutory limitation period?

The answer lies in examining the pleadings, the plaintiff's self recorded statement as filed and her testimony and that of her witness in court.

The plaint, parts of which have been summarised above allege that the cause of action arose between 18th April 2011 and 19th April 2011 leading to 5th May 2011 when the plaintiff was summarily dismissed from employment following those allegations that she had colluded to steal money from the club.

The plaint was filed in court on 3rd May 2012 in other words, the plaintiff relied on her summary

dismissal letter of 5th May 2011 to file suit for defamation, citing the libelous publications and utterances allegedly made by the defendants between 18th and 19th April 2011.

Section 4(2) of the ***Limitation of Actions Act***, Cap 22 Laws of Kenya provides:

> ***An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:***
>
> ***Provided that an action for libel or slander may not be brought after the end of twelve months from such date."***

This is what is contained in the proviso to Section 4(2) that an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued, but where the tort complained of is libel or slander, then it may not be brought after the end of twelve months from such date.

As I have stated, the plaintiff's claim is contained in paragraph 6,7,8 and 9 of the plaint, that she was defamed on diverse dates while she was still in employment of the 4th defendant, by the utterances and publication made against her by the 1st, 2nd and 3rd defendants on 18th and 19th April 2011 which publications/utterances she reproduced in her paragraphs 6,7,8,9 of the plaint.

In addition, the plaintiff alleges that the letter of dismissal of 5th May 2011 was defamatory of her.

In my assessment, the suit herein having been filed on 3th May 2011, as against the defendants for alleged defamation constituting of the utterances and or publication or write ups made on 18th and 19th April 2011 was statute barred.

The suit was filed over twelve months after the alleged libelous and or defamatory words were allegedly uttered or published by the defendants concerning the plaintiff. The claim touching on the alleged libel published or uttered on 18th April 2011 ought to have been filed by 19th April 2011 whereas the claim for libel published or uttered on 19th April 2011 ought to have been instituted by 20th April 2011.

In **H. Ndegwa & Another vs David Onzere (2007) e KLR**, M.K. Ibrahim J (as he then was) held that:

" I think that it was improper pleading in a libel suit for different correspondences, articles or publication to be combined to appear to be a single article or publication. Each libelous article and publication constitutes a separate cause of action and the contents must be confined to that article. It is not proper for one to pluck various words, statements etc from several articles or publication and put them together and mix them up and present them as the words complained of. Libel must be strictly proven by proof of the form in which they were contained and published including the dates etc."

I concur with the above holding of Honourable Justice M.K. Abrahim and add that the plaintiff herein ought to have had a single letter or write up or record containing all the words complained of and which had been written and signed by the defendants. There is no evidence that the limitation period was extended by any court of law. A suit that is instituted out of the statutory limitation period ousts the jurisdiction of the court from hearing and determining such a dispute. And as jurisdiction is everything, without which, this court must down its tools and say no more. In **Motor Vessel " Lilian S" v Caltex Oil(K) Ltd (1989) KLR 1 the court stated:**

" By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognizance of matter presented in a formal way for its decision. The limits or this authority are imposed by statute Charter or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of

which the particular court has cognizance or as to the area over which the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts in order to decide whether it has jurisdiction, but, except where the court or tribunal has been given power to determine conclusively whether the facts exist where the court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given ……"

Thus, without jurisdiction, a court of law acts in vain by purporting to determine a matter in dispute between the parties and in effect, amounts to nothing.

The only single letter is the dismissal letter of 5th May 2011. The other alleged defamatory words are contained in utterances and write up made on 18th April 2011 and 19th April, 2011 which as I have stated were filed out of the statutory limitation period of 1 year and hence the same are hereby accordingly struck out.

This case will therefore only proceed on the basis of the letter of dismissal which is dated 5th May 2011 and copied to the KUDHEIHA.

In her plaint dated 2nd May 2012, the plaintiff pleaded at paragraph 15 thereof that:

" On or about dated 2nd May 2012 the 3rd defendant maliciously on dictated (six) to Joyce Kariuki, and caused to be printed and circulated and published to members of the executive committee and to accounts, the personnel and or Administrative Manager and to the Workers Union,(KUDHEIHA) and to the shop steward thereof a letter of and concerning the plaintiff the following terms:-

5th May 2011

Ruth Njiru James,

C/o Public Services Club

NAIROBI

Dear Ruth

<u>RE: SUMMARY DISMISSAL</u>

Reference is made to our meeting with you, Augustus Kitonga, Zablon Kepha, Sarah Ndambiri(Account), Gerald Ngacha(Accounts) and Joyce Kariuki (Administrative Assistant) in my office on 19th April 2011, and our meeting on 28th April 2011 with the Executive Committee in the club and conference room and your subsequent letter dated 29th April 2011.

This is to inform you that the Executive Committee is convinced you colluded with your colleagues (Ben Onyiri and Augustus Kitonga) and stole from the club on various dates.

On instructions from the Executive Committee of the club I hereby notify you that you have been summarily dismissed from the employment of the club with immediate effect.

You are further instructed to return all company property in your possession forthwith.

Thank you.

Yours faithfully.

FOR PUBLIC SERVICE CLUB

KEN M. THAIRU

GENERAL MANAGER".

Copies to: Executive Committee

Workers Union (KUDHEIHA)

Personal file

That is the letter and those are the words in that dismissal letter which the plaintiff pleaded in her paragraphs 16,17 and 18 of the plant that in their natural and ordinary meaning, the words published on the undated write up of theft cases and on the summary dismissal letter dated 5th May 2011 served on the plaintiff on 11th May 2011 at 1.25pm meant and were understood to mean that the plaintiff had been unfaithful in the performance of her duties with the Public Service Club as an Assistant Accountant/IT Administrator Accountant/IT Administrator and had over a period of over one year stolen unquantified or unquantifiable sums of money belonging to the Public Service Club as a consequence she had to pay the ultimate price by summary dismissal from employment and loss of her benefits including salary for days worked.

The plaintiff further claimed that the said words were calculated to disparage and they did disparage the her in her burgeoning career as an accountant and IT specialist and in her employment prospects in those careers. She further claimed that in consequence of the said words she was summarily dismissed and injured in her credit, character and reputation and in her said career she has been brought into hatred and ridicule and has thereby been unable to obtain alternative employment.

In her testimony in court, the plaintiff denied that she ever stole any money in collusion with her colleagues as alleged in her letter of dismissal as she had explained in her letter of 29th April 2011 and that she was not involved in handling cash but documentation.

Further, those books of accounts were removed from her office without her consent only to be shown cancelled cash books showing deposits.

She testified that she was never charged before any court of law for the alleged theft of club money and neither was she ever reported to the police for investigations. Further, that it was unusual to see books of accounts cancelled the way she saw hers done and that no audit was ever carried out before she was served with allegations of theft and publications including the letter of dismissal which she produced in evidence. She testified that the defendants acted maliciously by alleging that she had stolen money from the club yet there was no audit report or a report made to the police.

The plaintiff further testified that there had been false allegations leveled against her and her colleagues that they had been responsible for the sacking of the former manager and that she and her colleagues were threatened with sacking before the managers could be sacked. Further, that she was asked to resign if she was undertaking studies but instead, she decided to work for 3 days and nights a week. She accused the 3rd defendant of planning to terminate her services so that he could work with a friend close to him.

The plaintiff also accused the manager who is the 3rd defendant hereto for intimidating her for refusing to approve his Sacco Loan application without a guarantor.

She stated that she was the treasurer for their Sacco Society and could not have allowed a member to be granted a loan without guarantors. The plaintiff testified that she could not get alternative employment because her reputation had been ruined. That she applied for a job in another club but she never got the

job and suspected that the dismissal letter in her personal file must have affected her prospects of getting another job as the prospective employer would make inquiries from her former employer.

She further stated that her former colleagues and friends and family members keep asking her why she had never gotten employment and they still think it is because of the alleged theft. She complained that despite clearing with every department after her summary dismissal she was denied her certificate of employment. She maintained that the utterances and publications against her were baseless and false and that she was never given a hearing. She stated that she has suffered mental torture for the false allegations in her personal file at the club for reference and cannot get employment because of the said false allegations.

The plaintiff sought compensation in damages for defamation and costs of the suit and interest and produced a bundle of documents as her exhibits as her P exhibit 1.

PW2, Humprey Maina Gatuturi testified that he had known the plaintiff for 13 years as they met at the Public Service Club where he worked as a barman and rose to a Supervisor and the plaintiff found him there. PW2 testified that the club used to sell alcoholic drinks, soft drinks and food. According to the witness, it is the bartenders who used to sell drinks and food and receive money from customers which they would then surrender to the cashiers who would in turn surrender to the accountant. That bill went directly to the cashiers while accountants would remain behind to work between 5pm-6pm. That as the services continued until later upto 1.00am, the bartenders would securely lock the money in a drawer until the following morning/day. He confirmed that the plaintiff was employed as an accounts clerk but rose to the position of assistant accountant and also worked as an IT personnel. He also confirmed that the plaintiff was sacked on allegations that she had colluded with others to have the money yet there was no physical audit of cash at hand or bank. He also denied ever being questioned for the alleged loss and neither were there any investigations conducted by the management concerning the alleged theft. He testified that the manager never employed any internal mechanisms to resolve the matter and that he had blacklisted some staff members who played a role in having some managers sacked. The witness also confirmed that at the material time, he was the chairman of the Sacco while Ruth was the treasurer and that when the manager applied for a loan of shs 300,000 without guarantors and on being denied on account of lack of guarantors, he got annoyed and refused to get signatures of his junior staff. PW2 maintained that the alleged theft was never reported to the police for investigations. He concluded that the allegations leveled against Ruth were malicious and damaging as she had been unable to secure employment because of the referrals to the club and the union.

At the close of the plaintiffs case, counsel Mr F.N. Wamalwa filed written submissions and authorities to guide the court in determining the claim.

Mr Wamalwa submitted on behalf of the plaintiff that (material to the letter of dismissal dated 5th May, 2011 only); that there was absolutely no justification for the allegations leveled against the plaintiff in the letter of dismissal. He reiterated her testimony in court, pleadings and her documentary evidence. He submitted that there was no incriminating evidence against the plaintiff to warrant her dismissal as she never handled cash but documentations. Further, that as a club it should have reported to the police the alleged thefts to be investigated by an independent public body and failure to do so is deliberate and evidence of malice and done to justify the summary dismissal of the plaintiff.

Counsel submitted that further evidence of malice against the 3rd defendant is underscored by his arbitrary demand that the plaintiff perform a cashier's duties for 17 hours shift up to midnight even though he was informed by the plaintiff that she was a single mother nursing a newly born child. It was also submitted that the actions by the defendants affected the plaintiff's progress as she could not complete her studies in IT at Inoorero University following her loss of employment and income.

The plaintiff's counsel further submitted that despite demand and notice of intention to sue, the defendants refused to respond and or make an apology for the defamatory utterances hence, the suit herein.

He accused the defendants of authoritarian arbitrary behavior of a public body and further urged the court to find that the defendant's conduct in failing to file defence or apologize or retract the defamatory allegations left the allegations unmitigated which had injured the plaintiffs reputation and feelings as she cannot get alternative employment since the defendants refused to issue her with a certificate of service commendation .

Counsel accused the defendants of being reckless yet refusing to rebut the plaintiff's claims. He relied on the case of **Gicheru vs Morton & Another (2005) 2 KLR 332** Tunoi JA dealing with the issue of damaged reputation opined at page 340 and 341 thus:-

"The latitude in awarding damages in an action for libel in very wide……

In an action for libel the trial court in assessing damages is entitled to look at the whole conduct of the defendant from the time the libel was published down to the verdict is given. It may consider what his conduct has been before action, after action, and in court during the trial: Praud vs Graham 24 QBD 53, 55:"

Counsel also cited **Broom vs Cassel & Co. (1972) AC 1027** where the House of Lords stated that:

in actions of defamation and in other actions where damages for loss of reputation are involved, the principle of restriction in intergrum has necessarily an even more highly subjective element. Such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but in case the libel, driven underground, ,emerges from its linking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a by stander of the baselessness of the charges."

Mr F.N. Wamalwa also relied on the decision in **Uren vs Jolum Fairfax & Sons Pty Ltd 117 CLRY 15,150** as cited with approval by Tunoi JA that:

"It seems to me that, properly speaking a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways: - as a vindication of the plaintiff to the public and a consolation to him for wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money."

Comparing awards made in **Gicheru vs Morton & another** case ranging from 1.5 million to 30 million, the plaintiff's counsel urged this court to award the plaintiff kHz 20,000,000 as reasonable Solatium alluding to award of shs 10,000,000 by Khaminwa J to Musinga Advocate and shs 20m to Charles Kariuki Advocate regarding defamatory slurs on their careers (no citations provided for the two cases referred to above).

Analysis and Determination

I have carefully examined the plaintiff's pleadings, her testimony in court and as adopted from her statement as well as the evidence contained in the documents produced in court in support of her case and the evidence of the plaintiff's witness. I have also carefully considered the plaintiff's advocate's submissions and the authorities relied on and submitted to court. The plaintiff did not frame any issues for determination. However, from the pleadings and evidence adduced, there are three main issues for determination

1. Whether the letter of summary dismissal dated 5th May 2011 addressed to the plaintiff was defamatory/libelous of her.

2. If the answer to (1) above is in the affirmative, what damages is the plaintiff entitled to.

The plaintiffs evidence is that the letter dated 5th May 2011 addressed to her and copied to the executive committee members of the 4th defendant and KUDHEIHA was defamatory as it contained false and malicious libelous allegations against her that she had colluded with her colleagues to steal money from the club.

According to the plaintiff, she never used to handle any cash and that she only dealt with documentation a fact which the defendants knew or ought to have known. Further, that the alleged theft was never investigated or even reported to the police to question her hence the letter was written with malice and paint her as a thief, which has greatly affected her employment prospects.

To find whether the letter complained of, being a dismissal letter from employment, this court must define what defamation is.

Winfield and Jolowicz on tort (17th edition) page 815 states:

" Defamation is the publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right thinking members of the society generally or tends to make them shun or avoid him."

It is not disputed that the summary dismissal made allegations against the plaintiff which overtly stated that she was a dishonest person in her accounting duty; and she had colluded with her colleagues as named therein and stole from the club on various dates. The dismissal letter was written by the 3rd defendant general manager to the plaintiff. The question is whether the summary dismissal letter was for circulation to third parties and therefore published. The said letter was copied to the executive committee of the club, KUDHEIHA (the union that represents the hotels and or club staff). It was also copied to the plaintiff's personal file.

In my view, the letter of dismissal was not published to third parties. This is because the plaintiff did not deny in her testimony before court that she was a member of KUDHEIHA. Neither did she produce the Human Resource Manual for the 4th defendant to demonstrate whether or not the union was entitled to be notified of any disciplinary action that may be taken against its members by the employer.

In my view, the letter of 5th May 2011 was written by the 3rd defendant on behalf of the employer, in the normal course of disciplinary proceedings as expected by the defendants and Human Resource Management policies and procedures, which in my view, cannot amount to publishing of defamatory matter concerning the plaintiff.

From the plaintiffs own defence, there had been allegations leveled against her and she was called upon to respond which she did respond on 29th April 2011 in writing. The plaintiff admittedly was issued with some write ups which were undated see page 5 of her bundle) on the theft cases. From her own exhibits, her letters of confirmation dated 13th March 2009 was copied to the executive committee, club accountant and personal file.

In my most considered view, the plaintiff's remedy for summary dismissal, which she is challenged before this court by way of defamation of character is without merit. Her claim fell elsewhere, in the employment and Labour Relations Court, for unlawful dismissal and or payment of her lawful dues or even damages or reinstatement. That is a matter that can only be adjudicated upon by the Environment and Land Court as contemplated by Article 162(2) (a) and 165(5) (b) of the Constitution of Kenya and Section 12(1) of the Employment and Labour Relations Act; 2011 (as amended). The demand notice dated 14th July 2011 and produced in evidence is clear that she was claiming from the defendants an explanation for unlawful termination of employment and not defamation of character.

Fortunately for the plaintiff, her claim under the employment laws is not statute barred and therefore she is advised to file her claim in the E.L.R.C for appropriate reliefs.

Albeit on the face of it, the letter of dismissal produced in evidence and whose contents I have reproduced in this judgment appears defamatory as it alleges that she was culpable for colliding to steal money from the club, in my view, the said letter would only be defamatory if it was published to third parties and secondly, if it was not an end product of the disciplinary proceedings being employed by the defendants (employer) to an employee.

The summary dismissal letter was written by Ken M. Thairu, the General Manager of the Public Service Club, on the clubs letter head, copied to Executive Committee, who are the policy/decision making body for the unincorporated Public Service Club, the 4th defendant, and who can therefore not sue and or be sued in its own name. The letter was also copied to the plaintiffs Labour Union and her personal file.

In my view, the dissemination of a letter of dismissal to the named individuals was on a privileged occasion. I am fortified on this point by the decision in Hunt vs Great Northern Railways Company (1891) QB 189 cited with approval in **H.W. Ndegwa & Another vs David Onzere Eldoret HCC CA 156/2003 per M.K. Ibrahim(2007) e KLR** where the principle underlying the defence of qualified privilege was explicitly defined. Lord Esher expressed that a privileged occasion:

"…….arises if the communication is of such a nature that it could be fairly said that those who made it had an interest in making such a communication and those to whom it was made had a corresponding interest in having it having it made to them when those two things co-exist , the occasion is a privilege one. In order for words to found the privilege, there must be a reciprocity of interest."

In the instant case, the author of the impugned letter was the General Manager of the 4th defendant club. I have examined the plaintiff's letter of appointment, confirmation and acting accountant. Those letters were all signed by the General Manager and copied to the Executive Committee and her personal file. The letter promoting her to the post of of acting accountant dated 29th September 2009 was signed by P.N. Muiruri for Executive Committee of the 4th defendant.

It is not denied that the defendants were the plaintiff's employer. That being the case, indeed, all the defendants were bound by a contractual relationship of employer and employee, with the plaintiff, which contract was through the collective bargaining agreement between the plaintiff's employer – defendants and the plaintiffs Trade Union (KUDHEIHA) and of which the plaintiff must have been a member as shown by her own advocate's letter of demand dated 14th July 2011 wherein the complaint was copied to the KUDHEIHA stating that the plaintiff's purported termination of employment by the General Manager was without any lawful basis for doing so.

This court cautions itself that it lacks the necessary jurisdiction to delve into matters of employee/employer relationships, save for justifying the orders that I am about to make.

It is undeniable that in an employer/employee relationship, an employer has a right to institute investigations, to inquire into the conduct or performance of an employee and also to investigate his or her conduct in the cause of her/his employment and institute appropriate action including, in appropriate cases, summary dismissal for gross misconduct.

On the other hand, the employee has a right to fair labour practices including the right to be heard on the allegations and the right to sue for wrongful dismissal which right the plaintiff has not exercised but she nonetheless complains that she was not heard and that the letter of summary dismissal was contemptuous and therefore defamatory of her.

In my view, the plaintiff's remedy lies elsewhere in the Employment and labour Relations Court which has necessary jurisdiction to determine all those issues relating to employer/employee relationships, as this court cannot grant orders that tend to determine the rights of employees.

I reiterate that the letter of dismissal of the plaintiff was privileged communication as it was communicating to her the decision of the Executive Committee which was convinced that the plaintiff had colluded with her colleagues (Ben Onyiri and Augustus Kitonga) and that she stole from the club on various dates and that she had accordingly been summarily dismissed from employment with immediate effect.

The contents of the summary dismissal letter may have been false and contemptuous, however, that is the only way an employer can or could communicate its findings and decision to the employee.

In **H.W. Ndegwa & Another vs David Onzee (supra**) which matter was similar to the plaintiff's case herein and where the employer copied the employee's letter of summary dismissal to the Branch Secretary of the Worker's Union and the Chief shop steward of the union of the defendant company, the court held that:

"The union through its officials were entitled and had an interest to be informed of the out come of the disciplinary proceedings and the decision of the employer. The defendant company as an employer was under a duty as per the collective Bargaining Agreement to inform the Union of the said outcome (that their member had been found guilty) and the decision (that he had been summarily dismissed for gross misconduct)."

The court found that the employer had an unqualified privilege to share the findings and decision with the Worker's Union. In this case, if the summary dismissal was a ***" a mere excuse as her fate had been sealed long before the outcome of inquiries or dismissal,"*** then I reiterate that the correct remedy would be found in the Industrial Court." The denial of certificate of service too, is an issue that can be ventilated before the right forum, the E&LRC.

The summary dismissal letter had to be written or typed anyway from a draft form by a secretary and signed by the General Manager and copies made to her personal file by employees responsible for filing as appropriate. That in my view, cannot amount to libel as there was a privileged relationship in this case and the communication and publication in the letter dated 5th May 2011 was written and published on a privileged accession.

The employer was under a duty to notify the plaintiff and her union of the decision reached. It was also entitled to keep a copy of the letter in her personal file. As the decision was reached at by the Executive Committee and the General Manager was only the disseminator of the decision, the decision makers too had to be notified that indeed he had executed his duties as directed. That in itself is not defamatory. In as much as prove of malice is not mandatory in libel cases, I find that there was indeed no evidence of malice as the General Manager wrote and signed the letter in the cause of and within the scope of his duties and he could only be sued and successfully so, if it was shown that the letter was defamatory and there was malice to deprive the communication its privilege.

For those reasons, I find that the plaintiff has not proved her case on a balance of probabilities. Although there was no defence filed challenging the claim herein instituted by the plaintiff, the burden of proof remained with the plaintiff as espoused in Sections 107,108 and 109 of the Evidence Act. In this case, I find that the plaintiff did not discharge that burden of proving that on a balance of probabilities, there was material that was libelous of her. Accordingly, I dismiss her case as filed against all the defendants. I make no orders as to costs as the defendants did not participate in the proceedings.

Had the plaintiff been successful in her claim, I would have assessed damages for defamation of character. That is an established principle of law as has been held in several decisions of this court and the Court of Appeal. The principle is grounded on the understanding that as this is not the final court, the plaintiff must be made aware of what she would have been entitled to, had she been successful in establishing liability against the defendants. See **Lei Masaku vs Kalpama Builders Ltd HCCA 40/2007 (2014) e KLR** where Mabeya J held:

"There is the issue of failure to assess damages. It has been held time and again by the Court of

Appeal that the court of first instance must assess damages even if it finds that liability has not been established. To have casually dismissed the suit and fail to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appellable and the appellate court needs to know the view taken by the court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behoves this court to assess quantum."

The plaintiff's counsel proposed an award of general damages in favour of the plaintiff amounting to kshs 20,000,000, relying on two decisions whose citations were not provided. Both cases involved advocates of the High Court of Kenya as plaintiffs, a Mr Charles Kariuki and Mr Musinga advocates who are now judges of the High Court and Court of Appeal respectively.

It was submitted by Mr F.N.Wamalwa that the court in the said two cases awarded the plaintiffs kshs 20,000,000 for defamatory slurs on their careers. He also referred to the case of **Gicheru vs Morton** where the Court of Appeal enhanced an award of kshs 2,000,000 to 6,000,000 in favour of the former Chief Justice Evans Gicheru and it is in the same Gicheru (supra) case where the Musinga and Charles Kariuki cases were cited for comparison.

To arrive at what I would consider fair and reasonable award, I would draw considerable support in the guidelines in **Jones vs Pollard (1997) EMLR 233,243** cited with approval by the Court of Appeal in Gicheru vs Morton case (supra) that:

a) The objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published, and any repetition;

b) The subjective effect on the plaintiff's image and feelings not only from the prominence itself but from the defendant's conduct thereafter both up to and including the trial itself;

c) Matters tending to mitigate damages, such as the publication of an apology;

d) Matters tending to reduce damages; and

*e)*Vindication of the plaintiff's reputation past and future.

Assuming that the matters complained of were false and defamatory of the plaintiff and were published of and concerning her, they would no doubt have lowered her in the eyes of the right thinking members of the society generally. No employer would recruit a thief or dishonest person and more so, an accountant who would be entrusted with an organization's financial resources. Those words if they had not been published on qualified privileged occasion would have had a lasting negative effect on a young life like that of the plaintiff as it would diminish her legitimate expectation of building a career and eking a living out of it.

I would therefore in the circumstances award the plaintiff a sum of kshs 5,000,000 general damages for defamation of character to vindicate the plaintiff to the public and as a consolation to her for the wrong done (solatium) rather than a monetary recompense for harm measurable in monetary terms.

However as I have stated above, the plaintiff did not prove her case against the defendants. Having dismissed her suit in whole, I award her nothing.

In the end, the plaintiff's suit is dismissed with no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 18th day of May, 2015.

R.E. ABURILI

JUDGE

18/5/2015

Coram R.E. Aburili J

C.C. Kavata

F.N. Wamalwa for the plaintiff.

No appearance for the defendant

COURT - Judgment read and pronounced in open court.

R.E. ABURILI

JUDGE

18/5/2015