



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL SUIT 797 OF 2004**  
**STEPHEN K. KIMUYA.....PLAINTIFF**  
**-VERSUS-**  
**THE BOARD OF TRUSTEES OF THE**  
**NATIONAL SOCIAL SECURITY FUND.....DEFENDANT**

**J U D G M E N T**

The Plaintiff has filed this suit against the Defendant in a plaint dated 30<sup>th</sup> October 2003 praying for judgment for:

***“(a) Kshs.569,992.20.***

***(b) General and exemplary or aggravated damages for defamation.***

***(c) An injunction order .....to restrain the defendant by itself its servants and/or agents or otherwise howsoever, from the further publication or causing to be published the said or any similar words defamatory of the Plaintiff and from alleging or continuing with the publication of any defamatory matter against the Plaintiff.***

***(d) A mandatory injunction order do issue directed at the Defendant to retract and apologize and publish the retraction and apology accordingly of the defamatory parts of the letters dated 6<sup>th</sup> March and 30<sup>th</sup> April 2003 and the press statement issued on 8<sup>th</sup> March and 7<sup>th</sup> May 2003.”***

That claim is made on the basis that the Plaintiff was employed by the Defendant on 1<sup>st</sup> August 1992 as the Defendant’s Senior Internal Auditor rising through the ranks to become the Internal Audit Manager of the National Social Security Fund (NSSF); that on or about 6<sup>th</sup> March 2003 and contrary to regulation 3.7 of the NSSF Code of Regulations for all members of staff, the Defendant suspended the Plaintiff from employment pending representations concerning what the Defendant called, the Plaintiff’s professional misconduct in connection with the loss of Kshs.256 Million by the Defendant on or about 25<sup>th</sup> June 2002.

The Plaintiff continues to say that on 8<sup>th</sup> March 2003, the Defendant wrongfully caused to be published on the top page of the Daily Nation the words the Plaintiff considers defamatory under the following caption:

***“MPs plotting to have me fired, says Ngilu, claim comes as NSSF Chiefs suspended over lost Kshs.256***

**Million.”**

The publication went on to say:

**“Mrs. Ngilu’s claim came as it was revealed three top officials of the National Social Security Fund have been suspended and faced dismissal over Kshs.256 Million lost from in the collapse of the scandal ridden bank.....**

**Mr. Gumo spoke out as it was revealed the suspended NSSF Officials were Mr. Stanley K. Chemngorem, Deputy Managing Trustee in charge of personnel and administration, Mr. David K. Ruto, the Investments Manager, and Mr. Stephen K. Kimunya the Internal Audit Manager”.**

The Plaintiff claims further that on 30<sup>th</sup> April 2003, the Defendant well-knowing that the Plaintiff had been cleared by three investigations in relation to loss of the money and ignoring a reasonable explanation tendered by the Plaintiff, suddenly and without notice summarily dismissed the Plaintiff from his position as Internal Audit Manager and that as a result of that dismissal the, Defendant has declined to pay the Plaintiff his notice pay and other terminal dues and the Plaintiff has suffered loss and damage.

But that was not all as on 7<sup>th</sup> May 2003 the Defendant again caused publication in the Daily Nation some other words under the following caption:

**“NSSF to seize Mtuweta’s property of Kshs.256 Million:**

**Meanwhile three senior NSSF Officers suspended a month ago over the Euro Bank scandal have been sacked.**

**The former Deputy Managing Director Mr. S. K. Chemng’orem, Investment Manager Mr. W. Ruto and Finance Week.**

**The three were first suspended over their role in the transfer in middle of last year of NSSF funds from the Central Bank to Euro Bank which collapsed owing more than Ksh. 1 billion, of which 67 percent was public money deposited by parastatals against the Treasury’s Instructions.”**

The Plaintiff claims it is the Defendant who published words in those articles and that subsequently on 30<sup>th</sup> April 2003 the Defendant suddenly and without Notice, summarily dismissed him. Hence the Plaintiff’s prayers in the plaint dated 30<sup>th</sup> October 2003 as stated at the beginning of this judgment.

Those words complained of, are set out in paragraphs 6 and 9 of the plaint and the Plaintiff says the words are defamatory of him and lists in paragraph 10 of the plaint what he thinks those words mean in their ordinary meanings and Plaintiff goes on to contend in paragraph 11 of the plaint that the contents of those words are false and untrue and that by the publication of those words, the Plaintiff’s character has been grievously injured and brought to disrepute for which the Plaintiff claims damage.

But in his defence dated 27<sup>th</sup> November 2003, the Defendant has included a counter-claim of Kshs.200,000/= plus interest at the rate of 15% per annum from 30<sup>th</sup> April 2003 being loan balance. Otherwise it is the Defendant’s case that the entire Plaintiff’s suit be dismissed with costs.

Evidence has been adduced on both sides and I must take it that the words complained of with respect to the libel the Plaintiff is alleging against the Defendant are the words found in paragraphs 6 and 9 of the plaint. At the same time I should make it clear that I am not handling an appeal against the dismissal of the Plaintiff from his employment. But will look at that dismissal first before I go to the question of defamation.

The letter of suspension dated 6<sup>th</sup> March 2003 was effective same date. It required the Plaintiff to hand over his office and notified the Plaintiff that the Board of Trustees intended to terminate his services

should he fail to submit any representations within seven days from date of the letter. I think that statement was not keenly worded. But there it was.

The Plaintiff submitted long representations of six pages dated 11<sup>th</sup> March 2003 but still was dismissed by letter dated 30<sup>th</sup> April 2003 – stating as follows:

***“Please refer to my letter SF/P/1672 Vol. 1 (14) of 6<sup>th</sup> March 2003 suspending you from duty for reasons well known to you and your subsequent representations thereof dated 11<sup>th</sup> March 2003.*”**

***I wish to inform you that after careful consideration of your representations against the facts of the case, the Board of Trustees have reached a decision that you be summarily dismissed from the service of the Fund with loss of benefits with effect from 6<sup>th</sup> March 2003, the date of your suspension.***

***Accordingly, you will be paid salary upto and including 5<sup>th</sup> March 2003 less liabilities to the fund, if any, which will be communicated to you in due course. You are, therefore required to surrender any Fund property in your possession immediately you receive this letter.”***

That letter was signed by the Managing Trustee, Mr. Naftali O. Mogere.

Part 3.7 (b) of the Code of Regulations provides that

***“Managing Trustee may suspend from the exercise of the functions of his office an officer against whom proceedings for dismissal have been taken if, as a result of those proceedings he considers that the Public Officer ought to be dismissed.”***

Paragraph (c) provides that

***“While an officer is suspended from the exercise of the functions of his public office under this regulation, he shall not be entitled to any salary provided that the Managing Trustee may, if he thinks fit, direct that any suspended officer shall be granted an dimentary allowance in such amount and on such terms as he may determined.”***

Those are provisions of the regulations applicable to the Plaintiff whose services with the Defendant ended by “summary dismissal” and not by “termination”. The dismissal letter states clearly that the Plaintiff goes “with loss of benefits” and that seems to be in accordance with regulations governing the employment between the Plaintiff and the Defendant.

The Plaintiff was on the other hand paid fully up to 5<sup>th</sup> March 2003 in accordance with old salary. There is no dispute that he had fully worked for those days. While his claim for salary from 6<sup>th</sup> March 2003 to 30<sup>th</sup> April 2003 cannot be accepted, his claim for arrears of salary from January 1<sup>st</sup> to March 5<sup>th</sup> 2003 is genuine, proper, lawful and meets ends of natural justice for that is money the Plaintiff had worked for before he was suspended and ought not be denied him that being the reason why he is being paid old salary up to and including the same 5<sup>th</sup> March 2003. The letter announcing the new salary may even have come 10 years after the Plaintiff’s dismissal. That would not have lawfully and fairly changed his entitlement to the said arrears. So let the Defendant give that arrears to the Plaintiff. It be not robbed from the Plaintiff. But he fails to satisfy me he repaid loan in excess.

With regard to the Defendant’s counter claim touching on the loan claimed the Plaintiff had taken and has not cleared, I find no sufficient evidence to convince me that that is so.

Otherwise the Defendant as the Plaintiff’s employer was entitled to dismiss the Plaintiff just as the Plaintiff as the employee was entitled to resign from the Defendant’s employment at any time. That is a contract of employment between an employer and an employee in which the court should not meddle. While the employees’ rights should be guarded, a loss of Kshs.256 Million to an employer is not

something to be taken lightly whether that employer is a private or a public body. In this matter, it appears to me that the Defendant in summarily dismissing the Plaintiff followed the regulations applicable so that the dismissal was not rendered unlawful.

On the issue of defamation, two important questions stood to be answered. First, who published the words complained of. Secondly, were the words complained of defamatory of the Plaintiff?

To answer the first question first, the best evidence I have before me is that amounting to nothing more than a mere suspicion. The plaintiff only suspects that it is the Defendant who published the words complained of in paragraphs 6 and 9 of the plaint aforesaid.

In my view, that evidence is not good evidence in a defamation case. The evidence has to be clear and definite as to whether the Defendant is the Publisher of the defamatory words complained of. If relevant evidence is all guess work or suspicion, there is no evidence for a suit in defamation.

The proper question is “*who published*” and not “*who caused*” because the latter question can be understood in a vague way and misleads and an inference should not be our way to the very important answer we are looking for.

Now to answer the second question assuming we know “who the publisher is” I will use the definition found in the Plaintiff’s written submissions as taken from “*Winfield & Jolowicz on Tort (17<sup>th</sup> Edn) PP 815*”. Where it is stated that

***“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 society generally or tends to make them shun or avoid him.”***

Looking at the words complained of as seen in paragraphs 6 and 9 of the plaint, it is a report of loss of Kshs.256 lost Million by the NSSF as result of which the Fund’s three top officials having been suspended and were being faced with dismissal over the lost money. Names of the three officers given included the Plaintiff.

From the evidence in this suit, those publications reported what was exactly happening as it was happening at that time without adding any of the meanings the Plaintiff has enumerated in paragraph 10 of the plaint namely that the Plaintiff: -

***“(i) was a corrupt, indecent and dishonest person who could and did collude with other persons to subvert and divert fund investments;***

***(ii) was responsible for the loss of the colossal sum of Kshs.256 Million from the Fund;***

***(iii) was irresponsible and incapable of holding a position of trust;***

***(iv) had been found guilty of gross misconduct and corruption;***

***(v) was a person capable of stealing from all Kenyan workers who are members of the Fund of their hard earned retirement dues;***

***(vi) had been investigated on the allegations made and was subsequently sacked after establishment that the said allegations were true;***

***(vii) had dishonestly and fraudulently stolen funds from the NSSF.”***

To my mind, and with all due respect, such meanings are far fetched to be obtained from the words complained of as set out in paragraphs 6 and 9 of the plaint and reproduced in this judgment earlier. That is defamation being forced to be where it does not fit to be. If it has ribs, they will all get broken and the

poor defamation will collapse and die.

Plaintiff: you have few shillings from your salary following your summary dismissal. Take that money and go as the rest is beyond the horizon.

Accordingly, judgment be and is hereby entered for the plaintiff against the Defendant in the sum of Kshs.64,382.50 being arrears of salary for the months of January and February 2003 plus 1<sup>st</sup> to 5<sup>th</sup> March 2003.

The rest of the Plaintiff's case against the Defendant is hereby dismissed.

The Defendant's counter claim against the Plaintiff also hereby dismissed.

Each party to bear its own costs of this suit.

Dated this 5<sup>th</sup> day of June 2009.

**J. M. KHAMONI**

**JUDGE**