



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE 3049 OF 1995**

NANCY KIRIKA PLAINTIFF

VERSUS

1. CONSOLIDATED BANK OF KENYA

2. ELIUD MATHU DEFENDANTS

JUDGMENT

The claim in this suit is for damages against the first Defendant for wrongful dismissal, and against both defendants for damages for libel, plus costs and interest, arising out of the dismissal of the plaintiff from her employment.

It is agreed that the second defendant was the chief executive of the first defendant bank and he was the one who had the plaintiff dismissed from her job. He signed the letter of dismissal. The letter was copied to a number of other persons.

The court sustains the preliminary point raised by the defendants that the second defendant having acted as agent of a known principal (the first defendant bank) is not, in the circumstances of this case, a proper party to be sued. The suit ought to have been brought against his principal alone. This is not one of those situations in which an agent may be sued in addition to, or in lieu of, a principal. The entire suit and claim against the second defendant is dismissed.

An issue was raised as to whether the plaintiff was in the employ of the first defendant bank. But then this should not be a realistic issue, given that it is the bank which wrote to the plaintiff ending her employment. The bank could not purport to bring to an end the employment of a person who was not its employee or otherwise subject to its regulatory powers.

By purporting to dismiss the plaintiff, the first defendant by its own actions acknowledged the fact the plaintiff being in its employ; and this is not a matter on which technicality and semantics can be allowed to carry the day. The action against the first defendant bank is against the right defendant. The first defendant has agreed that it managed Business Finance Company which originally hired the plaintiff. It has not been denied that such a management entailed amongst other things, hiring and firing staff, taking over and disciplining staff formerly hired by Business Finance Company. And it is not suggested that despite the take over and management by the Defendant Bank, Business Finance Company still retained an effective or any role on staffing and staff discipline.

The first defendant bank cannot be heard to be saying (as it is saying) that it was managing the affairs of Business Finance Company but because the Minister had not made a vesting order, it was not managing the Institution. That is double-talk, and the Court cannot allow itself to be treated to that kind of position.

The alleged payments of the plaintiff's terminal benefits were done by the first defendant (see the defendant's second witness, Mr. Mwangi). Why was the first defendant paying terminal benefits to a person who was not its employee and whom it had not dismissed? There can be no answer other than that the first defendant was the plaintiff's employer at the time of dismissal and it treated her as its employee and it dismissed her as such. How could the first defendant know the plaintiff's salary to be Shs 15,980 per month at the time of her dismissal if she was not on its record as a salaried employee of the first defendant? Again, this fact must have come to the first defendant's knowledge in the course of the relationship of employer-employee between the first defendant and the plaintiff.

The question then is: Was the dismissal wrongful? Yes; it was wrongful? Why? Because the alleged reasons set out in the letter of dismissal, for dismissing the plaintiff from her employ were not shown at the trial to have existed. There was nothing to affix the anonymous letters to the plaintiff. There was no act proved to have been done by the plaintiff "developed a very hostile attitude to the secretary who was employed by the bank and attached to the managing director's office". Such a secretary was not called to tell the court how the hostility was manifested.

The so-called "thorough investigations from officers and secretaries" to establish "the source of ... anonymous letters which have plagued the bank", were not revealed to the court; nor was the plaintiff given a fair hearing during those investigations. No evidence showed that the plaintiff was "the only disgruntled secretary among those who were laterally transferred". Nothing is in evidence to show that she "created unnecessary fuss over the transfer." The alleged "uncalled for utterances "by her to officers and secretaries at the Head Office which had "since been documented in a further anonymous letter which has reached our hands" were not availed to the Court; even though a "further anonymous letter" was produced and yet it was in the bank's hands. In short, none of the things alleged against the plaintiff in the letter of dismissal were proved to have occurred; and the process of "deduction" from which it "seems obvious that you have been grossly involved and/or assisted in authorizing all the previous anonymous letters", was not demonstrated to the Court. This termination of the plaintiff's service with the Bank for the reasons set out in the letter, was, therefore, wrongful, and the first defendant is liable for the wrongful termination of her service. The court also finds that the letter terminating the employ of the plaintiff contained defamatory matter of and concerning the plaintiff. In the absence of facts of acts on the part of the plaintiff to evidence the charges made against her, the allegations were untrue in their natural and ordinary meaning. The plaintiff was not shown to have been any of the negative person as described in the letter of dismissal. I find that letter defamatory of and concerning the plaintiff.

The facts of it having been written by the first defendant, and its publication to the persons to whom it was copied for no good reason, are not in dispute.

For the purposes of assessing general damages for the wrongful, termination of the plaintiff's employ, the Court has not been furnished with any evidential material other than the letter of appointment dated September 17, 1984, the letter dated August 23, 1991 increasing the plaintiff's salary, giving her House and Acting Allowances, and the evidence of the second witness for the first defendant. According to all these things, particularly the evidence-in-chief, of the 2nd witness for the first defendant, the plaintiff was on a monthly salary of Shs 15,980, and " just before she left employment there had been a salary increment which had been approved by the Board of Directors on April 4, 1995, back-dated to February 1, 1995. It was a general increase for all Staff. In the case of the plaintiff the proposal of increment was that she would get Shs 11,444/= on top of what she was getting at that time per month. She was then earning a monthly salary of Shs 15,980/=", in addition to a monthly Leave Traveling Allowance of Shs 1,225/=. So, the Court takes the sums of Shs 15,980 plus Shs 11,444 to have been the monthly salary of the plaintiff as at the date of her leaving the employment of the first defendant. The Court is not satisfied that it was this total of the two sums, which the first defendant used to calculate the terminal dues of the plaintiff.

As to the length of the notice of intended termination of employment, there is no basis for the plaintiff to say that it was six months. The Court believes the defendant that it was one month's notice. It was upon the plaintiff to prove that other than the one month's notice period stated in her letter of appointment, there was a subsequent variation of that period to six months' notice. She did not do so.

Accordingly, the Court assesses General damages for wrongful termination of the plaintiff's employment as being the monetary equivalent of one month's notice, being the equivalent one of her one month's salary of a total of Shs 27,424/= which was her original salary of Shs 15,980/= plus her increased salary by Sh 11,444/=.

As I said the letter terminating her services contained untrue matter defamatory of the plaintiff and published to other persons. The Court holds the first defendant liable for the libel. Taking into account the fact that the libel was in the way of the plaintiff's professional standing it was a ruinous libel. A fair and reasonable quantum of General damages for such a libel against this particular plaintiff by an Institution which ought to take a well-measured action and communicate it in a fair fashion, but did not do so for no good reason, and given the present relatively weakened state of the shilling, is a sum of Sh 300,000/=.

The alleged loss of Staff Pension Scheme Benefits and loss of 38 days leave and Leave Allowance were not proved to the satisfaction of the court on a balance of probability, and those claims are dismissed.

In the sum, there shall be judgment for the plaintiff against the first defendant in the sum of shs 27,424/= as General damages for wrongful termination of the plaintiff's employ; and Shs 300,000/= as General damages for libel. The first defendant shall pay the costs of this suit. The first defendant shall pay interest at the usual rates at respective points in time. Orders accordingly.

Signed and dated by me at Nairobi, this 24th day of May, 2001.

R. KULOBA

JUDGE

24.5.2001.

Coram: R. Kuloba, J.

Mr Kipsang for plaintiff, present

Mr Oyugi for defendant, present

Court clerk Mr Kabetu in attendance

Court: This judgment has been read out and delivered by me at Nairobi, this 24th day of May, 2001, in the presence of Counsel for both parties.

R. KULOBA

JUDGE