



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 1268 OF 2004**

**BEATRICE EVERLYN ATIENO ABONG'O.....PLAINTIFF**

**VERSUS**

**NATIONAL OIL CORPORATION.....DEFENDANT**

**JUDGMENT**

The Plaintiff herein has sued the Defendant seeking the following main reliefs -

- a. Damages for loss of employment and income, breach of contract and violations of fundamental human rights and freedoms;
- b. Damages for defamation;

The Plaintiff's case as pleaded is that she was summarily dismissed from employment by the Defendant contrary to the terms and conditions of employment and in breach of the contract of employment. According to the Plaintiff, definite charges were not framed against her and thus she could not respond to the charges properly. Thus she was not given an opportunity to defend herself nor was she given a fair hearing. Accordingly, the said dismissal was unlawful and without any justification.

The Plaintiff further pleaded that due to this, her fundamental rights and freedoms enshrined in the then Constitution in place were violated. These rights are enumerated in Paragraph 7A of the **amended plaint dated 20<sup>th</sup> November 2008**.

The Plaintiff also pleaded that the Defendant published or caused to be published words defamatory of the Plaintiff. The words pleaded to be defamatory of her are to be found in paragraph 9 of the amended plaint. Those words were published through a letter dated 7<sup>th</sup> October, 2004 circulated to all the Defendant's staff under the instructions of the Managing Director of the Defendant. At paragraph 10 and 11 of the amended plaint, the Plaintiff has pleaded that the words complained of, in their natural and ordinary meaning and also by innuendo and inference were defamatory of her. Particulars of innuendo are given. That as a result, her reputation has been seriously damaged and she has suffered considerable distress, anxiety and embarrassment.

In its amended **statement of defence** filed on **8<sup>th</sup> December 2008**, the Defendant denied the Plaintiff's claim of wrongful termination, and contended that the Plaintiff was lawfully dismissed on account of gross misconduct and was not entitled to any damages. The defamation claim was also denied on the basis that the words complained of were essentially true. Further denied was the claim that the fundamental rights and freedoms of the Plaintiff were violated and in any case the amended plaint did not particularize the alleged violations as required by law.

That the Defendant did carry out investigations into the Plaintiff's misconduct which was coupled with a hearing accorded to the Plaintiff, and it was concluded that she was guilty and thereafter summarily dismissed in accordance with the Employment Act.

Finally, the Defendant denied any loss suffered by the Plaintiff and her entitlement to general damages for breach of contract was denied as they are not recoverable. It prayed for the suit to be dismissed with costs.

The suit was heard by the late Khaminwa J.

The Plaintiff testified and did not call any other witness. She adopted her **witness statement filed on 30<sup>th</sup> September 2011** as her testimony-in-chief. She also produced her bundle and supplementary list bundle of documents. Her testimony was as follows. She was at the time of her dismissal an accountant III of the Defendant and had been such for four (4) years. Her duties as Accountant III included posting client invoices in the computer and posting receipts, credit notes and debit notes into the debtor's ledger. She would get receipts from the cash office or from depots.

The Plaintiff further testified that the Defendant's rules governing disciplinary matters were not followed in respect of her dismissal. Whereas there were rules applicable for dismissing employees, the dismissal letter did not indicate which of these rules had led to her dismissal. The Defendant went on to publish defamatory statements of her to service providers (hospitals). She also attributed the length of time she stayed without work subsequent to her dismissal to the Defendant.

Regarding the events that ultimately led to her dismissal, the Plaintiff testified as follows in cross-examination. There were indeed delays in posting as she was only supposed to post when money was banked but there was always a payment backlog. According to the Plaintiff, this was the standard practise since she joined the Defendant.

The Plaintiff further testified that upon being issued with the dismissal letter, she was subjected to humiliation by the Defendant's service providers as they denied her services on that account. That she was not aware only 12 months compensation was payable and that the general damages sought had been estimated.

Upon re-examination, she averred that she knew she had been dismissed because her colleagues told her even before she had seen the letter. She reiterated that the late posting was standard and she was only given new instructions on how to handle postings a day before she was dismissed. That dismissal affected her livelihood as she could not fend for herself and only relied on close relatives for her upkeep. She attended interviews but could not get employment due to her dismissal by the Defendant.

The Defendant called one witness, it's Human Resource Manager (**DW1**). She adopted her **witness statement filed on 3<sup>rd</sup> July 2012 as her testimony-in-chief**. Though she was not in the Defendant's employment when the cause of action arose, she had read the file and had this to say; that sometime in September 2004 it was brought to the Defendant's attention that there were discrepancies between posting of accounts of some of the Defendant's customers as against the audited reports in the months of January-July 2004 when the Plaintiff was in charge of posting and issuing receipts. Investigations commenced and it was discovered that the Plaintiff consistently back-dated receipts issued to certain customers thereby deliberately concealing previous errors, discrepancies and outstanding balances in respect of certain accounts.

It was then that the Plaintiff was brought before the Disciplinary committee comprising Department heads and the Human Resource Officer. The Plaintiff admitted the allegations levelled against her and failed to give a satisfactory explanation for doing so. This led to her dismissal for gross misconduct. That the information given to the service providers of the Defendant is customary when services of an employee are terminated. This does not extend to giving the service providers details of termination of an employee's services. She insisted that this is the procedure that was followed in this case thus the Plaintiff was not defamed in any way.

In cross examination she confirmed that she had worked for the Defendant for seven months and that she was only relying on the Defendant's record to testify. That though the Plaintiff had worked for the Defendant since 1994, discrepancies were only noticed in 2004. That while the computer system was down between August 2003 and November 2003, she could not tell whether there was backlog during that time. That she did not know who the Disciplinary committee members were and neither did the dismissal letter say whether the issues that led to the Plaintiff's dismissal had been discussed with her. That there is no provision for suspension for gross misconduct.

On re-examination, she stated that the meeting called by the disciplinary committee was confirmed by the Plaintiff in her testimony.

Summary dismissal is a power an employer may exercise without incurring any legal liabilities if an employee has been guilty of conduct of a wilful nature which amounts to a repudiation of the contract of service. It must be misconduct of a serious nature; otherwise ordinarily the employee is entitled to notice.

An employer may terminate an employee's employment for gross misconduct which could arise from either **Gross negligence** which refers to the lack of care in the performance of one's duties or **Habitual neglect** which implies a repeated failure to perform one's duties for a period of time, depending on the circumstances.

Gross misconduct has been defined in **Halsbury's Laws of England Vol. 16 (IB) 4<sup>th</sup> Edition** at paragraph 567 to be

***“Conduct so undermining the trust and confidence inherent in the particular contract of employment that the employer should no longer be required to retain the employees.”***

In this case, the gross misconduct attributed to the Plaintiff is to be found in her list and bundle of Documents in the Audit Report which recommended her dismissal as the credit position of the Defendant's clients was concealed through her actions of backdating the accounts.

Section 17 of the Employment Act, Cap 226 (since repealed) gives instances where an employee can be summarily dismissed. Section 17 of Cap 226 which is similar to section 44 (1) and 4 (c) and (g) of the Employment Act No. 11 of 2007 (the **Act**) provides as follows:-

**“44. (1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term;**

**(b) .....**

**(c) an employee willfully neglects to perform any work which it was his duty to perform, 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;**

**(d) .....**

**(e).....**

**(f) .....**

**(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.”**

At the time the Plaintiff's employment was terminated, Cap 226 was in operation. Unlike Act No. 11 of 2007 which provides for the procedure for termination of employment at section 41, that particular statute

did not have any provision on the right to a hearing before termination.

The Plaintiff has claimed damages for loss of employment and income from the date of dismissal up to the date she was able to secure employment. The Employment Act and the Industrial Court Act do not provide for damages for loss of employment for the unexpired term of the employment contract other than compensation for 12 months. For the Plaintiff to be entitled to damages for loss of employment she would have to prove to that the Respondents have incapacitated her to an extent that she is unable to find other employment. This is because employment is never permanent. It is a contract that provides for an exit and either party is only liable to the extent to which they have failed to comply with the exit clause in such contract or as presumed by law. In this particular case the Plaintiff has not adduced evidence on how the Defendant's dismissal affected her chances of obtaining employment elsewhere.

On whether the Plaintiff was defamed, the letter's wording that the Plaintiff was being summarily dismissed, (which was in fact true) did not defame the Plaintiff in any way. This is because the words in the letter did not tend to lower her reputation in the estimation of right-minded persons. It was not broadcast to the world at large but was addressed to the Plaintiff only. Moreover, the language used in the letter was not beyond the facts as it referred to manipulation of records which is what the Plaintiff was charged with. Another element of defamation that the Plaintiff has not attempted to prove is that the material in actual fact was published by the Defendant to third parties save for the service providers who had to be informed that the Plaintiff had ceased working for the Defendant as DW1 testified is customary.

The plaintiff had pleaded violation of fundamental rights.

Apart from not specifically pleading with particularity that of which she complained and the provision said to be infringed and the manner in which the right was violated, the Plaintiff did not adduce any evidence on how her rights were violated.

It is my judgment that, on a balance of probability, the Defendant was justified in finding that the Plaintiff was guilty of gross misconduct.

In the end this suit is dismissed. Bearing in mind the respective positions of the parties herein, each party shall bear their own costs.

**Dated and delivered at Nairobi this 3rd Day of March, 2015.**

**A.MBOGHOLI MSAGHA**

**JUDGE**