



REPUBLIC OF KENYA

IN THE HIGH COURT AT KENYA AT NAIROBI

CIVIL SUIT NO. 1583 OF 2002

**THE REGISTERED TRUSTEES OF THE SISTERS OF
MERCY T/A MATER MISERICORDIAE HOSPITAL.....PLAINTIFF**

VERSUS

DR. JACINTA W. MAINA.....1ST DEFENDANT

KAM HEALTH SERVICES LTD2ND DEFENDANT

(BY ORIGINAL ACTION)

AND

DR. JACINTA W. MAINA.....PLAINTIFF

VERSUS

**THE REGISTERED TRUSTEES OF THE SISTERS OF
MERCY T/A MATER MISERICORDIAE HOSPITAL...1ST DEFENDANT**

AND

DR. ANDREW KIARIE NDONGA.....2ND DEFENDANT

JUDGMENT

The plaintiff in the original action sued the 1st defendant and 2nd defendant through a plaint dated the 11th of October 2002. On the 29th April 2010, the plaintiff's suit was struck out on grounds that it did not disclose reasonable cause of action. The plaintiff did not appeal.

In the 1st defendant's defense and counter claim filed in court on the 5th November 2002, the 1st defendant who is plaintiff in the counter claim seeks judgment against the 1st defendant, the plaintiff in the original for;

- a. that the plaintiff's claim against the 1st defendant be dismissed with costs to the 1st defendant
- b. for the sum of Kshs. 440,920/=
- c. for general and exemplary damages

- d. for interest at court rates from the date of judgment until payment in full
- e. For cost.

The 1st defendant in her counter claim states that she was an employee of the plaintiff and that the plaintiff dismissed her summarily and unlawfully from employment. She now claims the sum of kshs. 440920/= being special damages

The plaintiff in its plaint claimed that the 1st defendant with others and colleague one Dr. Kinuthia incorporated a company called Kam Health Services limited and opened a rival medical clinic on 1st floor, Executive Tower, IPS Building, Kimathi Street, Nairobi and used her position as a medical officer to lure influence and induce patients under her care from the plaintiff to her said clinic.

The defendant in her defence filed on 5th November 2002 denied being a director or shareholder of the 2nd defendant (Kam Health Services Ltd) and sought to clarify that her employment agreement was made on 14th May 1999 not 1st April 1999.

The 1st defendant filed a counter claim against the plaintiff in the original suit jointly and severally with Dr. Andrew Kiarie Ndonga (the added party) on 5th November 2002 for summarily and unlawfully terminating her employment. She claims against the plaintiff Kshs. 440,920/- being special damages particularized as follows:-

- a. Emoluments; 15th August to 11th September 2002.....Kshs. 84560/=
- b. 1 month's emoluments in lieu of notice..... ..Kshs. 90600/=
- c. Emoluments in lieu of 34 days annual leaveKshs. 102680/=
- d. Gratuity (formulae $\frac{15 \times 90600 \times 12}{12}$)..... ..Kshs. 163080/=

Total440,920.00

The 1st defendant further claims that the plaintiff on 11th September 2002 through a published notice to the plaintiff's Chief Executive Officer (one Scanlon), the Human Resources Manager (one Janet Gechuki), one Mr. Bodo (consulting Orthopedic Surgeon) and to the public and/or to all and sundry through the plaintiff's hospital wards and its public notice boards the following words defamatory of and concerning the 1st defendant by way of her profession namely;

SUBJECT: DR. JACINTA MAINA

Note that with immediate effect, Dr. Maina's employment with the Matter Hospital has been terminated due to a serious abuse of her contractual obligations. She should therefore not engage in any activities on behalf of the hospital.

That on the 18th October 2002 the plaintiff placed and/or caused to be published in the "Daily Nation" whereat the 1st defendant's photograph and Kenyan identity number were displayed/depicted with another a Public Notice couched in the following words defamatory of the 1st defendant namely;

"PUBLIC NOTICE

This is to inform the general public that the above doctors ceased to be employees of the Mater Hospital on 11th September 2002.

They are not authorized to represent the hospital in any way, shape or form. Please govern yourselves accordingly.

BY MANAGEMENT”

The 1st defendant claims that these words were understood to mean that she had committed a serious criminal felonies defrauded the plaintiff and was not worthy of her professional calling as a medical doctor and is professionally guilty of unethical conduct unreliable and is greedy and of callous conduct, has no morals and is incompetent .

During her testimony in Court the plaintiff adopted the contents of her statement dated 25/1/2012 into evidence. Her testimony was that on the 11th September 2012 she reported to work and the Doctor in Charge Dr. Ndonga ordered her to go run the Orthopedic Clinic. On the same day at 2 pm the same doctor called her and showed her an anonymous letter with neither a name nor signature which stated that she had been referring patients from Mater Hospital to Kam Health Services. Thereafter she was dismissed. She left the hospital at 6pm. The following Monday she went and handed over all hospital properties under her care, signed all clearance forms and left. A month later while at a graduation ceremony at Kenyatta University she received calls which drew her attention to the publication in the Daily Nation newspaper. She was asked if she committed any crime. As a result for the said notice the Medical and Dentist Practitioners Board also called her to explain the notice. The notice affected her practice and for a while she did not receive any invitation for locums and therefore her income was adversely affected. She was also affected emotionally. She ought to be paid her dues from the hospital and special damages and general damages for defamation by the hospital for the notices put in the plaintiff's hospital notices on her termination

During cross examination she stated that she was given a termination letter by Human Resource, that she cleared with the hospital the day after receiving the said notice returned all tools she was given by the hospital and left and denied there having been any clearance forms to signs; that her basic salary Kshs. 41,580/- and house allowance Kshs. 16,000/- and that 20% was paid for every procedure performed and that gave her a gross pay of Kshs. 90,583.60 after taxes. She also sought to be given gratuity and leave for 34 days and that it was not her fault that her contract was terminated before the year ended; that it was not wrong to inform the hospital of her exist but the same used the wrong avenue as the same imputed and tarnished her character and she was affected emotionally and professionally; that Kshs. 84,560/- was her salary inclusive of taxes and would be less if the same were deducted.

On re-examination she affirmed that in April she got a gross of Kshs. 96,107.68 and would be more on adding the 20% commission from the procedures she did; that at the end of every 4 years she used to get gratuity which was 1 month 5 days and added that there was no formula to calculate leave days; that Mater hospital never demanded tools from her and that she was paid a month salary.

SUBMISSIONS

The plaintiff made oral submissions. Mr. Weda submitted that the defendant's claim was for benefits and damages for defamation. That the defendant had failed to discharge her burden of proof in that she did not call any evidence to prove defamation in the eyes of the 3rd parties. He referred the Court to the case of **GEORGE MUKURU MUCHIA VS STANDARD LTD, HCCC 2539/07**, where Justice Aganyanya (as he then was) cited the case of **Daniel N.Ngunia vs KGGCU Limited Civil Appeal No. 281 of 1998**, where Judges of Appeal Omolo Owour and Keiwua stated as follow;

‘leaving aside any questions of privilege upon which learned Judge dismissed that aspect of the appellants’ claim, we note from the record that the appellant was the only person who testified in support of his claim. In those circumstances, we cannot see how a claim based on defamation could possibly succeeded even I the absence of the defense of qualified privilege’

Counsel urged the Court to dismiss that aspect of the claim. He also referred to the case of **Kennedy Bitange Mageto and 4 others vs Macloud Malonza and another HCCC 483 of 2006** where the court held that the notice similar to the one in this case was not defamatory”.

On the claim on terminal dues he argued that the defendant did not prove her claim and the same was

made prematurely for the same to be given she had to clear with the plaintiff; that the amount due to her was worked out between parties hence her claim was premature and since the amount varied every month she wasn't clear on what was due to her that the 1st defendant did not separate her pay slips but expected the court to shift through them and award her claim. He urged the court to dismiss the 1st defendant's suit with costs..

Mr. Onyango for the defendant reiterated that the words published were defamatory and thus the defendant was entitled to a relief. He further urged the court to read the 2nd publication together with the memo; he submitted that the cases cited are of concurrent jurisdiction and are only meant to persuade the court. It was further submitted that 1st defendant submitted that it was a contractual term that each party give the other 1 month notice of their intention to terminate the contract or 1 month salary in lieu of notice and as such the plaintiffs owed her Kshs. 90,600/-; that by the time her contract was terminated she had not gone for her annual leave and was therefore entitled to the sum of Kshs. 102,680/- for the untaken leave; that it was common practice to give staff gratuity every end of year and as such she was entitled to the same at Kshs. 163,080. In total she claims against the plaintiff Kshs. 440,920/-.

On defamation it was submitted that the plaintiff's memo dated 26/8/2002 and the public notice of 18/10/2002 were defamatory and the same were understood to mean that the plaintiff had committed serious felonies, had defrauded the plaintiff, not worth be called a doctor, guilty of misconduct, unreliable a crook and fraudster is greedy and callous and having the same displayed on a notice board of a busy hospital with many people including staff, patients and their relatives and other members of the community. It was submitted that the publication on the newspaper was not defamatory on the face of it but when read with the said notices perpetuated the defamation to an even bigger scale; that it was not customary to publish notices on the newspapers and the same impute crime; that as a result of the same she was summoned before the Doctor's professional and disciplinary body to explain herself and her friends believe she had committed a serious offence. The 1st defendant sought a sum of Kshs. 2 million as damages and relied on the case of ***KENYA TEA DEVELOPMENT AGENCY LIMITED -VS- BENSON ONDIMU T/A B.O. MASESE & CO. ADVOCATES, KSM CIVIL APPEAL 95 OF 2006***, the court of appeal in reviewing the said court's award from Kshs. 10 million to 1.5 million.

It was submitted that matters are analogous and on all fours with the material matter in the sense that the appellant in the cited matter had been published that material that tended to show that the respondent was unprofessional in the manner he conducted business, corrupt, fraudulent, unscrupulous and money minded and could do anything to get money. That in the cited matter the defamatory material was not circulated in the scale of circulation as the material matter and that it was decided over six years ago.

DETERMINATION

I have read and considered the pleadings and the 1st defendant's witness evidence. The 1st defendant claims are two fold a claim for payment of unpaid salary and emoluments and damages for defamation. The defamation alleged was in writing in 2 publications dated respectively. This in essence constitutes a libel. A libel is *a defamatory statement... made in writing or printing or some other permanent form*". For the said words in the publication to amount to defamation the 1st defendant 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 words complained of by the defendant are in two publications. The 1st publication is an internal memo dated 11th September 2002 which states; ***"Note that with immediate effect, Dr. Maina's employment with the Mater Hospital has been terminated due to a serious abuse of her contractual obligations. She should therefore not engage in any activities on behalf of the hospital."*** The said publication was addressed to internal members the staff and management. From the general reading of the same I do not see any defamatory words as the same is just a notice to other staff members of the

plaintiff's ceasing to work with the said hospital. The defendant's argument that the notice published on 18th October 2002 in the nation newspaper should be read with the internal memo in my view is misguided as the internal memo is to a limited few which is the staff of the said hospital while the publication in the newspaper which she contends is not defamatory is a notice to the public hence the two cannot be read together as the target audience is different. I find that the defendant has not proved the ingredients of libel on a balance of probability and as such her claim for damages for defamation fails.

Further it is only the plaintiff who testified in this case. She stated how she got calls from persons who asked what she had done she did not call any of them to testify. The case cited by the 1st defendant is not on all fours with this matter. In the said case the court found that the publications were defamatory in the manner in which they had been published. In the case of **Daniel N. Ngunia vs KGGCU Limited (supra)**, the court of appeal observed that the appellant in the said case was the only person who testified and that they could not see how a claim based on defamation could possibly succeed. Similarly I find that the 1st defendant is the only person who testified and even though the plaintiff did not call any witness she has failed to prove her claim of defamation, I also find and hold that the publications were defamatory.

On the claim for terminal dues the plaintiff does not refute that the same were not paid but alleges that the procedure demanded that the 1st defendant ought to have cleared with the hospital and surrendered a signed clearance form which the 1st defendant alleges she did not comply as there was no such forms during that time, though she alleges that she cleared with the hospital and a certain doctor had confirmed the same but no documentary evidence was adduced to prove this. The 1st defendant has just attached a duty roster and has not shown how the amounts claimed were calculated this makes it very hard for this Court to determine any amounts due to her if any. The plaintiff has particularized a special damage however in her evidence in court and statement filed the 1st defendant did not adduce evidence on how she arrived at the sums claimed. In the case of **Hahn vs. Singh [1985] KLR 716**, where the Court of Appeal held as follows:

“Special damages must not only be specifically claimed but also strictly proved.

Further in the case of **Banque Indosuez V D J. Lowe & Company Ltd, (2006) 2 Klr 208** the Court of Appeal expressed itself as follows on special damages:

“It is simply not enough for the respondent to pluck figures from the air and throw them in the face of the court and expect them to be awarded. It is trite that special damages must not only be claimed specially but proved strictly for they are not the direct and natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves.”

In this matter it was upon the 1st defendant to prove how she arrived at the sums claimed which she failed to do. I therefore find that the 1st Defendant's claims have not been proved and her suit is dismissed with costs.

Dated, signed and delivered this 2nd day of **December** 2014.

R.E. OUGO

JUDGE

In the presence of:-

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

.....**For the 1st Defendant**

.....**Court Clerk**