



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, G. B. M. KARIUKI & OTIENO-ODEK, JJ.A.)

CIVIL APPEAL NO. 104 OF 2009

BETWEEN

KIAGE PETER WA MOCHAMA 1ST APPELLANT

CATHERINE MOGITI 2ND APPELLANT

AND

STANDARD CHARTERED BANK LIMITEDRESPONDENT

(An appeal from the Ruling/ judgment of the High Court of Kenya at Nairobi (Lenaola, J.) dated 10th February 2009

in

H.C.C.C No. 172 of 1995)

JUDGMENT OF THE COURT

1. The appellants are the personal representatives of the estate of *Felix Wilson Mochama (deceased)* who died on 24th October, 2008. Prior to his death, by a plaint dated 21st April, 1995, the deceased filed suit against the respondent Bank seeking from it damages for defamation and unlawful dismissal from employment.
2. In its defence, the respondent Bank averred that termination of the deceased’s contract of employment was lawful and denied defaming the deceased. Upon hearing the parties, the trial court dismissed the appellant’s suit in entirety expressing at paragraphs 17 and 21 of the judgment as follows:

“17. Firstly, the claim for damages for alleged defamation must be dismissed as being frivolous and vexatious because any person making such a claim must produce the document in which the alleged defamatory words were written. In this case, P. exhibit 7 was denied by the person who allegedly typed it, PW2. In the end, the words contained in it could have been typed by anyone. In fact, it has no heading, no date and no signature and

as correctly pointed out by the advocate for the Defendant, there is in fact no evidence at all that it was in fact published to anyone at all.

21 In any event, I have elsewhere above reproduced clause (6 b) of the Contract of Employment. The defendant was not obligated to give reasons for dismissal. In this case, the Defendant gave no reasons in the letter dated

23/9/1994 (P. exhibit 5) but agreed to pay one month's salary in lieu of notice. DW2 confirmed so, as did the plaintiff. Where is the breach? Nowhere and I have said above that what triggered the termination was a matter wholly justifiable. I agree with Law Ag. P. that it is that agreement to which this Court must look at in determining whether the exercise of the powers of dismissal was lawful - see E.A. Airways -v- Knight (1975) EA 165 at 170....Once I have held as above, the plaintiff deserves no prayer as regards termination of his employment and that includes reinstatement and the awards in damages. The suit before me has no merit and is dismissed with costs to the defendant”.

3. Aggrieved by the judgment, the appellant lodged the instant appeal citing 19 grounds which can be compressed as follows:

i. the learned judge erred in law and fact in holding that the appellant's claim on defamation was frivolous and vexatious;

ii. the judge erred and failed to appreciate that publication of the defamatory words was expressly admitted in paragraph 9 of the defence;

iii. the court failed to focus on whether the publication of the defamatory words was bona fide and prepared in the course of the author's duty and whether this defence was proved;

iv. the court erred in holding that the plaintiff's dismissal from employment was justified;

v. the court erred in relying on matters that were extraneous and or unproven and or not raised in the pleadings and

vi. the court erred in not maintaining a complete record of the proceedings.

4. At the hearing of this appeal, learned counsel Mr. S. J. Saenyi appeared for the appellant while learned counsel Mr. Geoffrey Orao Obura appeared for the respondent. Both counsel filed written submissions and made oral highlights.

5. The appellant urged this Court to allow the appeal. It was submitted that after being in the employment of the respondent for 8 years without promotion, the deceased was terminated from employment following a genuine mistake of duplication of voucher payment claims that could have been corrected; that the termination of employment was tied to the encashment of the duplicated claim; that the genuine mistake on the part of the deceased became an excuse and red herring for the respondent to terminate the employment contract; that the respondent did not give reasons for dismissal and this amounted to unfair dismissal under **Section 45 (2)** of the **Employment Act, 2007**.

6. Regarding the claim for defamation, it was contended that while the deceased was on leave, a staff member of the respondent, a one Mr. Richard Musau, wrote an internal memo to the Executive Director of the respondent Bank in charge of Finance and said memo defamed the deceased in the following words:

“It is very clear to me that Mochama was outrightly dishonest in the processing of the transaction as he did....We could consider the severity of the punishment but whatever the outcome of the decision, it is obvious that he can no longer be trusted to work in

Treasury operations or in any sensitive position in the Bank”.

7. The appellant contends that the trial court ignored that the publication by Mr. Musau was acknowledged by the respondent in its statement of defence. At paragraph 9 of the defence, the respondent denies that Richard Musau acted falsely and maliciously and the report by Mr. Musau was *bona fide* and prepared in the course of duty. It is contended that the respondent having raised the defence of truth and justification was required in law to establish the truth of the facts; that the appellant had no burden to prove the defence raised by the respondent. Citing the case of **Joseph Mangtup Din -v-African Newspaper of Nigeria Limited, No. 44/1986**, the appellant urged us to find that the onus was on the respondent to prove its defence. It was submitted that there was no evidence on record to prove that the deceased dishonestly raised and encashed the duplicate voucher and spurious invoice.
8. A further ground of appeal is that the trial court erred in failing to keep a complete record of the proceedings; that the trial court record partly confirms that the deceased was dismissed and the respondent was not obliged to give reasons for the dismissal; that having found the deceased was dismissed and there was no obligation to give reasons, the trial court erred by turning around and stating that what triggered the dismissal was justifiable; that the trial court erred and ignored the appellants submissions that had been filed which submissions and authorities could have assisted the court in arriving at a just and fair determination of the dispute.
9. The respondent in opposing the appeal raised two preliminary points of law. First, that under ***Section 2 (1) of the Law Reform Act (Cap 26 of the Laws of Kenya)***, a suit and claim for defamation does not survive the deceased; that in the instant case, the deceased died in 2008 and the suit and claim for defamation did not survive him and cannot be maintained by the estate of the deceased. The second preliminary point is that the appellants as personal representatives of the estate of the deceased had obtained limited Grant of Letters of Administration *Ad Litem limited* for the purpose of, only filing suit at the High Court. It was submitted that the limited grant did not allow the appellants to prosecute a suit which had been filed and or to appeal against a judgment delivered against the deceased; it was emphasized that the appellants had no *locus standi* to file and issue a Notice of Appeal, file the Record of Appeal and no right to prosecute the instant appeal. The respondent urged this Court to strike out the Notice and Record of Appeal for want of *locus*.
10. ***Section 2 (1) of the Law Reform Act (Chapter 26 of the Laws of Kenya)*** provides as follows:

“2: Effect of death on certain causes of action

 1. ***Subject to the provisions of this Section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against , or as the case may be, for the benefit of, his estate; provided that his subsection shall not apply to cause of action for defamation, or seduction or for inducing one spouse to leave or remain apart from the other or to claim for damages on the ground of adultery”.***
11. In support of the submissions under the Law Reform Act, the respondent cited the decisions in **Gibson Kagoi Mwangi -v- Kenyatta National Hospital & Another, (2014) eKLR** and **Hon. Emmanuel Karisa Maitha -- v- Nation Media Group Limited & Another, (2007) eKLR**.
12. On the substantive merits of the appeal, the respondent submitted that the appellant did not tender in evidence the alleged defamatory document to prove the contents thereof; that PW2 who was alleged to have typed the document and passed it over to the deceased denied that the document produced by the deceased in court was the one she typed; that the document in court was neither dated nor signed. It was submitted that even if there was a proper document produced in court, the publication to the respondent would be covered by the defence of qualified privilege because Mr. Musau who made the publication had a legal duty to the person to whom it was made and the

person to whom it was made had a corresponding legal duty to receive it. Counsel cited the decision in **University of Nairobi -v- Mbutia, (1985) KLR 821** to support this submission.

13. The respondent urged us to find that the deceased's contract of employment was lawfully terminated as per the appellant's letter of appointment dated 22nd July 1985 and accepted on 14th August, 1985, and which states in

Paragraph 6 (b) thereof as follows:

“The Bank may further cancel your employment forthwith without giving any reason therein on payment to you of one month's salary in lieu of notice during your probationary period and on payment to you of one month's salary in lieu of notice after your appointment to the permanent staff of the Bank”.

14. The letter terminating the deceased contract of employment stated as follows:

“This is to inform you that the Bank has decided to terminate your services with effect from 28th December 1994. In line with your contract of employment you will be paid one month's salary in lieu of notice”.

15. The respondent urged this Court to find that pursuant to the appellant's contract of employment, the termination of his services was lawful upon payment of the one month salary in lieu of notice. In support of the submission counsel cited the decisions in **Ombanya -v- Gailey & Roberts Limited (1994) EA 522**; **Rift Valley Textiles Limited -v- Edward Onyango Oganda, Civil Appeal No. 27 of 1992**; and **Kenya Ports Authority -v- Edward Otieno, Civil Appeal No. 120 of 1997**.

16. Responding to the ground of appeal that the trial court erred and relied on extraneous matter, it was submitted that the appellant has not identified the extraneous matters which the trial court considered. Despite the foregoing, the respondent submitted that the appellant filed written submissions before the trial court on 19th November, 2008, as evidenced by the court stamp and the submission was filed after the death of the deceased on 24th October, 2008; that the deceased could not posthumously have filed the written submission; that the submissions were filed after the trial court had closed proceedings on 3rd December 2008 and set the date of judgment as 10th February 2009. The respondent submitted that the submissions filed by the appellant before the trial court should be expunged and struck off the record of appeal as having been filed posthumously and after the record of the trial court had been closed.

17. In reply to the respondent's submissions, the appellant expressed that **Section 2 (1)** of the **Law Reform Act** does not prevent a defamation suit that had been instituted during the life time to survive the deceased and be prosecuted and appealed against; that what does not survive is a new or fresh suit for defamation. On the limited grant of letters of administration, it was submitted that upon obtaining the limited grant, there was no need for the appellants to obtain a further grant to prosecute a suit that had been instituted before the High Court or to lodge an appeal to this Court.

18. We have considered the grounds of appeal, submissions by counsel and the authorities cited. This is a first appeal and we are obliged to re-evaluate the evidence on record and arrive at our own conclusions. (See **Selle -vs-Associated Motor Boat Co. [1968] EA 123**); see also (**Abdul Hameed Saif vs. Ali Mohamed Sholan (1955) 22 E. A. C. A. 270**).

19. A preliminary point of law relating to survival of defamation suits has been raised and we are obliged to consider and determine this point of law before delving into the merits of the appeal.

20. In **Hon. Emanuel Karisa Maitha -v- The Nation Media Group Ltd. & Another EKLR 2007**, the High Court in a persuasive authority held:

“...This suit, being a defamation suit, by reasons of the proviso to Section 2 (1) of the Law Reform Act (Cap 25), which is in mandatory terms, the suit does not survive the deceased plaintiff even if the plaintiff died after an interlocutory judgment had been entered in his favour...”

21. The appellant submitted that a suit filed prior to the death of the deceased survives for the benefit of his estate. We are not persuaded for reasons that a plain reading of the proviso in **Section 2 (1)** of the **Law Reform Act** is explicit that all causes of action subsisting against or vested in the deceased in defamation do not survive for the benefit of the estate. In defamation law, the dead cannot be defamed. Defamation suits do not survive the deceased because defamation is a personal action that cannot be assigned or brought on someone's behalf. The reason why defamation suits do not survive is that the right of action dies with the person and once you are dead, you are taken not to have a reputation in legal terms that is capable of being damaged. The reputation of a person dies with him. In a comparative case from India, Justice R. Bassant in **Raju -v- Chacko, (2005) 4 KLT 197** aptly expressed:

“A claim for compensation for defamation may not be maintainable in respect of defamation of a deceased person on the principle that a personal right of action dies with the person (action personalis moritum cum persona)”.

22. There is no liability for defamation of the dead either to the estate of the deceased or to the deceased's descendants or relatives. Once a person has left the living, you can say anything you want about him. A reputation is as perishable as the person who earned it. The dead have no rights of reputation and can suffer no wrong. In the instant case, the deceased having died on 24th August 1995, his claim for defamation does not survive for the benefit of his estate. Accordingly, we uphold the respondent's preliminary objection and see no reason for us to deal with the grounds of appeal relating to the claim for defamation.

23. We have considered the ground of appeal that the trial court erred in finding that the dismissal and termination of employment was lawful and wholly justified. There is no dispute that the contract of employment between the deceased and the respondent bank provided that the respondent could terminate the employment on payment of one month's salary in lieu of notice. There is no dispute that the deceased was paid one month salary in lieu of notice.

24. In the case of **Rift Valley Textiles Limited -v- Edward Onyango Oganda, Civil Appeal No. 27 of 1992**, it was held that where a contract of service includes a period of termination of employment, the damages suffered are wages for the period of notice and where a notice period is provided in the contract of employment, then an employer need not assign any reason for giving the notice to terminate the contract. This position was reiterated in the case of **Kenya Ports Authority -v- Edward Otieno, Civil Appeal No. 120 of 1997**.

25. In the instant case, the deceased's contract of employment expressly stated that it could be terminated by one month's salary in lieu of notice and the respondent Bank did pay the said one month's salary in lieu of notice. On our part, we are satisfied and guided by the dicta in **Rift Valley Textiles Limited -v- Edward Onyango Oganda, (supra)** as reiterated in **Kenya Ports Authority -v- Edward Otieno, (supra)** and hereby hold that the deceased is not entitled to any damages for termination of his contract of employment. In the case of **Central Bank of Kenya -v- Julius Nkonge Nkabu, Civil Appeal No. 81 of 2000**, this Court held that the trial court erred in computing damages for termination of employment beyond the period of notice. In **Ombanya -v- Gailey Roberts, (1974) EA 522**, it was clearly stated that the measure of damages for wrongful termination of employment is the amount the employee would have earned as notice.

26. We note that the appellant in his submissions relied upon and cited the provisions of **Section 45 (2)** of the **Employment Act, 2007**. The cause of action in this matter arose in 1994 before the Employment Act 2007 was enacted and the rights of the parties are to be considered and determined in accordance with the law that existed at the time when the cause of action arose.

Unless expressly stated, the **Employment Act 2007** is not retroactive in its application and effect.

27. We have considered the other grounds of appeal urged by the appellant and we find they have no merit. For the reasons stated above, we arrive at the conclusion and make a finding that this appeal has no merit and is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 26th day of February, 2016.

M. K. KOOME

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR