IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 63 OF 2003

BETWEEN

JIMI MASEGE ……....……..APPELLANT

AND

KENYA AIRWAYS LIMITED …….……...……...RESPONDENT

(An appeal from the judgment of the High court of Kenya at Nairobi (Kuloba, J.) dated 25th July, 2000

in

H.C.C.C. NO. 1165 OF 1998)

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JUDGMENT OF THE COURT

The appellant before us, ***Jimi Masege*** (Masege), was employed by ***M/S. Kenya Airways Ltd*** (KQ) in 1979, and for the next 17 years until 1996, he appears to have rendered satisfactory service to KQ. In April 1996, however, KQ complained about an incident of unacceptable poor performance of duty by Masege and served him with the first warning letter in accordance with the terms regulating his employment. Two other warnings followed on 9th January, 1997 and 24th January, 1997 when Masege was accused of using *"unbecoming and insulting language"* in addressing his employer and showing *"true colours in contempt towards authority, disrespect and arrogance of unparelled degree"*. The following month, on 21st February, 1997, KQ addressed the following letter to Masege:

*"**TERMINATION***

Arising from the incident which occurred on February 11, 12 and 14, 1997 in which you were directly involved and taking into consideration that you were served with a third and final warning on 24th January, 1997, the company has decided to terminate your services with effect from 21st February, 1997.

You will be paid your terminal dues as shown below: -

1. Salary and allowances upto and including 21st February 1997.

2. Your 18 earned leave days as at 21st February 1997.

3. Your own and company's contributions of the Provident Fund in accordance with Staff Provident Fund Rules.

4. Your ESOP shares in accordance with ESOP Rules after you have handed over your ESOP share certificate.

Please note that all the above dues will be paid to you after you have gone through the normal company clearance procedures and returned all company property in your possession."

Masege did not take this termination lightly. He confronted his employer through the ***Transport and Allied Workers Union*** (TAWU) in which he was a member and appealed against the decision in March 1997, but the appeal does not appear to have made any impression on KQ. Two months later in May, 1997 he instructed his lawyers who have since appeared for him throughout, ***M/S. Adere & Co. Advocates***, and they challenged the termination of service as *"unlawful and wrongful"*. They also claimed the following terminal dues over and above what KQ had offered to pay:

"1. One month's notice or pay in lieu thereof.

2. 36 other leave days (not just the 18 you stated).

3. Overtime pay.

4. Rebated tickets for him and his family."

Further exchange of correspondence ensued between KQ and the lawyers until 19th September, 1997 when KQ finally agreed to pay the additional terminal dues as demanded by Masege. KQ, however, totally rejected the claim for rebated tickets on the ground that they were not available to employees whose termination of employment was on disciplinary grounds.

As the claim for terminal dues was under way, Masege was informed about a memo addressed to all unionisable members of KQ, dated 20th May, 1997 which had been posted on KQ's notice board at Moi Airport, Mombasa. It was purportedly issued by two shopstewards as a warning to their members in the following words:

*"**RE: WARNING TO ALL TAWU UNION MEMBERS***

We Local Shopstewards understand Mr. Masege who was a Kenya Airways staff at this Station has been employed by L.T.U Airways.

It has been noticed to a high level that some staff have involved to (sic) discuss their problems at their working place with Mr. Masege while they know where to channel their personal problems.

We are therefore warning our members at this Station not to let Mr. Masege interfere with the smooth running of Kenya Airways operations.

This is to remind you that your shopstewards at this airport are M.O. Onyango and R. Mugatsia.

Please be guided accordingly."

Curiously, the memo was on KQ letterheads and was endorsed by one of KQ officers for circulation to all staff in Mombasa and Malindi. It was also copied to four senior officers of KQ. Masege contended that the memo was defamatory of him and sought an explanation, but KQ denied involvement, asserting that it was a matter for union officials. Despite the denial, it would appear, and Masege confirms it, that the

memo was withdrawn from the KQ notice board soon after his complaint.

Neither the payment of terminal dues nor the withdrawal of the offensive memo stopped Masege from filing suit against KQ. On 18th May, 1998, he pleaded in his plaint that his services were unlawfully and wrongfully terminated and that he was unlawfully and wrongfully disentitled from obtaining rebated tickets. He also pleaded the publication of a false and malicious memo whose contents were libelous and defamatory of him in their natural and ordinary meaning as well as innuendo. In the end he sought judgment for:

"a) A declaration that the plaintiff is entitled to rebated tickets for himself and his family.

b) An order that the defendant do issue the plaintiff and his family the tickets for all the past years.

c) General damages for defamation and for wrongful dismissal and interest thereon.

d) Costs of this suit."

KQ denied all the claims in their written statement of defence and the matter fell before Kuloba J. for hearing and determination of five issues that arose out of the pleadings, namely:

1) Whether the termination of employment was unlawful and wrongful.

2) Whether Masege was entitled to rebated tickets after termination of his employment.

3) Whether the memo or notice in question was defamatory.

4) Whether KQ was liable in defamation.

5) What damages, if any, were payable.

Only Masege and one of his friends who saw the offending memo pinned on a KQ notice board testified during the hearing. KQ chose not to call any witness. Counsel on both sides, however, made submissions and the learned Judge, upon consideration of the material placed before him, answered the first issue in the negative, stating:

"On whether the termination of the plaintiff's services was unlawful and wrongful, the court has gone through the evidence as well as the correspondence commencing with the letter of termination through the ensuing correspondence on the subject between the plaintiff by his lawyers and the defendant. Read together with the staff Rules and Regulations of the defendant and the Collective Bargaining Agreement which uncontestably bound the parties, the court is satisfied that the termination of the plaintiff's services was not unlawful and wrongful. I find that although at certain times the plaintiff had received commendations (see e.g. at pages 12, 13 and 14,) it appears that those commendations got into the plaintiffs' head and he started performing negatively by, for example, unexplainably denying some frequent flyer boarding, disregarding laid down flight closing times. So, by April, 1996, for example the defendant had held "numerous counseling sessions" with the plaintiff regarding his "unacceptable poor performance especially in regard to customer service and attitude towards" his "superiors", but no change for the better was forthcoming from the plaintiff after such session (see, e.g page 15 in the exhibited bundle of exhibits). He got warnings. There are other warnings (e.g. at pages 19 – 20). At page 27 the employer was again (sic) called unbecoming/unacceptable response and/or behavior. It followed a response by the plaintiff to a memo from the defendant.

It appears from the replies by the plaintiff to memos from the defendant that he was tendering (sic) to operate himself (sic). One need not reproduce what he wrote in this judgment, but it seems that he was more interested in defending his record and self-righteousness than in hiding (sic) (heeding) **the cautions and concerns raised by the defendant for corrective measures to be attempted.**

So, when the termination of his services ultimately came, it was no surprise to anyone who can fairly read his replies at page 16, 21 – 22. Opportunity had been amply accorded him to correct his approach; but he chose an unnecessary confrontation an (sic) indulgence in self-righteousness. It is in the light of all the correspondence and what he said in court in evidence, and his demeanor before the court which I carefully watched, and was not satisfactory, that I hold that the termination of his services was not wrong or unlawful."

The second issue was also answered in the negative on the basis of interpretation of clause 13 paragraph 6 of the *"Staff Travel Rules, 1985"* which related to *"Rebated entitlement upon retirement or termination or reassignment on grounds other than disciplinary"*. The Judge took the view that the termination of Masege's employment was on disciplinary grounds and held:

"Clearly, if the services of an employee were terminated on disciplinary grounds, these facilities were not to be enjoyed. The heading of the clause is the controlling matter, and a disjunctive reading of it would defeat the spirit of discipline which must disqualify an employee or ex employee who leaves service on disciplinary grounds, from enjoying facilities meant for employees or ex employees who go without blemish. If an employee whose services are terminated on disciplinary grounds were to enjoy in same or equal measure facilitates as those who leave service with a clean record, then this would be a recipe for indiscipline, a disincentive to be and remain a disciplined employee, and generally contrary to good employment practice. Such is not what was intended by this clause."

As for the third and fourth issues, the learned Judge found as a fact that the offensive memo was written on the letterheads of KQ and was placed on the notice board on premises which were in possession, ownership and control of KQ. It was also copied to four senior officers of KQ. In those circumstances KQ could not extricate itself from liability for either publishing the document or authorising its publication. In the Judge's view, giving out space and allowing the document to be published and read by third parties, even when authorship of it was not KQ's, was no different from publishing it directly. He found the memo defamatory, reasoning thus:

"To warn people against another clearly means that such a person may be harmful in some way. In the context of what had happened in the case, the wording of the warning in all the circumstances suggested that the plaintiff was a trouble maker or not upright. The other interpretation given by the plaintiff in the plaint seems overstretched; but certainly he is right when he says that he was portrayed as a trouble maker, not to be associated with, and not upright. I see no evidence to paint such a picture of him.

In these circumstances the words complained of were defamatory of the plaintiff."

Having so found on the two issues, the learned Judge awarded Shs.150,000 as damages for libel, as well as costs and interest thereon.

Both Masege and KQ were aggrieved by those findings. In seven grounds laid out in his memorandum of appeal, Masege sought the reversal of the findings on the 1st and 2nd issues, and sought enhancement of the damages awarded to him on issues 3, 4 and 5. He sought the following orders from this court:

"a) The appellant and his family are entitled to and be granted rebated tickets for past years (or value thereof) and in the future.

b) The damages for defamation be enhanced from Shs.150,000/= to Shs.1,500,000.00 or such an amount found to be reasonable and just in the circumstances together with interest thereon at court rate from date of judgment of the superior court till full payment thereof.

c) The costs hereof abide the result."

KQ on its part sought, in a cross appeal, the setting aside of the award of damages and dismissal of the entire suit.

This is a first appeal, but even so, this Court will be slow to interfere with findings of fact made by the superior court unless the findings are based on no evidence, or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings. The rationale for that caution has been restated many times, and we take it from **Mwanasokoni v Kenya Bus Services Ltd [1985] KLR 931** where the court stated at page 934:

"Although this Court on appeal will not lightly differ from the judge at first instance on a finding of fact it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the House of Lords in Sotiros Shipping v Sauviet Sohold, The Times, March 6, 1983:

"It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate Court they should be ever mindful of the advantages enjoyed by the trial judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and, equally important, what was not said."

Again, in Peters v Sunday Post Ltd (1958) EA 424, a decision of the Court of Appeal for Eastern African, Sir Kenneth O'connor, P said at p 429: -

"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness."

But the jurisdiction "(to review the evidence) should be exercised with caution: It is not enough that the appellate Court might itself have come to a different conclusion."

As for the principles governing the award of general damages, this Court will be slow to disturb the findings of a trial judge merely because it thinks that if it had tried the case in the first instance, it would have given a larger sum. In order to justify reversing of the order of a trial judge, it will be necessary to show either that the judge acted upon the wrong principle of law or that the amount awarded was extremely so high or so low as to make it an entirely erroneous estimate of damages – see **Rook v Rairrie [1941] 1 All ER 297** and **Butt v Khan [1981] KLR 349**.

It is in the light of those principles that we now consider the submissions of counsel.

Learned counsel for Masege, Mr. Adere argued the seven grounds in three tranches. The first tranche, covering ground 1 – 5, related to the findings on termination of employment with the consequent loss of rebated tickets. Mr. Adere argued, in the first place, that it was erroneous for the learned Judge to find, as he did, that the termination of employment took effect when the letter dated 21st February, 1997 from KQ was served on Masege. It was erroneous, in his view, because after receipt of that letter there was further correspondence between the parties disputing the contents of the letter until September 1997 – a period of seven months – when KQ finally paid the terminal dues. The termination therefore took effect in September 1997, in which event the period of 7 months was unlawful and therefore attracted general damages which Mr. Adere assessed at Shs.50,000/=. That line of argument, as correctly pointed out by learned counsel for the respondent, Mr. Masika, was a departure from the pleadings before the superior court and never arose during the hearing or submissions of counsel in that court. The appellant himself had testified that he was not claiming any more terminal benefits as these were fully settled. Furthermore, in law, there can be no general damages for breach of contract. We reject the submissions made in that regard. Mr. Adere further submitted that the termination of Masege's employment was a normal one and was not on disciplinary grounds. That is why he was paid his terminal benefits. If he had lost his benefits, that would have amounted to summary dismissal. There was a choice between the two modes of termination by the employer, he submitted, and they chose normal termination. It was erroneous therefore for the learned Judge to find that the termination was lawful and was on disciplinary grounds. For his part

Mr. Masika referred to the letter of termination which was premised on several incidents of indiscipline and warning letters served in terms of the contract of employment. The termination could only therefore have been on disciplinary grounds although the employer chose to pay terminal benefits to the employee.

We have carefully examined the pleadings and evidence on record in relation to the issue of termination of employment. Neither of the parties found it necessary to exhibit the terms of appointment and the provisions therein relating to termination of employment. They must have regarded it as a non-issue since the employee had been paid his terminal benefits in full. The letter of termination was clearly predicated on various incidents of indiscipline cited by the employer and we think, as the learned Judge did, that the employment was lawfully terminated and was terminated on disciplinary grounds. That ground of appeal fails.

The second tranche argued by Mr. Adere was premised on the assertion that the termination of employment was normal and not on disciplinary rounds. It was in relation to rebated tickets which, he argued, were an entitlement of the employee who, like the appellant here, had worked in excess of ten years and had either left on retirement, termination or reassignment in terms of *clause 13 paragraph 6* of the *Staff Travel Rules, 1985*. Citing the dictionary meaning of *"entitlement"* as *"a right"* and not a privilege, Mr. Adere submitted that the employer had no choice but to comply with the clause on rebated tickets. In response, Mr. Masika referred us to *clause 2 paragraph (1)* of the same rules which provides for *"conditions governing staff travel"* and defines *"staff rebates"* as *"concessionary and only a privilege to staff. They can be changed or withdrawn or augmented by the company as deemed fit"*. Such privilege, he submitted, was tied to the contract of employment and confers no right to sue. In any event, fringe benefits in contracts of service go with termination of the employment as was stated by this Court in **Eric Makokha & others v Lawrence Sagini & Others Civ. App. No. NAI. 20/94 (ur)**. Consequently, Mr. Masika concluded, the privilege accorded by the rules was not extended to employees who lost their employment on disciplinary grounds.

Once again, we have considered this ground of appeal and we think it has no merit. Having found, as the superior court did, that the termination of the contract of service was on disciplinary grounds, we find no further basis for the argument that rebated tickets were a litigable entitlement or right. The specific rule governing staff rebates (Clause 2 paragraph (1)) defines such tickets as a *"privilege"* and the general rule subsequently appearing in Clause 13 paragraph 6 does not detract from that forthright definition. We agree with the reasoning of the superior court on the construction of that provision.

The final ground of appeal as well as the cross appeal was on defamation. Mr. Adere referred us to the finding of the superior court that the appellant was branded a *"trouble maker, not to be associated with and not upright"*. That, in his submission, was a serious imputation on someone who, as an employee in the airline industry and a member of TAWU, had to associate with other people. Referring to various authorities including **Johnson Evan Gicheru v. Andrew Morton & Anor**. **[2005] eKLR**; **Kenya Tea Development Agency Ltd v. Benson Ondimu Masese [2008] eKLR**, and **Moses Nailole v Meteine ole Kilelu & 19 others [2005] eKLR,** Mr. Adere observed that the average damages for libel in the country was Shs.3 million, and submitted that the appellant in this case was entitled to such amount, and not a meager Shs.150,000. On the other hand, Mr. Masika challenged the finding that KQ was liable for publication of the offending memo when it had played no part in its authorship. The publisher was the authors who had signed it and it did not matter that the memo was displayed on KQ's notice board or printed on KQ letterheads. In any event, he submitted, there was no evidence to prove that the contents of the memo were false and it could not therefore have been defamatory. The suit should therefore have been dismissed. Even if the finding was upheld, Mr. Masika submitted that the circumstances in this case were a far cry from those obtaining in the authorities cited in support of a higher award. The conduct of the appellant must be locked at; the medium of publication which was only a notice board; the target audience, in this case staff members of KQ in Mombasa and the conduct of KQ who in this case had the offending memo removed as soon as a complaint was lodged. All these, he submitted, were strong mitigating factors for a small award of damages.

We have considered all those submissions and we are unable to agree with learned counsel for the respondent that KQ did not publish the memo or that the memo was not defamatory of the appellant. The

opportunity was open for KQ to offer evidence refuting publication and authorship but they said nothing about the circumstances leading to the use of their letterheads, notice board, and endorsement on the memo that it should be circulated to a wider audience. On the available evidence, the superior court was right to find as it did on a balance of probability. We have no reason either, to depart from the finding that the memo was defamatory of the appellant as it imputed a character and disposition which the appellant's witness was shocked to hear as he had hitherto trusted him as a family friend. Having said that, we agree with Mr. Masika that there were mitigating factors in this case which cannot justify the level of damages touted by Mr. Adere. As this Court has observed before in the ***Gicheru*** case:

"In an action for libel, the trial court in assessing damages is entitled to look at the whole conduct of the defendant from the time libel was published down to the time the verdict is given. It may consider what his conduct has been before action, after action, and in court during the trial."

Citing with approval the guidelines in **Jones v Pollard [1997] EMLR 233. 243**, the court approved the following guidelines:

"1. The objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published, and any repetition.

2. The subjective effect on the plaintiff's feelings not only from the prominence itself but from the defendant's conduct thereafter both up to and including the trial itself.

3. Matters tending to mitigate damages, such as the publication of an apology.

4. Matters tending to reduce damages.

5. Vindication of the plaintiff's reputation past and future."

We have subjected the libel in this matter to those tests and in the end we are satisfied that the damages awarded by the superior court were neither inordinately too high nor inordinately too low to warrant interference by this Court. There was no error in principle.

All in all the appeal is for dismissal in its entirety and we so order. The cross appeal is also for dismissal in its entirety and we so order. Each party shall bear its own costs.

Dated and delivered at Nairobi this 11th day of June, 2010.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR