



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.221 OF 2016**

**JOSEPHINE NALIAKA SIMIYU.....CLAIMANT**

**VERSUS**

**MERCY COPRS.....RESPONDENT**

**JUDGEMENT**

1. The claimant was employed by the respondent on 29<sup>th</sup> October, 2012 as a Field Assistant in Trans Nzoia County and working from the regional office at Eldoret at a monthly salary of Ksh.35,000.00. A contract for one (1) year was issued.
2. The contract was extended for 3 years ending April, 2015. The salary was increased to ksh.55,000.00 and the last salary was ksh.70,000.00 per month.
3. On 19<sup>th</sup> February, 2015 the president of the county bunge forum (CBF) Robinson Wamalwa illegally withdrew Ksh.700,000.00 and submitted false bank statements concealing the withdrawal to the claimant for the purposes of her approval. When the claimant received the forged bank statement, she did a review and forwarded to the respondent sub grant officer for further review and approval who was specialised in accounts. the officer notice the forged statement and asked the claimant for confirmation with the bank whereupon it was discovered the transaction of ksh.700,000.00 had been forged.
4. On 10<sup>th</sup> April, 2015 A meeting was held with Wamalwa and the respondent's programme manager where he admitted he withdrew the money but made an undertaking to return the same from two loans he had applied and as an undertaking deposited Ksh.350,000.00. The claimant was informed by the respondent's Chief of Party that while the balance remained unpaid she would be held accountable.
5. On 22<sup>nd</sup> April, 2015 the respondent accused the claimant for having conspired to steal the money and suspended her services for two weeks on half pay pending investigations over the matter. On 29<sup>th</sup> May, 2015 the claimant received email inviting her to appear before a committee that had been investigating her. the committee informed the claimant that she would be informed of the outcome but which was never issued or the suspension lifted.
6. Efforts by the claimant to find out the outcome of the hearing did not bear fruits. The respondent went on to defame her through emails and letters to the CBF naming her as a thief despite of the fact of not sharing any findings from investigations. By email dated 30<sup>th</sup> September, 2015 by Deputy Country Director Maurice Amollo copied to 5 other staff members of the respondent confirmed that investigations were still on-going but labelled the claimant as a thief. Such has put the claimant into ridicule and removed here dignity.
7. The respondent has refused to clear the claimant over the allegations made against her and continued to defame her among her peers and people in Trans Nzoia making it impossible to secure new employment. Despite the undertaking by the respondent to pay the claimant half pay, there is no payment since the date of suspension.
8. On 10<sup>th</sup> May, 2016 the claimant received letter from the respondent to the effect that the outcome of the investigations would not be revealed to her but her employment had been terminated. The respondent stated that a salary of Ksh.22,587.20 had been paid as a part of the April, 2015 salary through account Number 1120313111 at KCB Kitale Branch and which account does not belong to the claimant.
9. The claim is that the claimant was bullied and intimidated by the respondent and who has continued to defame her, failed to pay the due salary to subject her to hardship and this has made it impossible to secure new employment. The termination of employment was in breach of the mandatory provisions of the law and contrary to section 40 of the Employment Act and is seeking for declaration that there was legitimate expectation for a hearing after the investigations completed, there was a legitimate expectation that the salary due during suspension would be paid, there was extension of contract by the conduct of the parties and there was untold suffering and pain as a result.
10. The claim is for;

- a) half pay due from April, 2015 to 30<sup>th</sup> June, 2016 at ksh.980,000.00;
- b) damages from constructive dismissal Ksh.480,000.00,
- c) damages for unfair dismissal,
- d) general damages for libel at Ksh.10,000,000.00,
- e) aggravated damages ksh.3,000,000.00;
- f) punitive damages Ksh.1,500,000.00,
- g) damages in lieu of an apology Ksh.1,000,000.00,
- h) costs, and
- i) an order that the respondent do issue a formal apology to the claimant and copy the same to all person copied of the defamatory statements.

11. The claimant testified in support of the claim.

12. The defence is that the claimant by letter dated 24<sup>th</sup> September, 2015 and by notice dated 30<sup>th</sup> March, 2015 was informed of the non-renewal of her contract and the allegations of constructive dismissal does not arise.

13. Employment was under fixed term contracts for the position of Field Officer for the period 1<sup>st</sup> September, 2014 to 30<sup>th</sup> April, 2015. The claimant was managing Yes Youth Can (YYC) programme in Trans Nzoia and CBF. The CBF was responsible for mobilising youths while the claimant was reporting to the programme manager.

14. The claimant's salary was varied under each contract.

15. The claimant was implicated in the theft and or embezzlement of Ksh.724,887.00 from a sub grantee of CBF under her responsibility. The respondent is aware Wamalwa was the president of CBF but has no knowledge of allegations made by the claimant that there were forged cash withdrawals of Ksh.700,000.00 and there was an offer to repay.

16. As part of the auditing process of its grantee, the financial reports of CBF for the period February, and March, 2015 were sent to the grant manager, Ms Irene Jebor in April, 2014 and upon review it was established that Ksh.724,887.00 was missing. Upon investigations, Wamalwa stated that he had shared the missing funds with the claimant another employee of the respondent. by letter dated 22<sup>nd</sup> April, 2015 the claimant was suspended for a full investigation into the missing funds.

17. The claimant appeared before the investigations committee and asked questions to enable the committee establish the circumstances under which the CBF funds were stolen and later she was informed of the outcome of the investigations and cleared of any wrongdoing.

18. The issue of lifting the suspension is not in dispute as employment ended by lapse of time on 30<sup>th</sup> April, 2015. The committee invited the claimant on 3<sup>rd</sup> June, 2015 after her contract had expired. Save for investigations over the missing funds, employment had ended.

19. Where the claimant allege to have been defamed, such cannot be attributed to the respondent.

20. Half salary for April, 2015 has been paid. By letter dated 10<sup>th</sup> May, 2016 the respondent wrote to the claimant directing her to clear so as to be paid her terminal dues. such was not a notice terminating employment which had since ended on 30<sup>th</sup> April, 2015. The claims made are without basis.

21. Maurice Amollo testified that he was in charge of programmes quality and coordination as Deputy director under which the claimant was required to mobilise and work with the youth for economic empowerment. The claimant was on a fixed term contract ending 30<sup>th</sup> April, 2015.

22. The respondent got an anonymous letter alleging that the claimant was involved in fraud under the YYC programme. The respondent conducted initial investigations to ascertain who and what amounts had been lost. Following the reports made by the claimant a decision was taken to suspend her to allow for proper investigations. The claimant was later called for a hearing and the committee found there was no strong evidence that the claimant had participated in any fraudulent or loss of money. On 2<sup>nd</sup> December, 2015 it was recommended that the claimant be cleared of the allegation and an email was sent. By this time the claimant had left her employment by effluxion of time of her contract. The withheld dues were paid.

23. The alleged defamatory email was an internal communication to the involved staff and intended to communicate on the matter. It was not defamatory of the claimant and was not shared out to people in Trans Nzoia.

24. Irene Jebor Komen testified that she is senior finance and sub grants officer for the respondent. she has the role to review grant finances, compliance and reporting. In the CBF and Youth Sacco under the YYC programme which the claimant was managing, she received the financial reports for the period February and March, 2015 in April, 2015 for review. She discovered discrepancies and found Ksh.724,887.00 was missing. In the bank statement account number 01134269974000 at Cooperative Bank there were two withdrawals of Ksh.700,000.00 and Ksh.2,500.00 made on 17<sup>th</sup> February, 2015 and not reflected on the statements submitted. on 9<sup>th</sup> April, 2015 a payment of Ksh.370,000.00 by Wamalwa was made but a similar amount was withdrawn on 10<sup>th</sup> April, 2015.

25. Ms Komen also testified that she received an anonymous email from a member of YYC claiming embezzlement of funds by members of the executive from the CBF accounts. the country director directed for investigations and Maurice Amollo was put in charge.

26. An internal inquiry interviewed the claimant and Wamalwa and other staff members over the allegations of funds embezzlement. The findings were that Wamalwa and other staff members of the respondent had embezzled Ksh.724,887.00 and the claim that such monies had been shared with respondent staff could not be proved. The claimant and Jean Opondo had both borrowed money from Wamalwa informally. This resulted in an inappropriate relationship between the CBF and the respondent employee. Wamalwa had forged bank statements to falsify financial reports and he accepted liability for the lost funds. The due benefits for the claimant were to be released upon the committee findings as her contract had lapsed.

Both parties filed written submissions.

The court has put into account the pleadings, the evidence and the written submissions and the issues which emerge can be summarised as follows;

When employment ended;

Whether there was unfair termination of employment;

Whether the claimant was defamed by the respondent; and

Whether the remedies sought are due.

27. It is common cause that the parties herein were regulated under fixed term contracts for the employment of the claimant. The last such contract was to end on 30<sup>th</sup> April, 2015.

28. Before the lapse of the employment contract, on 22<sup>nd</sup> April, 2015 the claimant was suspended from duty on the grounds that there were allegations of being involved in theft of funds granted to CBF. The suspension was with immediate effect with 50% pay for two weeks beginning 22<sup>nd</sup> April, 2015 pending investigations. A committee was to be set up to investigate the allegations and the respondent advised that the claimant that she would be invited to attend.

29. By email dated 24<sup>th</sup> July, 2015 the claimant asked the respondent on the progress of the investigations. By letter dated 24 September, 2015 the claimant made another reminder and ended by noting that;

*... I am therefore making demands to be paid the terminal dues owed to me obligatory to notice of non-renewal of my employment with Mercy corps dated 30<sup>th</sup> March, 2015.*

30. Effectively, the claimant was aware as early as 30<sup>th</sup> March, 2015 that her contract of employment was ending on 30<sup>th</sup> April, 2015 and notice of non-renewal had issued a month in advance. Such is lawful and legitimate in terms of section 10(2)(e ) and (3)(c ) of the Employment Act, 2007 (the Act).

31. Putting the above into account, the employer has the right to suspend an employee from her employment to address any misconduct or gross misconduct. Suspension from employment is not termination of employment.

32. The purpose of the suspension is to remove the employee from the workplace to enable proper investigations. By sending the claimant on suspension, the respondent as the employer must have had good grounds to justify the same as otherwise she should have been left at work to help with any investigations.

33. Upon the suspension, the claimant was removed from her place of work. She had no control of the events which followed.

34. In **Samson Omwoyo versus Maasai Mara University & Another Cause No.2367 of 2016** the court held as follows;

*... the employer has the prerogative to discipline its employees. However, a prolonged suspension of an employee that is not addressed within a reasonable time only results in anxiety and is bound to raise concern. ...*

35. And in in **Peter Gaiho Ng'ang'a versus Board of Management Banita School and another [2015] eKLR**

*Interdiction is a preliminary step in the disciplinary process. The petitioner may as well be vindicated by the investigations and that could be the end of the matter. Any pecuniary loss he may have suffered during the interdiction can be restored as provided for in*

*the regulations.*

36. Noting the notice and end of the claimant's contract with the respondent, it behoved upon the respondent to take reasonable steps to hear and determine the suspension to clear the matter. The end of contract aside, upon the suspension from employment, the rights to a fair hearing, being given reasons and justification are rights secured in the law and entitled to the claimant. Such rights did not abate or get limited to the end of the contract. They remained secured even where the contract was to end the next day after suspension though in this case, there were 8 days to the end from 22<sup>nd</sup> to 30 April, 2015.

37. To this end, the claimant was invited during the inquiries/investigation and from the *Internal Inquiry Report and Trans Nzoia CBF Investigations at Trans Zoia Youth Centre 02/06/2015* it is noted that on 3<sup>rd</sup> June, 2015 there was a meeting with the claimant and the committee over the alleged theft of CBF funds.

38. By email dated 2<sup>nd</sup> December, 2015 from Maurice Amolo to Irenken, Jean A Omanyam, and Irene Jebor he confirmed that the investigations had concluded and found no evidence of allegations made against the claimant. The committee also recommended that the claimant be paid her terminal dues.

39. As noted above, upon suspension, an employee is entitled to a hearing. Such right is secured under section 41 of the Employment Act, 2007 whatever the duration and period of employment. The employer has the legal duty to ensure both substantive justice and procedural justice in terms of section 41, 43 and 45 of the Act.

40. Where notice for the non-renewal was issued on 30<sup>th</sup> March, 2015 and the claimant suspended on 22<sup>nd</sup> April, 2015 the respondent enjoyed its rights and prerogative not to renew the contract and to suspend the claimant. On the same breath, the claimant's rights under section 41, 43 and 45 which are couched in mandatory terms should have been secured.

41. Without the due process of ensuring the claimant was given a hearing, was informed of the outcome of the investigations and allowed to urge her defence, such resulted in unfair termination of employment. To seat back and take the view that the employment contract ended on its terms and therefore absolved the respondent of any responsibility is a serious lapse and a misreading of the rights due under section 41, 43 and 45 of the Employment Act, 2007.

42. The court finds there was unfair labour practice committed against the claimant, such is not permissible and unfair under the provisions of section 45 of the Act. Compensation is due under section 49 of the Act.

43. As to whether there is a case of defamation of the claimant by the respondent the court in the case of **Phinehas Nyagah versus Gitobu Imanyara [2013] eKLR** in addressing the ingredients of defamations held as follows;

*Defamation is a tort and is defined as the publication of a statement which, tends to lower a person in the estimation of right thinking members of the society generally or which tend to make him be shunned or avoided. The defamatory statement is one which has tendency to injure the reputation of the person to whom it refers by lowering him in the estimation of the right thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike and disesteem and typical examples are an attack upon the moral character of the plaintiff attributing to him any form of disgraceful conduct such as crime, dishonesty, cruelty and so on. Publication is the communication of the words to at least one other person other than the person defamed. Publication to the plaintiff alone is not enough because defamation is an injury to one's reputation and reputation is what other people think of a man and not his own opinion of himself. An action for defamation is essentially an action to compensate a person for the harm done to his reputation. Defamation is not about publication of falsehoods against a person; it is necessary to show that the published falsehood disparaged the reputation of the plaintiff or tended to lower him in the estimation of right thinking members of society generally. An injurious falsehood may not necessarily be an attack on the plaintiff's reputation. The words must be maliciously published and malice can be inferred from a deliberate or reckless or even negligently ignoring of facts. [underline added].*

44. The defamatory material must be shown to have been published by the defendant. The published material/matter was false and malicious disparaging words against the claimant. The words are meant to injure the person of the claimant. See **J P Machira versus Wangethi Mwangi and Nation Newspapers Civil Appeal No. 179 of 1997.**

45. In the case of **Naqvi Syed Qmar versus Paramount Bank Limited & another [2015] eKLR** the court held as follows;

*In Employment Law defamation takes place when the Employer publicizes or causes to be publicized, statements which stigmatize the Employee. The manner of dismissal and the negative publicity attached to the Claimant had the potential to damage his employability. Potential Employers in the industry in which the Claimant was a long time servant, would find his attractiveness diminished. His stock in the market dipped. Employment related defamation is based on the old tort of defamation but given a new spin: the Employee's injured or damaged employability, and not merely the personal stigmatization, must be compensated.*

46. In this case the claimants case is that by email written to her by Maurice Amolo the Deputy Country Director and chair of investigating committee on 30<sup>th</sup> September, 2015 and copied to 5 other staff members of the respondent he confirmed that investigations were on-going but went on to label her a thief. The offending words are that;

*... If you did not already know, it is common knowledge in Trans-Nzoia that you, and another mercy corps staff member in collaboration with 3 CBF officials illegally obtained money from the CBF account ...*

47. The entire email is copied to; emarambo@ke.mercycorps.org; irenken@ke.mercycorps.org; jotieno@ke.mercycorps.org; jomanya@ke.mercycorps.org; and ijebor@ke.mercycorps.org;

48. all the above recipients of the impugned email are within the respondent entity.

49. From the filed records, Elijah Marambo of emarambo@ke.mercycorps.org was the Chief of Party and was aware of the matter and had directed the claimant to be accountable for the lost funds pending investigations following a meeting with him on 20<sup>th</sup> April, 2015. Lynn Renken of irenken@ke.mercycorps.org has made several communications with the claimant over the matter as the Country Director, Kenya. There are several back and forth communications between the two and this is the person who issued the letter of suspension. Irene Jebor was a witness herein as the senior finance and grant officer managing the grant under which the claimant was placed and became aware of the missing funds following a review of the bank statements submitted by the claimant for her reviews.

50. From the 22<sup>nd</sup> April, 2015 when the claimant was suspended from duty, she was aware that the respondent was conducting investigations over the matter and an internal committee was to be constituted in this regard. In its nature, an investigation is involving. An inquiry into a matter may involve various departments of the respondent, including the department where the claimant was placed, the department linked to the alleged financial impropriety and the human resource department and overall the management/governance department.

51. Such internal investigations and inquiry into a matter already brought to the attention of the claimant is not false and malicious and or meant to injure the person of the claimant. Such interrogation was to establish the true position to which there was communication to the claimant on 2<sup>nd</sup> December, 2015.

52. The claimant has since been issued with a Certificate of Service pursuant to the provisions of section 51 of the Act and the evidence that her reputation and standing in the sector was injured by the respondent following the email of 30<sup>th</sup> September, 2015 on the grounds that she will not be able to get a good reference from her employer has no basis. An employer is not obligated in law to issue an employee with a letter of recommendation. A Certificate of Service is mandatory. Such letter and Certificate of Service has since issued. The respondent has complied with its legal duty.

53. I find no material that there is a case for defamation.

54. On the remedies sought, the claimant testified that on 20<sup>th</sup> June, 2016 she was paid ksh.129,300.30 vide cheque No.3508. such pay was for terminal dues and 15 days. A Certificate of Service has since been issued.

55. The pay for the contract term ending 30<sup>th</sup> April, 2015 is due where not paid as part of the monies already advanced.

56. On the finding that employment terminated unfairly, the court shall assess due compensation.

57. On the claim for constructive dismissal, this is a concept of law which allows an employee to resign from her employment due to being placed under intolerable work conditions by the employer. The act of resignation and ending of employment is initiated by the employee on the grounds that it is motivated by the conduct of the employer. From the evidence herein, this is not a proper case for constructive dismissal as the key ingredients appurtenant thereto are fundamentally lacking.

58. On the finding above with regard to claims for defamation, the claims for general damages, gravitated and punitive damages, the payment of damages in lieu of an apology is not due.

59. On the costs, section 45(5) of the Act requires the court to take into account several matters in addressing the payment of compensation, assessment of what the claimant as the employee is entitled to. Fundamentally at section 45(5)(a) requires an inquiry as follows;

*(a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision*

60. As analysed above, from 22<sup>nd</sup> April, 2015 the claimant was taken through a circuit without clarity into the investigations being conducted against her. she was forced to severally write and make demand. The investigations commenced after the lapse of her contract and did not take into account the strain and obvious anxiety caused to the claimant. Such placed the claimant in limbo even where her contract had expired. The word on the investigations and closure was an important matter for the claimant.

**Putting the above into account, compensation is appropriate at two (2) months gross salary based on the last earned at ksh.70,000.00 all being ksh.140,000.00. Costs are also due. judgement is hereby entered for the claimant in these terms.**

**Delivered at Nakuru this 14<sup>th</sup> day of February, 2019.**

**M. MBARU JUDGE**

In the presence of:

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