



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 1925 OF 2014**

*(Formerly High Court Civil Case No. 91 of 2008)*

**Before Hon. Lady Justice Maureen Onyango**

**FAITH WANJIKU MACHARIA.....CLAIMANT**

**VERSUS**

**FORUM FOR AFRICAN WOMEN EDUCATIONALIST**

**KENYA CHAPTER.....RESPONDENT**

**JUDGMENT**

The Claimant (Plaintiff), Faith Wanjiku Macharia filed an Amended Complaint on 29<sup>th</sup> June 2009 against the Respondent (Defendant), Forum for African Women Educationalists Kenya Chapter. She avers that she was offered employment by the Defendant as its National Coordinator vide a probationary contract dated 6<sup>th</sup> June 2006, which offer she accepted and that her employment was to be governed by the terms and conditions set out in the Defendant's Staff Manual. That she was duly confirmed to the said position by the Defendant by a letter dated 20<sup>th</sup> March 2007 as a result of her effectiveness and sterling performance of her duties. That while on leave on 16<sup>th</sup> January 2008, she became privy to a report entitled "*Inquiry into the procurement process of the gender in education policy document printing*" purportedly prepared by audit by EKV Consultants on instructions from the Defendant and that the said report was adopted by the Defendant. That the report which was not officially conveyed to her nor her input sought in its compilation purported to wrongfully and maliciously implicate her in various professional misconduct and malpractices.

That while conducting investigations, the Defendant did not adhere to the fundamental tenets of its own disciplinary procedure set out in its Staff Manual and that it failed to afford her an opportunity for her defence to be heard before being condemned. That her advocates wrote to the Defendant on 16<sup>th</sup> January 2008 expressing her concern to which it responded vide its letter dated 18<sup>th</sup> January 2008. That in view of the Affidavit she swore dated 24<sup>th</sup> January 2008 shedding light on the matters in issue and demonstrating her innocence, the Defendant by its letter dated 25<sup>th</sup> January 2008 purported to release her from its organization without any proper and/or reasonable justification. That the Defendant thus breached the contract of employment and/or is guilty of anticipatory breach of the contract of employment. That she is apprehensive it may unlawfully withhold her dues. She contends that the aforesaid report dated 18<sup>th</sup> December 2007 containing words and phrases defamatory to her, has been irregularly disseminated to a section of the Defendant's employees, associates, and partners thus effectively publishing the contents thereof.

She continues to aver that on 28<sup>th</sup> January 2008, the Respondent further authored and published widely an email entitled "*Faith Macharia*" implying to all those who received it that she had been dismissed from work for unscrupulous reasons and that she was likely to masquerade still being at work. That the said words in their natural and ordinary meaning were received, understood and constructed by the recipients to mean: *she is a dishonest person, a fraudster, untrustworthy, a thief and con artist, and unscrupulous and unethical*. That the aforesaid words published by the Defendant out of sheer malice and spite towards her and being factually incorrect amounted to libel. That these words were highly defamatory to her and greatly injured her reputation for which she claims damages. She further claims unpaid salary for January 2008 and one month's salary in lieu of notice amounting to Kshs.166,600/=.

The Plaintiff prays that judgment is entered in her favour and against the Defendant for:

1. The sum of Kshs.166,600/=
2. Damages for breach of contract

3. Exemplary damages for defamation

4. Costs of this suit.

The Claimant filed a Witness Statement dated 30<sup>th</sup> May 2011 stating that on 19<sup>th</sup> November 2007, her request for annual leave was granted and she proceeded on 45 days' leave with effect from 1<sup>st</sup> November 2007. She believes that due to the nature and implication of the documents she produced in her affidavit dubbed "*the expose*", the Defendant had to terminate her employment. That the damning report has changed her personal life and that she cannot even secure employment due to the negative aspersions cast on her person.

The Defendant filed a Statement of Defence dated 23<sup>rd</sup> April 2008 stating that it invited the Plaintiff to a meeting to respond to the contents of the report to which she responded with an affidavit. That this affidavit was considered due and fair process followed before it made the decision to release the plaintiff. That the Plaintiff thus chose to communicate in writing as opposed to attending the said meeting. The defendant therefore denies not according the plaintiff the opportunity to be heard. The defendant also denies the Plaintiff's allegations of breach of contract or anticipatory breach and avers that the Plaintiff has to date not cleared with FAWEK. That she still holds keys to her office which has her personal property. That the report and email cited by the Plaintiff are privileged and cannot found a cause of action along the lines propounded by the Plaintiff. The respondent denies the particulars of defamation as set out in the Claim or that the Plaintiff is entitled to the reliefs she seeks. The respondent avers that the claimant's conduct while in the course of employment with FAWEK was incompatible with due and or faithful discharge of her duties and that they had no option but to release her for misconduct.

The Respondent filed a Witness Statement dated 2<sup>nd</sup> November 2018 made by its elected Board Treasurer, Dr. Lucy Ogot who states that the respondent recruited the Claimant to work for the Respondent for a period of 3 years. That on or about November 2007, Dr. Sarah Weight, USAID Kenya and Stephen Weaver, CIDA Kenya urgently invited her for a meeting at the FAWEK offices, which was to be attended by the Board members. That the two conveners arrived with the Claimant closely following the entourage and that the meeting commenced at 2 pm without a clear agenda, even though she assumed that USAID and CIDA being donors had some new ideas they wanted the Board to participate in. That Dr. Sarah then asked the meeting to discuss the irregular tendering of the printing of gender policy documents which astonished the board members who did not have information of how the document landed at FAWEK. That Faith had engaged the donors without the knowledge of the board and that she was actually insubordination of the board because all external communication should have been done with express approval of the board.

That Dr. Sarah informed the Board that USAID Kenya was not going to pay the printers due to discovery of conflict of interest which the Claimant purported that her colleague, Mr. Kinuthia had committed. That the board realised in this meeting there was bad working relation between Kinuthia and the Claimant due to this printing tender. That the Board members were embarrassed when the donors categorically stated that unless a thorough investigation was carried out and a full enquiry done on the procurement process, no further activities or funding would be honoured by it. That the chairperson then commissioned the inquiry which brought forth the report and which in turn established that the Claimant erred on several counts in the tendering of the work. That with guidance of the donors, the board terminated both officers' services. Dr. Ogot contends that the claim on defamation does not hold water as all matters raised in the report are true. Further, that the Claimant's actions have greatly prejudiced the organization to date since no single donor has been able to trust the organization or offer funding for any project.

### **Evidence**

The Claimant adopted her witness statement and produced documents she relied upon as evidence in this case. In re-examination she stated she was not in charge of procurement as evidenced by document number 25 on the Claimant's list of documents. She stated she did not go on leave for the 45 days because she was released back to the Ministry. That she was not issued with a warning letter during the period she worked and that she was not called for any meeting to explain herself or asked to be accompanied by a witness to the disciplinary meeting. That upon termination, she was released back to the ministry and was not paid any terminal dues.

RW1, LUCY OGOT relied on her filed witness statement as her evidence in the case and stated that after receiving the Claimant's affidavit, she was invited for another meeting on 24<sup>th</sup> January 2008 (letter dated 18<sup>th</sup> January 2008 no. 19 of Respondent's bundle) but she did not attend. That the respondent did not pay her one month's salary in lieu notice of pay as she had gone to court. That on the prayer for defamation, the report is factual. That FAWEK was not involved in the printing of gender policy. In cross examination, she confirmed the Claimant did not proceed on leave. She also confirmed that the Defendant did not ask the plaintiff to attend the meeting with a colleague for the meeting or give her notice. In re-examination Dr. Ogot stated that the Claimant went on leave half-heartedly even though she herself had requested for the leave.

### **Claimants' Submissions**

The Claimant submits that her employment contract was unlawfully and unfairly terminated contrary to Section 45 of the Employment Act and that the Respondent violated Section 41 of the Act. That in *Sabina Mutua -v- Amedo Centre Kenya Limited* [2017] eKLR, the court found that the claimant was unfairly terminated from her employment and awarded her compensation while observing that section 41 and 44 of the Employment Act require there be a proper hearing where an employee has grossly misconducted herself. That in *Mary Chemwono Kiptui -v- Kenya Pipeline Company Limited* [2014] eKLR, the court held that the reasons for termination must be given prior to and not after termination as this would be an outright negation of the purpose, intent and validity of any reason or reasons an employer may have against the affected employee. That the email sent to her on 25<sup>th</sup> January 2008 contravened the above authority as it purported to give the reasons after her employment had already been terminated. She urges this Court to associate itself with the holdings of the above authorities and find that the Respondent did not adhere to the rules of procedure and unfairly terminated her employment.

She submits that her salary as per her offer letter dated 26<sup>th</sup> January 2006 is at page 3 of the Claimant's list of documents and that she is entitled to the unpaid January 2008 salary having been in employment for 25 days in the said month. That the withholding her salary flies in the face of Section 25(1) of the Employment Act on payment of remuneration wrongfully withheld or deducted. That it is clear she was never

given notice as provided for under Section 36 of the Employment Act, which fact was admitted by the Respondent's witness in cross examination. That she is therefore entitled to one month's notice pay. That since she had proved to this Court that the Respondent unfairly terminated her employment, this Court has the discretion to grant damages for unfair termination. That 12 months' salary will be adequate compensation as damages for breach of contract as provided under Section 49(c) of the Employment Act. She relied on the case of Mary Mutanu Mwendwa -v- Ayuda Ninos De Africa-Kenya (Anidan K) [2013] eKLR where Radido J. observed that:

“...the court under the Industrial Court Act has been allowed to award damages and compensation but subject to the Industrial Court Act or any other written law. And the damages and or compensation is capped by the Employment Act to the equivalent of a maximum of twelve months gross wages.”

She urges the Court to find that the Respondent blatantly violated the provisions of section 41, 43, 45, 49, 50 and 51 of the Employment Act and that she is entitled to the terminal dues calculated as:

i. Salary for the month of January 2008	Kshs.83,300
ii. One month salary in lieu of notice	Kshs.83,300
iii. One year salary for unlawful termination	<u>Kshs.999,600</u>
Total	Kshs.1,166,200

#### Respondent's Submissions

The Respondent submits that it is the Claimant who directly breached her contract by failing to adhere to the terms of her employment contract and that her termination was fair and lawful. That it had valid and justifiable reasons to dismiss her for gross misconduct under Section 44(4)(c) of the Employment Act since she failed or refused to obey lawful and proper command within her scope of duty to obey, issued by those in authority over her. That section 47(5) of the Act burdens the employee to prove a case of unlawful termination with the employer required to rebut the same. It relied on the case of Francis Nyongesa Kweyu -v- Eldoret Water and Sanitation Company Limited [2017] eKLR where Marete J in dismissing the case for unfair termination stated that the open and clear display of dishonesty by the claimant in the course of duty eroded all trust and destroyed the core of the service contract such that it was no longer sustainable. That the Claimant has failed to prove her case for unfair termination of employment against the overwhelming evidence on its part

It submits that Winfield in J. A. Jolowicz and T. Ellis Lewis – Winfield on tort, 8<sup>th</sup> Edition at page 254 defines defamation and states: “...A defamatory statement, according to Gately and Libel and Slander 8<sup>th</sup> Edition By Phillips Lewis paragraph 4 page 5 discredits a man or tends to lower him on the estimation of others or to expose him to hatred, contempt or ridicule or to injure his reputation in his office trade or profession or to injure his financial credit.” Further, in Richard Otieno Kwach v The Standard Limited and David Makali, Nairobi HCCC No. 1099 of 2004, Visram J observed that words are defamatory if they involve a reflection upon the personal character or official reputation of the plaintiff. That the Claimant adduced no evidence to prove the Respondent's publication was defamatory to her and that no witness was called to give evidence as to whether or not the defamation injured the Claimant. It submitted that it has been severally held that the plaintiff in defamation cases cannot be their own witness on what he or other people perceive to be his good character. That the Claimant's prayer for exemplary damages does not hold water as it does not meet the test of the elements of defamation, which are that the statement must: be defamatory, refer to the plaintiff, have been published by the defendant and be false. That the publications complained about were made after careful objective professional assessment within its ordinary course of business and that all statements as evidenced in court were true.

It is submitted by the Respondent that it is trite law that employment remedies must be proportionate to the economic injuries suffered by the employees and are not aimed at facilitating the unjust enrichment of aggrieved employees but are meant to redress economic injuries in an appropriate way. That since the Claimant has not proved any abuse and violation of her rights and dignity the defendant prayed that she is not granted any relief. That the proposition that costs follow the event does not apply in this case as costs in the Employment and Labour Relations Court do not necessarily follow the event as is fortified by the case of Makana Asanyo v Nakuru Water and Sanitation Services Company Limited & 8 others [2015] eKLR, where the court held that an order of costs is discretionary and should be made after evaluating what is just in the circumstances of each case.

#### Determination

The issues for determination are whether the Claimant was unlawfully and unfairly terminated from employment by the Respondent and whether the Claimant is entitled to the reliefs sought.

The Claimant has submitted that there was no disciplinary hearing

convened for her to defend herself against the allegations while it is the Respondent's contention that they invited her for a meeting but she instead chose to respond with an affidavit and when they called her for a second meeting she did not attend or respond at all.

The claimant's employment was terminated on 25<sup>th</sup> January 2008. The law applicable to this case is the Employment Act 1976 (now repealed). Under the said Act, an employer was under no obligation to give an employee a hearing before termination of employment. Section 16 of the Act provided as follows –

#### 16. Payment of wages in lieu of notice.

**Either of the parties to a contract of service to which paragraph (ii) or (iii) of subsection (5), or the proviso thereto, of section 14 applies, may terminate the contract without notice upon payment to the other party of the wages or salary which would have been earned by that other party, or paid by him, as the case may be, in respect of the period of notice required to be given under the corresponding provision of that subsection.**

As was held by Radido J. in the case of *Anthony Mkala Chitavi v Malindi Water and Sewerage Company Limited [2013] eKLR*:

*“Section 41 of the Employment Act, 2007 has now made procedural fairness part of the employment contract in Kenya. Prior to the enactment of the Act, the right to a hearing was not part of the employment contract unless it was expressly incorporated into the contract by agreement/staff manuals or policies of the parties or through regulations for public entities.*

*An employer was free generally to dismiss for a bad reason or a good reason but on notice or payment in lieu of notice. The employer could even dismiss for no reason at all. There was no obligation to notify or listen to any representations by the employee.”*

For the foregoing reasons I find that the claimant is entitled to one month's salary in lieu of notice which I award her at Kshs.83,300. I further award her salary for 25 days worked in the month of January 2008 in the sum of Kshs.80,096. **The total award is Kshs.163,396/=.**

The same will attract interest at court rates from date of judgment.

The prayer for damages for breach of contract and exemplary damages has no foundation in law while the claimant did not prove defamation. Consequently, the said prayers are dismissed.

The respondent will pay the claimant's costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25<sup>TH</sup> DAY OF OCTOBER 2019**

**MAUREEN ONYANGO**

**JUDGE**