Khasiani v Barclays Bank of Kenya Limited & another (Cause 926 of 2016) [2022] KEELRC 1487 (KLR) (10 June 2022) (Judgment)

Neutral citation: [2022] KEELRC 1487 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 926 OF 2016

SC RUTTO, J

JUNE 10, 2022

BETWEEN

ABUNGAANA KHAHUU KHASIANI ..... CLAIMANT

AND

BARCLAYS BANK OF KENYA LIMITED ..... 1ST RESPONDENT

RELI COOPERATIVE SAVINGS AND CREDIT SOCIETY LIMITED ..... 2ND RESPONDENT

JUDGMENT

1. The instant suit was instituted vide a plaint filed at the High Court on September 11, 2003. The matter was later transferred for hearing and determination before the Employment and Labour Relations Court vide the Court's Ruling on April 19, 2016.

2. The claimant avers through the plaint that he was dismissed from employment on October 22, 2002, on the basis of misrepresentation by the 1st respondent, Barclays Bank of Kenya Limited through its letter dated September 11, 2002. He further termed the letter dated September 11, 2002 as defamatory as it contained malicious inuendo and negligent misrepresentation that caused his dismissal. Accordingly, the claimant prays for: -

    a. General damages for defamation and/or malicious and negligent misrepresentation;

    b. General damages for breach of contract and benefits for the reminder of contract period;

    c. Costs of the suit;

    d. Interest at court rates; and

    e. Any other relief that the Court may deem apt.

3. The 1st respondent disputed the claim and averred that in as much as it sent the letter dated September 11, 2002, its contents did not contain words that were to be understood to bear or were capable of bearing any meaning defamatory of the claimant. It asked the Court to dismiss the suit with costs.

4. On its part, the 2nd respondent denied that the claimant's dismissal was callous and/or actuated by malice. It denied that the claimant is entitled to any terminal benefits and /or damages for breach of contract having been summarily dismissed for gross misconduct. It asked the court to dismiss the suit with costs.

5. The matter proceeded for hearing on January 19, 2022. The claimant and the 1st respondent presented oral evidence. However, the 2nd respondent did not participate in the trial as counsel on record filed an Application dated November 11, 2021, to cease acting for want of instructions and which Application, was allowed.

Claimant's case

6. The claimant testified in support of his case, and at the outset, sought to rely on his witness statement and bundle of documents, which were adopted to constitute part of his evidence in chief. The documents were also produced as the claimant's exhibits before court.

7. The claimant testified that at the material time, he was a General Manager of the 2nd respondent and was earning a gross salary of Kshs 100,000. That he was also a customer of the 1st respondent bank. It was his testimony that he received a letter dated 19th September, 2002 from the 2nd Respondent, informing him that he had misappropriated funds as he had paid himself a double salary. That he replied to the letter and was later sent on compulsory leave. That he was subsequently dismissed from employment on October 22, 2002. That prior to that, on 29th August, 2002, and before the 1st respondent had made any payments, the 2nd respondent had instructed the 1st respondent not to credit his salary and return the sum of Kshs 73,328/= as he had been paid his salary in cash, through Reli Co-operative Sacco Limited SASA Section.

8. He further testified that vide a letter dated September 11, 2002, the 1st respondent through a Mr. Wanjau stated that his account had already been credited with the salary and the funds utilised hence could not be returned.

9. It was his further testimony that the statement by the said Mr. Wanjau, was erroneous as there had been no bank transfer by the 1st respondent to his account. That the credit made to his account was a cash credit and not a bank transfer.

10. That further, on September 11, 2002, the 1st respondent made out a banker's cheque in the sum of Kshs 73,078/= and the same was returned to the 2nd respondent as instructed on 29th August, 2002. That the same was subsequently acknowledged by the 2nd respondent on October 14, 2002.

11. The claimant informed Court that the letter of September 11, 2002 is a misrepresentation of facts and that it was that letter that formed the basis for his dismissal from employment. He further termed the letter as defamatory, malicious and negligent. He termed his dismissal as unfair, unlawful and unmerited as it affected his prospects of future employment.

12. Upon cross examination, the claimant maintained that he was terminated from employment based on the letter dated September 11, 2002, from the 1st respondent.

1st Respondent's case

13. The 1st respondent presented oral evidence through Mr. Michael Massawa who testified as RW1. He identified himself as a Legal Counsel at the 1st respondent bank. He adopted his witness statement and the documents filed on behalf of the 1st respondent to constitute part of his evidence in chief. The documents were also produced as part of the 1st respondent's exhibits.

14. He testified that vide a letter dated August 29, 2002, the 1st respondent was instructed by the 2nd respondent not to credit the claimant's account and to return his salary of Kshs 73,328/=. That the letter did not state the reason for the refund.

15. That the letter dated September 11, 2002, from the 1st respondent, was a statement of fact with no defamatory meaning. That on 2nd October, 2002, the 2nd respondent sought further clarification from the 1st respondent as regards the letter of September 11, 2002 and the 1st respondent responded as follows: -

    a. That the 1st respondent received the claimant's salary and that the same was returned to the 2nd respondent as instructed on August 29, 2002;

    b. That the salary had been returned to the 2nd respondent on September 11, 2002; and

    c. That the confirmation on the 1st respondent's letter dated September 11, 2002 was for cash deposit to the claimant's account.

16. That subsequent to this clarification, the 2nd respondent forwarded a cheque to the 1st respondent on October 14, 2002. He stated that the 1st respondent is an innocent party to the internal wrangles between the claimant and the 2nd respondent. That the claimant had no case against the 1st respondent.

Submissions

17. It was submitted on behalf of the claimant, that the 2nd respondent had failed to discharge its evidential burden by showing that there were valid grounds for his summary dismissal. That the 2nd respondent had the burden to prove the reasons for his dismissal as per section 43(2) of the *Employment Act*. That the claimant was dismissed on the basis of the 1st respondent's erroneous reckless, negligent and false advice as contained in its letter of September 11, 2002. The claimant further stated that the exhibits by the 1st respondent were inadmissible in light of section 177 of the *Evidence Act*. The cases of *Kenya Commercial Bank Limited vs James Kuria Njine* (2002) eKLR and *Guardian Bank Limited vs Skyflyers Travel and Tours Limited* (2004) eKLR were cited in support of this argument. That further, the claimant was not afforded a fair hearing prior to his dismissal nor given copies of the evidence against him, despite requesting for the same. Reliance was placed on the determination in *Postal Corporation of Kenya vs Andrew K. Tanui* (2019) eKLR.

18. Through its supplementary submissions, the claimant argued that the *Employment Act*, 2007 had retrospective effect and on this score, reliance was placed on the case of *Cooperative Bank of Kenya Limited vs Yator* (2021) eKLR. That the claimant is entitled to damages for tort of malicious/false and negligent misrepresentation or defamation. That the 1st respondent owed the claimant a duty of care not to negligently/ falsely/maliciously represent his account.

19. It was submitted on behalf of the 1st respondent that it was not liable for breach of the claimant's contract of employment. That as such, it cannot be held liable for damages for termination when

there was no privity of contract. That general damages could not be awarded for breach of contract. The case of *Municipal Council of Thika vs Elizabeth Wambui Mukuna* (2004) was cited in support of this position. It was the 1st respondent's further submission that the applicable law in the instant case was the *Employment Act* (1976). Reliance was placed on the authorities of *Abubakar Ali Shee vs Tourism Promotions Services (Kenya) Limited* eKLR and *Anthony Makala Chitavi vs Malindi Water & Sewerage Company Limited* (2013) eKLR.

20. In further submission, the 1st respondent argued that it did not make any statement capable of defaming the claimant. That no particulars of the alleged malicious innuendo and negligent misrepresentation has been placed before the Court. Reliance was placed on the case of *Peter Maina vs Ndirangu t/a Express Service Agency vs Standard Group Limited* (2016) eKLR. That pursuant to article 162(2) of *the Constitution* and section 12(1) and (2) of the Employment and Labour Relations Act, the Court has no jurisdiction to determine a claim for defamation.

Analysis and Determination

21. Flowing from the pleadings, the evidence on record and the rival submissions, it is evident that this Court is being called to resolve the following questions: -

    i. Is the *Employment Act*, 2007 applicable to the case?

    ii. Whether the 2nd respondent is liable for the dismissing the claimant from employment?

    iii. Whether the 1st respondent is liable to the claimant for negligent misrepresentation?

    iv. Whether the 1st respondent is liable to the claimant for defamation?

    v. Is the claimant entitled to the reliefs sought?

    Applicability of the *Employment Act*, 2007

22. It is notable that the cause of action arose in 2002 before the enactment of the *Employment Act*, 2007. The claimant has averred that the *Employment Act*, 2007 has a retrospective effect hence is applicable to the case herein.

23. In support of its position, the claimant has relied on the determination by the Court of Appeal in the case of *Cooperative Bank of Kenya Limited vs Yator* (Civil Appeal 87 of 2018) [2021]. I have carefully considered that decision and note that the Court considered the import of section 93 of the Act, which is basically a transition clause. In this regard, the learned Judges rendered themselves thus: -

> " While we are alive to the principle of retrospectivity, this law had been repealed and the only thing the legislators had to consider was the methodology of transiting from the repealed act to the current act and in so doing, had to save what they saw was of importance. Hence they inserted section 93 in the current *Employment Act* which provides inter alia;
>
> "A valid contract of service..... entered into in accordance with the repealed *Employment Act* shall continue in force to the extent that the terms and conditions thereof are not inconsistent with the provisions of this Act, and subject to the foregoing every such contract shall be read and constructed as if it were a contract made in accordance with and subject to the provisions of this Act, and the parties thereto shall be subject to those provisions accordingly."

24. It is also instructive to note that this determination contradicts an earlier determination by the Court of Appeal in the case of *David Ngugi Waweru vs Attorney General & another* [2017] eKLR in which it was held that: -

> "(18) We take the view in this matter that there are no express words in the *Employment Act*, 2007 or the necessary implication to compel us to declare that it was retrospective in effect. On the contrary, there were clear obligations under contract, vested rights and liabilities in this case that would be affected if the new Act was applied."

25. In my view, the transition clause under section 93 of the *Employment Act*, 2007, is a saving clause which was meant to save contracts of service that were valid at the time the current Act was being enacted.

26. The claimant's contract of employment had already been terminated by the time the *Employment Act*, 2007 was being enacted. It was not valid anymore hence did not fall under the contracts of employment which were transited to the new Act.

27. Besides, it will be unfair to expect an employer to comply with provisions of an Act that came into force 6 years later. It is further unfair to judge an employer's conduct based on a standard that was non existent at the time the employment was terminated.

28. The upshot of the foregoing is that I find that the applicable law in resolving the question of the claimant's dismissal from employment, ought to be the law that was in force at the time and that is the repealed *Employment Act*.

Whether the 2nd respondent is liable for the dismissing the claimant from employment?

29. The process leading upto the claimant's dismissal from employment was commenced vide a letter dated September 19, 2002 which is couched as follows: -

> " Re: Gross Misconduct
>
> It has come to our attention that on 29/8/2002 you misappropriated the society funds by double paying yourself for the month of July, 2002, through cash in Sasa Section and through your Barclays Bank Account. This is a serious offence and your explanation is therefore required within 72 hours in terms of the existing regulations."

30. Through his response dated September 26, 2002, the claimant responded to the letter from the 2nd respondent's denying the allegations as follows;

> " 1. I write to deny that I paid myself salary twice for the month of July 2002.
>
> 2. I am able to provide evidence to this effect.
>
> 3. Is the person or are the persons who notified you that I have paid myself twice able to provide proof?
>
> 4. I would like it established whether action to recall the funds was property done or was deliberately botched up with the malicious intention to set up a semblance of the General Manager has paid himself twice. In this regard, I kindly ask the Central Management Committee to direct the Savings Manager to check and confirm that the recall of the salary which was to go by bank transfer was property done.

5. As General Manager I wish to assure the entire Central Management Committee that a person of my professional standing and having in mind the trust you have bestowed onto me to look after your Sacco and its assets cannot stoop so low as to misappropriate funds by paying myself twice knowing very well that the amount so misappropriated will be reflected in my statements."

31. Subsequently, the claimant was sent on compulsory leave on September 27, 2002 for a period of 30 days. Thereafter, he was dismissed from employment vide a letter dated October 22, 2002 which reads in part: -

> " Re: Dismissal From Services (sic)
>
> This has reference to our letter dated 19/9/2002 and your subsequent reply vide your letter dated 26/9/2002. The Central Management Committee in their meeting held on 27/9/2002 deliberated on the issue and found you guilty of the offence as detailed in the same letter regarding the misappropriation of funds (double payment of salary). You are therefore summarily dismissed from the service of Reli Sacco Society with effect from 25/10/2002 in terms of Staff Regulations G3 (a) Paragraph (vi).
>
> You are therefore required to hand over the Society's property, which may be in your possession to the Ag. General Manager..."

32. It is apparent that the claimant's dismissal flowed the allegations of double payment of salary initially levelled by the 2nd respondent. It is therefore imperative to revisit the events and circumstances that gave rise to the said allegations and which largely transpired through correspondence.

33. The letter dated 11th September, 2002 from the 1st respondent and which is at the heart of this dispute, reads as follows;

> " Salary for Abungana Khasiani Kshs 73,328
>
> We refer to your letter dated August 29, 2002 and advice that the account had already been credited and funds utilised."

34. It is apparent that the above letter was triggered by the 2nd respondent's letter of August 29, 2002, through which it instructed the 1st respondent to return the claimant's salary of Kshs 73,328/=. It was upon receiving a response through the letter of September 11, 2002, that the 2nd respondent sought a clarification from the 1st respondent vide its letter dated 2nd October, 2002, as follows: -

> RE: JUly Salary for A. K. Khasiani A/C No. 1303370 – Haile Sellase Avenue
>
> We attach herewith a copy of a self-explanatory letter from yourselves written on 11th September 2002 on the above matter.
>
> We would like you to confirm by letter to us signed by duly Authorized Bank Signatories stating the following: -
>
> 1. That you did received from us the salary and you did do a bank transfer for the amount of Kshs.73,328/= which as per your letter was credited to A/c No. 1303370 at your Barclays Bank of Kenya Ltd, Haile Sellassie Avenue Branch.
>
> 2. That you did write a letter to us dated 11th September 2002 confirming having effected the bank transfer."

35. On record, is a letter from the 1st respondent dated October 9, 2002, through which the following clarification was given thus: -

> "July Salary for A. K. Khasiani
>
> We refer to your letter dated October 2, 2002 regarding the above salary and would like to clarify the matter as follows;
>
> 1. We received your cheque for the salary of Mr. Khasiani and the same was returned to yourself as per your instructions dated August 29, 2002.
> 2. We inadvertently confirmed having credited his account. The fact is that we returned the salary vide our cheque No. 1303370 for Ksh73,078.00 on September 11, 2002.
> 3. This confirmation on our letter dated 11th September was actually a cash deposit to the account of Ksh73,300.00 dated August 29, 2002.
>
> We enclose copies of the forwarding letter and regret the inconvenience caused."

36. Subsequently, it would seem that on October 14, 2002 and upon the receiving the foregoing clarification from the 1st respondent, the 2nd respondent, enclosed a banker's cheque to the 1st respondent with instructions that it recredits the claimant's account with the sum of Kshs 73,078/=. The letter reads in part: -

> " We have since recovered our money following your unreferenced letter dated 11/9/2002 a copy of which is attached for your reference."

37. It is notable that the 2nd respondent sent the letter of October 14, 2002 and returned the money for recrediting of the claimant's account, before his dismissal. It is also apparent that this action by the 2nd respondent was upon the clarification by the 1st respondent.

38. It is also apparent that the claimant's dismissal was undertaken despite full information and knowledge by the 2nd respondent, that he had not double paid his salary. It is therefore not clear what informed the 2nd respondent's actions when it dismissed the claimant from employment. This was despite the 1st respondent owning up to the error in communication through its letter of October 9, 2002.

39. In the end, the 2nd respondent dismissed the claimant on the basis of allegations that were unsubstantiated.

40. As a matter of fact, the 2nd respondent maintained in its defence that the claimant was dismissed on account of gross misconduct. Those grounds turned out to be baseless as no evidence was produced to back up the allegations of gross misconduct by the claimant.

41. Accordingly, the claimant's dismissal was wrongful and the 2nd respondent is liable.

Is the 1st respondent liable for negligent misrepresentation?

42. The claimant has submitted that the 1st respondent is liable for negligent misrepresentation and that it owed him a duty of care not to misrepresent the state of his account.

43. The *Black's Law Dictionary* (10th Edition) defines negligent misrepresentation to mean: -

> "A careless or inadvertent false statement in circumstances where care should have been taken."

44. It is not disputed that the claimant and the 1st respondent had a banker customer relationship at the material time.

45. The claimant submitted that the 1st respondent owed him a duty of care to ensure that it does not misrepresent his accounts and to ensure that it does not disclose his accounts to a third party.

46. In evaluating the duties of a banker towards its customers, the Court of Appeal in the case of *Fidelity Commercial Bank Limited vs Italian Market Kenya Limited* [2017] eKLR, cited with approval the holding by Brightman J in *Karak Brother Company Ltd vs Burden* [1972] 1 All ER 1210, where it was held as follows: -

> "As between the company and the bank, the mandate, in my view, operates within the normal contractual relationships of customer and banker and does not exclude them. These relationships include the normal obligation of using reasonable skill and care; and that duty on the part of the bank, of using reasonable skill and care, is a duty owed to the other party to the contract, the customer, who in this case is the plaintiff company, and not to the authorized signatories...while carrying out the customer's instruction a bank is under obligation to exercise reasonable skill and care. That skill and care applies to interpreting, ascertaining and acting in accordance with the instructions of the customer."

47. Further, in *Equity Bank Limited & another vs Robert Chesang* [2016] eKLR, the court cited the case of *Encyclopedia of Banking Law C.21 Selangor United Rubber Estate Ltd V Cradock* (No.3) [1968] 2 ALL ER 1073) where it was held that: -

> "A bank has a duty under its contract with its customer to exercise reasonable care and skill in carrying out its part with regard to operations within its contracts with its customers. The duty to exercise reasonable care and skill extends over the whole range of banking business within the contract with the customer. Thus the duty applies to interpreting, ascertaining and acting in accordance with the instructions of the customer."

48. I echo the sentiments expressed in the above authorities and apply the same to the case herein. It is my expectation that the 1st respondent acting as a responsible banker and exercising reasonable skill and care, ought to have confirmed the actual status of the claimant's account and ascertained the source of the money credited into his account, before communicating to the 2nd respondent.

49. As it later turned out, its communication of 11th September, 2002 was not a true reflection of the status of the claimant's account as the money was a cash credit hence had no connection with the 2nd respondent's funds.

50. Further, the 1st respondent owed the claimant a duty not to disclose his banking information to any party including the 2nd respondent, regardless of whether it was his employer. Indeed, the 1st respondent appear to have reversed roles as regards its duty as a banker and was acting on the instructions of the 2nd respondent, to the detriment of its own customer, the claimant. As such, it totally disregarded its duty of care towards the claimant as its customer. The Bank's duty to secrecy regarding a customers' account

and matters relating to it is never in dispute. As was stated in the English case of T*ournier vs National Provincial and Union Bank of England Ltd* [1923] All ER 550, in which Banker LJ stated as follows:

> " The case of the Banker and his customer appears to me to be one in which the confidential relationship between the parties is very marked. The credit of the customer depends very largely upon the strict observance of that confidence."

51. In this case, the 1st respondent had a contractual duty of confidentiality to the claimant and it breached that duty by disclosing information in regards to his bank account to the 2nd respondent. That was unauthorised disclosure.

52. My finding on this issue is that the 1st respondent was negligent, imprudent and incautious in its communication to the 2nd respondent, through the letter dated 11th September, 2002. This is the reason why: -

    a. The 1st respondent did not dispute issuing the letter dated 11th September, 2002;

    b. The said letter contained information relating to the claimant's banking information;

    c. The 1st respondent did not prove, let alone suggest that it had a duty to disclose the claimant's banking information to the 2nd respondent;

    d. The letter was in response to the instructions from the 2nd respondent to return the claimant's salary of Kshs 73,328/=;

    e. The 1st respondent notified the 2nd respondent through the letter of 11th September, 2002, that the funds in the claimant's account had been credited and utilised; this information turned out to be erroneous;

    f. The 2nd respondent took disciplinary action against the claimant ostensibly on the basis that he had paid himself double salary, based on the communication by the 1st respondent;

    g. The 1st respondent admitted vide its letter of 9th October, 2002 that it had inadvertently stated in its letter of 11th September, 2002 that the money was credited from the 2nd respondent;

    h. The claimant's bank statement clearly states that the amount in question was a cash credit; and

    i. The claimant was eventually dismissed from employment on the basis that he had double paid himself salary, and which allegation turned out to be unfounded.

53. It is no doubt that the claimant's eventual dismissal was triggered by the 1st respondent's letter of September 11, 2002. It is also evident that the 1st respondent communicated the contents of the letter of September 11, 2002 without verifying the facts. By the time it was verifying the facts and stating the correct position, vide its letter of October 9, 2002, the damage had already been done as the claimant was already on the firing line.

54. This chain of events was no doubt detrimental to the claimant and moreso, considering that he was at the pinnacle of his career.

55. The upshot of the foregoing is that the 1st respondent failed to discharge its duty to exercise skill and care towards the claimant in the manner it communicated to the 2nd respondent, regarding the status of his bank account. It cannot run away from this responsibility.

56. In light of the role played by the 1st respondent in the circumstances leading to the claimant's dismissal from employment, it cannot escape liability for negligent misrepresentation.

Is the 1st respondent liable for defamation?

57. The 1st respondent has submitted that this court lacks jurisdiction to entertain the claim for defamation as the same does not relate to an employer-employee dispute. It has based this argument on the provisions of article 162(2) of *the Constitution* and section 12(1) and (2) of the *Employment and Labour Relations Court Act*.

58. It is not disputed that the alleged defamation arose in the cause of an employment relationship.

59. In determining this issue, I will echo the determination of the court in the case of *Beatrice Achieng Osir vs Board of Trustees Teleposta Pension Scheme* [2012] eKLR where it was held that: -

> " The court upholds that wide scope of the jurisdiction of the court and finds that the remedies that the court may award are not restricted to the contract but spread to other injuries that may occur in the employment and labour relations. Section 12 (3) of the Industrial Court Act, 2011 empowers the court to make any other appropriate relief as the court may deem fit to grant. Section 12(3) (v) of the Act also empowers the court to order an award of compensation in any circumstances contemplated under the Act or any written law. "

60. It is therefore my finding that this Court has jurisdiction to determine the issue of defamation, the same having arisen within the employment relationship. Aside from that, it is not practical to mutilate the claim and have another portion thereof, determined in another Court without taking into context the circumstances under which the alleged defamation took place. It is only prudent that the claim be handled by one court and this being the Court vested with the primary jurisdiction to determine the main dispute, which is employment in nature, has jurisdiction to determine all the ancillary issues arising therefrom.

61. Having resolved the issue of jurisdiction, I now move to consider the 1st respondent's liability in light of the alleged defamation.

62. The claimant has termed the letter of 11th September, 2002 as defamatory in that it contained malicious innuendo and negligent misrepresentation. I will reproduce the letter once again thus: -

> " Salary for Abungana Khasiani Kshs 73328
>
> We refer to your letter dated 29th August, 2002 and advice that the account had already been credited and funds utilised."

63. The ingredients of defamation were summarized in the case of *John Ward vs Standard Ltd*, HCCC 1062 of 2005 as follows: -

(i) The statement must be defamatory.

(ii) The statement must refer to the plaintiff.

(iii) The statement must be published by the defendant.

(iv) The statement must be false.

64. The 1st respondent has denied that the letter was defamatory in any way and has averred that the same was a statement of fact.

65. Having reviewed the circumstances that transpired before and after the communication by the 1st respondent, the contents of the letter cannot be termed as factual. This is because the funds credited to the claimant's account and which were being referred to by the 1st respondent, had been as a result of a cash credit and had not emanated from the 2nd respondent. Therefore, if the communication was at all factual, it would have been couched differently. Besides, it admitted in its letter of 9th October, 2002 that its communication on September 11, 2002, that the claimant's account had been credited, was inadvertent.

66. Be that as it may, the claimant had the burden of proving publication of the statement which it deemed defamatory. It is not doubt that the letter of September 11, 2002 was addressed to the 2nd respondent, specifically, the "Chairman Reli SACCO"

67. On the issue of the publication of a defamatory statement, the Court of Appeal reckoned as follows in *Selina Patani & another v Dhiranji vs Patani* [2019] eKLR: -

> "[19]. In law, to constitute a cause of action, the alleged defamatory statement should be published to a third party. If the statement complained of has only been made to the person the letter is addressed to, this will not suffice."

68. In this case, the claimant did not prove that the letter in question was published to third parties.

69. In determining the burden of proof in regards to the issue of publication, the Court went on to hold in Selina Patani & another v Dhiranji vs Patani (supra) as follows: "The burden to prove publication is on the claimant, in this case the appellants."

70. To this end, it was upon the claimant to prove that the contents of the alleged defamatory letter were indeed, published. The claimant has stated that the letter containing the alleged defamatory material was published to third parties namely, the 2nd respondent and all its officers who had sight of the letter. First, the 2nd respondent is a corporate entity hence on its own, lacks the capability of deeming the letter as defamatory or otherwise. Second, the officers who apparently had sight of the letter, were not named by the claimant nor any of them called to testify to that effect.

71. In further addressing this issue of publication to third parties, the Court in *Selina Patani & another v Dhiranji vs Patani* (supra) went on to hold that:-

> "[26]. The other issue for our consideration is whether the Judge erred in finding it was imperative to call a third party to prove the appellants claim for defamation. In principle, defamation is actionable per se. This does not mean the ingredients of the tort must not be proved. It simply means you must prove the elements of the tort of defamation; what need not be proved is the damage suffered. If no damage is proved, a claimant may be entitled to nominal damages. In this case, the legal issue is whether the appellants proved there was publication to a third party and injury or damage suffered to their reputation.

> [27]. The evidence on record is the testimony by the 2nd appellant that her boss read the letter. The alleged boss was never called to testify. No other third party was called to testify as to the publication and injury to reputation. As to whether the appellants character and reputation was destroyed, there is no evidence on record from a third party stating that as a result of reading the impugned letter, the appellants reputation and standing in society was injured. It is in this context that we agree with the learned Judge that a person's own view about his/her reputation is not material in a claim for defamation; there must be evidence from a third party to the effect that the standing and reputation of the claimant has been lowered as a result of the defamatory publication. In the absence of third party evidence, we find no error of law on the part of the Judge in arriving at the determination that the appellants did not prove their claim for defamation." Underlined for emphasis

72. In light of the determination in the authority above and applying the same to the case herein, it is my finding that the claimant has failed to prove a claim for defamation against the 1st respondent as per the requisite standard.

Reliefs

73. As the Court has found that the claimant was wrongfully dismissed, he is entitled to damages to the extent permissible by the repealed *Employment Act* and which is limited to one month's salary in lieu of notice. This award is backed by the determination in *Kenya Broadcasting Corporation vs Geoffrey Wakio* [2019] eKLR where it was held that: -

> " It is trite law that general damages are not awardable for wrongful termination. Previous decisions of this Court have asserted that the damages payable to the employee for unfair dismissal or termination is that which is equivalent to salary in lieu of notice. (See *Alfred Githinji vs. Mumias Sugar Company Ltd* Civil Appeal No 194 of 1991).

74. Further in *Central Bank of Kenya vs Julius Nkonge Nkabu* [2002] eKLR the Court determined that: -

> " In view of the conclusions we have come to, above, we are of the view and so hold that, on the assumption that the respondent's dismissal was wrongful, he was only entitled to damages equivalent to the salary he would have earned for the period of the notice, namely three months, and that the trial judge erred in awarding him more."

75. In light thereof, the court awards the claimant damages equivalent to one month's salary, against the 2nd respondent,.

76. The court further awards the claimant damages for negligent misrepresentation against the 1st respondent.

Orders

77. In the final analysis, I enter Judgment in favour of the claimant against the respondents as follows;

    a. The 2nd respondent to pay to the claimant damages, equivalent to one month's salary in lieu of notice, being the sum of Kshs 100,000.00.

    b. The 1st respondent to pay to the claimant damages for negligent misrepresentation being the sum of Kshs 1,000,000.00

    c. Interest on the amount in (a) at court rates from the date of filing the suit until payment in full.

d. Interest on the amount in (b) at court rates from the date of Judgment until payment in full.

e. The respondents shall bear the costs of the suit in equal proportion.

DATED, SIGNED AND **DELIVERED** AT **NAIROBI** THIS **10TH** DAY OF **JUNE** 2022.

.....

STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Lubullelah

For the 1st Respondent Mr. Kimani

For the 2nd Respondent No appearance

Court Assistant Barille Sora

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE