



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO 3 OF 2020

FLORENCE AKOTH ABUOM.....APPELLANT

VERSUS

KCB BANK LIMITED.....RESPONDENT

(Being an Appeal from the Judgement of Hon W. K Onkunya, Senior Resident Magistrate,

in Kisumu CMCC No 209 of 2018 delivered on 10th December 2019)

JUDGMENT

INTRODUCTION

1. By a Plaint dated 2nd May 2018, the Appellant had sought the following orders:-

a. General Damages for Defamation and damages on the footing of aggravated and exemplary damages

b. Costs of the suit and interest.

2. In his decision of 10th December 2019, the Learned Magistrate, Hon. W.K Onkunya, SRM, dismissed the Appellant's suit with costs to the Respondent herein.

3. Being dissatisfied with this decision, the Appellant herein preferred this appeal and filed Memorandum of Appeal dated 14th January 2020 setting out five grounds of appeal. She prayed that this Appeal be allowed with costs, the Judgement of the Trial Court be entirely set aside and that her suit against the Respondent be allowed and damages be assessed as she had submitted or at a sum reasonable and that corresponds with comparable past decisions.

4. Parties filed Written Submissions, which they relied upon in their entirety. This Judgment is therefore based on the said Written Submissions.

LEGAL ANALYSIS

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd [1986] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

7. Having considered grounds of appeal and Written Submissions by both parties, it appeared to this court that the only issue that had been placed before it for determination was whether the Appellant proved her case to the required standard being on a balance of probabilities. The court thus dealt with all the grounds of appeal together as they were related.

8. Notably, the Respondent raised an objection as to the trial court's jurisdiction because Regulation 35 of the Credit Reference Bureau Regulations specified a dispute resolution mechanism where a dispute arose. It pointed out that although it did not raise the issue during trial, it still had the liberty of raising it at the appellate stage. It relied on several cases amongst them **Kenya Ports Authority vs Modern Holdings E.A Limited [2017] eKLR** where the Court of Appeal held that jurisdiction was an important issue and could be raised at any time even on appeal.
9. Whilst the court noted the Respondent's submissions on the issue of the jurisdiction of the Trial Court, it recognised that the Respondent did not file any cross-appeal to empower this court to deal with the issue. It also noted that the Trial Court had dismissed the Appellant's suit and hence if it was still urging this court to uphold the decision of the Learned Trial Magistrate, analysing the submissions in this regard would not add value as they amounted to an academic exercise.
10. Having said so, this court recognised that the Respondent may have been taking precautionary measures in the event this court was to overturn the decision of the Learned Trial Magistrate and find in favour of the Appellant herein. It is for the avoidance of doubt that this court therefore found it necessary to render itself that Regulation 35 of the Credit Reference Bureau Regulation only provided an avenue of correction of credit information errors. It did not address issues of defamation. The Appellant's suit in the lower court had therefore been properly filed and entertained.
11. Turning to the substantive issue, the Appellant contended that she indeed demonstrated that the Respondent occasioned the unlawful listing on CRB, with the knowledge that she had no loan or non-performing account, which was defamatory of her character and reputation as a citizen.
12. Being a claim on libel, which is actionable *per se*, she argued that she was entitled to general damages and punitive damages. She averred that she was viewed as a loan defaulter and shunned by other financial institutions, which lowered her reputation in the estimation of right-minded persons.
13. She submitted that she was able to demonstrate that she had been defamed in line with the cases of **SMW vs ZWM [2015] eKLR** and **Miguna Miguna vs The Standard Limited & 4 Others [2017] eKLR**.
14. It was her further submission that she had indeed adhered to and exhausted the procedures under Regulations 35 of the Credit Reference Bureau Regulations, 2013 before filing suit by following up the issue with both the CRB and the Respondent herein. She was emphatic that the Respondent's actions were malicious and spiteful towards her.
15. She thus urged this court to award her a sum of Kshs 2,000,000/= and Kshs 1,000,000/= being general and exemplary damages respectively. She relied on the cases of **Miguna Miguna vs The Standard Limited & 4 Others** (Supra), **Agnes Zani vs Standard Group Limited [2018] eKLR** and **Musikari Kombo vs Royal Media Services Limited [2018] eKLR** where they were each awarded Kshs 5,000,000/= general damages and Kshs 1,000,000/= for aggravated damages.
16. On its part, the Respondent submitted that defamation did not arise in the circumstances herein since the Appellant failed to discharge the burden of proof by presenting any evidence to show that it was the Respondent who had forwarded her name to Metropol CRB. It indicated that the Report that she referred to did not show who sent the information that was now complained of. It relied on the case **Phinehas Nyagah vs Gitobu Imanyara [2013] eKLR**.
17. Notably, all the witnesses adopted their respective Written Statements as their evidence in chief.
18. In her evidence before the Trial Court, the Appellant stated that she had attempted to apply for loan facilities with other financial institutions and failed on account of being unlawfully and irregularly listed by the Respondent as a loan defaulter on Metropol Credit Reference Bureau's platform. She said that she had been receiving facilities from the Respondent since 2009 and was still doing so even as at the time of trial. She stated that she only became aware of the listing with the Credit Reference Bureau (CRB) when she went to apply for a facility at Faulu. On being cross-examined, she stated that she had nothing to show that the Respondent listed her with CRB.
19. Her testimony was corroborated by Saphan Midudi, (hereinafter referred to as "PW 2"), a Regional Manager of Metropol CRB Limited based at the Kisumu office. He stated that as per their Report of 14th June 2017, he established that from their system, the information regarding the Appellant was forwarded by the Respondent. Although he said that he had a Report of 14th July 2017, there was no indication in the proceedings that the same was ever tendered as evidence before the court.
20. During his cross-examination, he stated that he could not assure (**sic**) that the listing was done by the Respondent but that the listing was positive. He emphasised that as per the listing, their Report was not negative to the Appellant.
21. On the other hand, Mary Chesang, who worked as a Credit Administrator (hereinafter referred to as "DW 1") testified on behalf of the Respondent herein. Her evidence was that the Respondent did not instruct anyone to list the Appellant with the CRB, a fact that she reiterated during her cross-examination.
22. The court perused the Appellant's Bundle of Documents and noted that in the Consumer Loans Deferral Form dated 6th June 2017 from Faulu, the reason for deferral was that she had been listed. There was also a message from KCB M-pesa dated 19th June 2017, which indicated that her loan request had been declined due to her CRB rating. She was, however, issued with a Certificate of Clearance by Metropol Credit Reference Bureau Limited. The same was dated 28th June 2017.
23. It was evident from the evidence that was adduced during trial that the Appellant did not prove that the negative listing to the CRB was forwarded by the Respondent herein. She had a duty to discharge her burden of proof as contemplated in Sections 107 and 108 of the

Evidence Act Cap 80 (Laws of Kenya).

24. This court came to the firm conclusion that the Appellant failed to discharge the burden to prove to the required standard in law, which in civil cases is on a balance of probabilities. Having admitted that she did not have a letter from Metropol CRB indicating that the Respondent had given them instructions to list her as a defaulter and the fact that PW 2 stated that her listing by the Respondent was positive, the tort of defamation could not have arisen.

DISPOSITION

25. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 16th January 2020 was not merited and the same be and is hereby dismissed with costs to the Respondent.

26. It is so ordered.

DATED and DELIVERED at KISUMU this 27th day of April 2021

J. KAMAU

JUDGE