



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 249 OF 2018

CORNEL OPIYO OSANO.....APPELLANT

-VERSUS-

CFC STANBIC BANK LIMITED.....RESPONDENT

(Being an appeal against the judgment and decree delivered by Hon. D.W. Mburu (Mr.) (Principal Magistrate) on 19th May, 2017 in Milimani CMCC NO. 6887 OF 2014)

JUDGMENT

1. The appellant filed a suit against the respondent vide the plaint dated 20th November, 2014 and sought reliefs in the nature of general, punitive and aggravated/exemplary damages; permanent and mandatory injunctions together with costs of the suit and interest thereon, arising out of the tort of defamation.
2. The appellant pleaded that sometime on or about 10th December, 2013 he had applied for a loan facility from Housing Finance Limited (“the financier”) in his capacity as a director of Kajina Holdings Limited and that the financier requested for information from the Credit Reference Bureau (CRB) regarding the credit standing of the appellant and his co-directors.
3. The appellant further pleaded in his plaint that CRB responded to the financier’s request by relaying information from its database to the effect that the appellant owed the respondent a principal loan sum of Kshs.3,430,296/= and yet the appellant had cleared all his outstanding loans with the respondent.
4. It was pleaded by the appellant that as a result of the above information which was false and inaccurate, he suffered injury to his reputation and was therefore entitled to compensation.
5. Upon being served with summons, the respondent entered appearance and filed its statement of defence dated 2nd February, 2015 to deny the allegations set out in the plaint.
6. At the hearing of the suit, the appellant testified, whereas the respondent summoned one (1) witness.
7. Upon filing of submissions, the trial court dismissed the appellant’s suit with costs in the judgment delivered on 19th May, 2017.
8. That judgment is now the subject of the appeal before this court. To challenge the judgment, the appellant has put forward three (3) grounds of appeal in his memorandum of appeal dated 30th May, 2019.
9. This court directed the parties to file written submissions on the appeal. The appellant by way of his submissions dated 29th July, 2020 contends that the trial court erred in finding that the act by the respondent of forwarding the appellant’s name for listing with CRB did not constitute defamation or malicious publication. The appellant contends that the respondent acted maliciously in having his name wrongly listed as a loan defaulter without any notice and irrespective of the fact that he had cleared all outstanding loans with the respondent.
10. It is the submission of the appellant that the trial court overlooked the fact that, the information which was forwarded to the financier was misleading and therefore resulted in injury to his reputation since it painted him as *inter alia*, uncreditworthy and untrustworthy. The appellant referred to the authority of **Gideon Mose Onchwati v Kenya Oil Co. Ltd & another [2015] eKLR** in which the court held that:

“It is however generally accepted of what a defamatory imputation is, as was stated by Gately on Libel and Slander, 8th edition by Phillip Lewis, paragraph 4 p 5 which would in my view sufficiently address the circumstances of this case that:

“a defamatory imputation is one to a man’s discredit or which tends to lower him in 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.””

11. It is ultimately the argument of the appellant that the trial court fell into error in not finding that the elements of defamation had been proved in this instance, and therefore urges this court to interfere with the said decision and to find in his favour.

12. On its part, the respondent who supported the decision of the trial court contends that the appellant did not bring any substantial evidence or call any additional witnesses to prove his claim for defamation and hence the trial court acted correctly in dismissing the claim.

13. The respondent went further on to submit that the appellant did not adduce any evidence to support his claim that the information which was forwarded to CRB was false, malicious and defamatory, thereby citing the case of **Agnes Zani v Standard Group Limited [2019] eKLR** where the court determined that in answering the question on whether a statement is defamatory, the court ought to consider the meaning behind such statement in the mind of the ordinary/reasonable man. The respondent is therefore of the view that the trial court arrived at a reasonable and well-founded decision in the suit.

14. I have considered the rival written submissions alongside the authorities cited. I have equally considered the evidence which the trial court had the opportunity to look at.

15. It is clear that the appeal lies against the decision by the trial court dismissing the appellant’s case for defamation. I will therefore address the three (3) grounds of appeal contemporaneously.

16. The key issue arising on appeal has to do with whether the learned trial magistrate was correct in finding that the appellant had not proved his case for defamation.

17. The appellant who was PW1 adopted his witness statement and list and bundle of documents as evidence in support of his case. He then went on to state that the information given to CRB by the respondent to the effect that he owed the respondent a sum of Kshs.3,430,296.70 as loan arrears affected his creditworthiness and injured his reputation. During cross-examination, the appellant testified that he only received a loan advancement from the financier after much struggle, and that he was unaware of any outstanding sums owed to the respondent. During re-examination, it was the testimony of the appellant that he had to obtain clearance from CRB in order to secure a loan from the financier and that by the time the respondent had written to inform him of the listing with CRB, he had already cleared the loan owing to the respondent. It was also his testimony that, the CRB report which was forwarded to the financier did not indicate any loan balance in respect to the loan advanced by the respondent.

18. Hamilton Suba who was DW1 gave evidence that he is the Manager-Rehabilitation, with the respondent. The witness stated that the appellant had taken a loan from the respondent sometime in November, 2012 in the sum of Kshs.3,430,296/= and that though he repaid the loan sum, an outstanding balance of Kshs.3,909.70 remained and which balance was generated in the automated system. The witness further stated that the report which was forwarded to the financier did not show any arrears by the appellant and hence the latter did not receive any negative listing under CRB. In cross-examination, DW1 testified that the outstanding balance of Kshs.3,909.70 was the result of a system error which was later rectified. The witness stated that this balance was however not reflected in the reports issued by CRB. In re-examination, it was the evidence of the witness that the above sum was subsequently written off.

19. In his judgment, the learned trial magistrate reasoned that the CRB report which was released to the financier does not show any loan arrears on the part of the appellant, and the information borne in the said report is true and cannot therefore be termed as defamatory. The learned trial magistrate also reasoned that the appellant had not proved malice on the part of the respondent, neither had he called any witnesses to prove injury to his reputation following the release of the report. In the end, the learned trial magistrate concluded that the creditworthiness of the appellant with the financier was not negatively impacted and therefore dismissed the claim.

20. The **Black’s Law Dictionary, 10th edition** as cited by the Court of Appeal in the case of **Nation Media Group v Gideon Mose Onchwati & Kenya Oil Company Limited [2019] eKLR** defines the tort of defamation as:

“malicious or groundless harm to the reputation or good name of another by the making of a false statement to a third person.”

21. The courts have also established specific ingredients associated with the tort of defamation, and which a party ought to prove in order for his or her claim for defamation to succeed. I considered the ingredients laid out in the case of **Phinehas Nyagah v Gitobu Imanyara [2013] eKLR** thus:

“The elements of the tort of defamation are that the words must be defamatory in that they must tend to lower the plaintiff’s reputation in the estimation of right-minded persons, or must tend to cause him to be shunned or avoided...Secondly, the words must refer to the plaintiff...Thirdly, and the words must be malicious.”

22. The above ingredients were also brought out by the Court of Appeal in the case of **Musikari Kombo v Royal Media Services Limited [2018] eKLR** in the manner hereunder:

a) The existence of a defamatory statement;

b) The defendant has published or caused the publication of the defamatory statement;

c) The publication refers to the claimant.

23. Upon re-examination of the material and evidence which was tendered at the trial, it is uncontroverted that the publication/report in question, though released by CRB, was prompted by the respondent and was in reference to the appellant. That said, did the appellant prove that the report was defamatory of him? Upon re-evaluating the material and evidence in its totality, I did not come across anything to suggest that the appellant's reputation suffered negatively as a result of the report since he gave evidence that he eventually received the loan facility from the financier. I therefore concur with the finding of the learned trial magistrate that the appellant did not bring any credible evidence to demonstrate the manner in which the publication was defamatory of him.

24. On the subject of malice, the court in the case of **Phinehas Nyagah v Gitobu Imanyara [2013] eKLR** sought to define the term 'malice' within the context of defamation in the following manner:

“Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice but the law does not weigh in a hair balance and it does not follow merely because the words are excessive, there is therefore malice. Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the defendant in the course of the proceedings. Malice can be founded in the publication itself if the language used is utterly beyond the facts. The failure to inquire into the facts is a fact from which inference of malice may properly be drawn.”

25. From re-examination of the pleadings and evidence, it is uncontroverted that the appellant took out a loan facility with the respondent in the sum of Kshs.3,430,296/= and that the same was repaid, though according to the evidence of DW1 there was a balance of Kshs.3,909.70 outstanding. However, I note from the testimony of the said witness that the outstanding balance could have been triggered by a system error, resulting in the listing of the appellant with CRB and which error the respondent sought to rectify by requesting for the de-listing of the appellant with CRB and by writing it off. I find this explanation to be reasonable. Moreover, upon re-examining the CRB report which was tendered in evidence by the appellant, there is nothing to indicate that the appellant had been listed as having any loan arrears with the respondent, and the only sum indicated in the said report was the principal loan sum previously advanced to the appellant. I therefore find, as the learned trial magistrate did, the appellant did not tender credible evidence to demonstrate the elements of malice against the respondent. In the same manner, there is nothing in the evidence tendered to indicate that the report released to the financier on 15th October, 2013 bore false information regarding the appellant.

26. For all the foregoing reasons, I am satisfied that the learned trial magistrate; upon considering the pleadings and evidence presented before hi, arrived at a correct finding by dismissing the appellant's suit.

27. Consequently, the appeal is hereby dismissed with costs to the respondent.

DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF JULY, 2021.

A. MBOGHOLI MSAGHA

JUDGE

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 29TH DAY OF JULY 2021.

J. K. SERGON

JUDGE

In the presence of:

Mr. Charles Ayugi for Ms. Ojienda for the Appellant

Eric Mose for Respondent