



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 507 OF 2017**

**BARCLAYS BANK OF KENYA LIMITED.....APPELLANT**

**VERSUS**

**HELLEN SERUYA WASILWA.....RESPONDENT**

**(Being an appeal from the judgement of the Hon. E. A**

**Nyaloti delivered on 22/8/2017 in Milimani CMCC No. 7219 of 2015)**

**JUDGMENT**

On 2/12/2015 respondent filed a suit before the magistrate's court against the appellant for defamation. The respondent alleged that on 19/9/2015 she used her debit card to purchase goods at Ross Shop in the USA and the transaction was declined. On 24/9/2015 she did some shopping at Mills Store and once again her debit card declined. It was her case that she did undergo distress and embarrassment due to both incidents and as a consequence, her character, credit and reputation were negatively affected.

In its judgment dated 22/8/2017 the trial court found that the respondent had proved her case against the defendant and awarded her Kshs. 5,000,000 as damages for injury to her reputation and Kshs. 3,456 as special damages in form of withdrawal commissions.

This appeal is against the judgment of the trial court and is brought on the following grounds: -

- 1. The learned magistrate erred in law and in fact in finding that the defendant had defamed the plaintiff.**
- 2. The learned magistrate erred in law and in fact in finding the word 'declined' displayed in the supermarket screens were defamatory to the plaintiff.**
- 3. The learned magistrate erred in fact and in law in holding that the declination of the plaintiff's transaction was as a result of negligence and inaction of the defendant.**
- 4. The learned magistrate erred in law in holding that the plaintiff had proved her case against the defendant on a balance of probability.**
- 5. The learned magistrate erred in law in holding that the defendant was liable to compensate the plaintiff.**
- 6. The learned magistrate erred in fact and in law in finding that the plaintiff had demonstrated that her reputation had been injured**
- 7. The learned magistrate erred in law in making an award of damages of Kshs. 5,003,465 as compensation to the plaintiff.**

On 12/3/2021 this court ordered that the appeal be disposed by way of written submissions and both parties complied. The appellant in its submissions submitted that the respondent's claim was premised on the words 'decline' which was allegedly displayed at the teller machine but there was no evidence to support the said transaction. The appellant stated that when a transaction is made at a point of sale the system or the POS machine generates a merchant copy and a customer copy receipt regardless of whether the transaction is successful or not.

It was submitted that during the cross examination and re-examination, the appellant's witness confirmed that the declined receipt produced by the respondent was from Kenya Commercial Bank. The shopping receipts produced demonstrated that the respondent went for shopping at the alleged stores and did not show that the debit card provided by the appellant was declined. It was therefore submitted that the trial court failed to take into account the fact that the respondent did not provide sufficient evidence to support her case. Reference was made to the case of **CMC Aviation Ltd v Kenya Airways Ltd (Cruisair Ltd) [1978] eKLR** where Madan J expressed himself as hereunder:-

**“The pleadings contain the averments of the three parties concerned. Until they are proved, or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. As stated in the definition of “evidence” in section 3 of the Evidence Act, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven. Averments in no way satisfy, for example, the following definition of “evidence” in Cassell’s English Dictionary, pg 394:**

**Anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”**

The appellants further submitted that the word “Declined” cannot be understood to mean the respondent was not in a position to meet her personal financial obligation and in any case the respondent did not provide witnesses to corroborate her allegations. In support of this position, the appellant cited the case of **Daniel N. Ngunia v. KGGCU Limited Civil Appeal No. 281 of 1998** where the Court of Appeal observed as follows; -

**“Leaving aside any question of privilege upon which the learned Judge dismissed that aspect of the appellant’s claim, we note from the record that the appellant was the only person who testified in support of his claim. In those circumstances, we cannot see how a claim based on defamation could have possibly succeeded even in the absence of the defence of qualified privilege.”**

On quantum the appellants submitted that the award of Kshs. 5,000,000 as damages for injury to reputation was erroneous as the respondent did not prove the existence of the transaction and injury to her reputation.

The respondent in her submissions maintained that she has been a prestige customer at the appellant bank since 1988. Before travelling abroad, she confirmed with the appellant that she would be able to use her debit card while there. While in the USA however as she was shopping at Ross stores she tried to purchase goods worth 988.73 US dollars but the card was declined as was indicated on the cashier’s screen. She tried to reach the appellant but there was no response. She tried to run her card again but the card was declined. At this time the customers at the store were looking at the plaintiff suspiciously and the personnel had summoned the security who stood at strategic corners of the store ready to pounce on her. The supermarket was full and customers could read the word declined from the screen which embarrassed the respondent.

The respondent maintain that the trial court correctly found that there was an existing contract between the appellant and the respondent and that the prestige account held by the respondent entitled her to efficient and preferential treatment. That the respondent had sufficient funds in her account and she was entitled to use the card to procure services and goods as per the contract with the appellant. In support of her case, the respondent referred to the decision in **Hon. Nicholas R. O. Ombija v. Kenya Commercial Bank Ltd [2009] eKLR** where the court quoted the Harlbury’s Laws of England 4<sup>th</sup> edition VOL.3 paragraph 155 on wrongful dishonored cheque where it is stated as follows; -

**“If without justification, a banker dishonors his customer’s cheque, he is liable to the customer in damages for injury of credit. Proof of actual injury to credit is not necessary to secure substantial damages, either for a business customer or for personal customers. The answer on a cheque dishonored on presentation by a third person may constitute libel, but such cases are rare; in such cases general damages may be awarded.”**

The respondent urged this court to uphold the decision of the trial magistrate as the transaction was declined in an open supermarket with many people who were able to read the words “decline”. Therefore, the appellant’s dishonored the respondent’s credit and breached the bank customer relationship.

On quantum the respondent relied on the case of **Bank of Baroda Kenya Ltd v. Timrod Product CA 132/2001** quoted in the case of Hon Ombija (supra) where the court of appeal upheld an award of Kshs. Three Million shillings (Kshs.3,000,000) awarded to the respondent by the High Court for loss of business credit, repute and loss of profit following a claim by the respondent for a dishonored cheque.

It was additionally added that the respondent is a reputable honorable judge of the industrial court in Kenya. The reigning chairperson of the judges association of Kenya and she has served as a judicial officer for now over 30 years with integrity and utmost honesty and these facts coupled with the inflation rates make the award of Kshs. Five Million very reasonable.

The duty of the 1<sup>st</sup> appellate court was explained in the case of **Selle and Another Versus Associated Motor Boat Company Ltd & Others [1968] EA 123**, as follows: -

**“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence on the case generally.”**

This being a first appeal the court is required to evaluate the evidence afresh before drawing its own conclusion. The respondent was the only witness in support of her case. She testified that she is a judge attached to the Employment and Labour Relations Court and has worked in the judiciary since 1990. She has held a prestige account No. 0451606794 with the appellant. She was scheduled to travel to the USA to visit

her children. Before she travelled she visited the appellant's branch at Jomo Kenyatta Airport and enquired as to whether she would be able to use her debit card while in the U.S.A. She was assured that it would be possible and was given a phone number which she was to call if she encountered any difficulties while out of the country.

On 19/9/2015 while she was in the USA she visited Ross Store accompanied by her daughter Anita and friend Miriam. They did some shopping but when she went to the counter to pay the cashier informed her that her card had been declined. She tried to reach the appellant and when she did they informed her that her card did not have a problem. When she swiped her card again it was declined. At this point people were looking at them suspiciously and security had been summoned. She decided to go to an ATM and use her credit card from KCB and managed to withdraw some money which was not adequate to pay for the items. She was forced to borrow the balance.

The said card was declined again when she tried to shop at another store called Foreman Malls but she managed to pay with her KCB card. She was greatly disappointed with the appellant considering the fact that she pays extra to have the prestige card which promised efficient services.

**DW1 Eva Mutile Mangeli**, a debit card portfolio manager with the appellant, told the court that the respondent's card had been activated to work at an ATM and Online. It could pay at the point of service. It was her testimony that the respondent used her card several times while she was visiting the USA. On 14/9/2015 there was a transaction at Good Will Stores and on 24/9/2015 there was a transaction at Payless Stores. It is her evidence that when a card is used at a point of sale it goes through Visa scheme where it gets confirmation from the acquirer, once its verified information is sent to the bank and finally the bank confirms the transaction and authorizes payment. Decline, however, is caused by multiple reasons such as connectivity problems or lack of funds. In this case the respondent had sufficient funds in her account and the decline would have been caused by a connectivity problem. It was her evidence that the declined receipt produced by the respondent was from KCB and not the appellant bank.

The **Black's Law Dictionary** defines defamation as "the act of harming the reputation of another by making a false statement to a third person." The book **Gatley on Libel and Slander** states that a statement is defamatory of the person against whom it is published if it tends to lower him in the estimation of right thinking members of the society generally or it exposes him to public hatred, contempt or ridicule or it causes him to be shunned or avoided.

The ingredients of defamation were reiterated in the case of **John Edward vs Standard Ltd HCCC 1062 of 2005** where the court stated as follows: -

**"A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule, or contempt or which causes him to be shunned or avoided or has a tendency to injure him in his office, profession or calling. The ingredients of defamation are:-**

- 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."**

It was the respondent's case that she had sufficient funds in her account for the transactions and therefore there was no reason for the transaction not to go through. That the term 'declined' that was printed on the cashiers screen indicated that the respondent was not in a position to meet her obligations which caused her great distress and embarrassment.

According to the applicant, the respondents did not produce sufficient evidence to show that her transactions were declined. It is indicated that when a transaction is made at a point of sale the system or the POS machine generates a merchant copy and a customer copy receipt regardless of whether the transaction is successful or not. The said receipt was never provided by the respondent though what was produced was a declined receipt from another bank and not the appellant.

It was additionally pointed out by the appellant that the respondent in her testimony indicated that at Ross Store, she was accompanied by her daughter Anita and friend Miriam but none was called to corroborate her claims.

The burden of proof was on the respondent to prove how the decline of her credit card defamed her. The Court of Appeal in **East Produce (K) Limited –v- Christopher Astiado Osiro Civil Appeal No. 43 of 2001** held as follows: -

**"It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of Kiema Mutuku V. Kenya Cargo Hauling Services Ltd 1991 where it was held that "there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."**

The issue for determination is whether the respondent was defamed. There was no publication in a newspaper or letter sent to the respondent. All that transpired was a bank transaction that was declined. The respondent contends that the words "declined" were reflected on the "Computer" and all customers in the shopping outlets could see. Gatley on Libel and Slander states 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 profession or to injure his financial credit.

In the case of **ONAMA –V- UGANDA ARGUS LTD (1969)E.A 92**, it was held:-

**“In deciding whether the words are defamatory, the test is what the words could reasonably be regarded as meaning, not only to general public, but also to all those who have greater or special knowledge of the subject matter”**

Way back in 1882, in the case of **SCORT –V-SIMPSON (1882) QBD 491** it was held:-

**“...The Law recognizes in every man a right to have the estimation in which he stands, in the opinion of others unaffected by false statements to his discredit, and if such statements are made without lawful excuse, and damage results to the person of whom they are made, he has a right of action.”**

The respondent in her plaint dated 1<sup>st</sup> November, 2015 at paragraphs 22 and 23 states that the words “declined” in their ordinary meaning resulted in defaming her. Those words could be interpreted to mean that she was among other things not honest, lacked integrity, did not have money or did not even operate an account with the appellant.

The incident occurred in the U.S.A. The only people who knew the respondent were her daughter and friend Miriam. It is quite obvious that the respondent was embarrassed. She was far away from home, had money in the account but could not access it. The ingredients of defamation calls for some form of uttered words or written document. According to the respondent the words “declined” were displayed on the teller machine and all could see. I am not convinced that for every transaction where a customer’s card fail to operate, then the bank should be held liable for defamation. Each bank has its own line of transaction when it comes to electronic transaction. As explained by DW1, there is a process involved. One transaction can be declined and after a few minutes the same card can process another transaction. These are daily transactions and to hold that a bank must ensure that at any given time its systems must work and that no client’s card should be declined whenever put in use would be asking too much from the banks. I am of the considered view that the tort of defamation was not established. Those who were in the queue waiting to be served did not know the respondent. It is not unusual for a credit card to fail to process a transaction. The respondent was able to obtain funds from the ATM using another card and settle the bill. The outlet teller was able to understand that the respondent had money in her account even if the same was sourced from a different bank. I do find that the words “declined” displayed on the teller machine at the shopping store did not amount to defamation. Grounds one and two of the grounds of appeal succeed.

Apart from seeking damages for defamation, the respondent also pleaded for damages for breach of contract. Paragraph 29 of the plaint states as follows:-

**“The Plaintiff has been a customer of the Defendant since 1988 and operated her accounts smoothly, diligently and consciously since 2005 when the Defendant altered by malice, unlawfully, illegally and without justifiable cause and in breach of the banking contract between the Plaintiff and the Defendant subjected the Plaintiff to the acts of embarrassment, defamation and abuse tabulated in the foregoing paragraphs.”**

One of the prayers in the plaint is for Damages for breach of contract. The appellant formulated ten (10) issues for determination by the trial court. Issue number eight (8) states as follows:-

**“whether the Defendant is negligent or acted in breach of contract or in any manner adverse to the plaintiff’s interest.”**

The trial court in its judgment at paragraph 42 observed as follows:-

**“On whether the Defendant failed to honor the agreement, I am satisfied that the Defendant was duly notified by the Plaintiff when her card was declined at Ross stores. There is no evidence that the Defendant notified the other Banks or Visa with which it has an agreement. DWI explained to the Court how the before payment is authorized, there is a merchant bank and then the merchant store. The Defendant has not demonstrated any effort it made in contacting the merchant bank or visa. The Defendant stated that the transaction could be declined for insufficient funds or network or connectivity problems. The Defendant failed to prove at what point connectivity problems occurred or if at all there were connectivity problems.”**

In the case of **BPI EXPRESS CARD CORPORATION V M.A. ANTONIA R. ARMOVIT (G.R NO.163654, 8, October, 2014, FIRST DIVISION); UST Law Review Voll LIX No.1, May 2015**, Ms Antonia Armuit treated her British friends to lunch at a restaurant. She gave out her credit card to the waiter to settle the bill. To her astonishment the waiter returned the card and told her that it had been cancelled after verification with the card issuer, BPI Express Credit (BPI). She called BPI and was told that her credit card had been summarily cancelled for failure to pay her outstanding obligations. She was not at fault and demanded compensation for the shame and embarrassment she suffered. The credit card company apologized for the incident. She sought moral damages, exemplary damages and costs. The court framed the issue for determination as follows:-

**“Is Armorit entitled to moral and exemplary damages despite the absence of bad faith on the part of BPI.”**

The court answered the above issue in the positive and held:-

**“Yes, The relationship between the credit card issuer and the credit card holder is a contractual one that is governed by the terms and conditions found in the card membership agreement. Such terms and conditions constitute the law between the parties. In case of their breach, moral damages may be recovered where the defendant is shown to have acted fraudulently or in bad faith.”** (emphasis added)

There is no dispute that the relationship between the appellant and the respondent amounts to a contract. The appellant undertook to render financial service to the respondent so long as the respondent ensured that her account had funds. The respondent notified the appellant that she was travelling out of the country. The appellant even gave her a telephone number which she could contact whenever there was any issue. The respondent contacted that number but could not get any assistance whenever she had a problem. Upon returning to Kenya, the respondent lodged a complaint with the appellant but there was no response or explanation as to what could have caused the problem.

Given the sequence of events and the fact that the appellant made the respondent believe that all would be well within the credit card, it is my finding that there was breach of contract by the appellant. The appellant did not render the services it promised the respondent.

The respondent testified that when the card declined to operate she called the appellant and told one of its staff that she was at the shopping outlet and her card had problems. She was told the card was okay and went back to the counter where the teller swiped the card but it could not work. This was on 19/9/2015. On 24/9/2015 once again the card was declined. She called the bank and registered her disappointment. The card went through on 26/9/2015 and the respondent produced receipts showing the transactions she did with the card. Upon her return, on 5/10/2015 she wrote a complaint to the appellant demanding an apology. There was no apology or explanation from the appellant.

I am satisfied that the respondent did comply with her part of the contract by ensuring that the account had enough funds. There is no allegation that the respondent had exhausted her funds in the account. I do find that the appellant did breach the contractual relationship with the respondent. The respondent is entitled to damages for breach of contract.

The next issue would be the quantum of damages to be awarded the respondent for breach of contract. The trial court awarded the respondent Kshs.5 Million as damaged. The award took care of the prayers in the plaint which had sought General damages, damages for tort and libel, damages for breach of contract, aggravated, punitive and exemplary damages. According to counsel for the appellant, the award of Kshs.5 million for injury to reputation is excessive. On without prejudice basis, counsel for the appellant settled on the sum of Kshs.559,595/35 which is equivalent to what was the balance in the respondent's account as reasonable solatium for the respondent.

In the case of **BUTLER –V- BUTLER (1984) KLR 225** the court held: -

**"The assessment of damages is more like an exercise of discretion by the trial judge and an appellate court should be slow to reverse the trial judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered, and in the result arrived at a wrong decision."**

Having found that the decline of the respondent's credit card did not amount to defamation, I do find that the award of Kshs. 5,000,000 (five million shillings) as damages by the Trial Court is quite excessive. That award was based on the Trial Court's finding that the respondent was defamed. The respondent is entitled to damages for breach of contract. The Court has to consider the inconvenience the respondent suffered in assessing the damages that can be awarded. The Trial Court observed that the respondent is a judge and the incident caused her pecuniary embarrassment which could affect her integrity.

In the case of **GIBBONS V WESTMINSTER BANK LIMITED [1939] 3 ALL ER 577**, the Court held inter alia: -

**"A person who is not a trader is not entitled to recover substantial damages for the wrongful dishonour of his cheque, unless the damage which he has suffered is alleged and proved as a special damage."**

In the case of **HADLEY & ANOTHER V BAXENDALE (1854) 9 EX. CH 341; 156 ER 145**, the Court observed as follows:

**"... Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants."**

In the case of **SHIRAKU V COMMERCIAL BANK OF AFRICA [1988] KLR 67** it was stated as follows:

**"To wrongly dishonour any cheque is to do some injury in fact. If that is right, then it is not necessary to plead and prove damages. But in ordinary circumstances, the damages will be quite modest. They will be more than nominal damages but not so greatly more as to be excessive."**

I do find that the Respondent is entitled to nominal damages which should not be so low as to amount to no compensation for the harm caused and not so high as to amount to severe punishment to the appellant who breached the contract. The term "nominal damages" was defined in the case of **KANJI NARAN PATEL V. NOOR ESSA AND ANOTHER, (1965) E.A. 484** while referring to the case of **THE**

MEDIANA (1900) AC 116, as follows:

**“Nominal damages’ is a technical phrase which means that you have negated anything like real damage, but that you are affirming by your nominal damage that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term nominal damages does not mean small damages. The extent to which a person has right to recover what is called by the compendious phrase damages, but may be also represented as compensation for the use of something that belongs to him, depends upon a variety of circumstances, and it certainly does not in the smallest degree suggest that because they are small they are necessarily nominal damages.”**

There is a slight difference between dishonouring a cheque and having an electronic transaction declined. In the case of the former, the bank has ample time to check the account involved or even call the account holder before deciding whether to honour it or not. In the case of the latter, the transaction is instant. The concerned bank may not even have been aware that a transaction has been declined especially where it is done out of the country. This is so because the transaction is expected to be conveyed by a different merchant to the bank. The merchant may fail to convey the transaction or could even be offline. It only takes a matter of second or few minutes and the transaction is declined. The client, of course, in both cases, suffers the same fate. However, when it comes to electronic transaction, the court has to take into consideration the instantaneous nature of the transaction.

In this case the respondent called the appellant when the card was declined. The appellant assured her that the card was okay. Despite the assurance, the card was declined. The appellant was in a position to check whether the client’s transaction was subsequently cleared or not. That was on 19/9/2015. Five days later on 24/9/2015, the same incident occurred and the card was declined. The respondent decided not to call the appellant. The appellant, despite protest from the respondent by way of a letter, has never apologized or given an explanation as to what could have caused the problem. The fact that the card ultimately worked on 26/9/2015 cannot be a consolation or justification by the appellant that it complied with its part of the contract. I do find that there was a breach of contract and the respondent is entitled to damages.

Given the circumstances of the case, I do find that a sum of Kshs. 1,000,000 (one million shillings) is sufficient damages for the embarrassment, pressure, anxiousness and discomfort suffered by the respondent. This, in my view, sufficiently compensates the respondent for the breach of contract by the appellant.

The upshot is that the appeal partly succeeds. I do find that although the decline of the Respondent’s card at the shopping outlets did not amount to defamation, there was breach of contract by the appellant. The award of Kshs. 5,000,000 (five million shillings) by the trial court is hereby set aside and replaced with an award of Kshs. 1,000,000 (one million shillings). The respondent shall have costs and interest awarded by the Trial Court. Parties shall meet their own respective costs of the appeal.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 21<sup>ST</sup> DAY OF OCTOBER, 2021**

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**S. CHITEMBWE**

**JUDGE**