REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

(Coram: Odunga, J)

CIVIL APPEAL NO. 9 OF 2018

BARCLAYS BANK OF KENYA.....APPELLANT

-VERSUS-

FRANCIS MANTHI MASIKA

T/A MANTHI MASIKA & COMPANY ADVOCATES.....RESPONDENT

(Being an appeal from the judgement and decree of the Honorable Y. A. Shikanda, SRM in Machakos CMCC 770 of 2016 delivered on 11th January, 2018)

BETWEEN

FRANCIS MANTHI MASIKA

T/A MANTHI MASIKA & COMPANY ADVOCATES.....PLAINTIFF

=VERSUS=

BARCLAYS BANK OF KENYA..... DEFENDANT

JUDGEMENT

1. The Respondent herein, **Francis Manthi Masika,** sued the Appellant, **Barclays Bank of Kenya,** in CMCC 770 of 2016 for damages for defamation and breach of contract. The facts of this case are not largely in contention. The Respondent, an advocate trading under the firm name and style of Manthi Masika & Co. Advocates, was the Appellant's customer maintaining a client's account with the Appellant. He drew a cheque dated 18th February, 2009 in favour of his client, **Laban Kitele** on the said account no. 1050-434 in the sum of Kshs 168,000/=. It is not in doubt that the said account had funds sufficient to cater for the said sum.

2. However, when the said cheque was presented for payment to the Appellant, the same was returned unpaid with comments *"Payment stopped – Confirmation awaited"*. It was this turn of events that provoked the Respondent into suing the Appellant since, according to him, that action meant that he had no sufficient funds standing to his credit and that he had converted his client's funds. It was further contended that the said action by the Appellant was meant to construe the fact that the Respondent had committed a criminal offence, was not credit worthy and could not be trusted with client's funds. As a result, the Respondent lost a client. He averred that a s result of the foregoing he was injured in his profession and suffered loss and damage.

3. It was contended that the action of the Appellant was negligent since it failed to confirm the said payment and further that the action of the Appellant was malicious.

4. In its defence, the defendant, in summary contended that its action was as a result of standard procedure well known to the Plaintiff used by the Appellant during processing of cheques in order to prevent fraud hence it acted in good faith after its frantic efforts to reach the Respondent failed. It was therefore justified in not paying the said cheque pending confirmation by the Respondent.

5. It was the Appellant's contention that the words "Payment Stopped – Confirmation awaited" could not be defamatory and could not be attributed to mean what the Respondent contended. It therefore denied defaming the Respondent, being negligent or breaching the contract between it and the Respondent.

6. In support of his case, the Respondent, an advocate of the High Court of Kenya since 1985, testified that he opened an account with the Appellant bank on 11th March, 1985 at its Machakos Branch and at the time of the incident he was the National Treasurer of Kenya Red Cross Society and its Machakos Branch, a Society with an account at the Appellant's Branch, where he is also a signatory. It was his evidence that he had given the details of his address and telephone number to the Appellant Bank which he had never changed and he was the sole signatory to the account. Further, his office was not far from the Bank.

7. According to him the Appellant Bank had the practice of contacting the client if a sum exceeding Kshs 100,000/= was being withdrawn and that previously he had been contacted in those circumstances. On 18th February, 209, he issued cheque no. 103659 on his said account in favour of his client, **Laban Kitele**, which cheque was presented to the bank on 21st February, 2009 but was returned to the client on 24th February, 2009 with the remarks payment had been stopped, confirmation was awaited. It was his evidence that he never received any call from the bank asking him to confirm the payment.

8. According to him, the client, who had an account in the same bank, went to complain to him that he had not received his money and that the cheque had been returned. According to the Respondent the reasons why the cheque was stopped were ambiguous as it was not indicated who was to confirm the payment and hence amounted to defamation as his client understood the words to mean that the Respondent had no money in the account or that he did not have sufficient funds and hence had committed an offence. It could also mean that the Respondent had colluded with the Bank to stop the payment of the cheque or that the Respondent had converted the client's money to his own use. Accordingly, his character was put into question as he could not be treated as an advocate.

9. It was the Respondent's case that the said action also amounted to breach of the contractual relationship between him and the Bank as the Bank did not carry out due diligence by getting in touch with him either on their own or through the said client who also had an account with the Bank.

10. It was further testified that returning of the cheque was negligent since they could have stated that they were unable to get in touch with him. He therefore prayed for damages as the Bank declined to offer an apology to him. It was the Respondent's case that as a result of the actions of the Appellant, he lost his said client who subsequently died. As a result of the mistrust that the client had in him, he had to draw a banker's cheque and the said client later complained that he had converted the money to his own use in the presence of his clients and staff.

11. In cross-examination, he stated that his case was based on defamation and negligence and that he filed his case in 2015 which was after 6 years. He was however basing his claim on breach of contract as well. According to him, he had never experienced a similar incident before and that according to the practice, the Bank would call him before paying his cheques exceeding Kshs 100,000/= and in this case, the cheque was for Kshs 168,000/= and he expected them to call him before paying the cheque.

12. It was his evidence that when he visited the ban after the cheque was returned, the insisted that the payment was stopped, confirmation awaited and contended that they tried to get in touch with him but in vain. It was his case that the Bank had no problem with his signature and did not indicate that they had insufficient funds in the account though his client believed so. It was his evidence that the said Laban had been his client for 5 years and he had handled a land transaction for him. He also had a matter involving collection of Kshs 168,000/- which was a balance of the money that had been deposited with him on behalf of the said client. However, after the cheque was returned the said client refused to listen to him and demanded a banker's cheque and he did not interact with him thereafter. He however left the said organisation due to tenure of office and had no issues with the organisation arising from the said incident.

13. The Appellant did not adduce any evidence after the court declined to grant them the adjournment and proceeded to order that the defence was closed.

14. In his judgement the learned trial magistrate found that the offending words were meant to portray the Respondent as a criminal who had issued a cheque knowing that there were no funds, had converted the client's money to his use, was not credit worthy and could not be trusted with the client's funds. The court found that the words were made in reference to the Respondent's bank account and that the words used were ambiguous. He found that it was not true that the Appellant was awaiting the confirmation from the Respondent before paying the cheque since the Appellant had not contacted the Respondent and it appeared that there was no intention to do so. He found that the Appellant therefore had no reason not to pay the cheque. Accordingly, the dishonour of the cheque injured the plaintiff's credit and reputation.

15. The court found further that the evidence on record clearly showed that the Appellant acted in breach of the contractual relationship with the Respondent by not honouring the cheque issued by the Respondent when there were sufficient funds. Accordingly, the Respondent was entitled to a remedy for breach of the contractual relationship.

16. Based on various authorities, the learned trial magistrate awarded the Respondent Kshs 3,000,000/= being general damages for breach of contract and disrepute to credit and reputation as well as the costs and interests.

17. Aggrieved by the said decision, the Appellant has relied on the following grounds of appeal in this appeal:

> **1) The Trial Magistrate erred in law and in fact finding that the Respondent had proved his case in defamation as against the Appellant to the required standard.**
>
> **2) The Trial Magistrate erred in law and fact in finding the words "Payment stopped confirmation awaited" constituted a defamatory statement.**
>
> **3) The Trial Magistrate erred in fact and law by failing to consider the Appellant's submissions in their entirety in arriving at his decision.**

4) The Trial Magistrate erred in law in failing to consider matters that ought to be proved in a claim for defamation.

5) The Trial Magistrate erred in law and in fact in failing to consider evidence by the Respondent during cross-examination.

6) The Trail Magistrate erred in law and in fact in considering facts not given in evidence by the Respondent.

7) The Trial Magistrate erred in law and in fact in condemning the Appellant prior to the analysis of the evidence and submissions on record.

8) The Trial Magistrate erred in law and in fact awarding damages that were manifestly excessive in the circumstances.

9) **The Trial Magistrate erred in law and in fact in considering matters it ought not to consider in arriving at making its findings on quantum.**

18. In this appeal, it is submitted by the Appellant that it is trite law that for a claimant to succeed in a claim for defamation, they must call another witness to corroborate the alleged defamation. According to the appellant, the record will show that Respondent closed his case without calling another witness to give evidence on the alleged defamation. The Appellant relied on **Daniel N. Ngunia vs. KGGCU Limited [2000] eKLR.**

19. It was therefore submitted that the Respondent could not have succeed in his claim for defamation for failure to call other witnesses to prove that he was lowered in their eyes as right thinking persons in the society. It was further submitted that in a claim for defamation, a claimant ought to establish that the offending statement is defamatory to him as explained in ***Gatley on Libel and Slander*** **10th Edition at page 8** and **Wycliffe A. Swanya vs. Toyota East Africa Ltd & another [2009] eKLR**.

20. The Appellant posed the question whether a reasonable man or woman, a right thinking member of the society generally can accept that those words "**Payment stopped-confirmation awaited**" are defamatory of the Respondent and cited the case of **Dennis Mukhulo Ochwada vs. Kenya Commercial Bank Ltd [2003] eKLR.**

21. In the Appellant's view, those words complained of are incapable of bearing the meaning that they allegedly bore according to the Respondent's allegation/and or argument and the trial Magistrate's findings. Accordingly, it was submitted that the trial Magistrate erred by making a finding that the words "***Payment stopped-confirmation awaited***" were defamatory. The Court was further urged to take judicial notice of the fact that it is standard practice for banks to contact their customer if the amount to be debited from the said customer's account exceed Kshs. 100,000/= to ensure that the bank is paying the right person and not a wrong person.

22. It was submitted that ***The Prudential Guidelines of 2006*** issued by the Central Bank of Kenya under the ***Banking Act*** place a duty on all licensed banks to make enquiries regarding the legitimacy of funds and transactions and that the failure to comply with the said guidelines would place a bank in direct contravention of the Central Bank Regulation and would therefore expose the said bank to risks of sanctions by the regulator. In this regard the Appellant relied on the decision of the Court of Appeal in **Tricon International Limited vs. Giro Commercial Bank Limited [2012] eKLR** which recognized the obligations on banks to make enquiries in relation to Central Bank Prudential Guidelines and noted that such requirements were of a legal nature. Since the cheque in question herein was for payment of Kshs. 168,000/=, it was submitted that the Appellant bank acted in line with banking custom and tradition by stopping payment of the said subject cheque pending confirmation.

23. It was submitted that in this regard, there was no breach of contract on the part of the Appellant or any unlawful or illegal actions by the Appellant as the Appellant acted in due diligence in the circumstances. Since there was no unlawful dishonour of the Respondent's cheque, the Appellant submitted that the trial magistrate erred by making a finding that the Respondent had proved defamation and breach of contract and urged this Court to allow this appeal.

24. On his part, the Respondent submitted that the only issue in contention was whether the words ***"payment stopped-confirmation awaited"*** were defamatory to the respondent. He relied on ***Halsbury's Laws of England,*** 4th Edition, Volume 3 at Paragraphs 125 and 155 on banker-customer relationship and obligations thereto.

25. The Respondent cited in support of his submissions ***Paget's Law of Banking,*** 13th edition, ***T. G Reeday, Law Relating to Banking,*** 2nd Edition and **Patel vs. National and Grindlays Bank Ltd (1959) E.A. 76.**

26. It was submitted that in this matter, it is apparent that there existed a bank-customer relationship between the parties. In law, there is a duty placed on the appellant bank to honour instructions and cheques issued by a customer and specifically the respondent herein, if there are sufficient funds in the account. It is agreed that the appellant had the practice of seeking confirmation from the respondent before paying cheques of amounts exceeding Kshs.100, 000/=. The respondent refuted any assertions that the appellant had tried getting a confirmation from him. As it was rightfully noted by the trial court, the appellant did not tender any evidence to counter that assertion and this could only mean that the appellant did not in any way try to communicate to the respondent so as to procure the confirmation that was required. According to the Respondent,

27. In honouring its customer's instructions, it was contended that a bank is under duty to exercise due diligence as well as reasonable care and skill and reliance was placed on **Karak Brothers Company Ltd vs. Burden (1972) 1 ALL ER 1210**.

28. According to the Respondent the words, *"the payment stopped-confirmation awaited",* in their natural and ordinary meaning were meant and were understood to mean inter alia that the respondent is deceitful and lacks integrity; that he is not capable of honouring his debts; that he is fraudulent and that he was a criminal. It is for this reason that the Respondent submitted that the issues for determination in this case is

whether the appellant's action of dishonouring the cheque as drawn and presented amounted to a breach of the contract executed by the parties and whether the appellant's above stated action was defamatory to the respondent. As to whether the aforementioned words were malicious and injurious to the respondent, the Respondent refereed to the case of **Phinehas Nyagah vs. Gitobu Imanyara [2013] eKLR** and submitted that it is apparently clear that the account that the respondent held with the appellant was a client account and this is normally an account held by advocates on trust. The appellant dishonoured a cheque which was drawn to the respondent's client without any reasonable explanation and such an action tainted the reputation of the respondent in a very heinous way.

29. As regards the award, it was submitted that where the banks decline to honour a customer's order for the money held in account, without any sufficient explanation, that refusal or failure constitutes a breach of contract for which the banker is liable in damages. Damages are available for breach contract as stated in the literary works of ***Anson's Law of Contract*** 28th Edition.

30. The Respondent also relied on **Bank of Baroda (K) Ltd vs. Timrod Product Civil Appeal No. 132 of 2001** where the Court of Appeal upheld an award of Kshs 3 million awarded to the respondent by the High Court for loss of business credit, reputation and loss of profit following a claim by the respondent for a dishonoured cheque. A similar principle was earlier on applied in **Gibson Ombonya Shiraku vs. Commercial Bank of Africa Civil Appeal No. 16 of 1985.**

31. As regards trading customers, it was submitted that, as it is the case between the parties herein, the law presumes injury without proof of actual damage. The special position of traders was recognized by the House of Lords in **Wilson vs. United Counties Bank Ltd [1920] AC 102.**

32. As for the principles guiding interference with an award of damages, the Respondent relied on **Rook vs. Raiunie [1941] ALL ER 297** and **Butt vs. Khan [1981] KLR 349.**

33. This court was urged to find that the trial magistrate correctly exercised his discretion in awarding to the respondent Kshs 3 million general damages for breach of contract and disrepute to credit and reputation in view of the humiliating, embarrassing and contemptuous manner in which the appellants treated the respondent and made no apologies about it. According to the Respondent, the appellant had no justification or excusable reasons for dishonouring the credit of its customer, the respondent herein. It is therefore our humble submission that the act of dishonouring the cheque was an act of carelessness which was not going to the benefit of any party of the law except injuring the respondent's credit and for which liability must attach and damages awarded not only for breach of contract but also for libelling the respondent's credit. It was his prayer that this court dismisses this appeal since it is meritless and it raises no triable issues for determination.

Determination

34. Before dealing with the substance of this appeal, it is worth noting that the manner in which the learned trial magistrate proceeded with the mater after the refusal to grant the adjournment was rather unprocedural. After declining to grant the adjournment, the learned trial magistrate marked the defence as closed. The manner in which a court ought to deal with such maters was set out in **Dr. Samson Auma vs. Jared Shikuku & Another Civil Appeal No. 191 of 2002** where the Court expressed itself as follows:

> **"Where an application for adjournment was made, it needed to be dealt with on its merit first and either be allowed or rejected and whichever way the Judge was minded to decide it, it was his duty to dispose of it first. It was a matter that called for his discretionary powers…The Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned Judge on such a question as an adjournment of a trial, and it very seldom does do so; but, on the other hand, if it appears that the results of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the Court has power to review such an order, and it is its duty to do so…To avoid deciding on an unopposed application for adjournment which was not frivolous as the appellant's counsel was before the Court of Appeal, the other counsel bereaved and the case was not yet ready for hearing as certain procedures were yet to be finalised before it could be heard, and dismissing the entire case on another ground not canvassed before it was a serious misdirection. The correct procedure that the Superior court should have adopted was first to decide on whether or not to allow the adjournment application, then the suit would proceed to hearing and then it would be up to the appellant's counsel to decide on how to prosecute his client's case in the absence of the plaintiff…The action taken by the court in this matter of failing to decide the application for adjournment on its merits and proceeding to dismiss the entire case on grounds that were not before him namely the absence of the parties at a time before the hearing proper could begin involved an incorrect exercise of the learned Judge's discretion and did result in grave injustice as the appellant's case was terminated before the appellant could be heard on its merits and therefore the Court of Appeal is entitled to interfere."**

35. It was similarly held by the Supreme Court of Uganda in **Natin Jayant Madhvan vs. East Africa Holdings Ltd & Others SCCA No. 14 of 1993** that:

> **"After the refusal of the application for adjournment, the plaintiff ought to have been asked to proceed with the case. It is not to be implied that since the plaintiff said the case was complicated, he could not proceed since the plaintiff has a right to reply to all the facts and state how he would proceed.**

36. The correct procedure therefore would have been for the learned trial magistrate to determine the application for adjournment and then leave it to the Appellant to decide on the manner it wanted to proceed but not to close the case for the Appellant before giving it an opportunity to decide on its next step. Of course if then the Appellant stated it had no evidence to offer or that it was leaving the matter to the court the court would properly be at liberty to deem the defence as closed.

37. That issue, is however not before me in this appeal and I will say no more on it.

38. I have considered the evidence and the submissions made on behalf of the parties herein.

39. However, before determining the above issues it is important to set out the principles guiding the law of defamation. In my view, defamation is rooted in our Constitution since under article 32(1) of the Constitution every person has the right to freedom of conscience, religion, thought, belief and opinion. This Article makes it clear that the freedom to express one's opinion is a fundamental freedom enshrined in the Constitution. Article 33(1) (a) provides that every person has the right to freedom of expression, which includes freedom to seek, receive or impart information or ideas. However, clause (3) provides that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others. This, in my view, is the constitutional fulcrum of the law of defamation. Accordingly, the law of defamation is not just anchored on a statutory enactment but has a constitutional underpinning.

40. Defamation is a tort and is defined as the publication of a statement which, tends to lower a person in the estimation of right thinking members of the society generally or which tend to make him be shunned or avoided. ***Gatley on Libel and Slander*, 8th Edition** at page 15 paragraph 31: "The gist of the tort of Libel and slander is the publication of a matter (usually words) conveying a defamatory imputation. 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. The standard of opinion is that of right thinking people generally."

41. Slander is defamatory matter that is in transitory form. It is only actionable on proof of special damages save for exceptional cases where it imputes a serious crime, disease, or attack on professional ability. See **Khasakhala vs. Aurali and Others [1995-98]1 E.A. 112**.

42. The defamatory statement is one which has tendency to injure the reputation of the person to whom it refers by lowering him in the estimation of the right thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike and disesteem and typical examples are an attack upon the moral character of the plaintiff attributing to him any form of disgraceful conduct such as crime, dishonesty, cruelty and so on. Publication is the communication of the words to at least one other person other than the person defamed. Publication to the plaintiff alone is not enough because defamation is an injury to one's reputation and reputation is what other people think of a man and not his own opinion of himself. An action for defamation is essentially an action to compensate a person for the harm done to his reputation. Therefore, defamation is not about publication of falsehoods against a person; it is necessary to show that the published falsehood disparaged the reputation of the plaintiff or tended to lower him in the estimation of right thinking members of society generally. This must be so because an injurious falsehood may not necessarily be an attack on the plaintiff's reputation. The words must be maliciously published and malice can be inferred from a deliberate or reckless or even negligently ignoring of facts. See **J P Machira vs. Wangethi Mwangi and Nation Newspapers Civil Appeal No. 179 of 1997.**

43. There are two kinds of defamation; slander and libel. Slander is where a person orally or verbally utters defamatory words of and concerning another person whereas libel is where a person writes of and concerning another person defamatory statements or words. Slander and libel are therefore different forms of defamation. Libel consists of a defamatory statement or representation in permanent form and as opposed to slander, libel is punishable *per se* without proof of damage and the actual sum to be awarded is "at large". Although a person's reputation has no actual cash value, the Court is free to form its own estimate of the harm taking into account all the circumstances.

44. 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. Whereas mere abusive words may not be defamatory, the speaker of the words must take the risk of his audience construing them as defamatory and not simply abusive, and the burden of proof is upon him to show that a reasonable man would not have understood them in the former sense. In this case the Appellant employed the use of the words *"the payment stopped-confirmation awaited"*. As rightly contended by the Respondent those were rather ambiguous and could be interpreted by different persons to mean different things including the meanings that the Respondent attached to them. I agree that the Appellant could have used more specific words. As was held in **Bank of Baroda (Kenya) Limited vs. Timwood Products Ltd Civil Appeal No. 132 of 2001 (CAK) [2008] KLR 236:**

> **"The reason given for dishonour of the cheques was wholly untrue i.e. that "cheque stopped". That could have been interpreted to mean that it was Timwood itself which had stopped the cheques. As the trial Judge correctly pointed out other more innocent words would have been used – like cheque not countersigned etc."**

45. Secondly, the words must refer to the plaintiff. As stated above, the speaker of the words must take the risk of his audience construing them as defamatory and in this case the witnesses construed the words as defamatory and were made in reference to the Appellant. To my mind there is no requirement that the words must mention the Plaintiff by name as long as they are directed at the Plaintiff. In this case all the witnesses stated that the utterances were directed at the Appellant.

46. Thirdly, the words must be malicious. 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. The language used is utterly beyond the facts. The failure to inquire is into the facts is a fact from which inference of malice may properly be drawn. Any evidence, which shows that the defendant knows the statement, was false or did not care whether it be true or false will be evidence of malice. See **Godwin Wachira vs. Okoth [1977] KLR 24; J P Machira vs. Wangethi Mangi** (supra).

47. To prove defamation, it is necessary for evidence to be adduced to show what third parties thought about the plaintiff as a result of the said publication. In this case, it is true that only the Plaintiff testified in support of his suit. The Respondent testified that as a result of the said publication, he lost his client. He however stated that his said client passed away. However, before be passed away, he had mentioned his dissatisfaction with the Respondent to the Respondent's customers and staff. None of these people were however called to testify in the suit. I agree with the decision in **Daniel N. Ngunia vs. KGGCU Limited [2000] eKLR** where the Court of Appeal held that:-

"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 essence of the defence of qualified privilege."

48. Where no such evidence is adduced as happened in this case, there would be no basis upon which the Court would be entitled to find that the plaintiff was defamed unless the case falls under the category which is said to be actionable *per se*. There is, however, no tangible evidence on record that the Respondent's business was ruined as a result of the said publication apart from bare allegations. In the premises, the Respondent failed to prove one essential ingredient of defamation. The claim for damages on that ground must therefore fail. I associate myself with the decision in **Wycliffe A. Swanya vs. Toyota East Africa Ltd & Another [2009] eKLR** where the Court of Appeal observed that:

"For the purpose of deciding a case of defamation, the Court is called upon to consider the essentials of the tort generally and to see whether these essentials have been established or proved. It is common ground that in a suit founded on defamation the plaintiff must prove:-

i. That the matter of which the plaintiff complains is defamatory in character.

ii. That defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.

iii. That it was published maliciously."

49. However, the Respondent also based his claim on breach of contract. It is clear that the relationship between the Appellant and the Respondent was contractual. I agree with the holding in **Dennis Mukhulo Ochwada -v-Kenya Commercial Bank Ltd (Supra)** that:

"The customer has no right to put upon a banker, and the banker is not bound to accept any risk or inability not contemplated in or essentially arising out of the ordinary routine of business. In banking practice contingencies arise where, in the interests of the banker and the customer alike, the only reasonable course is to "postpone" payment in appropriate and innocuous terms. In the instant case what the defendant bank did was merely to postpone payment in view of the unusual circumstances and the customer was paid a few days later after confirmation."

50. That a Bank is under an obligation to exercise reasonable care and skill in operating a client's account was appreciated in **Karak Brothers Company Ltd vs. Burden (1972) 1 ALL ER 1210** where it was expressed 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 contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely. The relevant considerations include the prima facie assumption that men are honest, the practice of bankers, the very limited time in which banks have to decide what course to take with regard to a cheque presented for payment without risking liability for delay, and the extent to which an operation is unusual or out of the ordinary course of business. An operation which is reasonably consonant with the normal conduct of business (such as payment by a stockbroker into his account of proceeds of sale of his client's shares) of necessity does not suggest that it is out of the ordinary course of business. If "reasonable care and skill" is brought to the consideration of such an operation, it clearly does not call for any intervention by the bank. What intervention is appropriate in the exercise of reasonable care and skill again depends on circumstances."

51. In this case, however, the Bank did not merely postpone the payment. It stopped the payment. Had it just postponed the payment to enable it verify or confirm that the cheque was genuine, it would have acted well within its mandate. By dishonouring the cheque, it did exceed its mandate and therefore could properly be found to have been in breach of the contractual relationship between it and the Respondent. This must be so since as stated in ***T. G Reeday, Law Relating to Banking,*** 2nd Edition : -

"The opening of a current account implies a contract that the bank will pay at the branch concerned cheques drawn by the customer in correct form and with funds available, whether consisting of a credit balance or an authorized overdraft limit. If a bank dishonours a cheque wrongfully i.e. where funds are available and no legal impediment to payment exists, then this is a breach of contract for which the customer can sue for damages and the measure of the damages is not the amount of the cheque but such sum as is reasonable compensation for the injury to his credit…However, in the case of a tradesman, and by analogy is that of a professional man or a commercial agent, reasonable compensation can be recovered without proof of special damages."

52. Similarly, in the case of **Patel vs. National and Grindlays Bank Ltd (1959) E.A. 76** the Court held: -

"Where a banker dishonours a cheque when the customer's account is in funds, it is the commercial credit of the customer that is injured and the inference arises that pecuniary loss will necessarily ensue. In Vanbergen Vs St. Edmonds Properties Ltd., 1933 I K.B. 345, where a bankruptcy notice was wrongly served on a trader, Macnaughteen J. , said at page 348;

"With regard to damages, I do not think that the cases with regard to contracts for sale of goods have any bearing on a case such as this. The Plaintiff is a trader, and the service of a bankruptcy as the jury have found in this case, is an act which would very likely affect the direct of a trader. In my view, those cases are opposite in which it has been held that if a banker, with funds in his hands belonging to a customer, dishonors a cheque drawn by the customer, he is liable to substantial damages to the

customer for breach of contract."'

53. Where the Bank breaches the contract between itself and the customer, the customer is entitled to an award of damages. This position is clearly recognised in ***Anson's Law of Contract,*** 28th Edition which states at page 589 that:

> ***(1) every breach of contract entitles the injured party to damages for the loss he or she has suffered." page 590. "damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. a claimant who has not, in fact, suffered any loss by reason of the breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal."***

54. What then is the amount awardable in those circumstances? The position differs between a trader and a non-trader. This was appreciated by the House of Lords in **Wilson vs. United Counties Bank Ltd [1920] AC 102** where **Lord Biksenhead** said:

> **"The *ratio decidendi* in such cases is that the refusal to meet the cheque, under such circumstances is no obviously injurious to the credit of a trader that the latter can recover without allegation of special damages, reasonable compensation from the injury done to his credit."**

55. Should the court therefore interfere with the award of damages by the learned trial magistrate? In **Butt vs. Khan [1981] KLR 349** it was reiterated that:

> **"……an appellate court will not disturb an award of damages unless it is as inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principle, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low…."**

56. In this case the learned trial magistrate based his award both on injury to the Respondent's reputation and breach of contract. Having found that the Respondent was not entitled to an award under injury to his reputation, it is clear that the award was based on wrong principle and must be disturbed. Had the Respondent succeed in his claim for loss of credit or had he been a trader, the position would have been different since as stated in ***Halsbury's Laws of England,*** 4th edition, volume 3 at Paragraphs 125 and 155:

> ***"125. The characteristic usually found in bankers are:***
>
> ***1. That they accept money from and collect cheques for their customers and place them to their credit;***
>
> ***2. That they honour cheques or orders drawn on them by their customers when presented for payment and debit their customers accordingly; and***
>
> ***3. That they keep current accounts in their books in which the credits and debits are entered."***
>
> ***155. If without justification, a banker dishonours 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."***

57. That is my understanding of the position in ***Paget's Law of Banking,*** 13th edition where the learned author states: -

> ***"The Credit of a customer may be seriously injured by the wrongful dishonor of a cheque. Yet it is rare that a customer will be able to prove special damage. His claim is for general damages in respect of injury to his reputation.***
>
> ***As regards trading customers, the law presumes injury without proof of actual damage. The special position of traders was recognized by the House of Lords in Wilson Vs United Counties Bank Ltd (1920) AC 102, where, after reviewing the authorities, Lord Birkenhead said:***
>
> ***'The Ratio decidendi in such cases is that the refusal to meet the cheque, under such circumstances, is so obviously injurious to the credit of a trader that the latter can recover, without allegation of special damage, reasonable compensation for the injury done to his credit.'"***

58. It is the same position in **Patel vs. National and Grindlays Bank Ltd (1959) E.A. 76** where the Court held: -

> **"Where a banker dishonours a cheque when the customer's account is in funds, it is the commercial credit of the customer that is injured and the inference arises that pecuniary loss will necessarily ensue. In Vanbergen Vs St. Edmonds Properties Ltd., 1933 I K.B. 345, where a bankruptcy notice was wrongly served on a trader, Macnaughteen J. , said at page 348;**
>
> ***'With regard to damages, I do not think that the cases with regard to contracts for sale of goods have any bearing on a case such as this. The Plaintiff is a trader, and the service of a bankruptcy as the jury have found in this case, is an act which would very likely affect the direct of a trader. In my view, those cases are opposite in which it has been held that if a banker, with funds in his hands belonging to a customer, dishonors a cheque drawn by the customer, he is liable to substantial damages to the***

customer for breach of contract.'"

59. In the premises, I set aside the award of Kshs 3,000,000.00 awarded to the Respondent and substitute therefor an award of Kshs 2,000,000.00 since the Respondent was not a trader. The said sum shall accrue interest at the court rate from the date of the judgement in the lower court till settlement in full. He is also entitled to the costs of the lower court.

60. As for the costs of this appeal, each party will bear own costs since none of the parties can be said to have been wholly successful.

61. It is so ordered.

Judgement read, signed and delivered at Machakos in open Court this 30th day of January, 2020.

G.V. ODUNGA

JUDGE

In the presence of:

Mr Mbaji for the Appellant

CA Geoffrey