



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 160 OF 2017**

**PARAMOUNT BANK LIMITED.....APPELLANT**

**-VERSUS-**

**HASSAN NAQVI SYED UL QAMAR.....RESPONDENT**

**JUDGMENT**

1. The Respondent who was the Plaintiff in the Lower Court suit filed against the Appellant/Defendant seeking

*a) Damages for libel;*

*b) An injunction restraining the Defendant;*

*c) An apology from the Defendants;*

*d) A confirmation that the Respondent's loan had been cleared and he was credit worthy and;*

*e) Costs of the suit.*

2. The Respondent blamed the Appellant for maliciously forwarding his name to the Credit Reference Bureau and publishing the wrong information in his **CRB Report**, which was defamatory and portrayed him as a person who was not credit worthy, consequently, causing serious damage to his reputation, embarrassment and he suffered considerable distress.

3. The Defendant (Appellant) denied the Plaintiff's (Respondent's) claim and averred that his termination was a result of the Plaintiff having been the Chief Manager of the Defendant's Mombasa Branch. It also states that the Plaintiff/Respondent still had an outstanding amount on his credit card which continued to accrue interest.

4. By **Judgment** delivered on the **17<sup>th</sup> August 2017**, the trial Magistrate found that the Plaintiff had proved his case on a balance of probabilities and held the Defendant wholly liable for deliberately and/or maliciously sending erroneous information about the Plaintiff's loan account to the **Credit Reference Bureau** which information caused the Plaintiff to lose a facility he had sought from another bank.

5. The Appellant being aggrieved by the said determination filed this Appeal as evidenced on the face of the **Memorandum of Appeal** dated **4<sup>th</sup> August 2017** on the following grounds:-

*1) The Learned Magistrate erred in law and in fact by holding that the tort of defamation had been proved without satisfaction of the basic foundations of such tort and/or any evidence from any third party or other right thinking member of society to the effect that the plaintiff had indeed been defamed.*

*2) The Learned Magistrate erred in law and in fact by ignoring the provisions of the Credit reference Bureau Regulations, 2013 which mandates the defendant to submit credit information of any loan/credit facility enjoyed by any person including the plaintiff whether the same is performing or non-performing.*

6. The Appeal was admitted for hearing on **28<sup>th</sup> October 2019** and by directions of the court on even date, parties canvassed the same vide written submissions filed on **25<sup>th</sup> November 2019** and **26<sup>th</sup> February 2020** respectively.

**APPELLANT'S SUBMISSIONS**

7. **Mr. Mumia** Learned Counsel for the Appellant submitted that **Rule 35(5)** of the **Credit Reference Bureau 2013** provides for a remedy

that ought to be followed by a customer in order to correct erroneous credit reports. Further, it was submitted that **Rule 35(9)** provides that the Bureau shall remedy the error and inform persons affected by the information (inclusive of third parties) including the customer. Therefore, litigation ought to be a remedy of last resort. For authorities, Counsel relied on the case of **Raphael Karuu Gitau...Vs... Barclays Bank of Kenya Ltd [2017]eKLR**, where the Court held that *'Rule 35 gives an avenue for correction of an error'*.

8. Counsel further submitted that the information submitted to the **Credit Reference Bureau** might have been inaccurate but it was not proved that the same was defamatory as the learned Magistrate conveniently forgot to observe the whole credit report as a whole as it was indicated therein that the Respondent had a **"NO NEGATIVE SCORE"**.

9. Counsel also submitted that no third party was called by the Respondent to prove that the Respondent was actually defamed and whether the statement made the witness view the Respondent in bad light. Counsel relied on the case of **Selina Patani & Another...Vs... Dhiranji V. Patani [2019]eKLR**.

#### **RESPONDENTS SUBMISSIONS**

10. **Mr. Otieno**, Learned Counsel for the Respondent submitted that even after several notifications, the Appellant still maintained that the information forwarded to the Bureau was correct and therefore, the Appellant cannot seek refuge in **Regulation 35(5)** of the **Credit Reference Bureau 2013**, as it was given an avenue for correction but ignored the same. Also, Counsel submitted that **Rule 28** of the **Regulations** provide that the Appellant ought to have instructed the Bureau to delete the inaccurate information and replace the same with the accurate one. The failure to correct the negative report is tantamount to malice and as a result, the Appellant is culpable in tort.

11. Counsel further submitted that having caused the Respondent to be charged and maliciously forwarding negative credit information to the Bureau, the tort of defamation was complete.

#### **ANALYSIS AND DETERMINATION**

12. It is now settled that the duty of a first Appellate Court is to analyze and re-evaluate the evidence on record in order to reach its own conclusions while bearing in mind that it did not have the benefit of seeing or hearing the witnesses. (See the case of **Selle & Anor...Vs... Associate Motor Boat Co. Ltd 1968 EA 123.**)

13. I have considered the eleven(11) **Grounds of Appeal**. It is my considered view that the issues for determination in this **Appeal** are:

*a) Whether the suit was premature.*

*b) Whether the Respondent proved defamation.*

a) **Whether the suit was Premature.**

14. It is the Appellant's contention that the Respondent did not consider the laid out procedure under **Regulation 35** of the **Bank (Credit Reference Bureau Regulation 2013)** and instead opted to file a suit. In the case of **Speaker of the National Assembly....Vs...James Njenga Karume (1992) KRL 425**, the court stated that:-

*"... Where there was a clear procedure for the redress of any particular grievance prescribed by the constitution or an Act of parliament, that procedure should be strictly followed."*

15. Does **Regulation 35** of the **Bank (Credit Reference Bureau Regulation 2013)** provide for a clear procedure for redress of disputes? In the case of **Jamii Bora Bank Limited...Vs...Joash Ondieki Gisore [2019] eKLR**, the Court held as follows:-

*"It cannot be said that the suit was premature because regulation 35 of the Credit Reference Bureau Regulation does not address a remedy for injured reputation, but provides administrative procedures to have the name removed from the reference. It cannot therefore be said that the respondent should have invoked that regulation instead of instituting the case in court..."*

*It bears repeating regulation 35 may not meet the expectations of a litigant seeking damages as claimed in the pleadings herein. In any case, the availability of alternative dispute resolution does not oust the jurisdiction of the court. If the legislature intended that a litigant must first exhaust that alternative before moving to the court, nothing stopped the provisions from expressly declaring so."*

16. I have considered what the court stated in the cases of **Speaker of the National Assembly...Vs... James Njenga Karume (supra)** and I am of the view that **Regulation 35** of the **Bank (Credit Reference Bureau Regulation 2013)** does not address the issue of defamation raised herein and it only provides an avenue of correction of credit information errors. Therefore, this suit is not premature, as the Respondent could not get a remedy for his prayer for damaged reputation under **Regulation 35** of the **Credit Reference Bureau Regulation 2013**.

b) **Whether the Respondent proved Defamation.**

17. A bank has a duty to its customer to ensure that accurate information is forwarded to **Credit Reference Bureau**. In the matter at hand,

the negative information forwarded by the Appellant Bank and concerning the Plaintiff was certainly inaccurate and the effect of that information, the **Bank of Africa** declined to advance some Credit facilities to the Respondent. The Appellant's witness admitted that the credit information concerning the Respondent sent to the Bureau related to his personal account and not on his credit card. He also admitted in cross-examination that the information sent to the Bureau by the Appellant was inaccurate.

18. Although representatives of this **Bank of Africa** were not called to give evidence, it can firmly be discerned from the letter from the bank that one reason why they turned down the Respondent's request is because they believed he was not Credit worthy as duly informed by the **Credit Reference Bureau**. The Appellant had initially confirmed that the Respondent had cleared all his personal loans relating to **Accounts No. 040075000002 and 040075000003** on the **11<sup>th</sup> March 2013**. It is outrageous for the Appellant to turn around and send an inaccurate credit information to the bureau on the **3<sup>rd</sup> July 2014**, which was after it had assured the Respondent that all the loans of his personal account had been cleared and later on refuse to issue him with his personal accounts statement when he demanded for them on the **25<sup>th</sup> July 2014**.

19. In respect to the Responsibility of an Institution, **Regulation 50(3) (4) and (5)** of the **Credit Reference Bureau Regulations** provide:-

**(3) An institution shall be responsible for providing accurate information to Bureaus.**

**(4) An institution shall be responsible and under an obligation to submit and update all customer information to the Bureau in accordance with these Regulations.**

**(5) Where an institution has provided customer information to the bureau and subsequently becomes aware that the information was inaccurate at the time of it was provided, the institution will within five working days from the day the Institution becomes aware of the inaccuracy, give the Bureau an amendment notice instructing it to delete the inaccurate information and replace with the correct Bureaus.**

20. I find and hold that the Appellant maliciously forwarded the negative report to the Bureau deliberately knowing very well that the Respondent had cleared all its loan obligations.

21. In my view, the malice was triggered by the criminal charges that had been preferred against the Respondent but did not materialize since the charges were withdrawn under **Section 87** of the **Criminal Procedure Code**.

22. Consequently, it is the finding of this Court that the trial magistrate rightfully held that there was malice on the part of Appellant hence they should be condemned and found culpable in tort as it was their duty under **Regulation 50(3)(4) and (5)** of the **Credit Reference Bureau Regulations** to provide accurate information to the **Credit Reference Bureau** and if upon, notification of the error, corrects it.

23. Further, this Court finds that the trial learned Magistrate did not get it wrong when he held that the Respondent had on a balance of probabilities proved negligence and malice on the part of the Appellant herein. In the case of **SMW...Vs...ZWM (2015)Eklr**, viz:

***"A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt, or ridicule or if it causes him to be shunned or avoided".***

24. It is a fact that the Respondent was denied a facility from **Bank of Africa** as a result of the inaccurate report listed by the Appellant stating that he was not able to provide a satisfactory **CRB Clearance Report**. The Respondent in trying to settle the dispute was denied his personal account statements by the Appellant on the **25<sup>th</sup> July 2014**, and so far no apology was offered to the Respondent. It is my view that the Respondent proved publication of the inaccurate credit report by attaching a letter from **Bank of Africa**, which stated that his **CRB** clearance was not satisfactory, and as a result, a credit facility was not advanced to him.

25. This Court also finds that though under **Regulation 50(4)** of the **Credit Reference Bureau Regulation 2013**, the Appellant had an obligation to submit and update all customer information to the Bureau, the Appellant herein did not exercise its mandate under **Regulation 50(4)** as it was triggered by malice and the result of its actions is that there was injury to the reputation of the Respondent, as he could not access a credit facility because of the malicious information.

26. In the upshot, I am of the view there was every justification to make the said awards and I have no reason whatsoever to interfere with the same. The end result is that this Appeal is dismissed with costs to the Respondent.

**Dated, Signed and Delivered at Mombasa this 11<sup>th</sup> March 2020.**

**D. O. CHEPKWONY**

**JUDGE**

**11/3/2020**

Mr. Muthui Counsel holding brief for Mr. Mbiya Counsel for Defendant

Mr. Ganzala Counsel holding brief for Mr. Otieno counsel for the Respondent

Court Assistant – Miss Mwanaidi

**D. O. CHEPKWONY**

**JUDGE**

**11/3/2020**