



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 516 OF 2011**

**MAUREEN ACHIENG OKETCH.....PLAINTIFF**

**VERSUS**

**EQUATORIAL COMMERCIAL BANK.....DEFENDANT**

**JUDGMENT**

1. The Plaintiff sued the Defendant vide a plaint dated 16<sup>th</sup> August, 2011 seeking:

- (a) An order for permanent injunction restraining the Defendant his agents, servants and/or employees from publishing or relaying the false/defamatory publication to any other party.**
- (b) A mandatory injunction to compel the withdrawal of the false publication from the Credit Bureaus Database.**
- (c) Punitive and Aggravated or exemplary damages for libel.**
- (d) General damages.**
- (e) Costs of the suit.**

2. It was averred that the Plaintiff applied for a loan from Kenya Commercial Bank (hereinafter KCB). That KCB in turn requested for customer information concerning the Plaintiff from the Credit Reference Bureau Africa Limited (hereinafter Bureau) to establish the Plaintiff's creditworthiness and credit capacity. That the information relayed by the Bureau to KCB reflected that the Plaintiff through a credit card No. 0400946804 owed Equatorial Commercial Bank, the Defendant (hereinafter the Bank) the principal sum of Ksh.54,000/=.

3. The Plaintiff's contention was that the said words were not true and that in their natural meaning portrayed her as uncreditworthy, fraudster, has a reputation of not paying debts, does not have credit capacity for a loan and is untrustworthy.

4. The claim was denied as per the statement of defence dated 16<sup>th</sup> March, 2012.

5. The Defendant described itself as Equatorial Commercial Bank Limited and denied the territorial jurisdiction of this court. In the alternative, it was contended that if the words "Credit card" were incorrectly recorded by the Bureau, the same cannot be visited on the Defendant as defamatory. That alternatively, the publication was true in substance as the Plaintiff was indebted to the Defendant in the sum stated and that the publication was *bona fide* and without malice. The Defendant pleaded the defence of justification and fair comment on a privileged occasion.

6. During the trial, the parties adopted the witness statements as their evidence-in-chief. All the documents in the lists of documents were produced as exhibits. The witnesses were then cross-examined.

7. The Plaintiff's evidence was that she applied for a loan of Ksh.313,250/= from KCB to pay for her masters degree. She further testified that the application was not successful. That on further investigations, it turned out that the Bureau had given an unfavourable report due to untrue information given by the Defendant that she held a credit card reference No. 0406946804 and owed the Defendant the principal sum of Ksh.54,000/= with the status allegedly partly paid. The Plaintiff further stated that such listing in the Bureau's database would remain for 7 years from the date of statement.

8. During cross examination, the Plaintiff stated that she was once employed on contract by the Defendant from the year 2004 to the year

2005 and further stated that her contract was not renewed. The Plaintiff conceded to having lost the sum of Ksh.100,000/= during the course of the said employment which amount was to be deducted from her salary. The Plaintiff further stated that by the time she left the said employment the entire amount had not been paid and confirmed that there is same amount which is owing. The Plaintiff further conceded that she is a debtor. She expressed her concern at the forwarding of her name to the Bureau for Ksh.54,000/= reflected as a credit card debt which was false information with serious consequences.

9. On the other hand, DW1 Brian Asin the Defendant's Legal Officer at the material time testified on behalf of the Defendant and adopted his witness statement. It is the evidence of DW1 that the information in question was forwarded by the Bank to the Bureau. That during the collation of data, the Bureau erred in reflecting that the Plaintiff was a credit card ref. No. 0400946804 holder and owed the Bank the sum of Ksh.54,000/=. He further stated that the correct position was that the Plaintiff owned the Bank the sum of Ksh.133,117.70 plus interest which amount remains unpaid. That the said debt arose out of a shortfall in the Plaintiff's cash transactions when she was working for the Bank in their Kisumu branch. That the said amount was on humane grounds turned into a loan account.

10. The court was urged to look at the substance and not the form as the Plaintiff remains indebted to the Bank. It was stated that there was no malice or recklessness on the part of the Bank and that therefore the report made to the Bureau was not libelous. It was further stated that the Plaintiff was telling lies while on oath by stating in her plaint that she is creditworthy and has no outstanding loan and further stating that there is no other suit pending and that there has been no previous proceedings in court between her and the Bank yet the parties have litigated in Kisumu CMCC 472/2007.

11. At the close of the case, written submissions were filed. I have considered the pleadings, the evidence adduced and the submissions filed. I have distilled the following issues for determination:

- Whether the report made to the Bureau was defamatory
- Whether the report was published.
- Whether there was Malice on the part of the Bank.
- The damages awardable.
- who should bear the costs.

12. Defamation is defined in Winfield in J.A. Jolowicz and T. Ellis Lewis – Winfield on Tort 8<sup>th</sup> Edition, thus:

**“Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of the society generally, or which tends to make them shun or avoid that person.”**

**A defamatory statement, according to Gately on Libel and Slander 8<sup>th</sup> Edition by Phillips Lewis paragraph 4 page 5 discredits a man or 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.”**

13. The elements of defamation were outlined by the Court of Appeal in case of **Wycliffe A Swanya v Toyota East Africa Limited & another Nbi CA No. 70 of 2008** as follows:

**“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 the 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.**

**(iv) In slander subject to certain exceptions that the plaintiff has suffered special damages.”**

14. It is not in dispute that the Defendant made the report complained of to the Bureau. The said report read as follows:

<b>“Institution:</b>	<b>Equatorial Commercial Bank Ltd.</b>	
<b>Listing:</b>	<b>Date 05 Oct 2010</b>	
<b>Delinquency Date</b>	<b>29 May 2005</b>	
<b>Reference</b>	<b>0400946804</b>	
<b>Type</b>	<b>Credit Card</b>	<b>Disputed? No</b>
<b>Principal Amount</b>	<b>KES 54,000.00</b>	<b>Payment Status Part payment</b>

**Paid Amount**                      **KES**                      **Dated last Paid 30 Mar 2011**

**Balance Amount**                **KES 1.00**

**Listing Description”**

15. It is also not in dispute that the correct information ought to have reflected that the said amount was a loan and not a credit card transaction(s)

16. It is also common ground that the Plaintiff was indebted to the Bank and the Ksh.100,000/= shortfall which had been converted to a loan had not yet been cleared.

17. Publication of the article is not denied. The article concerned the Plaintiff. The question is whether there was malice or recklessness on the Bank’s side.

18. DW1 explained in his evidence how the error by the Bank arose. His evidence was that the information was picked from the Banks system and relayed to the Bureau that the Ksh.54,000/= owing was in regard to a credit card reference No. 0400946804. He further explained that the sum owing was Ksh.133,117.70 and that the same had been owing for a long time. That based on practice provision was made for it to be reflected as a bad debt which was gradually being wiped out of the banks system, hence the reflection of the sum of Ksh.133,117.70. DW1’s contention was that the listing with the Bureau was not erroneous as the Plaintiff remains indebted to the Bank in the said sum of Ksh.133,117.70.

19. The above explanation by DW1 coupled with the Plaintiff’s admitted indebtedness to the bank does not reflect any recklessness or malice on the part of the Bank. As stated in **Carter-ruck on libel and slander 5<sup>th</sup> Edition** at page 54:

**“In order to succeed upon a plea of justification, the onus lies upon the Defendant to prove ‘that the whole of the defamatory matter complained of, that is to say, the words themselves, and any reasonable inference to be drawn from them are substantially true. On the other hand, for the defence to be successful, it is not necessary that every “t” should be crossed and every “I” dotted; it is sufficient if the substance of the libelious statement is justified. As much must ”be justified as meets the sting of the charge and if anything contained in the charge which does not add to its sting that need not be justified.”**

20. The Plaintiff having been indebted to the Bank, she was correctly portrayed as a debtor who had failed to meet her financial obligations. In the circumstances of this case, I hold the view that the failure to reflect the full amount owed or whether the same was owned through a loan or a credit card does not change the fact of the Plaintiff’s indebtedness to the Bank. The correct reflection on the database would have still ended with the same consequences.

21. With the foregoing, my conclusion was that the Plaintiff was not defamed. I will however proceed to assess the damages this court would have awarded.

22. A Plaintiff is entitled to general damages to compensate him/her for the harm caused to his reputation and the distress and humiliation caused by the defamatory publication (See for example **Ken Odondi & 2 others v James Okoth Omburah T/a Omburah & Co. advocates [2013] eKLR; Standard Ltd v G. N. Kagia T/a Kagia & Co. Advocates [2010] eKLR**).

23. Punitive or exemplary damages are awardable only under two circumstances, namely (i) where there is oppressive, arbitrary or unconstitutional action by the servants of the government; and (ii) where the Defendant’s action was calculated to procure him some benefit not necessarily financial, at the expense of the plaintiff. (See the Court of appeal exposition in **Obongo & another v Municipal Council of Kisumu [1971] EA 91**).

24. with regard to aggravated damages, as encapsulated in **Francis Xavier Ole Kaparo v the Standard & 3 others HCCC No. 1230 of 2004 (UR)**

**“Malicious and/or insulting conduct on the part of the Defendant will aggravate the damages to be awarded. The aggravated damages (distinguished from exemplary damages) are meant to compensate the plaintiff for the additional injury going beyond that which would have flowed from the defamatory words or statements above, caused by the presence of the aggravating factors ...Damages will be aggravated by the Defendant’s improper motive.”**

25. In the case at hand, I would have awarded a composite figure of Ksh.2,000,000/=.

26. The Plaintiff having failed to prove her case, same is hereby dismissed. Although costs ordinary follow the event, taking into account the circumstances of this case where the bank gave some erroneous details, each party shall bear own costs.

**Date, signed and delivered at Nairobi this 25<sup>th</sup> day of Sept, 2018**

**B. THURANIRA JADEN**

**JUDGE**