



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL APPEAL NO. 571 OF 2012**

**EQUITY BANK LIMITED.....1<sup>ST</sup> APPELLANT**

**LUCY NDURURI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**ROBERT CHESANG .....RESPONDENT**

**JUDGMENT**

1. This appeal arises from the judgment and decree of Honourable C.Obulutsa Senior Principal Magistrate delivered on 25<sup>th</sup> October, 2012 in Milimani CM CC No. 1930 of 2010. In the said suit, the respondent herein was the plaintiff. He sued the appellants Equity Bank Limited and Lucy Ndururi claiming for special damages, general damages, damages for the tort of libel, damages for breach of contract aggravated, punitive and exemplary damages costs and interest at commercial rates from 22<sup>nd</sup> February 2010 on specials and general damages and from date of judgment on costs.

2. The defendants were served with summons to enter appearance but they never entered any appearance and interlocutory judgment in default was entered against them. They later applied to set aside the interlocutory judgment but the trial court dismissed the application for setting aside of interlocutory judgment. An appeal was lodged vide HCCA 149/2011 and in a decision rendered on 17<sup>th</sup> July 2013 the High Court dismissed the appeal hence the matter had to proceed in the lower court for assessment of damages.

3. Being dissatisfied with the said judgment and decree wherein the plaintiff/ respondent was awarded a sum of shs 11,450 special damages, shs 1 million general damages for libel and breach of contract; and shs 1.5 million aggravated punitive and exemplary damages all totaling shs 2,511,450 plus costs of the suit and interest, the appellant filed this appeal on 31<sup>st</sup> October 2012 setting out the following 11 grounds of appeal contending that:

*1. The learned magistrate erred in law in awarding the respondent general damages for breach of contract;*

*2. The learned magistrate erred in law in law and fact in awarding the respondent general damages for libel yet there was infact no proof of libel, no publication by the appellants.*

*3. The learned magistrate erred in law and fact in awarding the respondent general damages for libel yet the respondent confirmed that the print out at the Nakumatt Supermarket was made*

by the supermarket not the appellants.

4. The learned magistrate erred in law and fact in assessing damages on the reliance of previous authorities of the High Court of Appeal in which damages were awarded to practicing advocates of many years standing who had thriving law practices yet the respondent confirmed that he has never taken out a practicing certificate.

5. The learned magistrate erred in law and fact in assessing damages on the reliance of previous authorities of the High Court of Appeal that involved publication in nationwide daily news papers whose impact, incidence, frequency if the publication cannot be compared with that of a publication in a supermarket till print out.igh

6. The learned magistrate erred in law and fact in failing to appreciate that the respondent confirmed that once 22<sup>nd</sup> February 2010 while at the Bank, the words allegedly uttered the Branch Manager were said to him while inside the Branch Manager's office and that there was no other person in that room at the moment . Further that the respondent confirmed that other words were uttered either by the Branch Manager or the Bank's employees uttered any words in relation to the account within the banking hall (sic.)

7. The learned magistrate erred in law when awarding and assessing damages he relied on the High Court authority of Nicholas R.O. Ombija V KCB which was delivered on 27<sup>th</sup> July 2009 in Milimani CC No. 547/2008 after the Court of Appeal In CA 153/2009 had on 24<sup>th</sup> July 2009 3 years prior to the delivery of the High Court authority stayed all proceedings including the delivery of the judgment the respondent was relying on.

8. The learned magistrate erred in law and fact when in awarding and assessing damages he relied on the High Court authority of Nicholas R.O. Ombija V KCB Bank yet the same involved a judge of the High Court as opposed to a person like the respondent who is not a judge of the High Court and has never taken out a practicing certificate in his life.

9. The learned magistrate erred in law and fact when he failed to hold and appreciate that there was no evidence at all and proof that the alleged libel had directly resulted in diminishing and or injuring the status of the responded in any manner.

10. The learned magistrate erred in law and fact in awarding punitive and exemplary damages given the peculiar circumstances on the case.

11. The learned magistrate erred in law and fact in completely disregarding the appellant's written submissions.

4. The appellant prayed that this appeal be allowed with costs, setting aside the judgment and resultant decree in the lower court and dismissing the suit in the lower court.

5. Parties filed written submissions which they highlighted disposing of this appeal. They also relied on several decided cases.

6. In the appellant's submissions filed on 9<sup>th</sup> June 2015, it was submitted that the amount of damages awarded by the trial court was inordinately high. Reliance was placed on **Butt Vs Khan [1981] 1 KLR** approved by the Court of Appeal in **Stephen Obure Onkanga V Njugu consolidated Limited [2013] e KLR** which set out the principles upon which an appellate court will disturb damages awarded by the trial court. According to the appellants, the authorities relied on by the trial court in assessing damages concerned nationwide publication in newspapers whose scope cannot be compared to the present case where the alleged publication was in a supermarket till print out. The appellants also challenged the award of damages in defamation, relying on **Jones V Polland [1997] EMLR 233.243** as cited with approval in **Johnson Evan Gicheru V Andrew Morton & Another [2005] e**

**KLR .**

7. It was further submitted that reliance on **Nicholas R.O. Ombija Vs KCB** case by the trial magistrate was erroneous as the reach of the said defamatory statements was markedly different. Further, that the respondents standing was not similar to that of Nicholas Ombija hence damages should be reduced and that in any case, the Nicholas Ombija case was overturned by the Court of Appeal in October 2015. Reliance was also placed on **KTDA Vs Benson Ondimu Masese [2008] e KLR** where the Court Appeal considered the social and professional standing of the respondent and reduced damages.

8. The appellants maintained that the respondent, though an advocate, had not taken out a practicing certificate and so the alleged damages on his reputation cannot be compared to that of Ombija J.

9. It was further submitted that general damages for breach of contract should not have been awarded, reliance being placed on **Provincial Insurance Company EA Ltd Vs Mordekai Mwangi Nandwa citing Dharamshi V Karsam[1974] EA 41.**

10. In the submissions filed on 15<sup>th</sup> July 2015 combined with the oral highlights, the appellant's counsel submitted that the court's jurisdiction had been properly invoked as opposed to the contention by the respondent.

11. Further, that the issue of filing a notice of appointment of advocates instead of a Memorandum of Appearance was not fatal and that the same was curable Under Article 159 of the Constitution, since the purpose of Memorandum of Appearance was the same as that of notice of appointment of advocates namely, to inform the other party and the court of the particulars of the defendant or his advocate and the addresses of service. The appellants also relied on the overriding objectives of the Civil Procedure Act which they urged, should not be defeated, as applied the decision in **Patrick Thoithi Kanyuira V Kenya Airports Authority [2011] e KLR.** Further that the submissions on that issue by the respondent is coming too late in the day an appeal.

12. On liability and formal proof, the appellants relied on the Court of Appeal decision in **CA 115/2016 Douglas Odhiambo V Telkom(K) Ltd** where the court held that even if the suit proceeded by way of formal proof, the plaintiff must prove liability by evidence and not submissions and pleadings. In this case, it was submitted that there was no evidence to prove liability hence the respondent should not have been awarded any damages. It was contended that the publication of the offending print out was done by the supermarket and not by the appellants and that even if this court was to uphold the finding on liability, the damages awarded were inordinately high.

13. The respondent Mr Robert Chesang who was acting *pro se* opposed the appeal and submitted relying on his sets of written submissions filed on 16<sup>th</sup> June 2015 and 29<sup>th</sup> July 2015.

14. On whether the appeal herein is competent, Mr Chesang submitted that first, the records of appeal as filed are incomplete in that some exhibits produced in the lower court are missing whereas in some records of appeal, a purported defence was sneaked in yet there was no defence and or appearance filed. According to Mr Chesang, the 1<sup>st</sup> record of appeal should be disregarded.

15. Further, that under Order 6 of the Civil procedure Rules, if one does not file a defence then they must seek leave to appeal.

16. Mr Chesang submitted that the trial magistrate applied all relevant principles and made no error. Further, that the trial court took into account the established principles for awarding damages. He stated that he had taken out all practicing certificates from 1997-2015 and paid the Law Society of Kenya and Advocates Benevolent Association fees as required.

17. Further, that he had given uncontroverted evidence as to the liability of the appellants hence the submissions by the appellants challenging the evidence is an attempt to file a defence on appeal. It

was also submitted that the grounds of appeal are vague and that they do not disclose how the trial court failed to act. Mr Chesang contended that it would appear that the appellants never read the proceedings and judgment of the lower court. He also submitted that there was no award of general damages for breach of contract, but for libel and breach of contract as was espoused by the Court of Appeal decision in **Nyamogo & Nyamogo Vs Barclays Bank of Kenya** where the Court of Appeal explained the meaning of an award of damages for breach of contract on the basis of libel.

18. Mr Chesang submitted that the case of **Douglas Odhiambo V Telkom Ltd** is distinguishable in that the advocate in that case only produced documents without a hearing unlike in this case where he testified, called one witness and produced 19 exhibits which are missing in the trial record of appeal herein filed. He urged the court to analyze and evaluate the trial court evidence and arrive at its own conclusions. He also urged this court not to interfere with the findings by the trial court as was held in **Nderitu & another (no citation given)**.

19. Further, that aggravated/exemplary damages were deserved in view of the malicious conduct of the appellants, adding that the court records have been tampered with hence the appeal should be dismissed with costs.

20. In a brief rejoinder, Ms Areri submitted that the appeal was competent and conceded that there was no defence filed by her clients but that their challenge of the trial court's judgment is regarding quantum regarding the standing of the respondent in society.

21. On the **Nyamogo & Nyamogo** case, it was submitted that it related to Bills of Exchange Act Section 27.

### **Determination**

22. This being the first appeal, this court is obliged to abide by the provisions of Section 78 of the Civil Procedure Act to reevaluate and reexamine the lower court record and the evidence before it and arrive at its own independent conclusion, having regard to the fact that it neither saw nor heard the witnesses as they testified, as was stated in the **Sielle Vs Associated Motor Boat Company Ltd [1968] EA 123** by Sir Clement De Lestang that:

*“ This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (Abdu Hamed Sarif V Ali Mohammed Solan [1995] 22 EACA 270.”*

23. And in the case of **Mbogo Vs Shah & Another [1968] EA 93**, the court set out circumstances under which an appellate court may interfere with a decision of the trial court as follows:

*“ I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because or because it was failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion.”*

24. Applying the above principles to this appeal, what is an undisputed fact is that the defendants neither entered an appearance nor filed defence in the lower court as a result of which interlocutory exparte judgment was entered against them and the plaintiff proceeded to formally prove his case. The first trial before Mr Okato was quashed by the High Court Honourable Korir J vide JR 149/2011 vide a judgment delivered on 17th July 2012.

25. The appellants /defendants herein also tried to challenge the exparte judgment on appeal but were unsuccessful. The plaintiff was heard by Honourable Obulutsa, SPM on 17<sup>th</sup> August 2012 as PW1. He testified, adopting his testimony on oath presented before Mr Okato on 10<sup>th</sup> March 2011 that he is an advocate of the High Court of Kenya from 1997 and produced all his exhibits listed P EX1-18.

26. According to the plaintiff, on 22<sup>nd</sup> February 2010 he went to Nakumatt Supermarket to shop. He used his ATM card with Equity Bank to pay for the goods. Regrettably, the transaction failed with results **“transaction declined account nonexistent.”** The Supermarket thought that the plaintiff/respondent was trying to defraud the supermarket using an ATM card and they caused him to be arrested and temporarily detained by anti-fraud banking unit which incident caused a commotion because the supermarket was full of shoppers. He was detained for 30 minutes and was only released after the shop’s manager intervened and scrutinized the ATM card and other documents belonging to the plaintiff upon which they confirmed that the documents were genuine. The plaintiff was very embarrassed by the incident. He had met Clement Karuma one of the shoppers on the queue for payment for the goods with whom they exchanged their contacts before the incident.

27. Soon thereafter the plaintiff went to the nearest Equity Bank Branch at Four ways Towers A/C 0120100307921 and on filling in a form to inquire in his account, he was told that he had no account with the bank as shown by ( Pex8). He also proceeded to his Tom Mboya Branch and met the Branch Manager, the 2<sup>nd</sup> defendant herein who became very rude to the plaintiff, refusing to hear anything and told him in his face that he was not clever to defraud the bank and she threatened to call the police to arrest him.

28. That despite all the embarrassment he was going through, he had 8 accounts with the 1st defendant bank and all of them had funds totaling to shs 800,000. That he tried to find out what was happening but was unsuccessful so he issued a demand notice for the opening of his accounts and release of all his money, which was only released after contempt proceedings were commenced against the Managing Director of the Bank. He produced deposit slips and Bank statements. He therefore prayed for damages, costs, interest and an apology.

29. In cross examination the plaintiff/respondent stated that he was an administrator with Lifemart Limited, Lifehouse Foundation and Lifehouse Services dealing in leasing rights in Kenya and other countries. Further, that he had registered the firm of Chesang and Chesang Advocates to offer legal services. He reiterated having 8 accounts with the 1<sup>st</sup> defendant and that 4 of those accounts were connected to the ATM card issued to do shopping. He stated that it was at 1.00pm when he shopped goods worth 15,000 and presented the ATM card which he had always used for payment but after swiping it is when he cashier/teller gave him a print out to the effect that the accounts were nonexistent. He was arrested and detained at the manager’s office until the manager, after examining his documentation believed him and said the problem must have been with the bank. He confirmed going to the defendant’s Fourways Towers and to the Tom Mboya Branches but got hostile reception in the latter branch where the second defendant manager told him that he was not clever to defraud a bank and she threatened to call the police. He produced Bank deposit and evidence of the accounts opened with the 1<sup>st</sup> defendant as listed in his plaint.

30. The plaintiff did not call his witness the second time when his case was reheard. The defendants had no evidence to offer following entry of exparte judgment which they had unsuccessfully tried to set aside so both parties filed written submissions for consideration by the court.

31. The plaintiff /respondent filed submissions seeking for judgment in his favour relying on the **Standard Ltd Vs G. Kagia[2010] e KLR** on damages and the cases of **Julius Orenge t/a RAO Otieno & Company V The Standard** and **Nicholas Ombija Vs KCB Ltd [2009] e KLR.**

32. The defendants submitted that they were not liable because the words “ transaction declined” were uttered by the supermarket and not the bank and that the words allegedly uttered by the 2<sup>nd</sup> defendant were not uttered in the presence of any third party and therefore did not amount to

defamation. Reliance was placed on the case of **Munyi Vs Lewa Wildlife Conservancy**. The defendants also relied on **Securicor Vs Benson Onyango** and submitted that no damages could be awarded for breach of contract and further, that as the plaintiff had not practiced or set up a law firm, he had no reputation that could have been destroyed. Reliance was placed on the **Standard d Vs G.N. Kagia** case.

33. The trial magistrate found that the plaintiff had not engaged in active legal practice. However, that on the evidence adduced, he was satisfied that the plaintiff had proved his case and on the basis of **Ombija Vs KCB**, he found that breach of contract and libel formed one transaction and that as there was evidence that A/C 0120100307921 which was linked to the ATM card had shs 258,167/90 as at 7<sup>th</sup> May 2014 there was no explanation why the ATM Card would be rejected as account being nonexistent. The trial magistrate considered submissions by the defendants who had contended that the Ombija case was inapplicable as there was an appeal pending. The trial magistrate found that the case was applicable and that as that judgment had not been set aside, the decision in Ombija case was binding on the lower court. He also found that the defamatory statement was communicated to third parties and hence the plaintiff's reputation was injured and that the defendant breached the contract it had with the plaintiff by failing to enable him use his card in circumstances that caused the supermarket to treat him as a fraudster.

34. From the above evidence in the lower court, pleadings, grounds of appeal, submissions both in the lower court and in this appeal and the authorities relied on, the issues for determination are:

1. Whether the appellants required leave of court to appeal;
2. Whether the appellants are liable for breach of contract and libel
3. Whether the respondent is entitled to any damages and if so how much
4. What order should this court make and
5. Who should bear costs of this appeal?

**35. On whether the appellants required leave of court to appeal**, Section 65 of the Civil Procedure Act is clear that an appeal shall lie to the High Court from any original decree or part of a decree of a subordinate court, other than a magistrate's court of a third class, on a question of law or fact.

36. Furthermore, Section 67 of the Civil Procedure Act enacts that an appeal may lie from an original decree passed *ex parte*.

37. In this case, the respondent obtained interlocutory judgment against the appellants and their efforts to set aside that judgment in order to defend the suit were unsuccessful. They were nonetheless allowed to cross examine witnesses and to file submissions.

38. In my view the decree in the lower court was therefore passed *ex parte* as there was no defence on record. That decree was appealable as of right. No leave was required to file an appeal. Accordingly the objection by the respondent fails.

39. On the issue of whether the appellants were liable for breach of contract and libel, the appellant submitted that the trial magistrate was in error in that there was no evidence of defamation since the printout slip was produced by the supermarket and secondly, that the 2<sup>nd</sup> defendant did not defame him in the presence of third parties. They also contended that the Nicholas Ombija case should not have been relied on by the trial court although its circumstances were similar because there was an appeal pending determination and that now the said decision has been overturned by the Court of Appeal in 2015.

40. I will first deal with the decision in **KCB Ltd V Honourable Nicholas Ombijah CA 231/2009**

which was an appeal from the judgment and Decree of Khaminwa J dated 27<sup>th</sup> July 2009. This court notes that in the said case, the High Court (Khaminwa J) had on 5<sup>th</sup> March 2009 struck out the defendant's defence and entered judgment on liability for the plaintiff against the defendant and ordered the suit to proceed for formal proof. Being dissatisfied with that decision of the High Court, the defendant appealed vide CA 231 of 2009 and in the judgment delivered on 23<sup>rd</sup> October 2015, the Court of Appeal, in allowing that appeal found that as a matter of fact, there was no denial by Honourable Ombija J that he had a debit balance in the card account hence he had an overdrawn account. Further, the Court of Appeal found that there was no unequivocal admission of the plaintiff's claim by the defendant through the letter dated 14<sup>th</sup> May 2008 which profusely apologized for the delay in uplifting the temporary suspension of the plaintiff's account after the cheque deposited on 15<sup>th</sup> April 2008 was cleared on the evening of 19<sup>th</sup> April 2008, until 6<sup>th</sup> May 2008.

41. It has not been shown in this case that the circumstances under which the appeal in CA 231/2009 was allowed are the same prevailing circumstances in this case, noting that the said appeal was against a ruling on an application which sought to have the defence struck out and judgment entered in favour of the plaintiff/respondent. Furthermore, the Court of Appeal did order for restoration of the defence on the record with the result that that suit is not yet determined and therefore it will have to be heard on the merits.

42. In this case, it has not been shown that the respondent had overdrawn his accounts whose existence with the 1<sup>st</sup> appellant is undisputed by the evidence adduced in the lower court. There is also no evidence that the respondent herein was relying on an alleged admission of his claim by the appellant/defendant.

43. Therefore, the concern of this court is whether on the evidence adduced by the respondent in the lower court, there is ample evidence to support the respondent's claim as allowed by the trial court. This court reiterates that the Court of Appeal in the Ombija case(supra) did not overturn the finding that in claims of this nature, contract and libel form one transaction, which is a relevant factor in determining liability and damages for injury to one's credit where there is evidence of bank/customer contractual relationship.

44. Therefore, on whether the appellant herein was liable for breach of contract and libel, there was uncontroverted evidence adduced by the plaintiff that he held 8 accounts with the 1<sup>st</sup> appellant which accounts had sufficient funds to pay for the items at the supermarket which did not cost more than 15,000.

45. Further, there was uncontroverted evidence that 4 of those accounts were co-joined and linked to the ATM card which the respondent was using as a debit card. Therefore, would the 1<sup>st</sup> appellant have been justified in refusing to honour the ATM debit card and in remarking that the account was nonexistent when the respondent used or presented the ATM card to the supermarket teller? And in addition, did that dishonor amount to breach of customer/bank relationship? And if so, was the respondent's credit injured and therefore would he be entitled to damages for breach of contract and libel?

46. It is trite law that the relationship between a bank and its customer is that of principal and agent. Consequently, the bank being the holder of customer's money is under a duty to pay a customer's order where there are sufficient funds to his credit and where there is such failure, a cause of action will accrue.

47. 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.

48. In addition, the principles applicable to dishonor of cheques presented for payment are the same as those applicable for the dishonor of the order for payment using a credit card as well as a debit card.

49. In this case, I find that the print out by the supermarket teller was information which the bank configured in its system and therefore the fact of rejection of the transaction for nonexistent account was uttered by the bank to the supermarket teller who is a third party for purposes of publication of defamatory matter. I am also satisfied on the evidence adduced in the lower court that that allegation that the plaintiff had no account was false, derogatory and unjustified and in breach of bank/ customer contractual relationship.

50. In **Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 3 at paragraph 125** on banker- customer relationship and obligations thereto, it is stated that:

**“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.”

51. In **Halsbury's Laws of England 4<sup>th</sup> Edition VOL 3 paragraphs 155** on wrongful dishonor of a cheque. It is stated;

***“ 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.”(Emphasis added).***

52. Therefore there being evidence that the plaintiff had 4 accounts all connected to the ATM card that was used for the failed transaction on account of nonexistent account, and which had sufficient funds for purposes of the transactions which the plaintiff was transacting, in my humble view, the receipt printed showing nonexistent account was uttered by the bank's system to a third party supermarket's teller thus dishonoring the plaintiff's credit, which was in breach of the bank customer relationship.

53. In **Paget's Law of Banking, 13<sup>th</sup> Edition** 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’.***

54. In **T. G Reeday, Law Relating to Banking, 2<sup>nd</sup> Edition** on the Obligations of the Bank in honouring cheques. The author writes thus: -

***“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.”*

**And Patel v 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, Macnaughten 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.”*

56. In the instant case, I find no merit in the appellant’s complaint that the trial court did not consider their written submissions as the trial court did consider those sub missions before arriving at the decision that he did and the record bears this out. Furthermore, it is clear to my mind that the accounts in issue existed, from which the ATM card was connected; that the funds were sufficiently available in those accounts in excess of sh 200,000; that the ATM card was current and not expired; that accounts were active or expected to be active as there was no reason why a bank would issue an ATM card on dormant accounts and not recall it; there was no evidence of default by the respondent; there was no evidence of fraud or suspected fraud for the accounts in issue to be frozen; there was no evidence of any unusual activity or heavy withdrawal from the accounts raising suspicion or red flag of fraud; there was no evidence that the ATM card was blocked; and neither was there evidence that the ATM card was being used at an unusual location to indicate some fraud in which case the issuer of the card would be made aware.

57. PEX5 which is the appellant’s own brochure on cash back encouraging account customers to shop, pay and withdraw cash conveniently is clear that the customer with the ATM as that held by the plaintiff respondent could shop for goods and services at their preferred outlet, pay using any of their equity cards and withdraw cash at their preferred outlets. This was never to be as the respondent could not access his money which was in his accounts connected to the ATM. Furthermore, when the respondent went to make inquiries from his bank, the bank claimed that his accounts 012010030791 at Fourways Towers, 0120290783826 0120291026554 at Haille Sellasie Avenue were nonexistent.

58. The claim by the appellant that the account was incomplete was in my view, insincere since the appellant did not provide any details of what details were lacking when the account was opened and whether the appellant was asked to furnish some further particulars before his account as opened could be activated. And even assuming that particular account’s opening process was incomplete, there was in my view, no justification for the appellant’s system refusing to allow the respondent to transact on his co-joined accounts which were active and which had sufficient funds.

59. Accordingly, I find that the trial magistrate was not in error when he found and held that the appellants were liable for breach of contract and libel. I uphold the decision of the lower court and dismiss that ground of appeal on liability.

60. On damages, although the appellants submitted that no damages are awardable for breach of contract, in law, damages are available for breach contract as stated in the literary works of **Anson’s Law of**

Contract 28<sup>th</sup> 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..”*

61. In **Bank of Baroda (K) Ltd V Timrod Product CA 132/2001** the Court of Appeal upheld an award of shs 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 dishonored cheque. A similar principle was earlier on applied in **Gibson Ombonya Shiraku Vs Commercial Bank of Africa CA 16/85(unreported)**.

62. In this case the reason given for dishonor of the ATM debit card was wholly untrue and unnecessarily strong- **“ transaction declined account nonexistent.”** These words are the same that the appellant’s managers at ways Towers Branch indicated on the respondent’s inquiry slip and two deposit slips at the Haille Sellasie Avenue branch produced in evidence.

63. That reason as given by the bank for the failed transaction in the supermarket depicted the plaintiff in bad light as was seen by the teller who called in security to detain the plaintiff for interrogation by the manager, that he must have been a fraudster. This evidence by the respondent was never rebutted. In addition, the arrogance of the defendant’s manager who is the second appellant herein Lucy Ndururi when confronted with the complaint by the plaintiff to explain the problem though not proven to be defamatory is a demonstration of spite and malice against the plaintiff. The defendant never showed any remorse for the humiliation shown to the plaintiff when the ATM card would not be used to pay for goods worth in the supermarket. The dishonor compelled the plaintiff/respondent to close all his 8 accounts with the appellants and the defendants even refused to release the monies available in those accounts to the respondent until he had to obtain a mandatory compelling injunction including commencement of contempt of court proceedings before his money was released to him while this case was pending.

64. If indeed the respondent/plaintiff had no accounts with the 1<sup>st</sup> appellant bank or there no money in those accounts, where did the bank get the sh 876,821.20 to refund to the respondent following the commencement of contempt proceedings? Such conduct on the part of the 1<sup>st</sup> appellant bank must be checked with sanctions of an award of aggravated damages as set out in **Obongo & Another V Municipal Council of Kisumu [1971] EA 91** where the Court of Appeal stated that...

*“.....the power to award exemplary damages does not affect the power of the court when making an award of general damages to take into account the conduct of the defendant as an aggravating factor.....”*

*It might also be argued that aggravated damages would have been more appropriate than exemplary. The distinction is not always easy to see and it is to some extent an unreal one. It is well established that when damages are at large and the court is making general award, it may take into account factors such as malice or arrogance on the part the defendant and this is regarded as increasing the injury suffered by the plaintiff, as for example, by causing him humiliation or distress. Damages enhanced on account of such aggravation are regarded as still being essentially compensatory in nature.”*

65. In this appeal, I reiterate that on the evidence adduced in the lower court, the 1<sup>st</sup> appellant/ defendant received the plaintiff’s money and opened accounts wherein the said monies were held yet when the respondent needed the money for his necessities at a supermarket, the appellants kept it away from him and claimed that he had no account with them. If that was the case, then where did they get the money which they refunded him after closure of his bank accounts and on compulsion by the court through contempt proceedings?

66. No apology was tendered to the plaintiff for the unfortunate action of the bank which I find was not well intentioned. That in my view was highly spiteful of the plaintiff /respondent who need not prove that he was an advocate at the time for him to deserve damages since the accounts were not in the names of his law firm. He was nonetheless the bank's customer. Whether or not he was an advocate with a practicing certificate in my view is not relevant since it is persons who practice law and not all legal practitioners, depending on their area of practice require a practicing certificate. The respondent herein was and is an advocate and he admitted that he was at the material time working for private companies.

67. The appellant cannot hide under the respondent's failure to hold a practicing certificate to escape damages for breach of contract or for libeling its customer. 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 V United Counties Bank Ltd [1920] AC 102** where, after reviewing the authorities, Lord Bixenhead said:

*“ The ration 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.”*

68. The appellant's conduct aggravated the plaintiff's misery and distress in the eyes of the supermarket teller who had to call in security to arrest, detain and interrogate the respondent. In my view, an apology would have mitigated the respondent's loss. I have rejected the evidence of the customer as he did not testify in the fresh proceedings after the first proceedings where he had testified were quashed by the High Court.

69. According to **Paget's Laws of Banking**, a customer is/must be taken to know the state of each of his accounts. If the balance on the whole is against him, he has no right to expect cheques he draws will be cashed. Further, money is not available immediately it is paid into an account even if payment is by cash as the bank must be allowed sufficient time to carry out book keeping operations before crediting the account.

70. In the instant case, there was evidence that the respondent had active accounts with the appellant, three of which were linked to the ATM card which he presented for swiping at the supermarket. There was no evidence that he had just credited the said accounts with money and was seeking to access the same without according the appellants sufficient time to carry out book keeping operations before making the said monies available to the respondent.

71. In **Patel Vs National Grindlays Bank Ltd [1959] EA 76**, the court held that:

*“ where a banker dishonors 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 Van Bergen V St Edmonds Properties Ltd,(1933) 1KB 345 where a bankruptcy notice was wrongly served on a trader, Macnaughten 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 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.”*

72. On quantum interference of damages, the principle is that an appellate court will not ordinarily interfere with the findings of a trial court on an award of damages merely because the appellate court may take the view that had tried the case it would have awarded a higher award or lower damages different from the award of the trial court. To so interfere this court must be persuaded that the trial

court acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the general principle to be found in **Rook V Raiunie[1941] ALL ER 297** and adopted with approval by the Court of Appeal in **Butt V Khan [1981] KLR 349** that (per Law JA:

***“.....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....”***

73. The appellants submitted on the ground challenging the award of shs 2,511,450 as being inordinately high with regard to general damages, aggravated, punitive exemplary damages, although it acknowledged that the award of damages is at the discretion of the court and that discretion should not be exercised to discourage litigants to seek justice, counsel for the appellant also out principles that guide the award of damages such as they are meant to compensate a party for the loss suffered but no to enrich a party, and as such, they should be commensurate to the injuries suffered; the punitive damages may be awarded if it was found that the appellants actions or conduct in the lower court suit were willful, wanton or malicious; punitive damages should only be awarded in those circumstances where the combined award of general an aggravated damages would be insufficient to achieve the goal of punishment and deterrence; that the award of punitive damages bears no relation to what the plaintiff should receive by way of compensation and may be awarded in situations where the defendants misconduct is so malicious, oppressive and high handed that it offends the court's sense of decency.

74. The trial magistrate in awarding the damages to the respondent considered submissions by both parties' advocates and the case law relied upon, taking into account the circumstances of the case, the conduct of the appellant, noting that account No. 0120100307921 which was linked to the ATM card had as at 7<sup>th</sup> May 2014 account balance of shs 258,168/90 and that there was no explanation given why the account would be rejected as being nonexistent. The trial magistrate also took into account the manner in which the respondent's inquiries with his bankers were received with hostility and contempt exhibited by the 2<sup>nd</sup> appellant. The trial magistrate considered that the communication was made to third parties and one such third party was the supermarket teller who swiped the card and produced a receipt showing that no accounts existed. In my view, that was sufficient publication which led to the respondent being arrested, detained and questioned by the supermarket security and manager.

75. The case of Honourable Nicholas Ombija on the issue of breach of contract and libel in banker/customer relationship forming being one transaction still holds true in principle as stated in **Paget's Law of Banking 13<sup>th</sup> Edition at paragraph 18.19** (supra) that:

***“ The credit of a customer may be seriously injured by the wrongful dishonor of a cheque and in so far as that may be a breach of contract, the customer's claim is for general damages in respect of injury to his reputation.”***

76. In this case, I find that the appellant failure to activate the respondent's accounts to enable him access money through the use of ATM card was gross recklessness which constitutes willful blindness which amounts to knowledge and which justify this court to fund malice, in view of the subsequent conduct of the 1<sup>st</sup> appellant's managers who attended to the respondents inquiries. I am fortified by the **Encyclopedia of Banking Law C.21 Selangor United Rubber Estate Ltd V Cradock (No.3) [1968] 2 ALL ER 1073**) It was held 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 contracts with its customers. The duty to exercise reasonable care and skill extends over the whole range of banking business within the contract with the customer. Thus the duty applies to interpreting, ascertaining and acting in accordance with the instructions of the customer.”***

77. In my humble, view; the appellant had no justification or excusable reasons for dishonoring the credit of its customer, the respondent herein. I find that act of declining to allow the respondent to transact his business with ease using the ATM card an act of carelessness which was not going to the benefit of any party of the law except injuring the customer's credit and for which liability must attach and damages awarded not only for breach of contract but also for libeling the customer's credit.

78. I also find that the appellant bank's action of not activating the respondent's accounts was not in accordance with the accepted standards in customer/bank relationship and in the ordinary course of business. The respondent, in my view, did not act in the best interest of its customer in the manner in which it handled the respondent's accounts and therefore the computer generated print out of there being no account was wrongful and humiliating hence the bank was in breach of the customer/relationship and contract.

79. Furthermore, this court finds that indeed, the appellants have, in this appeal by way of submissions, tended to challenge the factual evidence which was adduced in the lower court yet they never had any defence to any of those factual matters. Submissions are not evidence and have never been substitute to evidence. The suit in the trial court proceeded as a formal proof and on the evidence adduced, I am satisfied that the respondent proved his claim against the appellant on a balance of probabilities to warrant a judgment both on liability and an award of damages.

80. I also find that the appellant was in breach of f the contract it had with its customer, the respondent, to honour the use of ATM card which was a contractual relationship informed by a fiduciary nature of customer/bank relationship where the bank should not expose the customer to injury that is foreseeable. The bank/customer relationship is based on the utmost good faith. The bank is also under a contractual duty to diligently handle accounts of a customer, to ensure that funds-deposited on account are available when required by the customer. Any deviation from that understanding without justifiable reasons which should be communicated to the customer well in advance or immediately, the bank is in breach of a contract with the customer and is liable in damages.

81. In the end, I find that the trial magistrate correctly exercised his discretion in awarding to the respondent kshs 1 million general damages for libel and breach of contract and shs 1.5 aggravated damages in view of the humiliating, embarrassing and contemptuous manner in which the appellants treated the respondent and made no apologies about it. I see no reason advanced to persuade me to interfere with the exercise of the trial magistrate's discretion. I uphold the awards both on special damages general damages and aggravated damages as awarded as being reasonable in the circumstances of this case. There was no challenge to special damages of shs 11,450 which were awarded at the interlocutory stage I uphold the same.

82. +In the end, I uphold the decision of the trial court and find that this appeal lacks merit and the same is hereby dismissed with costs to the respondent.

**Dated, signed and delivered at Nairobi this 21st day of September 2016.**

**R.E. ABURILI**

**JUDGE**