



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA OF KISII
Civil Case 61 of 2001

RICHARD MACHUKA ATANDI PLAINTIFF

VERSUS

BARCLAYS BANK OF (K) LTD. DEFENDANT

JUDGMENT:

The plaintiff, RICHARD MACHUKA ATANDI operated two savings accounts Nos. 3807024 and 3696753 with the defendant's bank at their Kisii branch. By 2/7/99 the balance in account No.3807024 was sh.149,562/- and sh.39569/- in account No.3696753. On 2nd July 1999 the plaintiff went to withdraw money from the A.T.M. at the branch. His ATM card was detained and he went into the banking hall to inquire why. After a short while policemen came. He was arrested and taken to Kisii police station. Eventually he was charged vide Kisii CMCRC No.2411 of 1999 for the offence of stealing shs.296,000/= from the defendant bank. Eventually he was acquitted when witness failed to turn up.

The plaintiff told the court that the money in the two accounts was his deposited on various occasions and the bank was therefore in the wrong to block those accounts. He asked court to order the money paid to him.

Plaintiff also said he spent sh.50,000/= to defend the criminal case and prays he be paid the same by the defendant.

Lastly the plaintiff said that the defendant defamed him when it reported to Kisii police station that he had stolen the money, which was not true. His reputation was ruined and he prayed for damages.

The defendant called one George Otieno Oiro (DW1) their security and investigating manager as their witness.

He told court that the defendant discovered that there was fraud going on in their Kisii Branch. He was called in to investigate. He found that some of their staff especially one clerk called Tobias Nyarandi Momanyi was diverting money from some customers account and crediting it to other accounts including those of the plaintiff. Also credited to those accounts were commission earned by the bank. The bank reported the matter to police. The plaintiff and others were arrested. After investigation police charged them with offence of obtaining by false pretences. He said the money in those two accounts belonged to the bank. Further he said that they had no malice when they reported to the police and it is the police who decided to charge the plaintiff after their investigations.

There is no dispute that the plaintiff held the two accounts with the defendant bank and that they were blocked with the balances stated. The bank submitted that they supported that there was fraud going on. Indeed PW1 investigated this fraud and came up with a comprehensive report. It is clear that some bank employees were involved in the fraud. Court was told one of them Tobias Momanyi disappeared and has not surfaced to date. It seems that some funds were credited to the plaintiff's account. In fact his counsel

in submission stated that the amount channelled through the plaintiff's account were small amounts over a long period. He submitted that the plaintiff was not aware of the fraud going on otherwise he would have reported to the police.

PW1 admitted that the plaintiff was depositing money in the accounts. Plaintiff himself produced some deposit slips. Even if there were monies fraudulently channelled in the plaintiff's account by the bank employees, it is clear that plaintiff also had deposited money in that account. The defendant could not distinguish the money deposited by the plaintiff and the money deposited by the bank employees. Also, if the employees could deposit the money in the account fraudulently it was quite possible that they could withdraw the same without the plaintiff's knowledge. True he should have become suspicious if he saw strange amount in his bank statements but that is assuming that he read them.

Thus there was no way the bank can say that the amount, which was on the account by 2/7/99 belonged to it. As submitted they did not even put a counterclaim in their defence to claim the same. There was no prove that that amount belonged to the bank and as such the plaintiff's claim succeeds.

Plaintiff alleges that he was defamed. He sets out the defamatory words in paragraph 6 of the plaint. However the mere fact that the bank reported that there was a fraud going on cannot be construed to be defamatory. It is clear from the evidence of the DW1 that indeed there was such a fraud going on. Once they reported to police it was upon the police to investigate and take necessary action, which they did by charging the plaintiff and others. The plaintiff did not say to who exactly the words shown in paragraph six were uttered. Those words seem to me to be the particulars, which were given by the police in the charge sheet when plaintiff was charged. Nobody was called to testify that the bank officials uttered the exact words as shown in par.6 of the plaint. Mere reporting of a suspected crime alone cannot be said to be defamatory.

The defendant had a very good reason to report to the police. It was not shown that he had any malice against the plaintiff. I therefore find the prayer of defamation was not at all proved and dismiss the same.

Having said that the defendant perfectly right to report suspected fraud to police the claim for refund of money used to defend the criminal case cannot stand. The defendant did not direct the police to charge the plaintiff. He only reported. Police did their investigations and from their findings decided to charge the plaintiff. The defendant cannot therefore be made to bear his expenses of defending the criminal charges.

The upshot therefore is that I find the plaintiff has failed to prove his prayer (a) and (c) in the plaint and dismiss them. I however find he has proved prayer (b) and enter judgment on his favour for shs.185,800/= with interest from the date of this judgment. He will also have costs of the suit.

It is so ordered.

Dated and delivered at Kisii on 8th of October 2004.

KABURU BAUNI

JUDGE

Mr. Soire for Mr. Momanyi for defendant N/A for plaintiff.

KABURU BAUNI

JUDGE

Mr. Soire: Defendant prays for 30 days stay of execution.

Order: 30 days stay of execution.

KABURU BAUNI

JUDGE