



Wambua alias Mwongeli Wambua v Kenya Commercial Bank Ltd (Civil Appeal E489 of 2024) [2025] KEHC 13201 (KLR) (Civ) (18 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13201 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E489 OF 2024

DKN MAGARE, J

SEPTEMBER 18, 2025

BETWEEN

VICTORIA MWONGELI WAMBUA ALIAS MWONGELI W APPELLANT

AND

KENYA COMMERCIAL BANK LTD RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment of Hon. Geno L. Okwengu [SRM] delivered on 13/03/2024 in Nairobi CMCC No. 1215 of 2022. The appeal is that the tort of defamation had been established but awarded nominal damages for breach of contract and fiduciary duty together with interest and cost of the suit. The appellant was the Plaintiff in the lower court.
2. The Appellant was aggrieved by the finding and filed the Memorandum of Appeal dated 26/11/2024 setting forth the following grounds:
 - a. That the learned Honourable trial court erred in both law and fact in failing to appreciate that the Appellant had established all the ingredients for proving defamation and as such arrived at an erroneous decision.
 - b. That the learned Honourable trial court misdirected itself in law and fact as the court on one hand found that the Respondent had written defamatory words with reference to the plaintiff and caused the same to be conveyed to a third party, the supermarket which acts constitutes publishing the defamatory statement and on the other hand the trial court failed to find and hold that the defendant was liable for defamation on the basis that the defendant was not aware that a request for payment had been made despite the overwhelming and un rebutted evidence on record to that effect.



- c. That the learned trial court misdirected itself in law and in fact on the issue of defamation yet it had already established that the Appellant had experienced embarrassment and shame in presence of her son, cashier and curious onlookers on account of a failed transaction in the supermarket yet she had funds in her account, thereby creating a miscarriage of justice as the said evidence had not been challenged or rebutted in anyway by the Respondent during the trial
 - d. That the trial court erred in not appreciating that the Payment Declined-Do Not Honor were defamatory in themselves as they directly referred to the Appellant upon presentation of her card for payment of goods in a supermarket thus arrived at an erroneous decision and consequently failed to award damages for defamation and or state what amount it could have awarded for the same had the honourable court found otherwise
 - e. That the learned trial court misdirected itself by relying on foreign case law which in her case was distinguishable as she had used the card in the country in a populace common to her and not out of the country.
3. In summary the Appellant faulted the lower court for wrongly dismissing her defamation claim despite having proved all its ingredients. She argued the court contradicted itself by acknowledging publication of defamatory words yet failing to hold the Respondent liable, disregarded unrebutted evidence of embarrassment suffered in public, failed to appreciate that the words “Payment Declined–Do Not Honor” were inherently defamatory, and wrongly relied on distinguishable foreign case law. She therefore seeks to have the appeal allowed, the trial court’s decision on defamation set aside, damages for defamation awarded, with costs.

Pleadings

4. The appellant averred that she was a holder of a visa debit card number xxx 875. The appellant presented this visa card at a point of sale at food plus, where the Respondent failed to honour the obligation and pay. The respondent declined to honour and instead words ‘payment declined–do not honor’ were printed. The card was swiped several times but to no avail. She was holding the queue. This made her feel humiliated. On 27.03.2021, the words that were printed were payment declined–do not honor, which she took to be defamatory. Particulars pursuant to Order 2 Rule 7[1] were set out in paragraph 10 of the plaint. She therefore claimed for damages for libel, breach of bank customer fiduciary relationship and punitive damages.
5. The respondent filed a defence dated 1.04.2022 stating that there was no contract between the parties herein. The merchant number at Chandarana was said to be 00068213 while the defendant’s merchant at the said supermarket was 80001832. The respondent was therefore neither the acquiring bank nor the merchant bank. They stated that the request was made through the acquiring bank at the end of the merchant, that is Equity Bank, which is the bank that declined the transaction. They declined that the words were printed by them or attributable to them. They denied questions of scandal, odium, suspicion, opprobrium, contempt or injury.
6. The Appellant filed a long winded reply to defence raising issues that are not in the plaint or defence. It is unnecessary to set out the content of the reply to defence.

Evidence

7. PW1, Victoria Mwongeli Wambua, an advocate and customer of the defendant bank, testified that on 27/3/2021 at Chandarana Supermarket, her debit card payment was declined with the message



- “Do Not Honor” despite having sufficient funds in her account. She described being embarrassed in front of her son, the cashier, and other shoppers, and stated that the bank wrongly blamed a third party though her contract was with the bank. She sought damages for libel, embarrassment, breach of trust, and costs, noting that the bank never apologized. In cross-examination, she confirmed the receipt showed “Equity Bank” and the message “Do Not Honor,” implying lack of funds, though her account had money. She admitted she had no independent witness from the supermarket, but maintained the incident amounted to defamation, breach of fiduciary duty, and embarrassment.
8. In re-examination she stated that she signed and filled forms and those forms were the relation between a customer and the bank when she opened her account and that she was not given a copy of the content in terms and conditions. She stated that the account number is the visa account number on the receipt, and that the account and transaction are related to Victoria Mwangeli Wambua. She stated that if the transaction is approved, they give information to Equity bank for ruling. But in this case the information came from KCB Bank. She stated that she did not hold an account from Equity bank and that all that information came from KCB Bank.
 9. She further stated that there were funds in her account as evidenced in her bank statement at page 16. She stated that she made a call to the defendant bank on 27/3/21 and was attended to by one Mary Anne Wanyoike, whom she gave her name, number, account and she said the account was in funds. She alluded to receipts on page 17. She stated that she wrote her name on her receipt and went to the bank physically, the bank confirmed that there was no problem and it was a mistake on them for not honouring the payment.
 10. DW1 was John Mburu, an employee with KCB as an Operations Manager. He adopted his witness statement dated 1/8/22 as evidence in chief. He stated that the bank did an investigation and established that the client called their center and the bank did not receive request. He stated that they received a letter from the claimant. He further stated that the bank is supposed to send a request to the customer’s bank and the issuing bank to send sums which include total amount of the account and the response is sent to the acquiring bank. He stated that from what they established Equity Bank who have a contract for visa to issuing banks did not send to them to approve the transaction. He stated that they confirmed that the issuing bank was from equity and they were to request, which did not happen. What happens is that the card has details of the bank so that the machine reads the receiver and other if you insert card on machine anyone can read, you don’t have to come to bank, anyone with card voucher can read the information.
 11. In cross-examination he stated that the claimant made a call about the transaction. He stated that there was no issue with the card. He stated that for a transaction to be successful the acquiring and issuing bank must come from the bank. He stated that what goes back is an approval code which will be reflected at the end. He stated that it would be confirmation that the account has no money, and when it is proper we sent a declined reason code which will be printed. He stated that they did not print them out and did not know if it is on the bundle. He stated that he had not produced any document in examination in chief. He stated that the plaintiff can present a card at the point of sale. The transaction should be honored once the payments are met. He stated that the parameters namely # There were funds available # The customer entered the wrong pin # The request was not sent to us # The card was not expired. All were met but there was no request for approval. He stated that the Plaintiff has a contract with the KCB only and that KCB has a contract with visa. The plaintiff only calls KCB. He stated that the bank did not send the request.
 12. In re-examination he stated that the information of their finding was if their status did not honour on the receipt then it was not from the bank. The codes were from P.O.S itself. The request we have was not sent to KCB bank.



13. The trial court found that there was no defamation proven which decision led to the instant appeal

Analysis

14. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a subordinate court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. The duty of the first appellate court was set out in the case of *Selle and another v Associated Motor Board Company and Others* [1968] EA 123, where the Judges in their usual gusto, held as follows:-

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-subordinate and the Court of Appeal is not bound to follow the subordinate Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

15. The one question is, whether or not there was defamation. One thing that is clear is that from exhibit 5, the POS was used only on three occasions, that is:

- a. 24.03.2021 for 800/=
- b. 24.3.2021 for 2,000/=
- c. 30.03.2021 for Ksh 2,000/=

16. The transaction of 27.03.2021 was not reflected. It did not hit the KCB account and KCB could not be aware of the same. Secondly, the words “transaction declined, do no honour” cannot in any way be attributed to the respondent. They were printed on Chandarana Supermarket receipt issued and branded Equity Bank. Further, no right thinking member of the society can, first attribute the words claimed to KCB Plc and two, to any wrong doing on part of the appellant. The words were instructions not to honour the contract between Visa PLC, acquiring bank and the receiving bank. However, from the Appellant’s own statement, the bank did not participate in the transaction, meaning that the credentials to access the card had not been validated.

17. It is unnecessary to deal with whether there was breach of fiduciary duty as there was no interaction between the machine and the Appellant’s card. The Appellant should have a password or PIN that she can remember. For avoidance of doubt, it is important to describe the transaction that occurs when a card is swiped. To avoid re-inventing the wheel, I will do no better than quote Majanja J where he set out the process relating to a credit card as follows:

30. In order to determine this issue it is necessary to describe in some detail the workings of the credit card payment system and what constitutes the interchange fee as described by the respondent. According to the applicant the sequence of steps followed in a typical credit card transaction according to material before court is as follows:-

- [a] A customer applies to an Issuer [a financial institution that issues credit card to its customer] for a credit card and the Issuer issues a Visa, American Express or Mastercard to its customer depending on which card the customer holds.
- [b] The card holder goes to a Merchant and uses the card to make a purchase. The merchant swipes the card on a machine configured to accept a card. The merchant is



any establishment that allows for payment of goods or services with the use of credit a card.

- [c] By swiping, the card, the merchant seeks authorization through the Acquirer; the institution that honours payments to a merchant based on the credit transactions made with a credit card, who then seeks authorisation through the particular network in this case Visanet.
- [d] Since it is only the Acquirer that has an agreement with the Merchant, the network switches the transactions from the Acquirer to the Issuer in order to enable the latter verify the card holder's data and credit status before issuing an authorisation message back through the Acquirer.
- [e] The Acquirer sends authorisation to the merchant and once the Merchant receives authorisation, a charge slip is generated in duplicate and the customer signs the slip and thereafter takes possession of the goods so purchased.
- [f] The Merchant initiates banking by uploading the transactions to the Acquirer who pays the Merchant.
- [g] The Acquirer then sends the transaction details to Visanet. The information is then transmitted by the network to the issuer who sends a statement to the card holder.

31. These transactions are fast and normally take a few seconds and are facilitated by Visanet. Out of this transaction, the respondent claims that interchange fees are clearing and settlement fees between issuers and acquirers and that interchange fees are paid out of commissions earned from merchants. The bank's position is that interchange fees are not tied to commissions and are not payments in respect of any services provided by the issuers but is paid by acquirers to subsidise the costs of issuing and that in fact some of the payments made are part of the fees the bank pays to international credit card companies for accessing their networks.
18. In this case, Equity Bank Plc was the acquirer. There was no evidence that the transaction passed through to the issuing bank, KCB. Indeed, the transaction could not even enter the bank statement. It is thus clear that the problem was at the physical interface, that is, the password and access credentials. The message which was autogenerated, definitely fell among the transactions not to be honoured.
19. There was no error on part of all the institutions involved, that is Equity Bank Plc, KCB Bank Plc and Visa. The problem was with the Appellant, failing to enter proper credentials to be able to be served. It is not lost on the court that the attempted payment is made after the purchase was completed and payment made via M-pesa. If the Appellant felt slighted and none was said to know her, she may have her own estimation of self-importance but in matters defamation, it is important for a matter of this nature to show that there are people who witnessed, other than the clerk serving her. She paid via Mpesa without any failure.
20. There can possibly be no effect whatsoever on her character as it is not lowering of her reputation but a true reflection of the appellant. I agree with the court below, that only a few people possibly could have seen the same. The court can also not find fault on the parties or the transaction for several reasons, as they are not parties. Secondly, it was the appellant's duty to ensure that she was able to allow secure access to the point of sale.
21. If she was unable to do so, all the blame is on her. The second aspect is the animus of the Appellant. Her transaction was allegedly declined at 17:02:38, when she entered an offline PIN. However, the amount of Ksh. 962 had already been paid for at 17.01.48. The transactions are so close to each other to be



- believable. The bill had already been settled 50 seconds earlier, why pay again? The only explanation was that the Appellant deliberately entered a wrong PIN to be able to get the message purposely for this case.
22. In short, the Respondent cannot be held liable for actions of Equity Bank and the appellant. There was no evidence of a request from Equity Bank Plc as the acquiring bank for funds from KCB Plc. I agree that the transaction of the point of sale was not logged into the bank system. This means one of two things; the Appellant was ignorant of what was to happen or she was mischievous. In Kenya, we do not have liability without fault. The appellant was unable to enter the Equity point of sale. This was solely her fault and no one else. The words printed by equity bank's POS were thus correct in the circumstances. The Appellant did not suffer any loss at all.
23. What then is defamation? As succinctly put by this court in *S M W v Z W M* [2015] eKLR:-
- “ 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. Windeyer J. In *Uren John Fair Fax & Sons Pty Ltd* 117 CLC 115 at 115 stated.
- “Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of society generally, or which tend to make them shun or avoid that person.”
25. It was held in the case of *John Patrick Machira v Wangethi Mwangi & Another Nairobi HCCC No. 1709 of 1996* that: -
- “ A defamatory publication is the publication of a statement about a person that tends to lower his reputation in the opinion of right thinking members of the community or to make them shun or avoid him.”
26. The ingredients of the tort of defamation were set out by the Court of Appeal in case of *Wycliffe A. Swanya v Toyota East Africa Limited & Another* [2009] eKLR which outlined the elements of defamation as follows:
- “ It is common ground that in a suit founded on defamation the plaintiff must prove: -
- a. That the matter of which the plaintiff complains is defamatory in character.
 - b. 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.
 - c. That it was published maliciously.
 - d. In slander subject to certain exceptions that the plaintiff has suffered special damages.”
27. It follows that the common thread in the definition for a defamatory statement or utterance is one which if published tends to lower the estimation of the person it refers to in the opinion of the right-



thinking members of the community and may cause them to shun the person. In the case of *John Ward v Standard Limited* [2006] eKLR the court stated as follows: -

“A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule, or contempt or which causes him to be shunned or avoided or has a tendency to injure him in his office, profession or calling. The ingredients of defamation are: -

The statement must be defamatory.

The statement must refer to the plaintiff.

The statement must be published by the defendant.

The statement must be false.”

28. Subsequently, the Court of Appeal in *Nation Media Group & Another v Hon. Chirau Mwakwere – Civil Appeal No. 224 of 2010* stated that a Claimant in a defamation suit ought to principally establish in no particular order:

- i. The existence of a defamatory statement;
- ii. The Defendant has published or caused the publication of the defamatory statement;
- iii. The publication refers to the Claimant.

29. The claim for defamation was rightly dismissed. To answer paragraph 1 of the memorandum of appeal, from the foregoing, none of the ingredients of defamation were proved. That is, the words were not defamatory per se. Secondly, they were not made by the Respondent. The words were not false and did not lower the character of the Appellant. The words were not published but they were given to her by the POS sale agent or the clerk at Chandarana.

30. The words were not written by the Respondent. They were not conveyed to a third party by the Respondent. When the appellant took out a debit card, she knew that to access the same, she must input proper credentials. This secures her money. There was no embarrassment caused. As a fact, the presence of her son cannot be said to be publication. He cannot change the estimation of her mother. “Payment declined, do not honour,” does not relate to KCB at all. KCB did not publish those words. Had the Appellant wished for the truth to come out then she ought to have sued Equity Bank. They are the only ones who knew why they declined the transaction. In view of my finding, it is not necessary to address the authorities the court referred to in arriving at the decision.

31. On the question of fiduciary duty, the court had addressed this in the case of *Co-operative Bank of Kenya Ltd v Mutuku* [2025] KEHC 4324 [KLR], where E N Maina stated as follows:

22. As to whether the Appellant owed a duty of care to the Respondent, my finding is that it did. I am persuaded by the finding in the case of *Encyclopedia of Banking Law C.21 Selangor United Rubber Estate Ltd v Cradock* [No.3] [1968] 2 ALL ER 1073 cited with approval in the case of *Equity Bank of Kenya & Another v Robert Chesang* [2016] eKLR, where the court stated:

“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 with 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.”



23. My holding also finds support in the case of *Co-operative Bank of Kenya Ltd v Biwott* [Civil Appeal 18 of 2019] [2022] KEHC 9946 [eKLR], where the court stated:-
- “The bank-customer relationship is contractual in nature and imposes a duty on the bank to exercise reasonable care and skill in its dealings with the customer ... 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.”
32. In the circumstances of this case, I am satisfied that the Respondent owed the Appellant a fiduciary duty and that such a relationship indeed subsists. I am, however, unable to find any evidence of breach on the part of the Respondent. It is noted that the learned trial court gratuitously proceeded to award damages for breach of fiduciary duty. While the existence of a fiduciary relationship is not in dispute, the record discloses no evidence to establish a breach thereof. On the contrary, the obligation to safeguard and correctly utilize the Personal Identification Number lay squarely with the Appellant, the same being a confidential credential known exclusively to her.
33. That said, and in the absence of a cross-appeal on this aspect, I shall not disturb the finding of the trial court. I shall, in the circumstances, let sleeping dogs lie.
34. The next question is costs. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:
- [1] Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
- [2] The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.
35. The Court of Appeal in the case of *Farah Awad Gullet v CMC Motors Group Limited* [2018] KECA 158 [KLR] had this to say:
- “It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.”
36. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -
- “[18] It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth



the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.”

Determination

37. The upshot of the foregoing is that I make the following orders: -
- a. The appeal herein lacks merit and is accordingly dismissed with costs of Ksh. 95,000/= to the respondent
 - b. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 18TH DAY OF SEPTEMBER, 2025.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

Represented by: -

J. M. Njenga & Co. Advocates for the Appellant

J.K. Kibicho & Co. Advocates for the Respondent

Court Assistant – Michael

