Maina v Credit Reference Bureau Africa Limited t/a Transunion & another (Civil Appeal E195 of 2022) [2024] KEHC 10643 (KLR) (Civ) (11 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10643 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E195 OF 2022

RC RUTTO, J

SEPTEMBER 11, 2024

BETWEEN

DANIEL NDIRANGU MAINA ..... APPELLANT

AND

CREDIT REFERENCE BUREAU AFRICA LIMITED T/A TRANSUNION ..... 1ST RESPONDENT

DEVELOPMENT BANK OF KENYA LIMITED ..... 2ND RESPONDENT

(Being an appeal from the judgment delivered on 28/02/2022 at Milimani Civil Suit No. 3115 of 2017 by Honourable L.L Gicheha (C.M))

JUDGMENT

Background

1. The Appellant aggrieved by the decision of the trial court in Nairobi Civil Case No. 3115 of 2017 lodged this appeal. The background is as follows; by a Plaint dated 8th May 2017, the Appellant, filed a claim against the Respondents seeking;

    a. Mandatory injunction against the Defendants, their hirelings, agents, servants and/or people acting on their behalf from publishing the impugned statement and/or allegations related thereto.

    b. Aggravated, punitive and exemplary damages.

    c. General damages

    d. Costs in respect to publications made by the 1st Respondent, that he had failed to fully repay a loan advanced to him by the 2nd Respondent.

2. According to the Appellant the publication was false, unfounded, and malicious, consequently causing him to suffer untold damages, as it was calculated to malign him as a reputable businessman.

3. In response, the 1st Respondent filed a defence and a notice of claim against the 2nd defendant. In its defence it denied that such information would be defamatory by stating that the claim does not raise any cause of action against it since it received the information in the lawful performance of its functions. Further that the suit was statute barred pursuant to section 31(5) of the *Banking Act*.

4. The 1st Respondent was categorical that if at all the information listed by the 2nd Respondent in relation to the Appellant was false, unfounded or malicious and if at all the appellant suffered any loss and/or damages, the 2nd Respondent is solely liable to indemnify the Appellant.

5. Equally, the 2nd Respondent in a defence dated 23/11/17 denies that the information made to the Bureau was made out of malice; that the information given by it to the 1st Respondent was held under statutory limitations and not published to a wide audience as alleged; the information was given upon prior and written approval of the Appellant and they took immediate steps to correct the information once the error was brought to its attention.

6. During hearing, each party called one witness. Upon taking evidence of the witnesses, the trial court held that the Appellant had not proved his case on a balance of probability thus dismissed the claim with each party bearing its own cost.

The Appeal

7. Being aggrieved by the said decision, the appellant filed a memorandum of appeal dated 25th March, 2022 premised on nine (9) grounds detailed as follows: -

    i. That the Learned Magistrate misdirected herself both in fact and in law by failing to properly evaluate pleadings, evidence and legal issues raised by the Appellant.

    ii. Whereas the Learned court found that the 2nd Respondent forwarded erroneous information about the Appellant to the 1st Respondent which was injurious she misdirected herself both in law and in fact by finding and holding that there was no malice but an honest mistake on the part of the 2nd Respondent.

    iii. The Learned Court erred in law and in fact by finding and holding that the publication did not affect the reputation of the Appellant because no third party was called as a witness.

    iv. The Learned court erred in law and in fact by holding and finding that the information in the custody of the 1st Respondent was private and confidential and could only be and/or was accessed by the consent/approval of the Appellant.

    v. The court erred in law and in fact by holding and finding that the Appellant got credit facilities from various banks notwithstanding the erroneous listing thus concluding that no harm was occasioned at all contrary to evidence tendered by the Appellant.

    vi. The court erred in law and in fact by holding and finding, without any evidence, that the Respondents deleted the impugned erroneous listing promptly and apologized while disregarding the Appellant's uncontroverted evidence on the circumstances surrounding the listing and inaction of the Respondents.

vii. The Learned Magistrate erred in holding and finding that the Appellant suffered no quantifiable loss save for frustration and annoyance which doesn't warrant the court's intervention.

viii. The Learned court erred in dismissing all reliefs sought by the Appellant while disregarding overwhelming evidence in support of the same.

ix. The Learned court while acknowledging that the suit was filed because of the Respondent's acts and/or omissions she erred in condemning the Appellant to bear his own costs.

8. The appellant seeks that the appeal be allowed by setting aside the Judgment and decree of the lower court made on the 28/02/2022 and the reliefs sought in the plaint be granted as prayed.

9. The court directed that the appeal be canvassed by way of written submissions with each party filing their respective submissions. Notably, the Appellant filed submissions dated 11th June, 2024, the 1st Respondents submissions dated 21st June, 2024 and the 2nd Respondent dated 2nd July 2024.

Appellant's Submission

10. The Appellant summarized the grounds of appeal to four issues, that is, whether the admitted erroneous listing of the Appellant was reckless and malicious, whether the erroneous listing was defamatory, whether the Appellant is entitled to the reliefs sought in the plaint dated 8th May, 2018 and the issue of who bears costs.

11. On whether the publication was reckless and malicious, the Appellant submitted that the court erred in finding that the publication was not malicious, as upon the Appellant's demand for rectification, an apology was offered. That this finding was not supported by any evidence, as there was neither an apology nor expression of remorse by the Respondents.

12. The Appellant submitted that in delaying to delist the Appellant's name the Respondents acted maliciously, complaint was raised on 27/04/2017 but Appellant remained listed till 18/05/2017.Further, that the trial court ignored crucial evidence on when the complaint was received.

13. On whether the erroneous listing was defamatory, the Appellant submitted that the trial court erred in holding that the information was not defamatorysince there was no law which allowed the 2nd Respondent to circulate false information and the 1st Respondent's rules could not be used to shield circulation of such inaccurate, wrong and false information.Reliance was placed on the case of *Eunice Nganga vs. Higher Education Loan Board & 2 Others* [2020] eKLR, where the Court held that a person listed by any of the CRBs following adverse information or reports cannot be considered worthy of granting loans or doing business with, and thus loses all respect and dignity.

14. As to whether the Appellant is entitled to the reliefs sought in the plaint dated 8th May 2018, it was submitted that the trial court erroneously held that there was no quantifiable loss yet it had made a finding that the negative credit listing was erroneous and that the Appellant suffered frustration, annoyance and that its application for overdraft was rejected by CFC Stanbic. The Appellant relied on the case of *Ken Odondi vs. James Okoth Ombura t/a Okoth Ombura & Co Advocates* [2013] eKLR, *Reuben Kioko Mutyaene v Kenya Commercial Bank Limited; Transunion t/a Credit Reference Bureau Africa Limited (Interested Party)* [2020] eKLR among others on aggravated damages.

15. The Appellant urges the court to find that the listing affected his relationship with banks, his employee and suppliers since he could not get overdraft to settle the then outstanding bills. He seeks a sum of

Kshs 4, 000, 000/= together with costs of the suit for compensation for the injuries he suffered as a result of the Respondents' omission.

1st Respondent's submissions

16. The 1st respondent has submitted on the four issues for determination as set out by the Appellant. On the first issue whether the erroneous listing of the Appellant was reckless and malicious, the 1st Respondent submits that the court's finding that the 1st Respondent deletion of the Appellant's data immediately it was alerted by the 2nd Respondent demonstrated that there was no malice but an honest mistake. To support this argument reliance was placed in the case of *Raphael Lukale v Elizabeth Mayabi & anor* (2018) eKLR.

17. On whether the erroneous listing was defamatory, the 1st Respondent submitted that the defamation claim could not be sustained since malice was not established. It was their further Submission that the trial court considered the fact that the information was properly safeguarded and therefore did not fall in the hands of third parties and the information shared by the 1st Respondent was shared with the Appellant's Bank upon request which the Appellant had consented to.

18. On whether the Appellant is entitled to the reliefs sought in the plaint, the 1st Respondent submitted that the Appellant's claim failed to meet the principles for consideration in a defamation claim as set out in the case of *Ibrahim Mukhtar Abasheikh v Royal Media Services & another* [2020] eKLR which cited with approval the case of *Swanya v Toyota East Africa & Another* {2009} eKLR.

19. It was further submitted that the Appellant did not tender any evidence that the information was shared with a third party without his approval. They urged the court to find that the information was shared within the confines of a qualified privilege and no third party accessed the said information.

20. As to whether the Appellant is entitled to the reliefs sought, it was submitted that having not demonstrated that there was malicious intent in sharing of the information and that no third party other than those permitted by the law accessed the information, it then followed that the defamation claim was not proven and therefore no claim for damages can arise. They urged that the same be dismissed with costs to the 1st Respondent.

2nd Respondent Submission

21. The 2nd Respondent stated that submission of information to CRB was an error, not a malicious act and proceeded to submit as follows;

22. On ground 1 of the appeal, it was their submission that the trial court complied with Order 15 of the *Civil Procedure Rules* 2010 in framing issues and with the law of evidence in analysing the pleadings, evidence and testimony hence this ground ought to fail.

23. On ground two, it was submitted that there was no malice on its part in the submission of information to the 1st Respondent. That it was an inadvertent mistake and upon being notified they immediately had it amended, deleted and corrected as per the requirements of Regulation 50(5) of the *CRB Regulations* 2013.

24. It was also their submission that the 2nd Respondent is protected from liability under Regulation 19 of the CRB Regulations since the report was made in good faith and in the ordinary course of its business hence the trial court cannot be faulted for finding no malice.

25. On ground (6) six of the appeal, the 2nd Respondent submitted that delisting was strictly within the mandate of the 1st Respondent hence there was nothing left to be done by the 2nd respondent.

26. On grounds 3,4,5 and 7 it was their contention that the Appellant had not suffered any loss or damage. Reference was made to the decision in *Selina Patani & another v Dhiranji v Patani* (2019)eKLR.

27. It was their further submission that, the credit information given to CFC Stanbic was consented to, authorized and approved by the Appellant; secondly, no evidence was tendered to show that other banks accessed the credit information. Thirdly, the Appellant was not deterred or prevented from obtaining loans hence there was no prejudice or loss suffered by him. They urged the court to find that the Appellant suffered no harm beyond annoyance or frustration and in the event any damages were awarded the same would be very nominal, a prerogative the court should decline to exercise.

28. On ground 8, it was submitted that by the time the case was filed the 1st respondent had already delisted the Appellant and hence the prayer was overtaken by events.

29. On ground 9 it was submitted that costs are discretionary and the court gave a good reason for declining the prayer. The 2nd respondent urged the court to uphold the decision of the trial court and dismiss the appeal with costs.

Analysis and Determination

30. 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 trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. The foregoing duty was succinctly stated by the Court of Appeal in the case of *Selle v Associated Motor Boat Company Ltd* (1968) EA 123 and *Peters v Sunday Post Limited* [1985] EA 424).

31. I have carefully considered the appeal before this court and all the supporting documentation, as well as the parties' submissions, having done so, I now proceed to determine whether the plaintiff made out a case for a tort of defamation.

32. I have carefully considered the appeal before this court and all the supporting documentation, as well as the parties' submissions, having done so, I now proceed to determine whether the impugned publication by the 1st respondent amounted to defamation.

33. In the case of *Miguna Miguna v Standard Group Limited & 4 Others* (2017) eKLR the court held that

> "speaking generally a defamatory statement can either be libel or slander. Words will be considered defamatory because they tend to bring the person named into hatred, contempt or ridicule or the words may tend to lower the person named in the estimation of right thinking members of society generally. The words must be shown to have being construed by the audience hearing them as defamatory and not simply abusive. The burden of proving the defamatory nature of the words is upon the plaintiff. He must demonstrate that a reasonable man would not have understood the words otherwise than being defamatory. See *Gatley on Libel and Slander* (8th edition para 31)

The ingredients of defamation were summarized in the case of *John Ward v Standard Ltd*, HCCC 1062 of 2005 as follows:-

> "……The ingredients of defamation are:
>
> i. The statement must be defamatory.
>
> ii. The statement must refer to the plaintiff.

iii. The statement must be published by the defendant.

iv. The statement must be false."

34. Further in *Phinehas Nyaga v Gitobu Imanyara* (2013) eKLR the court held that defamation was not about publication of falsehoods against a plaintiff but rather, the plaintiff must show that the published falsehood disparaged his reputation and lowered him in the estimation of right-thinking members of the society.

35. Based on the above and applying the principles into the facts of this matter, it is not in dispute that the appellant was listed as a defaulter by the CRB. The listing was made by the 1st Respondent upon receiving information from the 2nd Respondent. It is admitted by the 2nd Respondent that the listing was in error and the publication was not true.

36. As to whether the statement was defamatory the Appellant contends that the said erroneous publication amounted to defamation as it was reckless and malicious since the listing was not immediately deleted after it was raised. Further that it was defamatory because the 2nd Respondent circulated false information and the 1st Respondent's rules/Regulations could not be used to shield circulation of such inaccurate, wrong and false information.

37. The Appellant's testified that on or about 27/4/2017 he learnt that he was listed as a defaulter, he contacted the 1st Respondent who advised him to contact the 2nd Respondent. Subsequently, he contacted the 2nd Respondent, who confirmed having forwarded the information to the 1st Respondent.

38. In response the 1st Respondent stated that they maintained a data base, from which they receive information and handling of such information was subject of qualified privilege under Regulation 18(1) and 50(6) of the *Banking (Credit Reference Bureau) Regulations* 2013 (the Regulations). While the 2nd Respondent admits that the information was forwarded to the 1st respondent, it states that the same was erroneous and that it took immediate steps to have it rectified, after which the 1st respondent made all necessary amendments.

39. In determining the issues, the trial court set out two issues for determination namely; whether the plaintiff listing was erroneous and whether he was entitled to damages. In determining whether the listing was erroneous, the trial court made reference to the case Phinehas Nyagah (above) and held that from the evidence of the witness there was no evidence of malice. The court observed that;

The 2nd Defendant admits that the listing was erroneous and when the Plaintiff notified him they immediately acted to have it delisted. They informed the 2nd Defendant and by the end of the day the Plaintiff had been delisted. There is therefore no evidence to demonstrate malice against the 1st Respondent. This was an honest mistake."

40. The trial court also noted that there must be evidence that the defamatory statement must be communicated to someone other than the defamed. The trial court then held that there is no evidence of communication to a third party to show that the Appellant's reputation was destroyed. That in fact access to the plaintiff's listing was confidential and only the banks had access and it had to be with the approval of the plaintiff.

41. I do agree with the finding of the trial court. This is because an analysis of the record before this court shows that on or about 27/4/2017 the Appellant learnt that he was listed as a defaulter, on 2/5/2017 the 2nd respondent wrote to the 1st respondent asking that the information be deleted for it

was inaccurate, and as at 9/5/2017, based on a copy of the short message from the 1st Respondent's code 21272, the erroneous listing of the Appellant had been delisted.

42. Based on the above, the authorities provided and the logical aspect of malice, it is my considered view that the 2nd Respondent shared the information believing the same to be true. Upon being notified, it realized its mistake and corrected it. I see no intention of malice by any of the Respondents. I am guided by the Court of Appeal's decision in *Raphael Lukale v Elizabeth Mayabi & anor* [2018] eKLR where it held that: -

> " Malice can be inferred from a deliberate or reckless ignoring of facts. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. Malice may also be inferred from the relations between the parties before or after the publication or in the conduct of the defendant in the course of the proceedings."

43. As to whether it was published to a third party, the trial court made a finding that the appellant ought to have demonstrated how the publication ridiculed and or lowered his standards before the eyes of the right-thinking members of the society.

44. In this instance, the Appellant submitted that CFC Stanbic rejected his request for an overdraft after it received the information shared by the 1st Respondent. This court notes that the information was shared upon a request for information by CFC Stanbic. The information was shared confidentially within persons authorized to access that information in their ordinary course of business. At the time the information was shared, the 1st Respondent had not been notified of the erroneous information. In fact, I note that CFC Stanbic notified the Appellant about the information, and it was then that the Appellant informed the Respondents of the error.

45. This court also notes the publication of the "Important Notice" on the Consumer Credit Report that:

> " the information is not intended to reflect upon the solvency, financial standing or the stability, honesty or motives of any person referred to and does not imply that any party is unable to make payment or that they are not prepared to pay their debts or that they are persons to whom credit should not be given."

46. The above important notice, in my view, has the effect that even if the publication was inaccurate or incorrect and read by a third party, in this case CFC Stanbic, it would not cast the Appellant in bad light.

47. Having carefully considered the evidence and proceedings in the trial court, and cognizant of the provisions of section 107 of the *Evidence Act*, which provides that the burden of proof lies on he who assert in this case the Appellant, I agree with the trial court's decision that the Appellant did not prove that the Respondents' conduct was malicious or reckless as alleged. Consequently, this ground of appeal equally fails.

48. The upshot of the above is that the appeal is dismissed with costs.

Orders accordingly.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 11TH DAY OF SEPTEMBER 2024.

For Appellants:

For 1st Respondent:

For The 2nd Respondent

Court Assistant: