Njoroge v Cooperative Bank of Kenya Ltd (Civil Appeal 314 of 2017)
[2023] KEHC 18342 (KLR) (Civ) (19 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18342 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 314 OF 2017

JN NJAGI, J

MAY 19, 2023

BETWEEN

FELISTUS WANJIRU NJOROGE ..... APPELLANT

AND

COOPERATIVE BANK OF KENYA LTD ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon. D. A. Ocharo, SRM, in Nairobi Chief Magistrate`s Court Civil Suit No.582 of 2016 delivered on 30/5/2017)

JUDGMENT

1. The Appellant instituted suit against the Respondent at the lower court claiming general damages, aggravated damages, exemplary damages and an apology after the Respondent purportedly defamed the Appellant for declining the Appellant`s debit card on three separate occasions by purporting that there were no funds in her bank account when in actual fact there was money in the account. After a full trial the trial Magistrate dismissed the suit on the ground that the Appellant had failed to satisfy the ingredients of the tort of defamation. The Appellant was aggrieved by the decision of the learned Magistrate and preferred the instant appeal.

2. The grounds of appeal are that:

    1. The learned Magistrate erred in fact and in law in dismissing the Appellant's suit while overwhelming evidence was tendered in support of the same.

    2. The learned Magistrate erred in fact and in law in holding that the Appellant had failed to satisfy the requisite ingredients for defamation and particularly ignored a letter written and published by the Respondent as well as an ATM Notification and letter were adduced as part of the Appellant`s documentary

evidence and which had clearly defamed the Appellant`s Character and injured her reputation.

3. The learned Magistrate clearly showed bias by adopting the Respondent`s line of submissions while totally ignoring the Appellant`s evidence as well as her submissions.

4. The learned Magistrate erred in law by ignoring that the Respondent were under an obligation to take and obey instructions given by the Appellant under their bank/client relationship and within the banking industry and that burden would never be shifted to the Appellant.

5. The learned Magistrate erred in fact and in law in not appreciating that the Respondent adduced evidence contrary to its pleadings, inconsistent with the facts of this case, simple common sense, and as such could only be in admission to the Appellant's case.

6. The learned Magistrate erred in fact and in law by assuming facts not in evidence so as to justify his decision of dismissing the Appellant`s case.

7. The learned Magistrate erred in fact and in law by completely disregarding the Appellant`s submission on the evidence, facts and issues before Court.

8. The learned Magistrate erred in fact and in law in not assessing damages, entering judgement submission as awarding costs and interest.

Case for the Appellant

3. The Appellant was at the time of filing suit an advocate of the High Court of Kenya of 25 years standing. She was holding a savings account with the Respondent for which the Respondent had issued her with a debit card.

4. It was the evidence of the Appellant that on the 1/2/2014 she purchased goods at Victoria Courts in Westlands, Nairobi, worth Ksh.600,000/= and had them loaded into a truck to be ferried to her house. That she tried to pay for the goods vide her visa card but the same was declined by the Respondent on the grounds that there were insufficient funds in her account. The Appellant called the Respondent`s customer care who did not give her any reason for the decline. On the following day she visited her branch where she was told that her card had been rejected for the wanting reason of avoiding fraud. There was Ksh.12,000,000/= in the account and she withdrew the required money in cash to pay for the goods. She contended that the bank was not saving her from any fraud in declining the withdrawal but was defaming her and publicly humiliating her.

5. That on the 26/6/2014 she attempted to withdraw cash at the Defendant`s Automated Teller Machine at Nakumatt Mega by use of her debit card so as to pay for her car parking charges as well as do some shopping when the transaction was declined and only got a slip showing that the account had been blocked. That at the time the account had a credit balance of over Ksh.6,000,000/= which was sufficient to cater for the transaction. She called the Respondent`s customer care who advised her to visit her branch which she did. She was informed that the reason for declining the transaction was a deposit into her account of Ksh.1,500,000/= for which the bank could not avail funds until the source of the said sum was established. It was the contention of the Appellant that in blocking her account the bank was out to defame and humiliate her as she was not a person of straw.

6. The third occasion was on 20/10/2015 when the Appellant attempted to withdraw cash using her visa debit card at the Defendant`s Parliament Road branch so as to fuel her car and entertain some high-profile guests at her house later that evening when her card was declined for reasons of insufficient funds. She contacted the customer care personnel of the Respondent and the explanation given was that the account had been overdrawn by Ksh.1,000,000/=. On the following day she visited her branch at Ukulima House and found that the account had a credit balance of Ksh.581,763.24 which amount was sufficient for the transaction.

7. The Appellant contended that on the three occasions the Respondent had caused her to be humiliated, lowered in character and her standing to reasonable thinking members of the society, her friends, associates and peers and hence defamed her. She thus claimed general damages for injury to reputation. The Respondent had declined to offer an apology thereby aggravating her loss.

8. The Appellant was the only witness in the case. Her evidence reiterated the evidence set out above.

Case for the Respondent

9. The Respondent called one witness in the case, Anthony Ndegwa, DW1. The witness testified in court and adopted the contents of his witness statement dated 21/9/2016. He stated that he is an internal investigator for the Respondent. That the Appellant was their customer and operated a visa debit card with them. That the card has transaction limits that are incorporated in the terms and conditions that are signed by customers in the course of opening the account. A customer who wishes to make a purchase beyond the transaction limit would need to contact the bank and request for a temporary authorization approval.

10. As regards the transaction at Victoria Courts on 1/2/2014, the Appellant`s authorization data extracted from their bank indicated that the card was declined on reason 104 – Restricted card, which meant that the transaction sought was in excess of the transaction limit. In that case the Appellant needed to call the bank to complete the transaction as she had not issued standing instructions to the bank to enhance the card limit.

11. The witness said that the allegation that the card was declined due to insufficient balances is not true. That the card data revealed that the Appellant had previously called the bank for approval for purchases beyond the set limit and she was therefore aware of the standard procedure to be undertaken in such instances. Excerpts of such authorization were annexed to the Respondent`s list of documents.

12. The witness said that the card data does not show there having been authorization request on the Appellant`s card at Nakumatt Mega on 26/6/2014.

13. On the transaction of 20/10/2015, the witness said that the card data showed that the request was not approved because the account had a negative balance of Ksh.1,068,316/= which was occasioned by two cheques of Ksh.825,000/= each deposited in the Appellant`s account on 16/102015. In accordance with Central Bank of Kenya clearing guidelines, the cheques were to be given value on 21/10/2015, considering that 20/10/2015 was a public holiday. The two cheques were unpaid by the clearing banks for reasons indicated as “Invalid MICR line” and “refer to drawer”, the effect of which was that the account had at that point in time uncleared balance of Ks.1,068,236.76 and not a credit balance of Ksh.581,736.24 as alleged by the Appellant. There were thus no cleared funds available in the Appellant`s account as a result of the extra clearing day occasioned by the public holiday.

14. The witness further said that the bank`s transaction approval systems are automated and therefore there was no malice or intention to disparage the Appellant as no financial information was communicated to her guests, friends, contacts or members of the general public.

Appellant`s submissions in the appeal

15. The advocates for the Appellant, J. Makumi & Co. Adocates, submitted that there was a contractual relationship between the Appellant and the Respondent. That among the obligations of the bank to its customers is the obligation to obey and follow instructions of its customer particularly where the customer`s account is in credit. That in this case the Appellant's account had funds on the three occasions when her debit card was declined. That this amounted to breach of the contractual relationship between the Appellant and the Respondent. The Appellant faulted the trial court for ignoring the fact that the Respondent breached its contractual obligation to the Appellant by not following her instructions.

16. The Appellant submitted that by failing to honour the Appellant`s instructions on three occasions, contact her or offer an explanation the Respondent failed to exercise what is now standard commercial practice in the banking sector. The acts by the Respondent were thus negligent, reckless and malicious.

17. It was submitted that the Respondent was required to act in good faith and exercise caution in discharge of its mandate to the Appellant. In support of this proposition the Appellant relied on the decision in the case of Supinder Singh Sagoo v Kenya Commercial Bank [2020] eKLR where it was held that:

> There is no gainsaying that a bank is under obligation to always exercise reasonable care and skill in the discharge of its duties to its customers. This was well explicated in Selangor United Rubber Estate Ltd vs. Craddock (supra) thus:
>
> "...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 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 relevant facts, which can vary almost infinitely."

18. Consequently, the Appellant submitted that the Respondent owed the Appellant duty of care to hold her money in trust and to comply with her instructions which they failed to do. Therefore, that the trial court erred in failing to award general damages for breach of contract.

19. The Appellant submitted that she had pleaded all the three transactions both in her plaint and reply to defence and evidence led by both parties to the same. That it was apparent that the issue had been left to the court`s determination. That in the premises the trial court was in error to reject them on the ground that the Appellant did not specifically pray for damages for breach of contract. To support this proposition, the Appellant relied on the Court of Appeal decision in Great Lakes Transport Co. (U) Ltd v Kenya Revenue Authority [2009], Msa Civil Appeal No.106 of 2006 where it was held that:

> In this case, as Mr. Gikandi rightly submitted, neither the parties nor the court framed issues before or after the trial. Nonetheless the issue as to claim for general damages was pleaded as stated above and the flow of evidence at the trial clearly established that that issue was left for determination. In the case of Odd Jobs v Muhia [1970] EA 476, Law JA stated:-
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> "On the point that a court has no jurisdiction to decree on an issue which has not been pleaded, the attitude adopted by this Court is not as strict as appears to be that of the courts in India. In East Africa the position is that a court may allow evidence to be called, and may base its decision, on an unpleaded issue if it appears from the course followed at the trial that the unpleaded issue has in fact been left to the court for decision."

20. The Appellant further submitted that the trial court erred in holding that the Appellant had failed to satisfy the requisite ingredients for defamation. The Appellant cited the elements of defamation as stated in the case of Phinehas Nyagah v Gitobu Imanyara [2013] eKLR thus:

> The elements of the tort of defamation are that the words must be defamatory in that they must tend to lower the plaintiff's reputation in the estimation of right-minded persons, or must tend to cause him to be shunned or avoided....Secondly, the words must refer to the plaintiff. Thirdly, the words must be malicious. Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts.

21. It was submitted that the breach of contract by the bank such as the one occasioned to the Appellant by the Respondent amounts to defamation because as a result of the decline the Appellant did suffer ridicule, spite and shame from her high-profile guests, friends and contacts. The Appellant relied on the decision in the case of Habihalim Company Limited v Barclays Bank of Kenya Ltd (2019) eKLR where Sergon J. held that:

....I have already stated that it is not disputed that the relationship between the parties to this dispute is that of a banker and a customer.

Among the obligations that fall within the purview of a bank in the course of a contractual relationship with its customer is the obligation to obey and follow through with the instructions of its customer particularly where the customer's account is in credit. Such was the position taken in the case of Eunice Wairimu Muturi & another v James Maina Thuku & another [2018] eKLR as hereunder:

> " The general principles of law are that, the relationship between the Bank and its customer is contractual. The main basis of this relationship is one of debtor and creditor. As held in the case of; Foley v Hill [1848], where the customer's account is in credit, then the bank is in effect the customer's debtor, that is to say that the bank owes the money to the customer. Where it is in debit, then the customer is the banker's debtor. In this contractual relationship, the bank owes the customer several duties which includes but not limited to: a duty to comply with the customer's mandate...It is important to realize that this duty not only refers to the original mandate completed when the customer opened the account but also various other documents which are interpreted as mandates, including standing orders, direct debits and cheques. Therefore, the Bank owes its customer an obligation to obey the customer's instructions based on the mandate given."

22. The Appellant faulted the trial court for blaming the Appellant in not calling additional witnesses to testify in the case. It was submitted that there is no requirement in law for a particular number of witnesses to proof any fact unless so provided by the law, which position is captured in Section 143 of the *Evidence Act*. The Appellant cited the decision in the cases of Fanuel Makenzie Akoyo v Republic, Kisumu Criminal Appeal No. 45 of 2006 and Charles Kariuki Mure v Republic [2009] eKLR where it was held that what matters in each particular case is the quality of evidence and not the quantity of witnesses. That a message of insufficient funds as long as it is false is defamatory and the Appellant only needed to demonstrate that the message was false and it lowered her in the estimation of right-thinking members of society generally or if it exposed her to public hatred, contempt or ridicule or it causes her to be shunned or avoided. That the Appellant had proved all that.

23. The Appellant urged the court to find that the Respondent`s message was defamatory to the Appellant`s reputation and the trial court`s finding that the Appellant did not meet the threshold

for defamation was in error. She urged that she be awarded exemplary, punitive and general damages assessed at Ksh.4,000,000/=. The Appellant relied on the decision in the case of Habihalim Company Limited v Barclays Bank of Kenya Ltd (supra) where a similar sum was awarded for breach of contract and defamation.

Submissions for the Respondent

24. The advocates for the Respondent, Iseme, Kamau and Maema Advocates, submitted that the claim pleaded by the Appellant in her plaint was one of defamation. That she had not pleaded the issue of breach of contract in her plaint. Thus, the trial court did not err in holding that the only claim that the Appellant had framed for determination was one hinged on defamation alone, and not breach of contractual obligation. Therefore, that the Appellant should not be allowed to raise a fresh cause of action founded on alleged breach of contractual obligation during the appeal as to do so would be a violation of the Respondent`s right to a fair hearing and access to justice. The Respondent submitted that parties are bound by their pleadings and relied on the case of Independent Electoral & Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR where it was held that:

> In the first, Adetoun Oladeji (nig) Ltd v Nigeria Breweries PLC S.C. 91/2002, Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows;
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> "....it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."
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> Other judges on the case expressed themselves in similar terms, with Judge Christopher Mitchell J.S.C. rendering himself thus;
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> "In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

25. Further reliance was made on the case of Patrick Muiru Kamuguna v Kaylift Services & another [2021] eKLR where the High Court relied on the decision of the Malawi Supreme Court of Appeal in Malawi Railways Ltd v Nyasulu [1998] MWSC 3 where the learned Judge quoted with approval an article by Sir Jack Jacob entitled "The Present Importance of pleadings" as follows:

> " As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation.

26. The Respondent submitted that the Appellant in her demand letter addressed to the Respondent, her evidence in court, her statement of issues as well as in her submissions before the lower court shows that the claim put forth was one of defamation. That the case that the Respondent made a reply to was one of defamation. That the only issue left for the determination of the court was one of defamation.

27. It was submitted that the decline of funds was properly explained by the respondent's witness, DW1. That the submission that the Respondent failed to obey instructions by the Appellant was false and misconceived. The claim for breach of contract does not lie.

28. On whether the trial Magistrate erred in holding that the Appellant had failed to satisfy the requisite ingredients for defamation, the Respondent submitted that the trial court was right in its finding that the claim for the events that occurred on 1/2/2014 and 26/6/2014 were statute barred by virtue of the provisions of Section 4(2) of the *Limitation of Actions Act*, Cap 22 Laws of Kenya. In support of that legal position the Appellant cited the case of Wycliffe A. Swanya v Toyota East Africa Ltd & another [2009] eKLR where the Court of Appeal held that:

When does the cause of action in the case of slander accrue? The appellant submitted through counsel that, in his view, it accrued after he started feeling the impact of the respondents' remarks at his place of work in May 2006; then he filed the suit the subject to this appeal. The pleadings did not disclose where his place of work was apart from what was disclosed in paragraph 4 of the plaint. The counsel submitted further that this was within the limitation period. Unfortunately, the *Limitation of Actions Act* (Chapter 22 Laws of Kenya) does not say so. It says in case of libel or slander no action may be filed

"after the end of 12 months from the date the cause of action accrued"

and we understand this to mean from the date the slanderous remarks are made. (see proviso to section 4 (2) – of the *Limitation of Actions Act* and section 20 of the *Defamation Act*). It would be absurd for slanderous remarks to be made about a person and then he/she waits until he/she feels the effects thereof to file an action in court. If this be the case then there would be no need for any limitation period to be specified.

29. The Respondent submitted that the only claim that was left for determination is the claim for defamation based on the transaction that occurred on 20/10/2015. The Appellant had to prove that the defamatory remarks were published to third parties with malicious intent of disparaging the Appellant to right thinking members of the society. The Appellant relied on the case of Peter Maina Ndirangu t/a Express Service Agency v Standard Group Ltd [2016] eKLR where the ingredients of defamation were summarized as follows:

The elements of the tort of defamation were laid out in the case of John Edward Vs Standard Limited as follows: -

1. The statement must be defamatory.
2. The statement must refer to the Plaintiff.
3. The statement must be published by the Defendant.
4. The statement must be false.

30. The Appellant also cited the case of James v Ndirangu & 3 others [2022] KECA 82 (KLR) where the Court of Appeal held that:

> This Court in Selina Patani & Another v Dhiranji V. Patani [2019] eKLR and Raphael Lukale vs. Elizabeth Mayabi& Another [2018] eKLR was explicit that: the law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation as it recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements that injure his reputation. Second, that the words must be shown to have been construed or capable

of being construed by the audience hearing them as defamatory and not simply abusive. Third, that the burden of proving the defamatory nature of the words is upon the aggrieved party. He must demonstrate that a reasonable man would not have understood the words otherwise than them being defamatory of the aggrieved party.

31. The case of Wycliffe A. Swanya v Toyota East Africa Ltd & another (supra) was cited where it was stated that:

> " For the purpose of deciding a case of defamation, the court is called upon to consider the essentials of the tort generally and to see whether the essentials have been established or proved. It is common ground that in a suit founded on defamation, the plaintiff must prove:-
>
> (i) That the matter which the plaintiff complains is defamatory in character.
>
> (ii) That the defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.
>
> (iii) That it was published maliciously.
>
> (iv) In slander, subject to certain exceptions, that the plaintiff has suffered special damage."

32. It was submitted that the Appellant during cross-examination confirmed that she is the one who informed her guests about the declined transaction of 20/10/2015. That the Respondent`s witness, DW1, confirmed that the ATM machines used by the Appellant were designed to provide for privacy and only one person can access it at a time. That the transaction advice was not published to any third parties as indeed held by the trial court.

33. The Respondent submitted that the Appellant did not call any witness to testify that they knew the Appellant and upon being informed by the Appellant that the transaction had been declined their thinking about her was lowered. The Appellant cannot rely on Section 143 of the *Evidence Act* to claim that witnesses were not required. The Appellant failed to prove her case of defamation and the trial court was right in not awarding her any relief. The Appellant urged the court to dismiss the appeal with costs.

Analysis and Determination

34. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> An appeal to this court from the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

35. The legal and evidential burden of establishing the facts in support of a party's case lies with the plaintiff. This is determined by considering the question as to who stands to lose if the burden is not discharged.

36. Section 107 and 108 of the *Evidence Act* provides: -

107. Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

36. The legal burden of proof in a case lies on the Plaintiff but the evidential burden may shift depending on the circumstances of the case and the evidence adduced by the Plaintiff. The question is whether the Plaintiff discharged the burden of proof.

37. The trial Magistrate in his judgment held that the claim pleaded in the case and the case that the Respondent responded to was one of defamation and as such the claim framed for determination of the court was one of defamation. The Magistrate also held that the causes of action on defamation that took place on 1st February 2014 and 26th June 2014 were statutorily time barred. On the purported cause of action that took place on 20th October 2015, the Magistrate held that the ingredients for the tort of defamation were not proved.

38. I have considered the grounds of appeal, the grounds in opposition thereto and the submissions of the respective advocates for the parties. The issues for determination are:

(a) Whether the trial magistrate erred in law and in fact by not making an award for breach of contract.

(b) Whether the magistrate erred in fact and in law in holding that the Appellant had failed to satisfy the requisite ingredients for defamation.

(c) Whether the magistrate erred in fact and in law in not awarding the appellant any relief.

Whether the claim for breach of contract was justified

39. The Appellant through her counsel submitted that the Respondent had sufficient funds on the three occasions complained of yet the bank declined her request to withdraw the money. She submitted that the bank owed her a duty to obey her instructions. That the conduct of the Respondent in declining the transactions on false grounds of insufficient funds was not only a breach of contractual obligation to comply with a customer`s instructions which duty was not time barred under contract since all the three instructions had been given within 6 years of 9th February 2016 when the suit had been filed.

40. Counsel for the Appellant submitted that the Appellant in her pleadings had pleaded that the declining of her debit card was without regard to banking rules and practices, and without justifiable cause. That having done so and evidence led by both parties on the same, it was apparent that the issue had been left for the court`s determination, whether specifically pleaded or not. That the court was thus in error to reject the claim on the grounds that the plaintiff did not specifically pray for damages for breach of contract. This submission was supported by the Court of Appeal decision in the above cited case where the court held that issues for determination in a suit generally flow from the pleadings, if it appears from the course followed at the trial that the unpleaded issue has in fact been left to the court for decision and not prayers. That the trial court ought to have awarded general damages for breach of

contract for failure by the Respondent to comply with the Appellant`s instructions despite a specific prayer for the same.

41. The Respondent on the other hand submitted that the case pleaded by the Appellant was on defamation and the claim on breach of contract did not lie. The question is whether the trial court ought to have awarded the Appellant general damages for breach of contract despite there having been no specific prayer for the same.

42. I have perused the pleadings by both parties. The Appellant pleaded, inter alia, as follows:

> Paragraph 10: That the said declines were malicious, careless, recklessly and without any justifiable cause and was only meant to mean and portray either by imputations, innuendos, ordinary and natural meaning of the reasons given for the decline that the plaintiff:
>
> Particulars.
>
> a) She was a fraudster.
>
> b) She was a perpetual defaulter who would not meet any obligations.
>
> c) She was of improper moral standing.
>
> d) She was a con woman and a show off.
>
> e) She was an advocate of dubious means not worth her calling as an advocate and should be disbarred from practicing as an advocate.
>
> f) She was not fit of holding any public office.
>
> g) She is unethical and unscrupulous.
>
> Paragraph 15: Accordingly, the defendants knew or ought to have known that the malicious dishonour of the plaintiff's debit card would result in defamation proceedings.
>
> Paragraph 16: Despite the defendant having been given a notice of intention to sue and having demanded of the defendants to:
>
> a. Furnish an apology.
>
> b. Compensate the plaintiff.
>
> c. A written admission of liability followed by payment of general damages for injury to reputation, image integrity, honour, credibility.
>
> The defendant has acknowledged the demand and reiterated its reasons for declining to honor the plaintiff claim thereby aggravating the loss.
>
> Paragraph 18: This cause of action arose within the jurisdiction of this Honorable court.
>
> Reasons Whereforethe Plaintiff's claim as against the defendants
>
> a. General damages, aggravated damages and exemplary damages.
>
> b. An apology for declining the plaintiff's debit card.
>
> c. Costs of the suit plus interest.

d. Any such further or other relief this Court may deem just to grant.

43. The Respondent in its defense denied all the allegations of defamation imputed by the Appellant.

44. It is clear from the pleadings that the case pleaded by the Appellant was one of defamation. The witness statement of the Appellant filed in court on 9th February 2016 dwelt on defamation. Similarly, the statement of issues drawn by the Appellant and filed in court on the 30th March 2016 dwelt on the issue of defamation. There is nowhere in all these documents did the Appellant raise a claim of breach of contract. The Appellant in her evidence in court dwelt on the issue of defamation. She admitted in cross-examination that her claim on defamation was based on the incident of 20/10/2015 as the other two were statute barred.

45. I have similarly perused the submissions by the Appellant at the lower court. Nowhere in the submissions did the advocate for the Appellant raise an issue on a claim for breach of contract. Their final submission was that "...the Plaintiff is entitled to an award of damages for general damages, aggravated damages and exemplary damages, for the damage on her reputation occasioned by the malice, carelessness and negligence of the defendant who repeated the injury thrice,"

46. From the above, the issue that was before the trial court for determination was on defamation. There is nothing on record, contrary to the submissions of the Appellant, that evidence on the issue of breach of contract was led by both sides and that the issue was left for the determination of the court. It is clear to me that the Appellant is changing the case that was before the trial court by introducing a claim for breach of contract when the same was not an issue at the trial court.

47. It is trite law that parties are bound by their pleadings -see Independent Electoral & Boundaries Commission & another v Stephen Mutanda Mule (supra), which was also cited by the trial court. In the instant matter the claim for damages for breach of contract was not pleaded. There is nothing to show that the issue was left for the determination of the court. The trial court did not err in holding that the only issue that was before the court for its determination was one of defamation. There was no basis for the court to make an award for damages for breach of contract. The claim for breach of contact does not lie.

Whether the ingredients for defamation were proved

48. Section 4(2) of the *Limitation of Actions Act* provides as follows:

> 4(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued: Provided that an action for libel or slander may not be brought after the end of twelve months from such date.

49. The trial court agreed with the submissions by the advocates for the Respondent that the cause of action for the incidents of 1st February 2014 and 26th June 2014 were, as far as defamation was concerned, statute barred for the reason that a period of more than one year had lapsed when the suit was filed. The Appellant admitted in cross-examination that the causes of action in the two incidents were statute barred by virtue of the provisions of Section 4(2) of the *Limitation of Actions Act* Cap.22 Laws of Kenya. The advocates for the Appellant did not make submissions on the issue. I find that the trial court was correct in holding that the causes of action in the two incidents were statute barred.

50. The trial Magistrate referred to the definition of defamation in the Black`s Law Dictionary as -

> " . The act of harming the reputation of another by the making of false statement to a third person."

51. The Magistrate set out the elements of defamation as restated in the case of Peter Maina Ndirangu t/ a Express Service Agency v Standard Group Limited [2016] eKLR where the same were summarized as follows:

(a) The statement must be defamatory

(b) The statement must refer to the plaintiff

(c) The statement must be published by the plaintiff

(d) The statement must be false.

52. The Magistrate further referred to what amounts to defamation as stated in the case of Joseph Njogu Kamunge v Charles Muriuki Gachari [2016] eKLR as:

> The elements of the tort of defamation are that the words must be defamatory in that they must tend to lower the plaintiff's reputation in the estimation of right-minded persons in the society or they must tend to cause the plaintiff to be shunned or avoided by other persons. In other words, the words complained of must be shown to have injured the reputation, character or dignity of the plaintiff. Abusive words may not be defamatory per se. The words must be shown to have been construed by the audience as defamatory and not simply abusive. The burden of proving the above is upon the plaintiff to demonstrate that a reasonable man would not have understood the words otherwise than being defamatory.

53. The Magistrate considered as to what amounts to publication as set out in the case of Wycliffe A Swanya v Toyota East Africa ltd & another [2009] eKLR as –

> "…. publication in the sense of defamation means that the defamatory statement was communicated to someone other that the person defamed."

54. The Magistrate then considered whether the ATM transaction of 20/10/2015 was defamatory and held that the ATM machine was designed to provide privacy as only one person can access it at a time. That the communication of "insufficient funds" was only communicated by the bank to the Appellant. That the Appellant admitted in cross-examination that she is the one who informed her guests of the declined transaction. That in the premises there was no evidence that the Respondent had published the information to a third party and as such defamation was not proved.

55. In my view, the learned trial magistrate properly considered the elements that constitute defamation which were comprehensively dealt with in the submissions of the advocates for the parties.

56. Defamation is defined in the Halsbury's Laws of England, 4th Edition, Vol. 28 as follows:

> " A defamatory statement which tends to lower a person in the estimation of right thinking members of the society or cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business."

57. Winfield on Tort gives the following definition;

> " It is the publication of a statement which tends to lower a person in the estimation of the right thinking members of the society generally or which tends to make them shy away or avoid that person".

58. And in Gatley on Libel and Slander, it is stated that: -

> " A defamatory imputation is one to a man's discredit or which tends to lower him in the estimation of others or to expose him to hatred, contempt or ridicule or to injure his reputation in his office trade or profession or to injure his financial credit."

59. In Miguna Miguna v Standard Group Limited & 4 others [2017] eKLR, the Court of Appeal had the following to say on the subject:

> " 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 standard of opinion is that of right-thinking persons generally. The words must be shown to have been construed or capable of 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:
>
> 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."

60. And in Kudwoli & Ano. v Eureka Educational & Training Consultants & 2 others [1993] eKLR, Kuloba J.(as he then was) defined defamation as follows:

> 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 tends to make them shun or avoid that person....
>
> ……A defamatory imputation is one to a man's discredit or which tends to lower him in the estimation of others or to expose him to hatred, contempt or ridicule or to injure his reputation in his office, trade or profession or to injure his financial credit....

61. It is thus clear that a defamatory statement is one which tends to disparage a person in the eyes of right-thinking members of his/her society as to expose him/her to hatred, contempt or ridicule. The burden of proving defamation is on the Plaintiff but once the Plaintiff has established a prima facie case, the burden shifts to the defendant to disapprove the allegations. In this matter it was upon the Appellant to prove that the transaction of 20/10/2015 was defamatory in the sense that it had the tendency to

lower her standing in society; that it was published or rather communicated by the Respondent to a third part; that it was false and that it was published maliciously.

62. The Appellant`s case was based on the ground that when she was withdrawing cash from the Respondent`s Automatic Teller Machine, she received an advice note that there were insufficient funds in her account, yet when she visited her bank on the following day she found there were sufficient funds in her account to cater for the withdrawal she wanted to make. The question then was whether the mere act of receiving an advice note to the effect that there were insufficient funds in her account was defamatory.

63. One of the elements of defamation is that the statement complained of must be published to a third party by the defendant. The Court of Appeal in Raphael Lukale v Elizabeth Mayabi & another [2018] EKLR considered what constitutes publication and stated as follows:

> Black's Law Dictionary 9th edition defines publication as "the act of declaring or announcing to the public".
>
> In Pullman v Walter Hill & Co (1891) 1 QB 524, the English Court of Appeal explained what publication constitutes as follows:
>
> "What is the meaning of 'publication'" The making known the defamatory matter after it has been written to some person other than the person of whom it is written. If the statement is sent straight to the person of whom it is written, there is no publication of it; for you cannot publish a libel of a man to himself. If there was no publication, the question whether the occasion was privileged does not arise..... If the writer of a letter shows it to his own clerk in order that the clerk may copy if for him, is that a publication of the letter." Certainly it is, showing it to a third person; the writer cannot say to the person to whom the letter is addressed, 'I have shown it to you and to no one else.' I cannot, therefore, feel any doubt that, if the writer of a letter shows it to any person other than the person to whom it is written, he publishes it" (per Lord Esher, MR).

64. In this matter there was uncontested evidence that the Respondent`s ATMs are designed in a manner that they give privacy to their users and only one customer can access it at a time. There was evidence that the information of insufficiency of funds was only relayed to the Appellant. There was no evidence that the Respondent published the information to a third party. Indeed, the Appellant admitted in cross-examination that she is the one who informed her guests about the declined transaction. In that case there was no publication by the Respondent. The mere act of receiving a note from the Respondent to the effect that there were insufficient funds in her account which information the Respondent did not communicate to another person other than the Appellant did not amount to a defamatory statement. It is the Appellant who published the information to her third parties. If at all there was defamation, it is the Appellant who defamed herself, if there is such a thing as one defaming oneself. She cannot defame herself then turn the blame on the Respondent. I would therefore agree with the trial Magistrate that there was no publication of the words complained of by the Respondent and as such there was no defamation by the Respondent. The Appellant did not discharge her burden of proof on the matter.

65. The Appellant faulted the trial Magistrate for holding that she should have called witnesses to testify that they held the Appellant in low esteem after being informed of the impugned words. The claim for the Appellant was based on libel which is actionable perse without prove of damage. In Joseph

Gilbert Kibe v James Muchene Ngei & BOC Kenya Limited [2020] eKLR, where a similar argument was raised, Githua J. held that:

> In my view, the fact that libel is actionable per se does not exonerate the plaintiff from proving damage to reputation since this is an essential ingredient of the tort of defamation. It only means that the plaintiff is not required to prove special damage. The Court of Appeal addressed this issue in Selina Patani & Another v Dhiranji V. Patani, [2019] eKLR where the court held thus:
>
> "... In principle, defamation is actionable per se. This does not mean the ingredients of the tort must not be proved. It simply means you must prove the elements of the tort of defamation; what need not be proved is the damage suffered. If no damage is proved, a claimant may be entitled to nominal damages. .... It is in this context that we agree with the learned Judge that a person's own view about his/her reputation is not material in a claim for defamation; there must be evidence from a third party to the effect that the standing and reputation of the claimant has been lowered as a result of the defamatory publication..."

66. In view of the decision of the Court of Appeal in the latter case, the trial Magistrate was correct in holding that the Appellant should have called a third party to testify that the reputation of the Appellant was disparaged as a result of any defamatory publication.

67. Upon carefully examining the grounds of appeal, it is my finding that the learned trial Magistrate rightly dismissed the case.

Damages

68. The law required the Magistrate to assess the amount of damages he would have awarded the Appellant had she succeeded in the case. In Selle v Associated Motor Boat Co., (supra at P. 131), where Law J.A., observed that;

> It is always desirable, in a suit for damages, for the trial judge to make a finding as to the amount to which he thinks the plaintiff would be entitled if successful, even though he gives judgment for the Defendant. Much time and expense can be avoided if this course is followed.

69. The learned Magistrate did not comply with the above. I am bound to assess the damages. Considering that the Appellant was an advocate of the High Court of Kenya of 25 years standing and having regard to all the circumstances of the case, I would have awarded her Ksh.2,000,000/= in general damages for defamation.

70. The upshot is that the appeal is dismissed with costs to the Respondent.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF MAY 2023.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Makumi for Appellant

Mr. Kariuki HB for Mrs Wahinya for Respondent

Court Assistant – Amina

30 days Right of Appeal.