



REPUBLIC OF KENYA



KENYA LAW
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**Kitili v Sidian Bank (Civil Appeal 120 of 2019)
[2023] KEHC 20766 (KLR) (Civ) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20766 (KLR)

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

CIVIL

CIVIL APPEAL 120 OF 2019

CW MEOLI, J

JULY 21, 2023

BETWEEN

JULIUS GIDEON KITILI APPELLANT

AND

SIDIAN BANK RESPONDENT

*(Being an appeal from the judgment of S.G. Gitonga, RM delivered
on 1st February, 2019 in Milimani CMCC No. 3138 of 2017)*

JUDGMENT

1. This appeal emanates from the judgment delivered on 1st February 2019 in Milimani CMCC No. 3138 of 2017. The suit was commenced by a plaint filed on 10th May, 2017 by Julius Gideon Kitili, the plaintiff in the lower court (hereafter the Appellant) against Sidian Bank, the defendant in the lower court (hereafter the Respondent).
2. The claim for general damages was founded on defamation and alleged fraudulent demand for a non-existing loan. The Appellant pleaded that sometime in the year 2006 he obtained a loan from the Respondent for the purchase of shares in the company known as Kengen and his motor vehicle registration number KAA 046N was pledged as security for the loan. The Appellant further pleaded that upon settling the loan amount in full, he instructed the Respondent to close his loan account no. 01xxxxx118 (the loan account) vide the letter dated 15th March, 2013.
3. That notwithstanding, the Appellant averred, he received a letter from Nimble Group Kenya Ltd on 4th January, 2017 demanding settlement of the sum of Kshs.716, 191.14 with the Respondent, being the outstanding balance of the loan amount, which had been advanced to him. That the Appellant later came to learn upon approaching a separate bank, namely, Consolidated Bank of Kenya for a loan facility, that he had been listed by the Credit Reference Bureau (CRB) as a credit defaulter. That



- following his letter dated 20th March, 2017 demanding an admission of liability for wrongful enlisting of the Appellant with CRB, the Respondent by way of the letter dated 27th April, 2017 admitted to the error and further confirmed that the Appellant did not have any outstanding liabilities with the Respondent.
4. It was averred that as a result of the wrongful listing and wrongful demand for payment, the Appellant suffered psychological stress and embarrassment for which he sought compensation by way of damages.
 5. Upon service of summons, the Respondent entered appearance and filed a statement of defence on 28th June, 2017 denying the key averments in the plaint and liability. Alternatively, the Respondent pleaded negligence against the Appellant and setting out the particulars thereof in the statement of defence. At the hearing of the suit on 12th March, 2018 the Appellant testified whereas the Respondent called one (1) witness.
 6. Upon considering the evidence and submissions on record, the trial court reasoned that the Appellant had not proved his claim for defamation against the Respondent and therefore dismissed the suit with costs.
 7. Aggrieved with the outcome, the Appellant preferred this appeal to challenge the dismissal of the suit, relying on the following grounds captured in his memorandum of appeal dated 4th March, 2019:
 - 1) That the Learned Trial Magistrate misdirected herself in law and in fact in failing to address the issue of publication to the auctioneers in determining defamation.
 - 2) That the Honourable Magistrate misdirected herself in law and in fact in failing to hold that the publication to the auctioneers amounted to financial defamation of the Appellant.
 - 3) That the Learned Trial Magistrate erred in law and in fact in misinterpreting the provisions of Order 2 Rule 7 of the Civil Procedure Rules, 2010 Laws of Kenya.
 - 4) That the Honourable Magistrate erred in law and in fact in holding that the Appellant failed to prove loss and/or damage.
 - 5) That the Learned Magistrate erred in law and fact in totally disregarding the grounds cited by the Appellant is counsel and thereby based her ruling on wrong principles.
 - 6) That the Honourable Magistrate erred in law and fact and as a result arrived at a wrong decision to the prejudice of the Appellant.” (sic)
 8. The appeal was to be canvassed by way of written submissions. However, at the time of writing this decision, the court notes that the submissions by the Respondent had not been availed for consideration despite its counsel indicating to the court on 6th March, 2023 that the submissions would be filed by end of that day.
 9. Be that as it may, counsel for the Appellant anchored his submissions on the decision in Eunice Nganga v Higher Education Loans Board & 2 others [2020] eKLR to argue that the trial court ought to have acknowledged that following his wrongful and malicious listing by the Respondent with a CRB, the Appellant suffered loss and damage entitling him to damages. Counsel further argued that the trial court erred in not finding that the Respondent had acted negligently by failing to notify the Appellant of its intention to forward his name to CRB for listing. The trial court was further faulted for not taking into account the injury to the Appellant’s reputation resulting therefrom.
 10. Here, counsel citing the decisions in Phinehas Nyagah v Gitobu Imanyara [2013] eKLR and J Kudwoli & another v Eureka Educational and Training Consultants & 2 others [1993] eKLR regarding the



tort of defamation. He argued that the ingredients of defamation had been proved by the Appellant and the court ought to allow the appeal and to award the sums sought namely Kshs.2,000,000/- and Kshs.1,000,000/- as damages for defamation and fraudulent demand for a non-existing loan, respectively.

11. The court has considered the memorandum of appeal, the record of appeal, the pleadings and original record of the proceedings as well as the submissions on record. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle v Associated Motor Boat Co.* [1968] EA 123 in the following terms:

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by 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.

In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

12. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another v Duncan Mwangi Wambugu* [1982 – 1988] IKAR 278.
13. From the grounds of appeal, it is evident that the appeal lies against the decision by the trial court to dismiss the Appellant’s suit and the court is called upon to determine whether the trial court arrived at a proper and well-reasoned finding. As such, the court will address the six (6) grounds of appeal contemporaneously.
14. It is apparent that the Appellant’s cause of action was based on defamation, the key averments of which have already been set out hereinabove. Concerning the statement of defence, in addition to denying the averments made on liability, the Respondent stated the following in paragraphs 6 and 11 thereof:

“6. The Defendant denies the contents of paragraphs 6 and 7 of the plaint and puts the plaintiff to strict proof. In response the defendant avers that it is obligated as per the Credit Reference Bureau Regulations 2013 at section 50(4) to submit customer information to the bureau upon default by its client as per the regulations in the aforesaid section. The defendant further avers that a clients name cannot be forwarded to the Credit Reference Bureau if the client is faithfully servicing their loans and or is not indebted to the bank thereto.

...



11. Without prejudice to the foregoing, the Defendant avers that if at all there was defamation, which is denied then the same were wholly caused and/or substantially contributed to by the Plaintiff's own negligence.

Particulars Of Plaintiff's Negligence

- a. Failing to pay the Kshs. 716,194.14/= being the balance of the loan that was advanced to him by the Defendants herein.
 - b. Neglecting/failing to take notice of the various notification messages that were sent to him by the Defendant reminding him of the amount owed by him to the Defendant.
 - c. Neglecting/failing to respond to the aforesaid notification messages that were sent to him by the Defendant.
 - d. Neglecting/failing to inform the bank of the payments made to the defendant in settling the amounts owed thereto." (sic)
15. The trial court, upon setting out the ingredients of defamation as derived from precedent, some of which were cited in the Appellant's submissions on appeal, reasoned that it was not in dispute that the Appellant had at some point defaulted on his loan repayments necessitating the Respondent's action of forwarding this information to CRB. The trial court concluded that there was nothing to show that the action by the Respondent was malicious and defamatory, since upon the realization that there was an error in the listing, the Respondent took the necessary steps to inform CRB and to request for the delisting of the Appellant's name from the list of defaulters.
 16. It was the reasoning by the trial court that in any event, the particulars of defamation had not been set out in the plaint pursuant to the proviso of Order 2, Rule 7 of the Civil Procedure Rules and ultimately found that the Appellant had failed to prove his claim on defamation against the Respondent. It was also the reasoning by the trial court that the Appellant did not prove that he suffered any loss/damage as a result of the listing made by CRB. On those findings, the trial court proceeded to dismiss the Appellant's suit, while also assessing the damages it would have awarded had the Appellant's claim succeeded.
 17. In his oral evidence, the Appellant who was PW1 adopted his witness statement as his evidence-in-chief and proceeded to state that he obtained a loan with the Respondent in the year 2006, in the sum of Kshs.500,000/- and pledging the motor vehicle registration number KAA 046N as security. The Appellant stated that he settled the loan in March 2013 and duly instructed the Respondent to close his loan account, vide his letter produced as P. Exhibit 2. It was his evidence that later in the years 2016 and 2017 he received communications from Nimble Group Kenya Ltd, a debt collector, demanding payment of the sum of Kshs.716,191/- on behalf of the Respondent on an outstanding loan.
 18. That upon his advocate contacting the Respondent the latter apologized and sought to rectify his record with CRB. That since then, he has been unable to take out any loans with other financial institutions.
 19. In cross-examination, the Appellant admitted that he did not have any documentation to support his assertions that he had been denied loan facilities as a result of the listing with CRB. He also admitted that at some point he had defaulted on the loan repayments with the Respondent, inter alia. In re-examination, the Appellant stated that between 30th August, 2012 and 13th February, 2013 he did not make any payments towards the loan but that from the months of 13th February, 2013 and 15th March,



- 2013 he cleared the outstanding loan repayments. The Appellant stated that the Respondent ought to have removed his name from listing with CRB upon full repayment of his loan.
20. James Karanjo Mwangi who testified as DW1 identified himself as the Assistant Manager Debt Recoveries in the Respondent at the material time . He confirmed that the Appellant had approached the Respondent for the purpose of securing a loan for the purchase of shares in Kengen. The witness testified that the Appellant began defaulting on his loan repayments in February, 2012 and that he was listed with CRB in January, 2013. That in March, 2013 the Appellant approached the Respondent with a request to offset the loan through a payment plan, by which time, the latter had already engaged the services of a debt collector.
 21. That the Appellant eventually cleared the loan on 15th March, 2013 during which time a reconciliation process of the Respondent's old and new systems was ongoing. That the Respondent subsequently applied to have the Appellant delisted from CRB and which was done, as shown in the letters tendered as D. Exhibits 2 and 3. The witness concluded by adopting his signed witness statement.
 22. Under cross-examination, DW1 stated that the Appellant defaulted on his loan for a period of one (1) year from February, 2012 and that numerous reminders were sent via email requesting him to clear his loan arrears. That the Respondent did not inform the Appellant of the decision to list him with CRB. That the Respondent procured the services of a debtor collector in 2012 and again in 2016 although the Appellant had cleared his loan in 2013.He admitted that the Respondent was in error to send a debt collector in 2016 when the loan had been settled in full.
 23. In re-examination, he asserted that the law at the time did not require the Respondent to inform the Appellant of his listing with CRB. It was also stated that the listing error was rectified by the having the Appellant's name delisted from CRB.
 24. Upon consideration of the trial court record and the material tendered at the trial, it is apparent that the Appellant's claim against the Respondent was limited to the alleged defamatory information which was conveyed to CRB by the Respondent. From the Appellant's pleadings and testimony, there was no indication that the claim for defamation extended to the information passed on to the debt collector, ,an issue similarly not canvassed before the trial court for determination. Consequently, the court finds that grounds 1) and 2) of the appeal constitute new issues and cannot be raised on appeal.
 25. Black's Law Dictionary, 10th edition as cited by the Court of Appeal in the case of Nation Media Group v Gideon Mose Onchwati & Kenya Oil Company Limited [2019] eKLR defines the tort of defamation as:

“malicious or groundless harm to the reputation or good name of another by the making of a false statement to a third person.”
 26. The underlying rationale for the law of defamation was enunciated by the Court of Appeal in Musikari Kombo v Royal Media Services Limited [2018] eKLR in the manner hereunder:

“The law of defamation is concerned with the protection of a person's reputation. Patrick O'Callaghan in the Common Law Series: The Law of Tort at paragraph 25.1 expressed himself in the following manner:

“The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: 'As a general rule, English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporal sanction ...' Defamation protects a person's reputation that is the estimation in which he is



held by others; it does not protect a person's opinion of himself nor his character. 'The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit' and it affords redress against those who speak such defamatory falsehoods..."

27. In *Selina Patani & Another v Dhiranji V. Patani* [2019] eKLR the Court of Appeal succinctly stated that the law of defamation is concerned with the protection of a person's reputation, that is, the estimation in which such persons are held by others. The court went further on to set out the following:

"In rehashing, we note the ingredients of defamation were summarized in the case of *John Ward v Standard Ltd*. HCC 1062 of 2005 as follows:

- a. The statement must be defamatory.
- b. The statement must refer to the plaintiff.
- c. The statement must be published by the defendant.
- d. The statement must be false."

28. In order to succeed on his claim therefore, the Appellant was required to establish the above ingredients on a balance of probabilities. Upon re-examination of the material and evidence which was tendered at the trial, it is uncontroverted that the publication/report made to CRB was prompted by the Respondent and was in reference to the Appellant, as the trial court correctly found.

29. This appeal turns on the twin questions of whether the Appellant proved that the publication by the Respondent was false and defamatory. In this regard, Order 2 Rule 7(1) of the CPR provides as follows on the subject of particulars of defamation:

"(1) where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense."

30. In delivering its decision, the trial court correctly observed that the Appellant had failed to set out the particulars of the defamatory words which were published about him. Upon re-examination of the pleadings and record, the court notes that no particulars of the alleged defamatory words or their ordinary meaning were set out in the plaint. Even so, trial court proceeded to analyze the case before it in line with the ingredients associated with the tort of defamation.

31. On the question whether the Appellant had proved that the publication was defamatory of him, a defamatory statement is defined in *Halsbury's Laws of England* 4th Edition Vol. 28 paragraph 10 as:

"... a statement which tends to lower a person in the estimation of right-thinking members of society generally or to 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."

See also the Court of Appeal definition of a defamatory statement in *SMW v ZWM* (2015) eKLR.

32. The Court stated in *Elizabeth Wanjiku Muchira v Standard Ltd* [2011] eKLR that whether a statement is defamatory or not is not so much dependent on the intentions of the defendant but on the "probabilities of the case and upon the natural tendency of the publication having regard to the



surrounding circumstances. If the words published have a defamatory tendency it will suffice even though the imputation is not believed by the person to whom they are published.”-Clerks & Lindsell on Tort 17th Edition 1995-page 1018.”

33. In Musikari Kombo (supra) the Court of Appeal stated that:

“The test for whether a statement is defamatory is an objective one. It is not dependent on the intention of the publisher but on what a reasonable person reading the statement would perceive. In Halsbury’s Laws of England 4th Edition Vol. 28 at page 23 the authors opined:

“In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense.”

34. Based on undisputed material on record, the Appellant had benefited from a loan advance from the Respondent and while the Appellant cleared the loan in 2013, he admitted default in payments between 2012 and 2013 resulting in loan arrears. It is apparent that it is around this time that the Respondent forwarded his information to CRB.

35. This action was in accordance with its obligations in line with Section 31 of the *Banking Act* Cap. 488 Laws of Kenya which provides that: -

(2) Except as provided in this Act, no person shall disclose or publish any information which comes into his possession as a result of the performance of his duties or responsibilities under this Act and, if he does so, he shall, for the purposes of section 49, be deemed to have contravened the provisions of this Act.

(3) Notwithstanding the provisions of this section—

(a) the Central Bank may disclose any information referred to in subsection (2) to any monetary authority or financial regulatory authority, within or outside Kenya, where such information is reasonably required for the proper discharge of the functions of the Central Bank or the requesting monetary authority or financial regulatory authority fiscal or tax agency, fraud investigations agency;

(b) the Deposit Protection Fund Board institutions licensed under this Act and institutions licensed under the *Microfinance Act*, 2006 (No. 19 of 2006), institutions licensed under the *Sacco Societies Act*, 2008 (No. 14 of 2008), institutions registered under the *Co-operative Societies Act* (Cap. 490), public utility companies and any other institution mandated to share credit information under any written law shall, in the ordinary course of business and in such manner and to such extent as the Cabinet Secretary may, in regulations, prescribe, exchange such information on non-performing loans as may, from time to time, be specified by the Central Bank in guidelines under section 33 (4):

Provided that the sharing of information with institutions outside Kenya shall only apply where there is a reciprocal arrangement;

(c) the Central Bank and institutions licensed under this Act and institutions licensed under the *Microfinance Act*, 2006 (No. 19 of 2006) may, in the ordinary course of business, in such manner and to such extent as the Cabinet Secretary may, in



regulations prescribe, exchange such other information as is reasonably required for the proper discharge of their functions.

- (4) Without prejudice to the generality of subsection (3)(b) or (c), regulations under that subsection may provide for the establishment and operation of credit reference bureaus, for the purpose of collecting prescribed credit information on clients of institutions licensed under this Act, and institutions licensed under the *Microfinance Act*, 2006, and the *Sacco Societies Act*, 2008, and public utility companies and any other institution mandated to share credit information under any written law and disseminating it amongst such institutions for use in the ordinary course of business, subject to such conditions or limitations as may be prescribed.”
36. Moreover, the information forwarded by the Respondent to CRB and concerning the Appellant was protected under the CRB Regulations 2013, mandating the Bureau to protect the confidentiality of a customer’s information as received, and only to release such information to (a) the customer concerned, (b) the Central Bank, (c) a requesting subscriber and (d) a third party as authorized by the customer, or as required under the law.
37. The onus therefore fell on the Appellant to demonstrate that the Respondent’s publication regarding his default amounted to defamation. First, it was admitted by the Appellant that he had initially defaulted for about a year, but secondly, the Respondent’s initial action regarding the said default had legal sanction. How was the publication defamatory? There was no evidence tendered before the trial court to demonstrate that the said publication, as maintained with the CRB had the tendency of lowering the Appellant’s reputation in the eyes of right-thinking members of the public, indeed his pleadings were bereft of these mandatory particulars.
38. In Selina Patani’s case (*supra*), the Court of Appeal stated:
26. The other issue for our consideration is whether the Judge erred in finding it was imperative to call a third party to prove the appellants claim for defamation. 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. In this case, the legal issue is whether the appellants proved there was publication to a third party and injury or damage suffered to their reputation.
27. The evidence on record is the testimony by the 2nd appellant that her boss read the letter. The alleged boss was never called to testify. No other third party was called to testify as to the publication and injury to reputation. As to whether the appellant’s character and reputation was destroyed, there is no evidence on record from a third party stating that as a result of reading the impugned letter, the appellants reputation and standing in society was injured. 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. In the absence of third-party evidence, we find no error of law on the part of the Judge in arriving at the determination that the appellants did not prove their claim for defamation. (Emphasis added)
39. The Appellant did not tender any documentary or other evidence showing that he was denied subsequent loan facilities due to the report made to CRB or shunned in any way; in proving the element of defamation, it was not the Appellant’s view of himself that mattered.



40. The mutual evidence of the parties was that upon realization of a system error and the fact that the Appellant had cleared his loan, the Respondent took upon itself the responsibility of having the Appellant's name delisted from CRB.
41. DW1 explained that the error in the Appellant's loan records was likely due to the Respondent's transitioning from an old to a new system and that the error was rectified as soon as it was discovered. The rectification was confirmed by the Appellant in his testimony and also through the exhibits which were tendered at the trial. This negates any element of malice on the part of the Respondent, and the delayed delisting of the Appellant from the CRB does not in the circumstances of this case aid his claim.
42. Reviewing the foregoing, the court finds that the Appellant failed to prove two key ingredients of the tort of defamation, namely, that the publication by the Respondent to the CRB was false and was also defamatory. The court has already stated that the case in the lower court did not include any publication made to the debt collector in 2016.
43. This court is satisfied that the Appellant's suit was properly dismissed. The trial court analyzed the pleadings and evidence presented before it arrived at a correct finding. Consequently, the appeal is without merit and is dismissed with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 21ST DAY OF JULY 2023.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Ms. Ondijo

For the Respondent: Mr. Awino

C/A: Carol

