



REPUBLIC OF KENYA



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**Cooperative Bank of Kenya v Ongoya & another (Civil Appeal E048 of 2017)
[2023] KEHC 22460 (KLR) (Civ) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22460 (KLR)

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

CIVIL

CIVIL APPEAL E048 OF 2017

AA VISRAM, J

SEPTEMBER 21, 2023

BETWEEN

COOPERATIVE BANK OF KENYA APPELLANT

AND

ELISHA ONGOYA 1ST RESPONDENT

LEMMY NYONGESA MULAKU 2ND RESPONDENT

*(Being an appeal from the judgment dated 15th January, 2021 of Hon.G.A Mmasi
(Mrs.) Senior Resident Magistrate in Milimani CMCC Case No. 9662 of 2018)*

JUDGMENT

1. This judgment determines the Appellant's appeal dated 22nd December, 2021 vide its Memorandum of Appeal dated 1st February, 2021.
2. The Respondents who were the Plaintiffs before the trial court pleaded that on 23rd of December, 2010, the 1st Respondent received an SMS message from the Appellant in the following terms:-

New Debit Card Transaction

Date 23/12/10 11:34

Amount Kes 5994

Details =Nakumatt Ngong Rd>NairobiKE

Co-op Bank (254)020-2776000



3. The Respondents pleaded that the 1st Respondent had not used his visa card for any transactions, the aforementioned message therefore caused him mental anguish and stress. He had no option but to track down the source of the transaction, which led to him to Nakumatt, Ngong road.
4. Once he arrived at the supermarket, after a tedious exercise of searching numerous records, the staff were able to identify the transaction that matched the bank details. It turned out that the individual who carried out the transaction, the 2nd Respondent, was known to the 1st Respondent. Accordingly, the 1st Respondent led the Nakumatt staff to the 2nd Respondent's house to let the law take its course.
5. Upon arrival at the 2nd Respondent's home, and after investigation, it turned out that the 2nd Respondent had indeed made a purchase at the Nakumatt Ngong road, but had done so using his own account-linked credit card. He showed the card to the Nakumatt staff, who were present and they informed him that the card looked genuine.
6. Faced with the confusion over the event, the 1st and 2nd Respondents drove to the Appellant's Westlands branch, who ended up attributing the mix up to its IT department, who had relayed the message to the wrong number.
7. Based on the above scenario, the Respondents commenced a suit against the Appellant's alleging negligence on the part of the Appellant's staff, for which they claimed the Appellant ought to be held vicariously liable and sought general damages for mental stress and agony; and general damages for defamation in respect of the 2nd Respondent.
8. After conducting a hearing, the Magistrate in his judgment awarded the following together with costs of the suit.
 - a. General damages for stress and mental anguish Kshs.500,000/= for each Plaintiff.
 - b. General damages for defamation of the 2nd Plaintiff for Kshs.500,000/=.
9. Aggrieved by the said judgment, the Appellant has filed this appeal dated 1st February, 2021 on the following grounds:-
 - a. That the Learned Magistrate erred in law and in fact in failing to appreciate the proper effect and purport of the evidence before it and in arriving at a decision, which is not supported by and/or is manifestly against the weight of the evidence.
 - b. That the Learned Magistrate erred in Law and in fact by disregarding the totality of the Appellant's pleadings, submissions, cited authorities and as a result, arrived at materially unsupported findings of fact and Law.
 - c. That the Learned Magistrate erred in law and in fact by finding that the alleged erroneous text messages sent to the 1st Respondent had originated from the Appellant yet both the Respondents and the Appellants had pleaded explicitly of lack of knowledge of the origin of the same.
 - d. That the Learned Magistrate erred in law and in fact and misdirected herself by holding and insinuating that the decision by the Defendant's Customer's Relations Officer and the Branch Manager of their intention to investigate the issue concerning the alleged erroneous text message amounted or was equivalent to express admission that the erroneous text message had originated from the Bank.



- e. That the Learned Magistrate erred in law and misdirected herself by failure to appreciate the Respondents' testimony and express admission that they had no evidence or proof loss, injuries, stress or mental anguish.
 - f. That the Learned Magistrate erred in law and fact by finding that the Appellant had defamed the 2nd Plaintiff despite the express admission and confirmation by the Respondents that the text message had not originated from the Appellant.
 - g. That the Learned Magistrate erred in law and in fact and misdirected herself in failing to appreciate the uncontested evidence and facts that it is the 1st Plaintiff who had showed the 2nd Plaintiff the alleged text message and as such there could be no defamation by the Appellant.
 - h. That the Learned Magistrate erred in law and in fact by failing to appreciate the law and the elements of the defamation and particularly had been made by the Appellant to any 3rd party.
 - i. That the Learned Magistrate erred in law and in fact by failing to appreciate the law on admission of electronic evidence and particularly failing to appreciate the undisputed admission and confirmation by the Respondents at the trial that they had not provided certificate of electronic evidence to the alleged text message.
 - j. That the Learned Magistrate erred in law and in fact by failing to appreciate the admission by the Respondents to the effect had not filled in for SMS Alert in their respective Personal/Joint Account Application Form and as such the Bank did not have any obligation and duty to send any SMS alert and if any had erroneously sent to the Respondents as alleged, the Bank was not the author or the sender of the same.
 - k. That the Learned Magistrate erred in law and in fact to appreciate that the evidence on record to the effect that there was no evidence on record to show that the Appellant was negligent.
 - l. That the Learned Magistrate erred in law and in fact by failing to undisputed evidence on record and as record and as confirmed on cross examination that no money had been lost from their Respondent's respective bank accounts.
 - m. That the Learned Magistrate erred by pronouncing itself on issues that had not been raised before him and particularly by referring to the alleged listing of the Respondents by the Appellant yet the same had never been raised nor pleaded by any party.
 - n. That the Learned Magistrate general conduct and contemptuous demeanor at the trial court and particularly against the Appellant demonstrate partiality and denial of justice.
 - o. That the Judgment of the Honourable Magistrate is manifestly punitive against the Appellant and contrary to the overwhelming evidence and submissions of the Appellant.
 - p. That the Learned Magistrate erred in law and in fact by failing to find that evidence by the Plaintiffs' Witness Number 3 was inadmissible in court having confirmed in court that he had not signed his witness statement and that he was not an Advocate of Kenya as falsely alleged in his witness statement.
 - q. That the Learned Magistrate erred in law and in fact by shifting the burden of proof to the Appellant yet it is the Respondents that had the onus of proof in the circumstances.
10. The parties agreed to dispose this appeal by way of written submissions. They filed and served their respective submissions dated 26th January, 2023 and 10th February, 2023.



Appellant's submissions

11. The Appellant relied on the decision of the Court of Appeal in *Kemfro Meru Express Services [1976] & another vs Lubia & Another No.2 (1985) eKLR*, where the Court stated the principles set out concerning interference of an award as follows:-
 - a. Whether the Trial Magistrate took into account an irrelevant factor, or left out of account a relevant one when assessing damages.
 - b. Whether the amount awarded by the trial Magistrate is so inordinately high that it must be a wholly erroneous estimate of the damage.
12. The Appellant submitted that the Trial Magistrate took into account an irrelevant factor, being the source of the challenged SMS alert; and neglected to take into account a relevant factor, being the 2nd Respondent's failure to establish defamation against him. It submitted that the legal requirements for defamation had not been met.
13. The Appellant contended that it was the 1st Respondent who found the 2nd Respondent and informed him of the existence of the SMS alert. This was established during the trial, where he confirmed that he was not aware of the origin of the SMS message and could not prove that it had originated from the Appellant. This fact was corroborated by PW3.
14. The Appellant submitted that the Respondent had not proved the prayer of defamation against it. It relied on the decision of High Court in *Ernest Omondi & Another v Felix Olick & 2 Others (2021) eKLR*, the Honourable Court stated the test for defamation in the following terms:-

The test to determine whether a statement is defamatory is an objective one which depends on what a reasonable person on reading the statement would perceive. Halsbury's Laws of England 4th Edition Volume 28 states at Page 23 states:

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.

15. The Appellant contended that it was the 1st Respondent who went to look for the 2nd Respondent, showed him the message; and the 2nd Respondent had never received the message. Further, the message did not refer to any particular person and did not disclose the names of any of the Respondents.
16. As regards the quantum of damages, the Appellant contended that the amount in dispute was Kshs. 5,994/=, which neither party lost, and the Trial Magistrate granted the Respondents a total of Kshs. 1,500,000/=. This award was excessive in the circumstances.

The Respondent's submissions

17. The Respondents submitted that the Appellant forwarded a message intended for the 1st Respondent to the 2nd Respondent, causing them stress, mental anguish, and agony. As a result of the above, the 2nd Respondent was portrayed as someone who is unreliable and a fraudster to the Nakumatt staff and the 1st Respondent.



18. Further, that the ordeal, as outlined above caused them stress, anguish and fear that they had been duped by fraudsters. The 1st Respondent averred that he was enroute to Nakuru and was forced to divert to Ngong Rd and engage in the tedious process of locating the source of fraud.

19. The Respondents relied on the decision of High Court in Joseph Njogu Kamunge v Charles Muriuki Gachari (2016) eKLR, where the court held as follows in relation to defamation:-

“Black's Law Dictionary defines defamation as "the act of harming the reputation of another by making a false statement to a third person." The book Gatley on Libel and Slander authoritatively states that a statement is defamatory of the person of who it is published if it tends to lower him in the estimation of right thinking members of the society generally or it exposes him to public hatred, contempt or ridicule or it causes him to be shunned or avoided. A Plaintiff in a defamation case must prove that the words were spoken or written by the Defendant, that those words refer to him/her, that those words are false.”

20. They submitted that the existence of the SMS alert was uncontested. The bank manager assured them that the bank would investigate the transaction, and the Appellant had acknowledged the event on the day of the event.

21. As regards damages, the Respondents submitted that the award by the lower court was appropriate in the circumstances. They relied on the decision of the High Court in Julius Munga Ndungi v John Maina (2020) eKLR, where the court cited Butt v Khan (1977) 1KAR, Law JA, stated as follows:-

“ An appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and arrived at a figure which was either inordinately high or low.” Similarly in the case of Kenya Breweries Ltd [1991] eKLR it was held that,“It is now well established that this Court can only interfere with a trial judge's assessment of damages where is it is shown that the judge has applied wrong principles or where the damages awarded are so inordinately high or low that an application of wrong principles must be inferred.....”

Analysis and determination

22. As this is a first appeal, I have a duty to re-evaluate the evidence before me. This principle as set out in the Court of Appeal decision of Selle and Another Versus Associated Motor Boat Company Ltd & Others [1968] EA 123, where the court stated that:-

“ 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 conclusion. 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 in some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally.”



23. I have reviewed the record in its entirety and I have considered the grounds of appeal raised by the Appellant. I have also considered the rival submissions of the parties. The issues that arise for determination are:-
- i. Whether the Appellant had defamed the 2nd Respondent
 - ii. Whether the award of damages was excessive?

Issue No.1: Whether the Appellant had defamed the 2nd Respondent

24. The Black's Law Dictionary 8th Edition defines defamation as:-

“The act of harming the reputation of another by making a false statement to a third person. A false written or oral statement that damages another's reputation”.

25. Further to the above, Halsbury Laws of England 4th Edition Vol. 28 at paragraph 22, states that the defamatory words in question must also refer to the Plaintiff. It states the following:-

“The proper purpose of an action of libel or slander is to vindicate the reputation of the person defamed, and accordingly, the proper and the only party to bring the action is the person actually and personally defamed. This is not enough that the words reflect on the persons properly; there must also be imputation against the Plaintiff personally...” (emphasis mine)

26. The test to establish defamation was articulated in the Court of Appeal decision of *Miguna Miguna v Standard Group Limited & 4 others* [2017] eKLR, where the court stated as follows:-

“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.”



27. Applying my mind to the test as set out above, and based on the facts in the present matter, I am satisfied that the test has not been met. I am guided by the decision of the Court of Appeal in *S M W v Z W M* [2015] eKLR, where the court stated as follows:-

“A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided.”

27. Looking at the publication above, read in the ordinary way and given its ordinary meaning, I do not think, on the face of it, the publication lowers the esteem of the 2nd Respondent in the minds of right-thinking members of society. PW2 admitted this when he testified “the SMS I was shown did not show anything defamatory”.

28. Based on the reasons above, I am satisfied that the lower court reached the wrong conclusion in relation to its finding on defamation and the same is accordingly set aside.

29. Having stated the above, I am satisfied that the Appellant ought to be held accountable for the so called ‘IT mix- up’. The system belongs to the bank and is under its exclusive control. To my mind, the subject matter in question, being Kshs. 5,994/= is immaterial, the real issue is that this could have been any amount, and the same error may have persisted for an indeterminate amount of time had the 1st Respondent not noticed the transaction and taken great pains to rectify the error.

30. In this regard, I am satisfied that the lower court reached a reasonable conclusion with regard to its finding on negligence. The Magistrate stated, and I am in agreement, that a bank owes a duty to its customer “to exercise reasonable care and skill with regard to its operations within its contract to its customers”. And further, that “the failure by the Defendant to exercise skill in relaying an erroneous message as I have found above, was in this Court’s opinion a breach of its duty to exercise reasonable skill and care. The Plaintiffs do not share an account or at all a phone number and a relaying of the wrong message can only be a sign of the bank’s failure in exercising its skill and care.”

31. Based on the reasoning as stated above, I decline to interfere with the lower courts finding in relation to the negligence of the Appellant.

32. As regards the appropriate quantum of damages. I am guided by *Kemfro Meru Express Services* (supra) in terms of the applicable principles under which an appellate court would interfere with an award for damages. Addressing my mind to the same, I am persuaded that the lower court’s award was indeed inordinately high. I note that neither of the parties submitted authorities or suggested alternative figures to the present award. Therefore, based on the facts in the present matter, I am of the view that the sum of Kshs. 300,000/= each would be sufficient to compensate the Respondents and I hereby adjust the award of the lower court accordingly.

33. Based on the reasons as set out above, the appeal succeeds in part. Accordingly, each of the parties shall bear their own costs. The orders of this court are as follows:-

- a. The finding of liability for defamation against the Appellant in the lower court and subsequent award of Kshs. 500,000/= for the 2nd Respondent is hereby set aside.
- b. The award of general damages for stress and mental anguish in the lower court in the sum of Kshs. 500,000/= for each of the Respondents is hereby reduced to Kshs. 300,000/= for each Respondent.
- c. Each of the parties shall bear their own costs of the appeal.



DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 21ST DAY OF
SEPTEMBER 2023

ALEEM VISRAM

JUDGE

In the presence of;

.....For the Appellant

.....For the Respondent

