



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 520 OF 2017**

**STANLEY T. MUGACHA.....APPELLANT**

**VERSUS**

**CFC STANBIC BANK.....RESPONDENT**

***(Being an appeal arising from the Judgment in Milimani Chief Magistrate's court***

***civil suit No. 6316 of 2015 –dated 15<sup>th</sup> September, 2017 by M/s. I. Gichobi Senior Resident Magistrate***

**JUDGMENT**

1. Stanley Mugacha (the appellant) sued CFC Stanbic Bank (the respondent) in the Milimani Chief Magistrate's court civil suit No. 6316 of 2015. He sought damages based on the following prayers;

- (i) General damages, aggravated and exemplary damages.
- (ii) An apology for declining the plaintiff's debit card,
- (iii) Costs of the suit plus interest.
- (iv) Any such further relief or other relief the court may deem just to grant.

The prayers were said to be as a result of the suffering he went through when the defendant denied his debit card.

2. The respondent filed a defence denying the claim. It denied maliciously and unreasonably causing the appellant's debit card transaction of June 10<sup>th</sup> 2015 to fail.

3. The matter proceeded to full hearing with each party calling one witness. Judgment was finally entered in favour of the respondent as the appellant's suit was dismissed with costs.

4. The appellant being aggrieved by the judgment filed this appeal through the firm of J. Makumi & Co. advocates. The grounds raised are as follows:

*a) That the learned trial magistrate erred in law by dismissing the plaintiff's suit when the evidence tendered before the court was overwhelming to sustain a claim for defamation.*

*b) That the learned trial magistrate erred in law in finding that the elements and/or the thresh hold for defamation was not met by the plaintiff.*

*c) That the learned trial magistrate erred in law in finding that more witnesses were required to testify with regards to the particulars of defamation.*

*d) That the learned trial magistrate erred in law by completely disregarding the appellants submissions on the evidence, facts and issues before court which should have persuaded her to reach a different conclusion.*

*e) That the learned trial magistrate erred in law in not awarding damages, entering judgment as well as awarding costs and interests.*

5. The appellant who testified as PW1, stated that on or about 10<sup>th</sup> of June 2015 he attempted to run his debit card at Nation Centre so as to pay for an obituary of his cousin when his card was declined for reasons of insufficient funds yet he had a credit balance of Kshs. 475,514/=. He stated that being an auctioneer of over 20 years experience he was held in high esteem by his family, friends and the Nation fraternity. The incident portrayed him as fraudster.
6. He further stated that for a fact the defendant declined his card out of malevolence, spite, malice and without regard to the banking rules and practice. He had tried to amicably settle this matter and did invite the defendant to make an apology to him and compensation for damage caused but the defendant refused to admit liability despite him issuing notices to sue.
7. The respondent testified through one witness (DW1) who averred that the debit card transaction failure was not caused by any malice and the said transaction did not depict the appellant as a fraudster, a person of improper moral standing or any of the meanings ascribed. Further that the connectivity issues the appellant experienced were failures or malfunctions which were caused by circumstances beyond their control. Otherwise the transaction was approved by the respondent and an approval code sent to the merchant.
8. Parties agreed to dispose of the appeal by written submissions which were promptly filed.
9. J. Makumi & Company advocates for the appellant filed submissions dated 17<sup>th</sup> June 2021. On ground (1) counsel submitted that the appellant demonstrated that he swiped his card at Nation Centre as acknowledged by the respondent's defence and their testimony too. On this counsel relied on the case of **Nairobi HCCC No.13 of 2014 Habihalim Company Limited v Barclays Bank of Kenya Limited (2019) eKLR** where Justice Serگون had this to say on the relationship and duties of a bank to its customers:

*“Having disposed of the preliminary issue I now turn back to the first twin issues. It is the evidence of PW1 that the unpaid bankers’ cheque was never returned to the plaintiff by the defendant but the plaintiff was only informed by the beneficiary that the cheque was returned due to insufficiency of funds by the beneficiary’s bank Citi bank. According to the defendant the cheque was actually marked “refer to drawer” and not insufficient funds as intimated by PW1. 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.”*

10. He further relied on the case of **Wairimu Muturi & Another v James Thuku & Another (2018) eKLR** where it was stated:

*“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 vs 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.”*

11. It is his submission that the appellant received “an insufficient funds” message and the message could only have been sent by the respondent as it is common knowledge that it is only the bank which could have information as to the customer’s funds. Counsel further contends that the trial court merely accepted the defendant’s allegation of connectivity issue as gospel truth without interrogating whether it was true or if it fell among circumstances beyond the respondent’s reasonable control.
12. He therefore urges that if the learned magistrate had interrogated this vis a vis the testimonies then she ought to have found that there was no way a system with connectivity issues could read a card, transmit the authorization message and send back an approval message unless it was tampered with to relay wrong information which would still make them liable. He submitted that the POS machine properly transmitted instructions from Nation Centre POS to the respondent and vice versa. There was therefore no connectivity problem and it did not fall within circumstances beyond the respondent’s reasonable control.
13. On ground (2) counsel submitted that the appellant had demonstrated that the respondent sent an “insufficient funds” message which was false and he was embarrassed in front of his kins and clients the Nation Media Group. They shunned him as a result of this false communication and ridiculed him as being broke yet pretending to be rich. Counsel submitted that the appellant was not expected to call the Nation Media Group as witnesses to confirm they were no longer shunning him as this would have reminded him of something he wanted to forget.
14. He referred to section 143 of the Evidence Act which was emphasized in the case of **Fanuel Mackenzie Akoyo v Republic Kisumu Criminal Appeal No 45 of 2006** where the court held as follows:

*“The contention that the evidence of PW4 and PW6 should have been corroborated by independent evidence has, respectfully, no legal basis. By section 143 of the Evidence Act:*

*“No particular number of witnesses shall, in the absence of any provision of law to the contrary be required for the proof of any fact.”*

*Further in Abdalla bin Wendo and Another v. R [1953] 20 EACA 166 the court said in part at page 168:*

*“Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness.....”*

*The cases in which the corroboration of evidence is required as a matter of law are provided by law and are well known. There is no provision of law that the evidence of police officers should be corroborated by independent evidence. After all what matters in each particular case is not the quantity but the quality of evidence -see **Kihara v. Republic [1986] KLR 473**. And whether the sole evidence of police officers in any particular case will be sufficient ultimately depends on the credibility of the police witness."*

15. He further relied on the case of **Nairobi HC.CR No. 172 of 2007 Charles Kariuki Mure v Republic (2009) eKLR** Mary Kasango J & M.S.A Makhandia J (as he then was) had this to say on 30<sup>th</sup> January 2009 on the law relating to the number of witnesses to be called:

*"with regard to witnesses who were not called, as a matter of law, there is no requirement that any number of witnesses be called to prove a particular fact. See for instances section 143 of the Evidence Act. We are not aware of any requirement that a case cannot be proved on the evidence of a single witness. Indeed it is not the quantity but quality of the evidence that counts. In the circumstances of this case we do not see what would have been gained by the prosecution calling members of the public who responded to the distress call and or PW1's mother who was in the vehicle "*

16. Counsel further submitted that it's not in issue that the respondent admitted the use of the words "insufficient funds" and in its evidence testified that the appellant was not defamed because his card was not blocked and was functional at ATMs, POS machines and online.

17. On this argument counsel relied on the case of **Habihalim Company Limited v Barclays Bank of Kenya Limited** (supra) where the Learned judge observed as follows when addressing the words "insufficient funds" being defamatory thus;

*"In seeking to determine what would amount to defamation, I make reference to the definition given by the Court of Appeal in **Musikari Kombo v Royal Media Services Limited [2018] eKLR**, cited by the defendant as follows:*

*"As succinctly put by this Court in **S M W vs. Z W M [2015] eKLR:-***

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

The Court of Appeal further 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."*

18. In the foregoing, he submitted that a message of "insufficient funds" as long as it is false is defamatory more so when the same is made in the presence of others who held the plaintiff in high esteem. He contends that it is not in dispute that the appellant had sufficient funds in his account and he was in company of his kins. The message of "insufficient funds" was communicated by the cashier and that he was an auctioneer and did business with the Nation Media Group. It is therefore not true that the appellant walked away to go and look for the funds elsewhere without inviting the attention of other people at the Nation Centre as held by the learned magistrate.

19. Counsel urges the court to find that the respondent's message was defamatory to the plaintiff's reputation and the trial court's finding that the appellant did not meet the threshold for defamation was an error.

20. On ground (3) he submitted that the appellant submitted at length on the elements of defamation, their jurisprudential interpretation and analyzed the facts and evidence of their case. He argued that the learned trial magistrate not only disregarded the submissions but she did not even point out her point of departure from the said jurisprudence and the legal provision she relied on in disregarding the express provisions of section 143 of the Evidence Act.

21. On ground (4) he again relied on the case of **Habihalim Company Limited v Barclays Bank of Kenya Limited** (supra) and contended that the court having found that a message by the defendant indicating that the plaintiff had insufficient funds was defamatory to the plaintiff and the learned judge awarded damages as follows;

*"On quantum the plaintiff has asked this court to award it damages of ksh.6 million. The defendant is of the view that the plaintiff is not entitled to damages. Having found the defendant liable for breach of contract and for defamation, I am convinced that the plaintiff is entitled to be paid damages. The figures suggested by the plaintiff in my view appear to be exorbitant. A sum of ksh.4 million appears to be reasonable. The plaintiff is awarded ksh.4,000,000/= plus costs of the suit. The aforesaid sum to attract interest at court rates from the date of judgment until full payment. The prayer for exemplary and punitive damages is refused since the same is not justified."*

22. Counsel therefore urges that the assessment of damages by the learned magistrate at Kshs. 300,000/= and which was not supported by case law is low under the circumstances. As guided by the case of **Habihalim Company Limited v Barclays Bank of Kenya Limited** (supra) he argues that the appellant is entitled to exemplary, punitive and general damages assessed at Kshs. 4,000,000/= as well as costs for

both the trial court and this appeal.

23. The respondent's submissions dated 30<sup>th</sup> June 2021 were filed by Mohammed Muigai Advocates. It is counsel's submissions that a statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule or contempt or which causes him to be shunned or avoided or which has the tendency to injure him in his office, profession or calling. On this counsel relied on the case of **John Ward v Standard Limited (2006) eKLR** which outlined the ingredients of defamation to be 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.

24. He submitted that based on the evidence adduced, the trial court correctly held that the appellant did not meet the threshold for defamation and did not demonstrate that;

- a) The alleged offending words referred to him
- b) The alleged offending words were defamatory or false
- c) They were published by the respondent.

25. He contends that the general principle demands that the defendant be given due notice of the case he has to meet. Therefore, the statement of claim should allege in respect of each publication relied on as a case of action, that the words were published by the defendant on a specific occasion, to a named person other than the plaintiff.

26. Counsel referred to the case of **Gatley on Libel and Slander Ninth Edition paragraph 26.11** which discusses the importance of setting out the words complained of. In libel the words are the material facts and must therefore be set out verbatim in the statement of claim preferably in the form of a quotation. It further discusses that it is not enough to describe their substance, purport or effect. The law requires that the very words of the libel be set out in the declaration in order that the court may judge whether they constitute a ground of action.

27. In his submissions, counsel stated that the requirements for particulars to be set out is to ensure that one has a proper case to put before the court and is not a merely fishing for one. On this counsel relied on the decision in **Collins v Jones (1955)2 ALL ER 145** and adopted in **HCCC No. 1369 of 2003 Hon. Nicholas Kipyator Kiprono Biwott v Hon Paul Kibugi Muite & Anor** (unreported). The court in that decision held that:

*"in libel and slander the very words complained of are the facts on which the action is grounded. It is not the facts of the defendant having used defamatory expressions, but the fact of his having used those defamatory expressions alleged which is the fact on which the case depends..... "If he cannot give the particulars he cannot be allowed to go on with the charge".*

28. He submitted that it was evident that the plaintiff did not set out the words used in reference to him and further during the hearing he could not say the exact words used in reference to him. That the failure to set out the alleged defamatory words means that the appellant did not discharge the burden of proof and the plaintiff's claim did not disclose any cause of action. On this, counsel relied again on the case of **Hon. Nicholas Kipyator Kiprono Biwott (supra)** where the court stated:

*"...it is quite evident that as in the case of libel where material propositions or facts have been omitted the right to sue does not exist and therefore cannot be a reasonable cause of action and the court is clearly entitled to strike out the plaint. In the case of libel the words used are the material facts and there cannot be a cause of action whatsoever without the material facts."*

29. He goes on to urge that the award of damages sought by the appellant lacks judicial basis or justification and therefore urges the court to be guided by the holding by Lord Hailsham in **Cassel & Co. Ltd v Broome (1972) 1 ALL ER 801** where it was held that:

*".....properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways –as a vindication of the plaintiff to the public, and as consolation to him for a wrong done. Compensation is here a solarium rather than a monetary recompense for harm measurable in money."*

30. Counsel further submits that the appellant did not demonstrate that he was publicly defamed to warrant grant of the reliefs sought and that the damages sought are manifestly excessive that they go beyond vindicating or consoling him for the alleged wrong done. On this counsel urged the court to be guided by the decision of the Court of Appeal in **Ken Odondi & 72 Others v James Okoth Omburah T/a Okoth Ombura & Company Advocates (2013) eKLR** where it was held that;

*"I would think that in the instant case to arrive at what could have been said to be a fair and reasonable award the learned trial Judge could have drawn considerable support in the guidelines in **Jones v. Pollard [1997] EMLR 233.243** and where a checklist of compensatable factors in libel actions were enumerated as:-*

- 1) The objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published, and any repetition.
- 2) The subjective effect on the plaintiff's feelings not only from the prominence itself but from the defendant's conduct thereafter both up to and including the trial itself.
- 3) Matters tending to mitigate damages, such as the publication of an apology.
- 4) Matters tending to reduce damages.
- 5) Vindication of the plaintiff's reputation past and future.

..... Having therefore reviewed the whole matter and all the relevant factors that go into the award of damages which we have enumerated in this judgement we are persuaded that the appellants complaint that the award of Kshs. 7,000,000/= as general damages is on the high side, not without merit. The same followed a pattern where damages were awarded at large and which as Justice Tunoi showed in the "Gicheru case" lacked judicial basis or justification. Trial judges awarded damages without attempting in any way to find a balance between the damage done to claimants against other factors."

31. Counsel therefore prays that the court be guided by the authorities he has relied on and dismiss the appellant's appeal with costs and uphold the decision of the trial court.

### **Analysis and Determination**

32. This is a first appeal and this court has a duty to re-examine and re-evaluate the evidence on record and arrive at its own conclusion. It should also bear in mind that it did not see nor hear the witnesses and give an allowance for that. See **Selle & another Vs. Associated Motor Boat Co. Ltd & others (1968) E.A 123; Gitobu Imanyara & 2 others v Attorney General [2016] eKLR.**

33. Having considered the grounds of appeal, evidence on record and both submissions and authorities cited I find the main issue falling for determination to be:

a) *Whether the Respondent established the necessary ingredients to prove the tort of defamation and if so, whether he was entitled to damages.*

34. Winfield on Tort gives the following definition of defamation: - "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."

On the other hand, **Halsbury's Laws of England** defines a defamatory statement as:-"A defamatory statement is 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."

35. An authority often cited as definitive on defamation is **Gatley on Libel and Slander** who wrote this, as was adopted in **Thomas v CBC 1981 4 WWR 289** follows: -

*"The gist of the torts of libel and slander is the publication of matter (usually words) conveying a defamatory imputation. 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. The standard of opinion is that of right-thinking persons generally. To be defamatory an imputation need have no actual effect on a person's reputation; the law looks only to its tendency. A true imputation may still be defamatory, although its truth may be a defence to an action brought on it; conversely untruth alone does not render an imputation defamatory."*

36. 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 thinking 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 who should demonstrate that a reasonable man would not have understood the words otherwise than being defamatory.

37. 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 neighbor. 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..."*

38. A perusal of the impugned judgment shows that the appellant ran his debit card at the Nation Centre to pay for an obituary for his cousin only for the card to be declined for having insufficient funds. He says this happened while he was with some of his family members and friends which was embarrassing as he was highly rated as a well-respected auctioneer of 20 years standing. On the other hand the respondent through DW1 stated that it did approve the transaction and sent the authorization code to the point of sale (POS) whose machine it does not own. That the failure of the machine could not be attributed to them and that the circumstances in this case were beyond their control.

39. The alleged defamatory words are: “insufficient funds” when indeed the appellant had funds in his account. The respondent has denied issuing the words complained of. I have on the other hand noted that the document or receipt containing the words complained of was never produced as evidence before the trial court. This was key considering the fact that the respondent claims to have approved the transaction.

40. The appellant claims to have been defamed because at the time of the transaction he was with some of his relatives and friends who he never called as witnesses so that the court could be able to get their side of the story. At the same time there was no indication of the scene at the Nation Centre for the alleged failed transaction. The person from Nation Media Group who gave this report to the appellant should have testified and produced the document or receipt.

41. Reputation is an integral and important part of the dignity of an individual and once besmirched by an unfounded allegation damages one’s reputation forever, especially if there is no opportunity to vindicate it. See **Nation Media Group Ltd & 2 others v John Joseph Kamotho & 3 others (2010) eKLR** where the court stated:

*“In assessing damages in an action for defamation the court has to consider the particular circumstances of each case, the plaintiff’s position and standing in society, the mode and extent of publication, the apology, if offered and at what time of the proceedings, the conduct of the defendants from the time when libel was published up to the time of judgment.*

*In determining damages, I am alive to the principle that the sums should be fairly compensatory in the light of the nature of the injury to reputation and that a restrained hand in the award of damages is desirable since the court must maintain stable bearing. The award should also appear realistic in all the circumstances.”*

42. I find nothing in the judgment of the lower court or even in the arguments advanced by the appellant’s counsel to suggest that the learned magistrate erred in awarding less the damages. What the learned trial magistrate stated was that had the claim been proved she would have made an award of Kshs 300,000/= as general damages.

43. All in all I find the words ‘insufficient funds’ not to be defamatory “per se” since there was no proper explanation to the origin of these words. No one from the Nation Media Group testified to say something about the machine said to have had connectivity issues. The respondent insisted that it approved the payment and it could not explain what may have happened since it did not own the machine. The document said to have had the words complained of was never produced. Secondly this was a personal document meant for the account holder. The machine does not shout for every Tom and Dick to hear that an account holder has “insufficient funds.” The appellant did not explain how the relatives, friends and Nation Media people knew about the message on the piece of paper. More evidence ought to have been adduced.

44. In the case of **SMW vs ZVM [2015] eKLR**, the Court of Appeal held that in determining the words for purposes of defamation, the court does not employ legal construction but that the words complained of must be construed in their natural and ordinary meaning.

45. In our day to day operations we have experienced issues to do with bank transactions and which the bank has no control over. These are machines and they sometimes make errors which can only be corrected by the bank. It would be unfair to the banks if everyone experiencing such hiccups would run to court for compensation or to be awarded damages. This case is not different.

46. Upon assessment of the evidence on record and the law, I find that the learned trial magistrate analyzed the evidence and the law well and arrived at the correct decision that the claim for defamation was not proved. I uphold the learned magistrate’s decision and dismiss the appeal with costs.

**DELIVERED ONLINE, SIGNED AND DATED THIS 7TH DAY OF OCTOBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.**

**H. I. ONG’UDI**

**JUDGE**