



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 89 OF 2018**

**REV. JOSEPH MAINA MWAURA.....APPELLANT**

**VERSUS**

**EQUITY BANK OF KENYA LIMITED.....DEFENDANT/RESPONDENT**

**(Being an appeal against the judgment of the Senior Resident Magistrate Hon. L. Lewa delivered on 27<sup>th</sup> April 2018 in SRM CC NO. 1331 of 2016 Mombasa)**

**JUDGMENT**

1. The appellant herein, who was the plaintiff before the lower court, sued the respondent through the plaint filed on 10<sup>th</sup> July 2016 seeking the following orders

***(a) A declaration that reporting of the Plaintiff to the Credit Reference Bureau by the Defendant was unlawful and illegal***

***(b) A declaration that the Defendant breached the duty of care it owed the Plaintiff by reporting the Plaintiff to the Credit Reference Bureau as a loan defaulter.***

***(c) General, punitive, exemplary and aggravated damages against the Defendant for breach of fiduciary duty of care for behavior that can only be punished by an order for adequate general and aggravated damages be assessed with reference to the loss by the church because of the Defendant's unlawful action. The amount should be in a sum that would be felt by the Respondents so that the Respondents will not in the future behave in a similar manner.***

***(d) General damages***

***(e) Costs of this suit***

***(f) Any other relief this court may deem fit and appropriate.***

2. A summary of the appellant's case was that sometime on or about 14<sup>th</sup> October 2011 he obtained an Asset Finance Loan of Kshs. 600,000/= from the respondent which loan he paid in full on or about 15<sup>th</sup> November 2013. He states that despite having settled the loan and being issued with a letter of discharge dated 26<sup>th</sup> November 2013, the respondent still listed him as a defaulter with the Credit Reference Bureau (CRB) thereby ruining his reputation as an upright church minister and further, preventing his church from securing loans with other financial institutions.

3. The respondent defended the suit through its statement of defence filed on 15<sup>th</sup> August 2016 in which it denied all the allegations made by the appellant. After taking the evidence of the parties at a hearing, the trial court held that the appellant had proved his case to the required standards and awarded him general damages in the sum of Kshs. 700,000/= as compensation for the defamation.

4. The appellant was however dissatisfied with the amount awarded for damages and filed the instant appeal in which he set out the following grounds of appeal:-

***(a) The learned Magistrate erred in law and in fact by failing to consider the evidence of the Appellant and that of his witness when awarding damages.***

***(b) The learned Magistrate failed to consider the fact that because of the Respondent's malicious act, the Appellant's church was denied a loan of Kshs. 1,000,000/=***

***(c) The learned judge (sic) failed to consider the Appellant's ruined reputation and standing in the society when awarding the damages.***

***(d) The learned Magistrate failed to consider the authorities on quantum cited by the Appellant when awarding the damages.***

***(e) The learned Magistrate erred in law in fact by awarding damages that were too low considering the Appellant's reputation and damaged caused by the Respondent's malicious act.***

5. At the hearing of the appeal, Mr. Wachira learned counsel for the appellant submitted that the trial Magistrate did not explain how he arrived at the award of Kshs. 700,000/= general damages as the said award was on the lower side and not commensurate with the award made in similar cases. For this argument, counsel relied on the decision in the case of ***Bishop Margaret Wanjiru v The Nairobi Star Publications Nairobi HCC 445 of 2012***, wherein an award of Kshs. 2 million general damages was made for libel and Kshs. 1,000,000/= for exemplary and punitive damages.

6. The appellant's counsel also faulted the trial court for failing to make any award for aggravated damages despite the fact that the respondent remained adamant and did not bother to tender any apology to the appellant even after having served with a demand letter.

7. In a rejoinder to the appellant's submissions, Miss Nzava, learned counsel for the respondent supported the trial court's decision and argued that the award of Kshs. 700,000/= general damages made to the appellant was sufficient. She added that an appellate court should not interfere with the trial court's discretion in making an award in damages except in specified circumstances.

8. On aggravated damages, counsel submitted that the same is pegged to the actual injury suffered by a party and that in this case, the appellant did not suffer any injury so as to entitle them to an award of punitive damages. For this argument, counsel relied on the decision in ***Whiten v Pilot Insurance Co. 2002 SCC 18***. Wherein the essential points for an award of punitive damages were set out as follows:-

***(a) "Punitive damages are very much the exception rather than the rule;***

***(b) Imposed only if there has been high handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behavior;***

***(c) Where they are awarded, punitive damages should be assessed in an amount reasonable proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant;***

***(d) Having regard to any other fines or penalties by the defendant for the misconduct in question;***

***(e) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation;***

***(f) Their purpose is not to compensate the plaintiff, but to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence, and to mark the community's collective condemnation (denunciation) of what has happened; and***

***(g) Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and they are given an amount that is no greater than necessary to rationally accomplish their purpose"***

9. I have considered the record of Appeal and the submissions of counsel for the parties and note that the issue for determination is whether there was an error made in the trial court's finding on the quantum of damages. It is trite law that award of damages are ordinarily made at the court's discretion which discretion an appellate court cannot interfere with except under certain specified circumstances.

10. The principles which guide an appellate court when faced with the question of whether or not it should interfere with an award of damages were stated in ***Kemfro Africa Ltd v Lubia And Another, (1987) KLR 30***, where Kneller JA identified the principles as follows:-

***"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former court of appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage."***

11. Similarly, in the case of ***Shabani V City Council of Nairobi (1985) KLR, 516***. The Court of Appeal equally held as follows:-

***"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate based on some wrong principle or on a misapprehension of the evidence."***

12. In the instant case, I note that upon finding that the appellant had proved his case to the required, the trial court made the following observations before pronouncing itself the amount payable to the appellant in damages.

***“I have considered the claim, and noting the consequences resulted (sic) by defendants conduct/action of forwarding the plaintiff's name to the bureau an act which has depicted him as dishonest person with low integrity and has similarly damaged his reputation to his congregants and society at large and makes him not to be able to access a financial facility from any financial institution, I herein find a sum of Kenya Shillings Seven Hundred Thousand (Kshs. 700,000/=) as most suitable compensation under general damages.***

***The plaintiff is equally awarded costs of the suit at Court rates.”***

13. Having regard to the above findings of the trial court. I am satisfied that in determining the award payable to appellant, the said court considered the claim in a wholesome manner and took into account the consequences of the respondent's action in listing the appellant in CRB before finding that an award of Kshs. 700,000/= was suitable in the circumstances of the case. I am unable to find that the said award was so *inordinately high or low as to represent an entirely erroneous estimate or that is was based on some wrong principle or on a misapprehension of the evidence.* I therefore decline the appellant's invitation to interfere with the said award.

14. Consequently, I find that the instant appeal is not merited and I therefore dismiss it with orders that each party shall bear his/its own costs.

**Dated and signed at Nairobi this 29th day of October 2019**

**W. A. OKWANY**

**JUDGE**

**Dated, signed and delivered in open court at Mombasa this 14<sup>th</sup> day of November 2019.**

**ERIC OGOLA**

**JUDGE**

**In the presence of:**

Mr. Wachira for appellant

No appearance for respondent

Mr. Kaunda – Court Assistant