



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL CASE NO. 242 OF 2014**

**KENA HOLDINGS LIMITED.....PLAINTIFF**

**V E R S U S**

**CONSOLIDATED BANK OF**

**KENYA LIMITED.....DEFENDANT**

**JUDGMENT**

By plaint dated 28<sup>th</sup> July, 2014 the Plaintiff herein seeks the following reliefs against the Defendant:-

- a. Special damages for penalties levied against it at Kshs. 10,000/-.
- b. Damages for general breach of contract.
- c. Aggravated damages for defamation and character assassination.
- d. Exemplary damages.
- e. Pecuniary damages for loss of interest on the Kshs. 175,705.20/-
- f. Interest on (a), (b), (c) (d) and (e) from the date of filing suit until payment in full.

The Plaintiff's case as pleaded is that it was at all material times a customer of the Defendant holding a savings account at the Defendant's Harambee Avenue branch, Nairobi; that on or about 9<sup>th</sup> December, 2013 an Electronic Funds Transfer for Kshs. 175,705.20/- was received by the Defendant on behalf of the Plaintiff. That on that presumption the Plaintiff caused two cheques to be drawn in favour of Rose Sharon Academy where its Director's children attend school.

The cheques numbers 1000011 and 1000013 amounted to Kshs. 163,000/-; that the cheques were returned unpaid with statements that the Plaintiff had insufficient funds to honour the said cheques; that the cheques' recipient levied penalties amounting to Kshs. 10,000/- against the Plaintiff; that for failure to honour its contractual obligation the Defendant assassinated the character of the Plaintiff and that of its directors, defamed them and lowered their moral standing in the estimation of the right thinking members of society.

The particulars of defamation, character assassination and embarrassment are set out in paragraph 9 of the Plaint. The alleged natural and ordinary meaning or innuendo of the alleged defamatory statements are also set out in the same paragraph.

It is further pleaded that the Defendant communicated and disseminated the intentional false and defaming communication to other parties with an advice statement being broadcast to all its departments.

By virtue of the said act of the Defendant, the Plaintiff's Directors and their children have been brought into public scandal, odium and contempt in the estimation of right-thinking members of society and their peers, including being labelled as criminals as the issuance of a bounced cheque is a criminal offence.

The Defendant entered appearance on 29<sup>th</sup> September, 2014 but did not file defence. Interlocutory Judgment was entered against it on 6<sup>th</sup> November 2014. The matter was then fixed for formal proof.

At the hearing, only the Plaintiff's Director, Job Kariuki Kamondia testified (as PW1). He adopted his witness statement filed together with the Plaint as his evidence-in-chief. The Plaintiff's bundle of documents was produced and marked **P. Exhibit.1**. I have considered the testimony of the witness. I have also considered the Plaintiff's written submissions and the authorities cited.

It has not been disputed that the Defendant dishonoured a cheque issued by the Plaintiff wrongfully as funds were available and no legal barrier existed at the time. This amounted to breach of contract and the Plaintiff requires is entitled for injury to his credit.

As for damages, the Plaintiff had more than sufficient money in its account for its Directors to pay their Children's school fees by cheque. Due to the mistake of the Defendant, it followed that the Plaintiff's credit would no longer be relied upon and its Directors would now be forced to go out of their way to obtain cash and deposit it in the school's account.

When it comes to damages, the Court of Appeal (Platt JA) in **Shiraku vs Commercial Bank of Africa [1988]eKLR** pronounced itself thus -

***“The right to redress has been built up cautiously as Sheridan J’s view of the cases in Patel v National and Grindlay’s Bank Ltd., [1969] E.A 76 shows. A further development is now necessary, for several reasons:***

- 1. The basis lies in the contractual relationship of customer and banker, but with the added element of the payee built in. The bank knows that the drawer has obliged himself to pay the payee and it is for this reason that the banker’s action strikes at the credit worthiness of the drawer of the cheque which remains of great importance. A cheque should be equivalent to cash. Section 5 of the Penal Code treats it as such.***
- 2. There is nowadays very little difference between the trader and another person. It does not need great circumspection to perceive the insidious danger that loss of credit involves. It is not only the attitude of the payee himself that is involved, it is his method of seeking redress that may widen the area and draw in others. The payee must decide not to receive any more cheques, but what if he broadcasts that fact by a general notice or involves the drawer’s employer? What is the position of the public servant who must avoid debts? It is easy to see that the payment of rent, school fees and professional fees, taxes, as well as grocery bills depend just as much on the credit of the drawer of the cheque as the trader paying for items of commerce.***

***It may be urged that cheques are nowadays dishonoured in greater numbers than ever, and that therefore no great harm is done, either to the trader or non-trader. It does not relieve the position of the honest trader or non-trader to be lumped together with unscrupulous persons. If anything it makes it worse. The credit aspect of cheques should be preserved.***

***There can be found no real juridical difference between any class of persons whose cheques are dishonoured. It is therefore time for Lord Tenterden’s words to bear full fruit, even such fruit as he himself failed to grasp. To wrongly dishonour any cheque is to do some injury in fact. If that is right, then it is not necessary to plead and prove damages.”***

That said, PW1 in his testimony alluded to the fact that the publication by the Defendant to third parties of the defamatory statements ‘insufficient funds’ and ‘bounced cheque’ led to levying of charges on the children's Account; he could no longer issue personal cheques to the school not to mention the ridicule he went through.

It is true that any reasonable person who came across the defamatory statements would have no hesitation at all in concluding that the Directors of the Plaintiff were dishonest, lacked integrity and were not men of honour.

These statements were defamatory of the Plaintiff and on liability therefore the Plaintiff has proved its case on a balance of probabilities.

The communication from the Defendant was written and thus constitutes libel. Libel is actionable *per se*; the Plaintiff need not prove any injury as long as the words complained of are defamatory of his character and reputation.

Compensatory damages will be awarded in order to vindicate the Plaintiff in the eyes of the public and to compensate him for the injury caused to their reputation and character. In assessing compensatory damages, the court will take into account the distress, hurt and humiliation which the defamatory publication has caused the plaintiff. The court will consider the gravity of the libel: the more closely it touches the Plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his/her personality, the more serious the libel is likely to be. See the case of *Johns -vs- MGN Limited [1996] All ER 34*. It was also stated in that case that -

***“The extent of publication is also very relevant; a libel published to millions has a greater potential to cause damage than a libel published to a handful of people. A successful plaintiff may properly look to an award of damages to vindicate his reputation; but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place. It is well established that compensatory damages may and should compensate for additional injury caused to the Plaintiff's feelings by the defendant's conduct of the action, as when he persists in an unfounded assertion that the publication was true, or refuses to apologise, or cross-examines the plaintiff in a wounding or insulting way.”***

The court will thus consider the conduct of the defendant after the defamation, and even the conduct of the plaintiff; whether or not there has been a satisfactory apology or attempt at correction of the wrong impression created; whether there has been malicious and/or insulting conduct and whether the plaintiff was accorded an opportunity to give his side of the story in order to correct the wrong impression created.

The Defendant in the present case published an apology when they wrote a letter dated 18<sup>th</sup> February 2014 to the Plaintiff acknowledging reversal of the charges levied on the account and apologizing for any inconvenience caused to the Plaintiff. It can be construed from the Defendant's conduct that the statements were not actuated by malice. Exemplary damages which will normally be awarded to punish the Defendant, primarily where the defamation was actuated by malice are thus uncalled for.

The Plaintiff called only one witness, one of the directors of the Plaintiff. There was no independent person called that the defamation harmed the Plaintiff's directors' characters in their eyes or how the statements changed their view of the Directors' character and reputation. However, this does not take away anything from the very grave nature of the defamation committed.

Courts must guard against unduly high awards in defamation cases. This would have the effect of encouraging more and more defamation litigation.

Aggravated damages will normally be awarded where, by his conduct, the Defendant has aggravated the defamation. It will also depend on the nature of the defamation and various other factors. Aggravated damages don't seem justified in the present case. The prayer for pecuniary damages for loss of interest was not proved.

A global award of KShs. 2 million seems reasonable as general damages. The Plaintiff also pleaded and

proved Kshs. 10,000/- being the charges levied by the school for the bounced cheques. There will be judgment for the Plaintiff for that sum against the Defendant. Special damages attract interest from the date of filling suit while general damages attract interest at court rates from the date of judgment until payment in full.

The Plaintiff will also have costs of this suit together with interest thereon at court rate. There will be judgement accordingly.

*Dated, signed and delivered at Nairobi this 9<sup>th</sup> day of July, 2015*

**A. MBOGHOLI MSAGHA**

**JUDGE**