



Patrick Kimiti Mureithi t/a P. K. Mureithi & Co Advocates v Bank of Africa Kenya Ltd (Civil Appeal 141 of 2018) [2024] KECA 417 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KECA 417 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 141 OF 2018
K M'INOTI, M NGUGI & F TUIYOT'T, JJA
APRIL 26, 2024**

BETWEEN

**PATRICK KIMITI MUREITHI T/A P. K. MUREITHI & CO
ADVOCATES APPELLANT**

AND

BANK OF AFRICA KENYA LTD RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Jaden, J.) dated 27th February 2018 in HCCC No 270 of 2009)

JUDGMENT

1. At all material times, the appellant, Patrick Kimiti Mureithi, an advocate of the High Court of Kenya practising in the name and style of P. K. Mureithi & Company Advocates, had a customer-banker relationship with the respondent, Bank of Africa Kenya Ltd., a duly registered financial institution under the Banking Act, cap. 488 laws of Kenya. The appellant maintained and operated two bank accounts, an office account and a client account, at the respondent's branch at Reinsurance Plaza, Nairobi.
2. On 15th January 2009, the appellant drew on the office account two cheques, cheque No. 974379 for Kshs. 29,920.00 (first cheque) payable to the Law Society of Kenya and cheque No. 974380 for Kshs. 1,500.00 (second cheque) payable to the Advocates Benevolent Fund. When the two cheques were presented for payment, the respondent honoured the first cheque, but declined to pay the second, which it marked "R/D" (Refer to Drawer). It is common ground that at the time the second cheque was presented and returned unpaid, the appellant's office account was not in credit.
3. When the appellant complained to the respondent about the dishonoured cheque, the latter sent a letter of apology on 23rd February 2009 explaining that the problem arose because of new personnel who did not know the relationship between the appellant's two accounts. The respondent reversed



a penalty of Kshs. 3,000 it had imposed on the appellant for the dishonoured cheque. On the same day, the respondent wrote to the Law Society of Kenya, who were threatening to initiate disciplinary proceedings against the appellant for the dishonoured cheque, explaining that the appellant's cheque was returned unpaid because of a problem not of his making. The respondent further paid to the Law Society of Kenya the Kshs. 1,500 due on the dishonoured cheque, as well as an additional Kshs. 2,000 which the Society had levied on the appellant as a penalty.

4. On 21st May 2009, the appellant filed a suit in the High Court against the respondent for libel. In the suit, which was amended on 22nd April 2009, the appellant pleaded that there was a custom established by practice between the parties whereby the appellant held minimal amounts in the office account. Even if the said account was not in credit, the respondent would nevertheless grant the appellant an overdraft, which made it possible to honour cheques drawn on the account. Subsequently, the appellant would put the office account into sufficient funds. The appellant pleaded that the custom ensured that at no time would any cheque drawn on the office account be returned unpaid, whether or not there were sufficient funds in the account, and constituted a representation by the respondent to that effect.
5. It was further pleaded that the dishonour of the second cheque was in breach of the custom and that the words "R/D" (Refer to Drawer) inscribed on the cheque were defamatory and that in their natural and ordinary meaning meant and were understood to mean that the appellant:
 - a. intentionally issued a cheque despite knowing that the account had insufficient funds;
 - b. was guilty of criminal conduct;
 - c. an advocate of thirty seven (37) years standing, had no sense of professional ethics;
 - d. was guilty of professional misconduct; and
 - e. was impecunious.
6. Lastly, the appellant pleaded that the respondent's correspondence, waiver of penalty and the payments it made to the Law Society constituted admission of liability. Accordingly, the appellant prayed for general damages for libel, exemplary damages, costs and interest.
7. By its amended defence filed on 29th April 2010, the respondent denied liability and pleaded that it had not granted the appellant any overdraft because there was no overdraft agreement executed between the parties. The respondent further admitted having returned the second cheque unpaid for the reason that it was drawn on an account that did not have sufficient funds. As regards the custom relied on by the appellant, the respondent pleaded that the appellant's client account was expressly governed by the [Advocates Act](#) and the Advocates (Accounts) Rules which prohibited the respondent from applying any right of set off on an advocates' client account and withdrawal of any money from the client account in contravention of the rules.
8. The respondent further denied that the words "R/D" (Refer to Drawer) were defamatory of the appellant and pleaded that the words were true in substance and fact, the particulars of truth being that at the time the second cheque was presented for payment, the appellant's office account did not have sufficient funds and that the respondent could not, in contravention of the [Advocates Act](#), apply funds from the client account to regularise the office account.
9. The respondent denied that it had admitted liability and averred that the payments it made and its correspondence with the appellant and the Law Society operated as accord and satisfaction of the



- appellant's claim and amounted to discharge from liability. Accordingly, the respondent asked the court to dismiss the appellant's suit with costs.
10. The suit was heard by Jaden, J., with the appellant testifying on his behalf, and the respondent calling one witness. After considering the evidence and the law, the learned judge found that although the respondent had previously honoured the appellant's cheques when his account was overdrawn, the appellant had not executed an overdraft agreement and that the terms and conditions governing his accounts expressly provided that in the absence of an overdraft agreement, the respondent could refuse to carry out instructions which could result in an overdraft. Accordingly, the learned judge found that the respondent's failure to honour the second cheque was not wrongful and could not, in the circumstances, form the basis of a claim in defamation. If the claim had succeeded, the learned judge indicated that she would have awarded the appellant Kshs 2,000,000.00 as general damages, but would not have awarded any exemplary damages. Ultimately the learned judge dismissed the appellant's suit, but directed each party to bear their own costs. The appellant was aggrieved and preferred this appeal.
 11. The appeal is founded on five grounds, but avoiding repetition and clear overlaps, the appeal raises three issues, namely, whether the learned judge erred by:
 - i. ignoring the evidence of established practice between the parties whereby the respondent would honour the appellant's cheques even though the account was overdrawn;
 - ii. relying on the evidence of the respondent's witness who was probably not an employee when the cheque in question was dishonoured; and
 - iii. failing to find that the dishonour of the cheque constituted libel.
 12. The appellant and the respondent filed written submissions dated 4th October 2018 and 31st October 2018, respectively. When the appeal came up for highlighting of the submissions, Mr. Masese, learned counsel, appeared for the appellant and opted to rely on the written submissions. There was no appearance for the respondent, although its advocates were duly served with a hearing notice.
 13. On the first issue, the appellant's submission is that the banker-client relationship between the parties was a fiduciary relationship in which the appellant placed complete trust and confidence in the respondent as regards the management of his bank account. The decision of the High Court in *Kilimani Junior Academy Ltd. v. S. M. Nzioki* [2012] eKLR regarding the nature of a fiduciary relationship was cited. It was the appellant's further submission that the parties had an established custom and practice whereby the respondent would honour the appellant's cheques even though the account was overdrawn. The appellant referred to four instances, when, he contended, the respondent honoured his cheques even though the accounts were in debit, which in his view constituted an overdraft. It was further submitted that it was absurd for the respondent to honour cheques for much higher amounts and decline to pay a relatively small cheque for Kshs. 1,500.
 14. On the second issue, the appellant submitted that during the banker-customer relationship, he dealt with four officers of the respondent, namely Mr. Gitonga, Mr. Gichuki, Mr Mwangangi and Ruth, who were better placed to testify about the established custom and practice. It was contended that the learned judge erred in relying on the evidence of Sylvester Kivindu alone, even though, in the same breath, the appellant conceded that the witness corroborated the custom and practice between the parties.
 15. On the last issue, the appellant faulted the learned judge for failing to hold that his character and reputation had been damaged by the dishonour of the cheque. It was contended that at the material time the appellant was an advocate of 36 years standing, without blemish, which the learned judge failed to consider. Relying on this Court's decision in *Hon. Musikari Kombo v. Royal Media Services*



- Ltd [2018] eKLR, the appellant submitted that the law recognises a person's character and reputation and protects him from false statements to his discredit. He contended that because of the established custom and practice, the respondent had no justification in dishonouring the second cheque, which in the circumstances constituted libel. On the authority of the decision of the High Court in Otieno-Omuga & Ouma Advocates v. CFC Stanbic Bank Ltd [2015] eKLR, the appellant submitted that wrongful dishonour of a cheque presented by a third party may constitute libel.
16. Lastly, on quantum of damages, the appellant submitted that he was entitled to a global sum of Kshs. 6,000,000 as general damages. In support of the quantum the appellant relied on Otieno-Omuga & Ouma Advocates v. CFC Stanbic Bank Ltd (supra), Santowels Ltd v. CFC Stanbic Bank Ltd [2018] eKLR and Equity Bank Ltd & another v. Robert Chesang. The appellant therefore, urged the Court to allow the appeal with costs.
 17. Opposing the appeal, the respondent submitted, as regards the first issue, that the appellant did not adduce any evidence of a custom or practice that obliged the respondent to honour cheques drawn on an account in debit. It was contended that there was no overdraft agreement in force between the parties and that by dint of clause 1 of the General Terms and Conditions governing the operation of the appellant's accounts, in the absence of an overdraft agreement, the respondent could refuse to carry out any instructions that would result in an overdraft. The respondent argued that the second cheque was returned unpaid because, at the time of presentation for payment, the appellant's account was overdrawn and that under the General Terms and Conditions, the respondent was not obliged to honour that cheque in the absence of an overdraft agreement. The decision of this Court in National Bank of Kenya Ltd v. Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR was relied upon to submit that the courts will only enforce parties' agreements rather than re-write them.
 18. It was the respondent's further submission that even if it had previously honoured the appellant's cheques drawn on an overdrawn account, that was a voluntary indulgence that could not give rise to a cause of action in the face of the clear provisions of the General Terms and Conditions. Further, that the previous exercise of discretion by the respondent in honouring some cheques when the account was overdrawn did not confer on the appellant a right to similar discretion in future transactions. It was also contended that to change the General Terms and Conditions to entitle the appellant to an overdraft as of right required another agreement in writing, which was not done. In support of these submissions, the respondent relied on the decision in Kenya Breweries Ltd v. Kiambu general Transport Agency Ltd [2000] eKLR to the effect that a nudum pactum agreement gives rise to no cause of action.
 19. On the second issue regarding the respondent's witness, it was submitted that the relationship between the appellant and the respondent was regulated by a written contract which the appellant admitted and therefore there was no basis to fault the respondent's witness. It was also the respondent's submission that if the appellant considered that there were more relevant and material witnesses in the employment of the respondent, he could have summoned them, which he failed to do.
 20. On the last issue, the respondent submitted that since the refusal to pay the second cheque was not wrongful, then it did not constitute libel. It was contended that the words "Refer to Drawer" on the second cheque indicated that at the time of presentation, there were insufficient funds in the appellant's account, which was true in substance and in fact and therefore, cannot constitute defamation. For the above reasons the respondents urged the Court to dismiss the appeal with costs.
 21. There are a number of facts that are not in dispute in this appeal. The customer-banker relationship between the parties was regulated by the General Terms and Conditions dated 13th September 2007. That agreement did not oblige the respondent to honour the appellant's cheques when his office account was overdrawn. There was no overdraft agreement between the appellant and the respondent.



On four previous occasions, the respondent had nevertheless honoured the appellant's cheques even though his office account was in debit. On the date when the second cheque was presented for payment, the appellant's office account did not have sufficient funds and the respondent refused to honour the same. The cheque was marked "R/D" (Refer to Drawer) and returned unpaid to the Law Society of Kenya and in the fullness of time the respondent made good the payment as well as some penalty levied on the appellant. The respondent also wrote a letter of apology to the appellant.

22. The first issue in this appeal calls upon us to determine whether, in the circumstances and from the evidence on record, there was a custom by practice whereby the respondent represented to the appellant that it would always honour his cheques every time they were drawn on the account when it did not have sufficient funds.
23. The relevant part of clause 1 of the General Terms and Conditions provided as follows:

“Where no overdraft has been agreed or the limit of overdraft agreed has been reached, the Bank may nevertheless refuse to carry out any instructions which would result in there being an overdraft or any overdraft greater than that agreed as the case may be.”(Emphasis added).
24. In interpreting the above clause, the Court is called upon to give effect to the intendment of the parties as expressed therein. In *Attorney General of Belize v. Belize Telecom Ltd* [2009] 2 All ER 1127, Lord Hoffman, L. J. stated the duty of the court in determining the intendment of the parties as follows;

“[T]he court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed ... It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.” (Emphasis added).
25. Black's Law Dictionary (8th Ed., Thomson & West, 2004) defines an “overdraft” as “a withdrawal of money from a bank in excess of the balance on deposit.” Under the General Terms and Conditions signed by the parties, for the appellant to enjoy an overdraft as of right, there had to be an overdraft agreement between the parties. It is common ground that the appellant and the respondent did not enter into such an agreement. In our view, the General Terms and Conditions are crystal clear that in the absence of an overdraft agreement, whether to honour the cheque or not when the appellant's account had insufficient funds depended on the discretion of the respondent. The parties freely left that discretion to the respondent, which could refuse to pay a cheque drawn on the account when it had insufficient funds.
26. If that be the case, then the mere fact that the respondent had previously honoured the appellant's cheques when there were insufficient funds in the account cannot create in the appellant an enforceable right to an overdraft. To do so would be contrary to the express agreement between the parties. As submitted by the respondent, to alter the written General Terms and Conditions required another agreement in writing, which the parties did not enter into. Therefore, the payment of cheques by the respondent when the account had insufficient funds did not constitute a custom by practice that negated the parties' agreement in the General Terms and Conditions. It was nothing more than exercise of discretion, which under the General Terms and Conditions was vested in and exercisable by the



respondent. The respondent could pay or decline to pay such cheques at its discretion. By the terms agreed upon between the parties, the appellant could not compel the respondent to pay cheques drawn on an account with insufficient funds, in the absence of an overdraft agreement.

27. The appellant's complaint in the second issue is difficult to comprehend, not the least because of its lack of certainty. From the way the appellant drafted the relevant ground of appeal, he is not sure whether or not the respondent's witness, Sylvester Kivindu, was an employee of the respondent at the material time. He merely asserts that the witness "was probably not even an employee at the time the cheque was dishonoured." The Court cannot be requested to make a firm finding on the basis of such speculation. More intriguing, even after casting doubt on the witness, the appellant is happy to rely on the evidence of the same witness in so far as his evidence confirmed that the respondent had previously honoured some of the appellant's cheques when his account did not have sufficient funds.
28. More substantively, however, the appellant neither objected to that witness nor applied to the trial court to summon the officers from the respondent that he deemed to have more relevant evidence. Having failed to do so, he cannot turn around and complain about the witness that the respondent called and whom the appellant cross-examined. We are satisfied that there is absolutely no merit in this ground of appeal. In fact, the evidence that the appellant wished his preferred witnesses to adduce, namely, that the respondent had honoured his cheques when his accounts did not have sufficient funds, was adduced by Sylvester Kivindu and the respondent never denied honouring the cheques.
29. The last issue is whether the trial court erred in holding that in the circumstances of this case, the respondent was not liable to the appellant for libel. To succeed in a claim for libel, the appellant was obliged to prove three elements, namely that the words "R/D" (Refer to Drawer) were defamatory, that they referred to him and that they were published to a third party. The second and third elements are not in dispute in this appeal. The only question as regards libel is whether, in the circumstances of the case, those words were defamatory. In its amended defence, the respondent put up the defence of justification and averred that the words complained of by the appellant were true in fact and substance.
30. The defence of justification is a complete answer to a claim in defamation. A long time ago, Littledale J. in *M'Pherson v. Daniels* [1829]10 B&C 263, explained why justification is a complete defence:

"The law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not, to possess."
31. In this appeal, the inscription of "R/D" (Refer to Drawer) by the respondent on the appellant's cheque meant that at the time the second cheque was presented for payment, the appellant's account had insufficient funds. That was true and the appellant admits as much.
32. Having found that there was no established custom between the parties which obliged the respondent to honour the appellant's cheques when his accounts were overdrawn, the second cheque was properly returned unpaid in exercise of the respondent's discretion under the General Terms and Conditions which were binding on the parties. To the extent that there were insufficient funds in the appellant's account when the second cheque was presented for payment, the inscription on the cheque was true in fact and substance and cannot therefore form the basis of a valid claim in libel.
33. For all the foregoing reasons, we are satisfied that this appeal has no merit and the same is hereby dismissed with costs to the respondent. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL 2024.

K. M'INOTI

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**JUDGE OF APPEAL
MUMBI NGUGI**

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**JUDGE OF APPEAL
F. TUIYOTT**

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JUDGE OF APPEAL

I certify that this is a true copy of the original

SIGNED

DEPUTY REGISTRAR

