



**Kenya National Bank of Kenya Ltd v Mwangi (Civil Appeal  
1 of 2018) [2023] KEHC 23323 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23323 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CIVIL APPEAL 1 OF 2018  
J WAKIAGA, J  
OCTOBER 12, 2023**

**BETWEEN**

**KENYA NATIONAL BANK OF KENYA LTD ..... APPELLANT**

**AND**

**SIMON MUKUNJU MWANGI ..... RESPONDENT**

*(Being an appeal from the judgement and decree of the Chiefs Magistrates Court at murunga delivered on 14th December 2017 by Hon R.A. Ogayo CM in CMCC NO 57 of 2016)*

**JUDGMENT**

1. By a plaint filed in Court on the 14<sup>th</sup> November 2014, the Respondent sued the Appellant together with Metropol Credit Reference Bureau Ltd for general damages for defamation in respect of an alleged publication by the Appellant in Metropol Credit Reference Bureau Ltd to the effect that the Respondent had an outstanding loan of Kshs.27,633,242.96 Million as a result of the said publication the Respondents loan application with Unaitas Sacco was rejected.
2. It was contended that the said publication amounted to a label as the Respondent's reputation was injured and his estimation lowered in the estimation of right-thinking members of society.
3. By a defence filed on the 9<sup>th</sup> day of December 2014, the Appellant stated that the Respondent's claim was statute barred by dint of the provision of Section 4(20) of the Limitation of Actions Act and stated that it had granted the Respondent credit facilities at his own request which he defaulted in repaying and therefore shared the Respondents credit information with a dully licenced Credit Reference Bureau in terms of Section 31 of the Banking Act and Regulations therein, which cannot be understood to bear or capable of bearing or being understood to bear any meaning defamatory to the Respondent.
4. It was further contended that the sharing of the Respondent's credit information was done on an occasion of qualified privilege as the Appellant was under a duty to do so.



5. Based on the above pleadings and upon full hearing the Court found that the Respondent had established on a balance of probability his claim against the Appellant by publishing an erroneous credit report and awarded the same damages for defamation to their sum of Kenya shillings 5,000, 000, together with cost and interest thereon.
6. Being aggrieved by the said determination, the Appellant filed this appeal and raised the following grounds of appeal:
  - a. The Court erred in failing to sufficiently consider whether as pleaded, the same disclosed a cause of action in defamation.
  - b. The Court erred and misdirected herself in considering the merit of the Respondents claim and sailed to establish that the Respondent had been denied a financial facility by another financial institution on account of the matters complained of against the Appellant.
  - c. The Court erred and misdirected herself in law and fact in finding, against the weight or evidence tendered during trial, that the Respondent had been denied a financial facility by another financial institution on account of the matters complained of against the Appellant.
  - d. The Court erred and misdirected herself in law and fact in finding, against the weight of evidence tendered during trial, that the Respondent had, on account of the matters complained of against the Appellant been led into selling a property that he never wished to sell.
  - e. The Court erred and misdirected herself in law and fact in finding against the weight of evidence tendered during trial and the applicable legal principles, that the Respondent had proved its case against the Appellant.
  - f. The Court erred and misdirected herself in law ad fact by failing to consider or sufficiently consider the submissions made on behalf of the Appellant and the authorities binding on her relied upon in that respect on behalf of the Appellant and thereby arriving at a manifestly wrong decision holding the Appellant liable for libel.
  - g. The Court erred and misdirected herself in law and and fact in finding that the Respondent suffered loss on account of the matters complained of against the Appellant which was against the weight of evidence tendered during trial.
  - h. The Court erred and misdirected herself in law and fact in assessing and making an award in general damages in favour of the Respondent against the Appellant in the sum of Kshs.5,000,000 which is manifestly excessive as to represent an entirely erroneous estimate.
  - i. The Court erred and misdirected herself in law and fact in assessing and making an award in general damages in favour of the Respondent against the Appellant in the sum of Kshs.5,000,000 by failing to take into account relevant factors and thereby arriving at an entirely erroneous estimate.
  - j. The Court erred and misdirected herself in law and fact in assessing and making an award in general damages in favour of the Respondent against the Appellant in the sum of Kshs.5,000,000 by taking into account relevant factors and thereby arriving at an entirely erroneous estimate.

## **Submissions**

7. Directions were issued that the appeal be disposed of by way of written submissions and on behalf of the Appellant it was submitted was contended that the Court failed to consider whether the



- Respondent's case disclosed a cause of action in defamation as the Respondent failed to particularise the words alleged to have been defamatory against him thereby rendering his suit incompetent as was stated in the case of *Dr. Lucas Ndungu Munyua vs Royal Media Services Limited & another* [2014] eKLR.
8. It was submitted that since the Respondent never pleaded the actual statements allegedly published about him his claim cannot be maintained as for the Plaintiff to successfully prove defamation, he must satisfy the Court that the statement was defamatory, it was false and referred to him, and maliciously published by the Defendant to a third party as was stated in the case of *Jamlick Gichuhi Mwangi vs Kenya Commercial Bank Ltd and another* [2016] eKLR.
  9. It was contended that the trial Court took a very narrow view of the matter before her by failing to appreciate the evidence tendered to the effect that the Respondent was indebted to the Appellant and therefore the Appellant was under an obligation by law to share the information whether it was positive or negative and that the error as to the actual amount outstanding was explained by the witnesses. It was stated that the Appellant was protected in law where it acted in good faith by virtue of Section 31(50) of the *Banking Act* and therefore the magistrate arrived at a wrong conclusion.
  10. It was submitted that the Court failed to consider the fact that the Respondent did not follow the correction of error procedures in respect of Credit information shared and that the suit was filed without exhaustion of the mechanisms provided and thus did not have the capacity to institute suit in respect of the alleged cause of action as the suit was premature.
  11. On an award of damages, it was submitted that the same was excessive since it was based on an erroneous estimate and that the same if the Respondent had proved his case should not have been in excess of Kshs.500,000 in support of which the case of *Jamlick Gichuhi Mwangi* (supra) was tendered.
  12. On behalf of the Respondent, it was submitted that the same proved all the elements of the case and that the false information given by the Appellant were actuated by malice based on the conduct of the Appellant and as was stated in *Barclays Bank of Kenya Ltd v Francis Manthi Masika & Co Advocates* [2020] eKLR malice does not mean spite or ill will but recklessness itself may be evidence of the same based on the relationship between the parties.
  13. On the issue of failure to disclose the particulars of defamation, it was submitted that by forwarding the name to the bureau while there was no negative credit score as per *Co-operative Bank of Kenya Ltd v Peter Ochieng* [2018] eKLR was in itself defamatory since the bank had a duty to its customer to ensure that accurate information is forwarded to the Credit reference Bureau as was stated in *Paramount Bank of Kenya Ltd v Peter Ochieng* [2018] eKLR and *Paramount Bank Ltd v Hassan Naqvi Syed Uqamar* [2020] eKLR .
  14. It was contended that the award by the trial Court took into account the status and business enterprises of the Respondent together with the financial loss he suffered and that this Court should not interfere with the award simply because it would have reached a different award as was stated in *Omar Athumani Mobammed T/a Paint Works v Jumwa Kaingu* [2021] eKLR and that the award was supported by the decision in *Musikari Kombo v Royal Media Services Ltd* [2018] eKLR .

## Proceedings

15. This being a first appeal, the Court is required to reevaluate the evidence tendered before the lower Court as was stated in the case of *Thomas Nyawade v Richard Sule Odongo* [2015] eKLR.
16. It was the Respondent's evidence that he was a business man and a Director in four companies. He opened an account with Unaitas Sacco and Corporative Bank and was given a loan of four million



- by Agricultural Finance Cooperative for planting wheat which he repaid and when he took his third loan his wheat was burned in the 2007/08 post-election violence and was allowed to sell the security by private treaty and when he applied for loan, it was denied on account that he owed the Appellant monies which was not true.
17. In cross examination he stated that he was a resident of Oklahoma in the USA and that it was not possible to see the report which he considered defamatory since it was sent directly to the bureau and that Barclays Bank had also reported him.
  18. On behalf of the Appellant Dw1 John Kamati Kamau stated that they advanced to the Respondent sums of Kshs.175,000 on the 30<sup>th</sup> September 2007 which was still outstanding and that AFC owed an Account at the bank and that it was not true that the Respondent applied for Kshs.27, 000,000 and that they wrote on credit bureau to correct the error of listing the Plaintiff at the time they were served with the notice of intention to sue.
  19. Dw2 Esther Wanjiku Masrugua stated that the 2<sup>nd</sup> Defendant was a licenced Credit Reference Bureau and that when banks send information to them they refer to the individual identification numbers and that the information on the Respondent was requested by Unaitas Sacco and that he had a performing loan with the National Bank without a default history. It was his evidence that they amended the report on 28<sup>th</sup> July 2014.
  20. He confirmed that the information received could only be accessed by individuals and banks through Court Orders.
  21. The trial Court found for the Respondent against the Appellant having identified the issue for determination to be whether the information as shared was defamatory and whether the Respondent suffered loss or injury to his character and reputation and held that the report complained of was made by the Appellant to the 2<sup>nd</sup> Defendant regarding the Respondent which report was untrue and therefore caused injury to the Respondent as he was portrayed as a defaulter as a result of which he failed to obtain a loan from Unaitas which lead to him suffering many other losses including the selling of his land for which he awarded him damages.
  22. From the proceedings and submissions above the Court has identified the following issues for determination in this appeal:
    - a. Whether the Respondent proved the element of defamation to the required degree against the Appellant.
    - b. Whether the Respondent was entitled to damages and if so whether the award was justified.
  23. A defamatory statement as per Halsbury Laws of England 4<sup>th</sup> Edition Volume 28 is a statement which tends to lower a person in the estimation of right-thinking members of society generally or to caused him to be shunned.
  24. In this appeal, the fact of publication was not contested, the only issues the Appellant raised was that there was no malice. At the trial herein, the Respondent is the only witness who testified. There was no independent witness called to justify his claim that his reputation was lowered in the eyes of right-thinking members of society as defamation protects the reputation of the Plaintiff amongst members of society and not what he thinks of himself.
  25. This position was stated by the Court in *Phineas Nyagab v Gitobu Imanyara* [2013] eKLR where the Court held that defamatory statement is one which has the tendency to injure the reputation of the person by lowering him in the estimation of the right thinking members of society generally and



- in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike and disesteem and typical example are attack upon the moral character of the Plaintiff attributing him to any form of disgraceful conduct such as crime dishonesty cruelty and so on.
26. One of the ingredients of defamation which the Plaintiff has to prove in order to succeed is that the statement was false and that the same was maliciously published. From the record of the proceedings as re-evaluated herein I am not persuaded that the Respondent proved malice on the part of the Appellant as the evidence of the Appellant witnesses confirmed that upon notification by the Respondent of the mistake on listing the Appellant made attempts to amend the same at the trial explained that the amount stated therein was as a result of a technical error, which was subsequently rectified and corrected, and therefore find as a fact that no malice was pleaded and proved.
  27. From the authorities submitted by the Respondent on the issues of malicious publication, the thread therein all shows that for the same to succeed, malice must be proved either directly or through the conduct of the Defendant and that the Respondent contrary to his submission did not prove malice on the part of the Appellant and as such his claim fails.
  28. In this holding I find support in the decision of the Court in *Jamlick Gichui Mwangi v Kenya Commercial Bank Ltd & Another* [2016] eKLR where Nairobi High Court Commercial Case No 551 of 2011 where the Court held that the case was premature for failure to follow the procedure provided for under the regulation as it is trite law that where the law has provided a procedure for doing something the same must be followed before an action is filed as was stated in the case of *The Speaker of the National Assembly v Njenga Karume* {1992} KECA 42 (KLR).
  29. It therefore follows that the trial Court in finding for the Respondent fell into error and therefore misdirected herself both in fact and law and find merit in the appeal herein which I hereby allow and dismiss the Respondent's case before the lower Court for want of proof.
  30. Damages is at the sole discretion of the Court and in awarding the same to the Respondent the Court stated that she had looked at the relevant authorities cited by the parties and would therefore find no fault with the same noting that the Respondent had supported the award and cited the case of *Musikari Kombo v Royal Media Services Limited* [2018] eKLR where the Plaintiff was awarded similar amount against the Appellant proposed award of Kshs.500,000 and had the Respondent succeeded would not have interfered with the award in as much the same was not supported with relevant authorities noting that there is no scientific method for assessing and arriving at an award save that like injuries should attract like award.
  31. In the final analysis I find merit on the appeal herein which I hereby allow by setting aside the lower Courts finding on liability and substitute the same with an order dismissing the Respondent's case.
  32. Whereas cost follows the event in this matter in exercise the discretion of the Court each party shall bear their own cost and it is ordered.

**DATED SIGN ED AND DELIVERED AT MURANGA THIS 12<sup>th</sup> DAY OF OCTOBER 2023**

**J. WAKIAGA**

**JUDGE**

In the presence of: -

Mr. Muchoki for Mr. Mutua for Applicant

Ms Onyango for Muchiri for Respondent

Jackline – Court Assistant

