



REPUBLIC OF KENYA



**Absa Bank Kenya Plc & another v Oshe (Civil Appeal E006 of 2023)  
[2024] KEHC 7398 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7398 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CIVIL APPEAL E006 OF 2023  
JN ONYIEGO, J  
JUNE 21, 2024**

**BETWEEN**

**ABSA BANK KENYA PLC ..... 1<sup>ST</sup> APPELLANT**

**ABSA LIFE ASSURANCE KENYA LTD ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MANJUU MBARAK OSHE ..... RESPONDENT**

*(Being an appeal from the judgement of the chief magistrates' court at Garissa (Hon. J.Omwange-SRM) delivered on 26th day of April 2023 in CMCC No.E.035 of 2022)*

**JUDGMENT**

1. The appellants herein were the defendants in the lower court while the respondent was the plaintiff in Garissa CMCC No. E035 of 2022 Manjuu Mbarak Oshe v Absa Bank Kenya PLC & Another.
2. In his plaint dated 13.10.2022, the plaintiff, the respondent herein averred that on or about 04.06.2020, the appellants through their staff, employee and or agent, Christopher Musyoka Savali, unlawfully and fraudulently enrolled him into Absa's Life Insurance Protection Plan, Policy No. BFPA19347 without his knowledge or consent. That the premium amount payable for the fraudulent policy was an annual sum of Kes. 5,082 and that the said amount was deducted from his account on two occasions.
3. He therefore prayed for; A declaration that the family protection plan reference no. BFPA619347 between the plaintiff and ABSA are null and void; restitution of Kshs 10,164; exemplary damages; costs of the suit and interest at court rates.
4. The appellants in response entered appearance and further filed a statement of defence on 28.11.2022 wherein they denied the claim as alleged in the plaint. It was their case that in accordance with the terms and conditions and the operations of the bank, there exists a duty for them to honour any direct debit authority issued in respect of a policy.



5. That pursuant to receiving a complaint from the respondent, they proceeded to cancel further debits from the respondent's account so as to undertake further investigations. The 1<sup>st</sup> appellant thus commenced the process of refunding the respondent the sum of monies irregularly deducted following completion of the internal investigations and implementation of the recommendations therein.
6. Via a consent dated 22.02.2023, the parties agreed that the Family Protection Plan Reference No. C368908 and Policy Number BFPA619347 be cancelled; the 2<sup>nd</sup> appellant to pay the respondent the sum of Kes. 10,164 within 30 days of the consent and in default the respondent be at liberty to apply for execution. The respondent's statement was adopted without calling the makers and thereafter, the parties agreed to submit on quantum on general damages.
7. The trial magistrate after considering the facts and evidence adduced before him, reached a determination that the appellant was liable for breach of fiduciary duty towards the respondent and therefore, awarded a sum of Kes. 1,200,000/- as general damages plus costs of the suit. Dissatisfied with the said finding, the appellants moved to this court seeking to set aside the same.
8. The appellant listed six grounds of appeal in the memorandum of appeal dated 16.05.2023 as follows:
  - i. That the learned trial magistrate erred in fact and in law in finding that the plaintiff was entitled to damages of Kes. 1, 200,000/-, which amount was excessive in view of the alleged injury occasioned on the respondent.
  - ii. That the learned trial magistrate erred in law and in fact by failing to consider the 1<sup>st</sup> and 2<sup>nd</sup> appellants' submissions and judicial authorities on quantum thereby arriving at an erroneous figure on quantum.
  - iii. That the learned trial magistrate erred in law and in fact by failing to consider conventional awards for general damages in cases of similar injuries
  - iv. The learned trial magistrate erred in law and fact by failing to take into consideration that the loss occasioned by the respondent was remedied vide the consent filed by the parties and therefore, no loss was actually suffered by the respondent.
  - v. The learned trial magistrate erred in law and in fact whilst exercising his discretion in a manner that goes against public policy and the principles of justice to award an excessive and exorbitant award in favour of the respondent.
  - vi. The learned trial magistrate erred in law and in fact by failing to consider that the damages are not a means of unjust enrichment by a party whose loss has been remedied.
9. The appellant urged this court to grant orders that:
  - i. The appeal be allowed with costs.
  - ii. The lower court's judgment be set aside and the court be pleased to reassess the damages payable to the respondent.
10. This court having admitted the appeal herein, gave directions that the same be canvassed by way of written submissions wherein all parties complied with the said directions.
11. In their submissions dated 22.02.2024, the appellants urged that the appeal challenges quantum only as the same were excessively high. The trial magistrate was faulted for failing to distinguish the facts before him and the related cases similar to the case before the court. That it is trite that comparable injuries should be compensated by comparable awards which awards must be conventional. Reliance



was placed on the case of Ronyad Enterprises Limited v Kenya [ 2009] eKLR where the respondent bank had unlawfully and without prior consent or approval of the appellant transferred a sum of Kes. 1,669,000/- to another account and the court found an award of Kes. 150,000/- for damages to be appropriate. Counsel contended that in the same spirit, this court should interfere with the finding of the trial court and accordingly award an appropriate award.

12. On costs, it was contended that the same follows the event. That noting that the appeal herein is merited, the same be allowed with costs being awarded to the appellants.
13. The respondent in his submissions dated 28.02.2024 urged that the respondent had pleaded fraud, negligence and breach of fiduciary duty by the appellant to the respondent. It was urged that the appellant recklessly breached its fiduciary duty owed to the respondent by irregularly enrolling him into a fraudulent insurance policy. It was contended that where the conduct of a tortfeasor is so egregious and motivated by personal gain and profit making, the award of exemplary damages is proper.
14. To that end, support was drawn from the case of Rookes vs Benard [1964] UKHL which holding Maraga J reaffirmed in the case of Abdulhamid Ebrahim vs Municipal Council of Mombasa [2004] eKLR by stating that exemplary damages on the other hand are punitive damages and they have an intention to punish the defendant and vindicate the strength of the law. It was urged that the malicious manner in which the servant of the appellants enrolled the respondent into a life policy insurance scheme and fraudulently executed the attendant contract documents with the intention of meeting targets set by the appellants to bring profit to the appellants, invited an award of exemplary damages.
15. Counsel contended that it is common ground that this court can only interfere with the trial court's exercise of discretion where the court misdirected itself thus arriving to a wrong determination. While relying on the case of Equity Bank Limited & Another, v Robert Chesang [2016] eKLR, the High Court at Nairobi declined an invite to disturb an award of Kes. 11,450/- in special damages, Kes. 100,000/- and Kes. 1,500,000/- exemplary damages for negligence and breach of fiduciary duty by a bank.
16. That the allegation that the trial court did not consider the authorities by the appellant was a sham as the said authorities presented were distinguishable with the case herein. In the end, this court was therefore urged to dismiss the appeal for the same was in want of merit.
17. I have re-considered and re-evaluated the pleadings herein, evidence adduced at the trial court a fresh as required of the first appellate court. See Peters v Sunday Post 1958 (EA) 424].
18. The court therefore finds that the sole issue for determination is whether taking into account the nature of the injury suffered by the respondent, the award by the trial magistrate was inordinately excessive as to warrant this court to interfere.
19. Circumstances under which a court can upset a determination such as the one before me were laid down by Madan JA (as he then was) in United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] E.A where it was held that;

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account;



fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

[ Also see *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* [1982 – 88] IKAR 278].

20. The appellant contended that the trial magistrate failed to distinguish the facts before him and the related cases similar to the case before the court. That it is trite that comparable injuries should be compensated by comparable awards which awards must be conventional. The respondent on the other hand urged that the finding by the trial court was proper and in order for the reason that the malicious manner in which the servant of the appellants enrolled the respondent into a life policy insurance scheme and fraudulently executed the attendant contract documents with the intention of meeting targets set by the appellants to bring profit to the appellants, invited an award of exemplary damages.
21. In the case of *Bank of Baroda (Kenya) Limited vs Timwood Products Ltd Civil Appeal No. 132 of 2001*, the Court of Appeal citing the case of *Obonyo & Another vs Municipal Council of Kisumu* [1971] EA 91 and *Rookes v Banard & Others* [1964] AC 1129 it was held that; in Kenya, punitive or exemplary damages are awardable only under two circumstances, namely (i) where there is oppressive, arbitrary or unconstitutional action by the servants of the government; and (ii) where the defendant’s action was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff .
22. The Court of Appeal in the case of *Miguna Miguna vs The Standard Group Ltd & 4 others* [2017] eKLR while quoting the case of *John v GM Limited* [1993] QB 586: had this to say; “Aggravated damages will be ordered against a defendant who acts out of improper motive e.g. where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize.”
23. The Court of Appeal in the case of *Godfrey Julius Ndumba Mbogori & another v Nairobi City County* [2018] eKLR also stated that: “Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Barnard* [1964] AC 1129 where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are: i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant’s conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute”.
24. It seems then that aggravated damages go beyond compensation since they are meant to punish the wrongdoer and act as a deterrent from similar conduct in future.
25. Having read and understood the determination by the trial court, it is not lost to me that an award of damages is at the discretion of the trial court. But in the same breadth, the same must be founded within comparable awards. In the impugned judgment, I am unable to find any comparable authority in which the trial magistrate anchored his reasoning in coming up with the impugned award. It follows that the same was not anchored or supported on any specific law or case law. [ See *Makhandia J* (as he was then) in *Mununga Tea Factory Ltd v Ephantus Munyi Gichimu Nyeri HCCA No. 82 of 2004*].
26. In the case of *Joe Owaka Ager v Barclays Bank of Kenya Limited* [2020] eKLR the plaintiff who had a wrongful deduction of Kes. 1,880,000, the court found that an amount of Kes. 500,000 in general damages was sufficient.



27. In the same breadth, in the case of Westlink Mbo Limited vs Equity Bank Limited & 2 others [2019] eKLR, where the bank had wrongfully deducted the plaintiff's account of Kes. 4,485,000, the court awarded Kes. 2,000,000 as general damages.
28. Similarly, in the case of CFC Stanbic Bank Limited v Otieno-Omuga & Ouma Advocates [2019] eKLR the Court of Appeal awarded Kes. 3,000,000 as damages for injury to credit where it transpired that an amount of Kes. 900,000/- was rejected considering that the plaintiff had Kes. 6,000,000/ into his clients account which was sufficient to meet payment for both cheques but received no satisfactory answer from the bank.
29. From the above and while noting that in the case herein, the appellants having wrongfully deducted from the respondent an amount of Kes. 10,164.00, the same was remedied by a refund upon the respondent. It therefore follows that an appropriate amount in reference to the exemplary damages suffered by the respondent ought to have reflected the amount in question as initially wrongfully deducted. Guided by the reasoning in Joe Owaka case(supra) and further considering the weight of the amount lost and subsequently refunded, I find a sum of Kshs 300,000 reasonable exemplary general damages.
30. In view of the above holding therefore, the appeal herein is found to be meritorious and succeeds to the extent as follows:
  - i. The award of Kes. 1,200,000 is hereby set aside and substituted with an award of Kes. 300,000/-.
  - ii. Each party to bear its own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 21ST DAY OF JUNE 2024**

**J. N. ONYIEGO**

**JUDGE**

