



REPUBLIC OF KENYA



**ABSA Bank Kenya PLC v Mochache (Civil Appeal E370 of 2021)
[2024] KEHC 9039 (KLR) (Appeals) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9039 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

APPEALS

CIVIL APPEAL E370 OF 2021

HI ONG'UDI, J

JULY 26, 2024

BETWEEN

ABSA BANK KENYA PLC APPELLANT

AND

ROBERT MOCHACHE RESPONDENT

*(Being an Appeal from the Judgment in Nairobi CMCC No. 7756 of 2019)
delivered on 28th May, 2021 by Hon D. W. Mburu Senior Principal Magistrate)*

JUDGMENT

1. The respondent herein sued the appellant for damages for breach of contract, professional negligence, punitive and exemplary damages for physical and emotional pain and injury, costs of the suit, interest and any other or further reliefs the court may deem fit to grant.
2. The case as stated in the plaint dated 11th October, 2019 is that on 17th November, 2018 while in the USA the respondent attempted to use the prepaid debit card issued by the appellant for payment of airline ticket for himself when the payment was declined. He severally attempted to effect the transaction with the full knowledge that the pre-paid card was in credit and had sufficient funds but all transactions were declined. The effect of the same caused the respondent to miss his desired flight and left him stranded. It was the respondent's case that the appellant was negligent hence breached its statutory duty to its client.
3. The claim by the respondent was fully defended and the trial Magistrate delivered his judgment on 28th May, 2021 ordering the appellant to pay the respondent Kshs. 500,000/= being damages for breach of contract, plus Kshs. 2,500,000/= as general damages for physical and psychological, emotional pain, injury, ridicule and loss of esteem plus costs of the suit and interest at court rates.



4. The appellant being aggrieved by the entire judgment, lodged this appeal on 17th March, 2023 based on the following grounds:
 - i. The Learned Magistrate erred in fact and in law in finding that Appellant had breached its fiduciary duty to the Respondent;
 - ii. The Learned Magistrate erred in law in finding that the Respondent was entitled to general damages for breach of contract;
 - iii. The Learned Magistrate erred in law in finding that the Respondent was entitled to general damages for physical, psychological and emotional pain, injury, ridicule and loss of esteem;
 - iv. The Learned Magistrate erred in law in the assessment of quantum of general damages;
 - v. The award of general damages for breach of contract of Kenya Shillings Five Hundred Thousand (Kshs. 500,000.00) are excessive and exorbitant;
 - vi. The award of general damages for physical, psychological and emotional pain, injury, ridicule and loss of esteem of Kenya Shillings Two and Million Five Hundred Thousand (Kshs. 2,500,000.00) are excessive and exorbitant
5. The appeal was canvassed by way of written submissions, and both parties complied.

The Appellant's Submissions

6. The Appellant's Submissions were filed by the firm of Komm advocates and are dated 26th February, 2024. Counsel submitted that it had discharged its contractual obligations to the respondent as the VISA card issued was up to par with the required local and international standards as the respondent was able to use the card for his other transactions. Counsel further submitted that the declined transaction could not be attributed to the appellant as the failure was on the part of Spirit Air for not properly configuring their machine.
7. On the first ground of appeal, counsel argued that the trial court erred in finding that the appellant breached its fiduciary duty by failing to inform the respondent that some merchants may be incompatible with his VISA card. He further argued that the said finding was not supported by the evidence adduced at the trial. He stated that by the respondent's own admission, he confirmed that the card was operational for other various transactions while in the USA. He further argued that no evidence had been led by the respondent attributing the declined transaction to the appellant.
8. It was further counsel's argument that if the VISA card was faulty, one would expect all transactions to fail. He submitted that in the instant case, all transactions on the card were successful save for the Spirit Air transaction which explanation was that the Spirit air merchant machine was incompatible with the respondent's card.
9. Counsel submitted that the appellant religiously discharged its fiduciary duty adding that the trial Magistrate relied on authorities that were inapplicable to the present case.
10. On the second ground, counsel submitted that in the plaint at pages 5-8 the terms of the contract as well as the particulars of breach of contract were neither pleaded nor particularized. He relied on Order 2 Rule 10 of the *Civil Procedure Rules* which obligated the respondent to plead particulars of the said breach. He thus argued that the prayer for damages for breach of contract was therefore without basis.
11. It was his submission that general damages cannot be awarded for breach of contract where the loss was not pleaded and proved. In support of this position, reliance was placed on the cases of; *Kenya*



Tourist Development Corporation v Sundwoner Lodge Limited [2018] eKLR and *Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited* [2016] eKLR.

12. Counsel further submitted that the learned trial Magistrate went on a tangent in awarding general damages on a contractual dispute just because the respondent allegedly suffered loss. He added, that the award of Kshs. 500,000/= as general damages was erroneous since the respondent did not prove having suffered any other loss that would entitle him to the said award. He argued that the allegation that he missed a meeting and lost on business opportunities was not supported by evidence.
13. On the third ground, counsel submitted that the trial Magistrate erred in awarding general damages for physical, psychological and emotional pain and injury. Additionally, that the respondent did not produce any evidence in support of the alleged loss of business. He thus prayed that the appeal be allowed.

Respondent's Submissions

14. The respondent's Submissions were filed by the firm of R. M Mochache & Company advocates and are dated 12th March, 2024. Counsel submitted on each of the grounds of appeal as highlighted. He submitted that the relationship between himself and the appellant was that of an agent and principal such that the banker acts as an agent of the customer who is the principal where the agent keeps money on behalf of the principal. He additionally submitted that the agent ought to act diligently and ensure it does not act contrary to the principal's instruction. He submitted that the trial magistrate did not err in finding that the appellant breached its fiduciary duty. Counsel relied on the cases of *Cooperative Bank of Kenya Ltd V Biwott (Civil Appeal 18 of 2019)* [2002] KEHC 9946 eKLR and *Equity Bank Ltd & Another V Robert Chesang* [2016] eKLR, in support.
15. On the second ground, counsel while placing reliance on the cases of *Jamuto Enterprises Limited v County Government of Meru* [2021] eKLR and *Capital Fish Kenya Limited v Kenya Power & Lighting Company Limited* [2016] eKLR argued that there was no doubt that there was breach of contractual duty by the appellant. He added that whether the respondent proved the actual loss or not, the award of damages for breach were justly awarded nominally.
16. Counsel submitted further that the trial Magistrate did not err in awarding damages for breach of contract. He relied on the case of *Consolidated Bank of Kenya Limited v Ken Muiruki & Peter Kirimi Mbogo t/a Mbogo & Muiruki Advocates* [2021] eKLR where the court held that damages are awardable for breach of contract.
17. On the third ground he submitted that the respondent suffered humiliation, ridicule, economic inconvenience and loss of self-esteem. He argued that the respondent lost several hours while on his trip as a result of the rejection of the VISA card and submitted that the trial court properly awarded Kshs. 2,500,000/= as general damages.
18. On the fourth ground, counsel submitted that the award of damages for breach of contract was reasonable in light of the facts presented by the parties. He submitted that an award of Kshs. 500,000/= on the same was quite nominal in the circumstances. He relied on the case of *Barclays Bank of Kenya Limited v Hellen Seruya Wasilwa* [2021] eKLR where the respondent's debit card had been declined and the court awarded damages for breach of contract.
19. Counsel on the fifth ground Submitted that the trial Magistrate took note of the fact that the respondent suffered emotional, physical and phycological distress. In support he cited the case of *Hon. Nicholas R.O Ombija v Kenya Commercial Bank Ltd* [2009] eKLR where the court entered judgment against the defendant bank in favour of the plaintiff in the sum of Kshs.2,500,000/= after the bank



declined to honour the plaintiff's credit cards despite the availability of funds in his account. Counsel submitted that the award of Kshs. 2,500,000 was reasonably awarded in view of the psychological, physical and emotional distress the respondent was subjected to while on his trip.

20. It was his further submission that the respondent was a person of both local and international repute and it humiliating and demoralizing for him to be subjected to such a scenario. He added that the appellant alleged that the card failed due to the merchant's system not having been configured to read the VISA card. He however, argued that no documentary evidence was tendered by the appellant in support of this claim.
21. He relied on the case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR and urged the court to disallow the appeal with costs to the respondent.

Analysis and Determination

22. This being a first appeal, it is this court's duty under Section 78 of the *Civil Procedure Act* to re-evaluate the evidence tendered before the trial court, and arrive at its own conclusion.
23. This principle of law was well settled in the case of *Selle & another v Associated Motor Boat Company & others* 1968 EA 123

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears based on the demeanor of a witness is inconsistent with the evidence in the case generally”.

24. Having considered the evidence, grounds of appeal, the submissions and the authorities relied on by the respective parties, I find the issue for determination to be whether the instant appeal has merit.
25. It is not in contention that the respondent had consulted the appellant on whether the said VISA card would be acceptable in the USA which answer was in the affirmative. It is also not in dispute that by virtue of the appellant holding the respondent's money as its agent, it had a fiduciary duty towards the respondent.
26. In the case of *Equity Bank Limited and Another v Robert Chesang* Nrb HCCA No. 571 of 2012 [2016] eKLR the court held that:

“The bank is also under a contractual duty to diligently handle accounts of a customer, to ensure that funds-deposited on account are available when required by the customer. Any deviation from that understanding without justifiable reasons which should be communicated to the customer well in advance or immediately, the bank is in breach of a contract with the customer and is liable in damages.”

27. The appellant argued that the reason for the decline of the VISA card was as a result of the Spirit Air merchant's system having not been configured for the said transaction. It was the appellant's case that the VISA card was not compatible with the merchant's card reader which error was explained as “code 57” by DW1 (Esther Muasya).
28. It is this court's opinion that despite the appellant having produced evidence that there was an error with Spirit Air merchant's system, the same ought to have been rectified by the appellant since the contractual relationship was between the respondent and the appellant. Furthermore, the argument by the appellant that the card ultimately worked on other transactions cannot be a consolation or



justification by the appellant that it complied with its part of the contract. No apology was offered by the appellant to the respondent. From the facts and evidence adduced, this court finds that the trial Magistrate did not err in establishing that indeed there was a breach of the fiduciary duty owed to the respondent., hence a breach of contract. Ground (i) of the appeal therefore fails.

29. In the appellant's submissions counsel argued that the trial Magistrate erred in the assessment and award of general damages for physical, psychological and emotional pain, injury, ridicule and loss of esteem. Additionally, the appellant contends that the Kshs 500,000/= and Kshs. 2,500,000/= awarded to the respondent by the trial Magistrate as general damages for breach of contract was excessive and exorbitant.
30. This court has already established that the appellant was in breach of its customer – bank relationship with the respondent which relationship was fiduciary and contractual. In the cases of:
 - i. *Capital Fish Kenya Limited v Kenya Power & Lighting Company Limited* [2016] eKLR and
 - ii. *Royad Enterprises Limited v Kenya Commercial Bank Limited* [2019] eKLR it was stated that as a general rule, damages are not available for breach of contract.
31. It therefore follows that if a contract breach is successfully established the injured party will still be required to provide evidence to demonstrate that they suffered loss and damage. This court will now move to see if the respondent demonstrated that he suffered loss and damage.
32. The respondent relied on the information by the appellant to plan his financial usage of the VISA card on his USA trip. Based on this, and the fact that he was unable to pay for his flight despite having sufficient funds, he was clearly subjected to delay, humiliation, emotional and economic inconvenience which fact was not disputed by the appellant. He was delayed at the Airport for roughly seventeen (17) hours, before being checked in on the next flight. Despite the appellant's explanation on the cause of the unsuccessful transaction, there was no evidence placed before the court in support. Moreover, the respondent had no relationship with the Airline as far as the visa card was concerned. It should have availed the evidence to support its claims. I however concur with the trial Magistrate that the failure of the transaction was not occasioned by malice or ill will on the part of the appellant. I find it to be an unfortunate incident.
33. In his claim for damages the respondent relied on the Court of Appeal case of *Barclays Bank of Kenya Limited v Hellen Seruya Wasilwa* [2021] eKLR where the court substituted an award of Ksh 5,000,000/= with Ksh 1,000,000/= as damages for injury of her reputation where the respondent's debit card was declined for purchase of goods in the US despite the availability of sufficient funds in her account.
34. In his evidence the respondent herein admitted that prior to and even after this single incident his VISA card had never declined any transaction, both in Kenya and in the USA. The respondent did not however inform the court whether he reached out to the appellant on the material night to express his experience with the VISA card and what its response was.
35. After weighing all the evidence, decisions and the circumstances under which this incident occurred I find the award of Ksh 2, 500,000/= for general damages by the trial Magistrate to be abit on the higher side. I do find the sum of Ksh 1,800,000/= (one million, eight hundred thousand shillings) to be sufficient for the disappointment, inconvenience etc that the respondent went through. No evidence was adduced to show any loss of business and amenities by the respondent.
36. The upshot is that the appeal partially succeeds. Both awards for Ksh 500,000/= and Ksh 2,500,000/= by the trial court are hereby set aside and substituted with a single award of general damages in the



sum of Ksh 1,800,000/= (one million eight hundred thousand shillings only). The respondent shall have costs and interest as awarded in the lower court. Each party shall bear its own costs of the Appeal.

37. Orders accordingly.

DELIVERED VIRTUALLY DATED AND SIGNED THIS 26TH DAY OF JULY, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

