



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL APPEAL NO 22 OF 2019**

**CO-OPERATIVE BANK OF KENYA LIMITED.....APPELLANT**

**VERSUS**

**MIDLAND AUTOCARE LIMITED.....1<sup>ST</sup>RESPONDENT**

**JAMES MUTEKI.....2<sup>ND</sup> RESPONDENT**

**(Being an appeal from the Ruling(sic) of Hon E. Wanjala (Miss), Senior Resident Magistrate**

**(SRM) at the Chief Magistrate's Court at Milimani in Civil Case No 7351 of 2016 delivered 2<sup>nd</sup> November 2018)**

**JUDGMENT**

**INTRODUCTION**

1. In her Judgment that was delivered on 2<sup>nd</sup> November 2018, the Learned Trial Magistrate, E. Wanjala (Miss), Senior Resident Magistrate (SRM) entered judgment in favour of the 1<sup>st</sup> Respondent herein against the Appellant for the sum of Kshs 3,782,000/= subject to fifty (50%) contribution on the part of the 1<sup>st</sup> Respondent herein.
2. Being dissatisfied with the said decision, the Appellant filed its Memorandum of Appeal dated 18<sup>th</sup> January 2019 on 22<sup>nd</sup> January 2019. It relied on four (4) grounds of appeal. Its Written Submissions and Bundle of Authorities were dated 14<sup>th</sup> January 2019 and filed on 16<sup>th</sup> January 2019 while those of the 1<sup>st</sup> Respondent were dated 27<sup>th</sup> November 2019 and filed on 28<sup>th</sup> November 2019.
3. The Judgment herein is based on the said Written Submissions, which the parties herein relied upon in their entirety.

**LEGAL ANALYSIS**

4. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
5. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

**“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”**

6. Having looked at the grounds of appeal and the respective parties' submissions, it appeared to this court that the issues that had been placed before it for determination were:-

**a. Whether or not the Learned Trial Magistrate erred in finding that the Appellant was liable for the loss the 1<sup>st</sup> Respondent suffered to the extent of fifty (50%) per cent;**

**b. Whether or not the Learned Trial Magistrate erred in law in awarding the 1<sup>st</sup> Respondent herein the sum of Kshs 1,891,000/=.**

7. The court therefore deemed it prudent to address the said issues under the following distinct heads.

**I. LIABILITY**

8. Ground of Appeal No (4) was dealt with under this head.

9. This court found the following issues not to have been in dispute:-

- a. THAT the 1<sup>st</sup> Respondent was at all material times a customer of the Appellant herein;**
- b. THAT the 2<sup>nd</sup> Respondent was an employee of the 1<sup>st</sup> Respondent herein;**
- c. THAT twenty four (24) cheques were encashed against the 1<sup>st</sup> Respondent's bank account with the Appellant herein;**
- d. THAT eight (8) cheques had misspelt the word "ninety" and were reading "Ninty";**
- e. THAT the 1<sup>st</sup> Respondent had authorised one Joymary Kainda Mwamba as an agent to be confirming the validity of the bank cheques drawn against its Current Account Number 0113xxxxxxx300;**

10. What the parties were not agreed upon was:-

- 1. Whether the cheques were drawn by the 1<sup>st</sup> Respondent's employees and encashed with collusion of the Appellant's employees;**
- 2. Whether the Appellant did call-back confirmation before encashing the cheques;**
  - a. Whether the call back confirmations by the Appellant were sufficient before encashing the 1<sup>st</sup> Respondent's cheques;**
  - b. Whether the cheques had apparent errors on their face which could have prevented the Appellant not to have encashed the cheques.**

11. In respect of the question of whether or not the Appellant did call back confirmations before encashing the 1<sup>st</sup> Respondent's cheques and if the said call back confirmations by the Appellant were sufficient before encashing the said cheques, this court noted that the Appellant's Relationship Manager, Immaculate Ludie Nanga (hereinafter referred to as "DW 2") testified that upon presentation of the cheques, she did a call back to the 1<sup>st</sup> Respondent's agent, namely, Joymary Kainda Mwamba, before forwarding the same for encashment. She was emphatic that never at any given time did she hand over the cheques to the Tellers for payment without first before calling her to confirm the amounts on the cheques, that the same were properly drawn and signed. She added that she also sent the 1<sup>st</sup> Respondent bank statements on a daily basis.

12. Her testimony that a call back was done on all cheques was confirmed by the Appellant's Operations Manager, Jenipher Mwamba (hereinafter referred to as "DW 3"). The call back confirmations were shown in the call logs that were produced in evidence by the Appellant herein. It was the Appellant's submissions that the call logs were sufficient to show that call backs were indeed done before encashing the 1<sup>st</sup> Respondent's cheques.

13. In further support of its case, the Appellant adduced in evidence a letter dated 21<sup>st</sup> March 2014 by Barnabas K Muturi (hereinafter referred to as "PW 1"), the 1<sup>st</sup> Respondent's Managing Director introducing the said Joymary Kainda Mwamba to be confirming validity of cheques drawn in the aforesaid account. The said letter had stated as follows:-

**"This is to introduce our administration manager Joymary Kainda Mwamba as an agent to be confirming validity of cheques drawn against our current account no 0113xxxxxxx300."**

14. It also produced in evidence, a letter dated 11<sup>th</sup> August 2011 from the 1<sup>st</sup> Respondent's Managing Director, addressed to it which stated as follows:-

**"This letter serves to appoint Benson Muendo Mutie holder of ID No 22707260 Serial No. 215013887 as one of our agents to transact bankings, cash withdrawal, obtaining balances and collecting statements."**

15. In arguing that there was evidence that Appellant herein did not exercise diligence when encashing its cheques, the 1<sup>st</sup> Respondent relied on the Appellant's letter to it dated 29<sup>th</sup> July 2013 where the Appellant had stated as follows:-

**“ Cheque number 007219 for Kshs 97,600- we here by advice that we were able to stop the cheque.**

**. Cheque number 007106 for Kshs 90,000.00- we wish to inform you that the matter is being followed with the collecting bank and you will be advised of the outcome.**

**We have in the meantime put measures to ensure that no payment is made before confirming with yourselves(emphasis court).”**

16. It was evident from the aforesaid letter dated 29<sup>th</sup> July 2013 that there was implied admission by the Appellant that it had not acted always diligently when it encashed cheques. If it had, then it would not have had to stop Cheque No 007219 for Kshs 97,600/= or to follow up Cheque number 007106 for Kshs 90,000/= with the collecting bank. The fact that the Appellant had informed the 1<sup>st</sup> Respondent that it had put measures to ensure that no cheques were encashed without confirming with the 1<sup>st</sup> Respondent was proof that the Appellant had failed to comply with the mandate that it was given in the 1<sup>st</sup> Respondent’s letter dated 21<sup>st</sup> March 2014.

17. Further, the fact that in DW 2’s evidence she stated that she counter-checked seventeen (17) checks that were set out in her Witness Statement dated 27<sup>th</sup> April 2017 which she adopted as her evidence in chief during trial clearly confirmed the Appellant’s lack of duty of care towards the 1<sup>st</sup> Respondent herein. There was a lacuna as to whether she proceeded in a similar manner in respect of the remaining seven (7) cheques it had purported to have had minor errors that could be ignored. The Appellant could not approbate and reprobate regarding what it was required to do in the said letter of 21<sup>st</sup> March 2014.

18. In this regard, this court found and held that the Learned Trial magistrate could not have been faulted for having concluded that the Appellant failed to act with due diligence in paying out the cheques.

19. Having said so, it was the considered opinion of this court that she erred in law and fact in having imposed a heavier burden on the Appellant by requiring it to do more than the call back confirmations to verify the cheques. This was outside the instructions it had been given by the 1<sup>st</sup> Respondent herein. It was not necessary for the Appellant to have adduced in evidence any memos to show that it was required to make call back confirmations for the reason that the aforesaid letter dated 29<sup>th</sup> July 2013, which the 1<sup>st</sup> Respondent had not disputed, had expressly set out its mandate and duty to the 1<sup>st</sup> Respondent before it encashed the said cheques.

20. Turning to the question of whether or not the cheques had apparent errors on the face of the cheques that could have prevented the Appellant to encash the cheques, this court noted that the Learned Trial Magistrate found and held that the call back confirmations were not sufficient to pay cheques which had apparent errors on the face of the cheques. She asserted that the errors were not minor. It was her averment that the Appellant ought not to have normalised the apparent errors by closing its eyes to them.

21. She thus found and held that there was collusion between the Appellant’s employees and the 2<sup>nd</sup> Respondent herein in defrauding the 1<sup>st</sup> Respondent herein due to the errors, alterations and variations on the face of the cheques that were encashed and which cheques were at variance with the amounts in the requisition forms.

22. The 1<sup>st</sup> Respondent agreed with her determination on the ground that it was not practical for the 1<sup>st</sup> Respondent’s employees to have been served by the same employee of the Appellant unless of course there had been collusion between them. It further faulted the Appellant for having emailed the bank statements to info@midlandautocare.co.ke whereas its email address as given in the account opening forms was midlandauto@wananchi.com.

23. On the other hand, the Appellant had argued that only eight (8) cheques out of the twenty four (24) cheques it encashed had errors, which errors were negligible. DW 2 had stated that the 1<sup>st</sup> Respondent’s Managing Director had at one time presented a cheque where the amount was wrongly spelt as “Ninty” and was paid without any complaint. The Appellant therefor denied that there had been any collusion between its employees and the 2<sup>nd</sup> Respondent herein as had been contended by the 1<sup>st</sup> Respondent and determined by the Learned Trial Magistrate.

24. Right at the outset, the court noted that the email address that was given in the account opening form was midlandauto@wananchi.com. It was not clear to this court where the Appellant got the other email address from. Suffice it to state that this court did not find the email address where the bank statement was to be sent to have been pertinent in the circumstances of the case herein for the reason that the letter of 11<sup>th</sup> August 2011 was clear that Mr Benson Muendo Mutie was the one authorised to collect statements on behalf of the 1<sup>st</sup> Respondent herein. In any event, PW 1 confirmed that the Appellant regularly furnish him with the bank statements. It was not therefore necessary to spend more time on this issue as the issue of the wrong email address was really not one that could explain the lack of diligence or otherwise on the part of the Appellant.

25. This court did not find any proof that the handing over of the 1<sup>st</sup> Respondent’s cheques by the 2<sup>nd</sup> Respondent to DW 2 for counter-checking was fraudulent in itself. This appeared to have been her normal duties in the bank. Her evidence was that she would forward the counter-checked cheques to the concerned Tellers. The 1<sup>st</sup> Respondent did provide any evidence to demonstrate that DW 2 was acting in collusion with the 2<sup>nd</sup> Respondent to defraud it and therefore came to a different conclusion to that which had been arrived at by the Learned Trial Magistrate.

26. It also found that the errors on the face of the cheques were not sufficient for the Appellant not to have encashed especially after they had been verified by the said Joymary. It would be placing too much burden on the Appellant to enquire whether the alterations had been authorised once the verification was done. It was also onerous on the part of the Appellant to require it to ascertain whether the figures in the cheques matched the cheque requisition forms. Indeed, those were internal documents which, as it rightly pointed out, it did not have at the time of presentation of the cheques to counter-check the figures.

27. Going further, the 1<sup>st</sup> Respondent did not rebut DW 2's evidence that PW 1 had once been paid on a cheque that bore the word "Ninty" instead of "Ninety." In this regard, the 1<sup>st</sup> Respondent could not purport that it was alright for some cheques bearing the word "Ninty" to be paid and not proper for similar cheques to be paid. The 1<sup>st</sup> Respondent could not approbate and reprobate.

28. In this regard therefore, this court did not agree with the Learned Trial Magistrate that the Appellant ought not to have overlooked these apparent errors despite PW 1 having been a beneficiary of one such cheque that had minor errors. Indeed, the Appellant could exercise discretion regarding the errors it could excuse before encashing cheques. Hence, that discretion could not be dictated to it.

29. Going further, the said Joymary was a critical witness to the 1<sup>st</sup> Respondent's case. However, she was not called to testify to rebut the assertions by DW 2 and DW 3 that the call back confirmations on the cheques were done before they were encashed. She would also have shed more light regarding the amounts that were appearing in the face of the cheques vis a vis the figures that were appearing in the cheque requisitioning forms.

30. The onus was also on the 1<sup>st</sup> Respondent to have called a handwriting expert to confirm that indeed certain figures had been added to the cheques thus causing alterations to the cheques. In the absence of such expert evidence, this court was reluctant to rely on a cursory view of the cheques to conclude that the said cheques had been altered.

31. In her evidence, DW 2 confirmed having counter-checked the following cheques and called the said Joymary to confirm if the same were proper:-

1. Cheque No 012047 Kshs 75,000/=
2. Cheque No 12290 Kshs 95,000/=
3. Cheque No 012584 Kshs 93,225/=
4. Cheque No 012712 Kshs 95,000/=
5. Cheque No 012772 Kshs 94, 798/=
6. Cheque No 013062 Kshs 95,000/=
7. Cheque No 013063 Kshs 130,500/=
8. Cheque No 013066 Kshs 150,000/=
9. Cheque No 013163 Kshs 114,806/=
10. Cheque No 013272 Kshs 95,000/=
11. Cheque No 013273 Kshs 130,700/=
12. Cheque No 013348 Kshs 120,378/=
13. Cheque No 013350 Kshs 98,033/=
14. Cheque No 013449 Kshs 132,450/=
15. Cheque No 013448 Kshs 95,000/=
16. Cheque No 013545 Kshs 128,439/=
17. Cheque No 014084 Kshs 431,800/=

32. It was evident from the evidence that was adduced during trial that the following cheques were not verified by DW 2 as they were missing from her schedule of verified cheques:-

1. Cheque No 13873 Kshs 405,000/=
2. Cheque No 14225 Kshs 405,000/=
3. Cheque No 14223 Kshs 231,750/=
4. Cheque No 13872 Kshs 132,000/=

5. Cheque No 13748 Kshs 426,824/=

6. Cheque No 13679 Kshs 405,000/=

7. Cheque No 12516 Kshs 95,000/=

Kshs 2,100,974/=

33. While considering the cases of **Peter Karuiru Gachira t/a Karunje Enterprises Limited vs Consolidated Bank of Kenya Limited [2015] eKLR**, **London Joint Stock Bank Limited vs McMillan & Another [1918] A.C. 777** that was cited in the case of **Simba Commodities Limited vs Citibank N.A. [2013] eKLR** and **Grindlays Bank International (Z) Limited vs Nahar Investments Limited (1990-1992) Z.R. 86 (SC)** that were relied upon by the Appellant, this court came to the conclusion that the same were distinguishable from the facts of this case.

34. In those cases, the general common thread customers were found not to have been diligent and/or negligent for not having taken reasonable care to ensure there was no fraud as a result of which the banks were exonerated from the loss they suffered. As can be seen hereinabove, in the Appeal herein, this court had found and held that the Appellant herein did not exercise due care and attention when encashing all the cheques and could not therefore escape liability for the loss the 1<sup>st</sup> Respondent herein suffered.

35. In the absence of any evidence that DW 2 verified the aforesaid cheques, this court came to the firm conclusion that the Appellant was vicariously liable for the negligence and lack of diligence on the part of DW 2 and/or other concerned officers who handled the transactions relating to the unverified cheques. Bearing in mind that the 2<sup>nd</sup> Respondent was the 1<sup>st</sup> Respondent's employees, this court agreed with the Learned Trial Magistrate that the 1<sup>st</sup> Respondent could not escape contributing to the negligence as the 2<sup>nd</sup> Respondent herein was the perpetrator of the fraudulent activities in its account.

36. In this regard therefore, this court was not persuaded that it should interfere with the determination in respect of the apportionment of liability between the Appellant and the 1<sup>st</sup> Respondent that was arrived at by the Learned Trial Magistrate. The only point of departure of this court was that it found that whereas there was evidence that the Appellant was negligent in the way it managed the 1<sup>st</sup> Respondent's bank account, there was no proof that the Appellant's employees colluded with the 2<sup>nd</sup> Respondent herein as had the Learned Trial Magistrate had found.

37. The case of **Barclays Bank of Kenya Limited vs Evans Ondusa Onzere [2015] eKLR** that was relied upon by the Appellant in which the appellate court found the trial court therein to have misapprehended the evidence thus arriving at a wrong conclusion was thus not relevant in the circumstances of the case herein.

38. On the other hand, this court fully associated itself with the holding of Havelock J (as he then was) in **Kenya Grange Vehicles Industries vs Southern Credit Banking Corporation Limited [2014] eKLR** where he held as follows:-

**“... What can be said is that the Banker is not required to engage in an impractically extensive inquiry, nor is it to be held to a standard of perfection. All that is required of the Bank is that it act reasonably in the circumstances...”**

39. In the premises foregoing, this court found that there was no merit in Ground of Appeal No (4) and the same is hereby dismissed.

## **II. QUANTUM**

40. Ground of Appeal Nos (1), (2) and (3) were dealt with together under this head as they were all related.

41. Having ascertained that the Appellant was liable for the loss the 1<sup>st</sup> Respondent sustained, the next concern of this court was to establish whether or not the Learned Trial Magistrate arrived at a correct conclusion as regards the loss that the 1<sup>st</sup> Respondent herein sustained.

42. The Learned Trial Magistrate compared the copies of the cheques that were presented before her and the cheque requisitioning slips and bank statements and concluded that the 1<sup>st</sup> Respondent was entitled to a sum of Kshs 3,782,000/= and not Kshs 3,882,000/= as it had claimed in its Plaint. This court, however, disregarded the cheque requisitioning forms as they were the 1<sup>st</sup> Respondent's internal documents which were not demonstrated to this court to have been presented to the Appellant at the time the cheques were deposited for encashment.

43. As this court had found that the only cheques that were not verified were seven (7) in number, the 1<sup>st</sup> Respondent thus suffered loss in the sum of Kshs 2,100,974/= that was made up as shown hereunder:-

1. Cheque No 13873 Kshs 405,000/=

2. Cheque No 14225 Kshs 405,000/=

3. Cheque No 14223 Kshs 231,750/=

4. Cheque No 13872 Kshs 132,000/=

5. Cheque No 13748 Kshs 426,824/=

6. Cheque No 13679 Kshs 405,000/=

7. Cheque No 12516 Kshs 95,000/=

Kshs 2,100,974/=

44. In the premises foregoing, this court came to the conclusion that Grounds of Appeal Nos (1), (2) and (3) were partly successful.

**DISPOSITION**

45. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 19<sup>th</sup> December 2016 was partially successful. In the premises foregoing, this court hereby sets aside and/or vacates the judgment by the Learned Trial Magistrate of 2<sup>nd</sup> November 2018 and replaces the same with an order that judgment be and is hereby entered against the in favour of the 1<sup>st</sup> Respondent against the Appellant for the sum of Kshs 1, 050,487/= made up as follows:-

Actual loss of monies on unverified cheques Kshs 2,100,974/=

Less fifty (50%) per cent contribution Kshs 1,050,487/=

Kshs 1,050,487/=

Plus interest thereon at court rates from the date of filing suit until payment in full and costs thereon.

46. As the Appellant was partially successful on its Appeal, each party will bear its own costs of the Appeal.

47. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF MAY 2020**

**J. KAMAU**

**JUDGE**