



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CIVIL APPEAL NO.3 OF 2016**

**KENYA COMMERCIAL BANK LTD.....APPELLANT**

**VERSUS**

**JOHN KHAINDI.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

*[An appeal from the judgment and decree delivered by Hon. C.N ORUO,*

*Resident Magistrate on the 12<sup>th</sup> January 2016 at Webuye)*

**JUDGMENT**

The Plaintiff filed a suit before trial court by way of amended plaint dated 24<sup>th</sup> November 2014 pursuant to the court order of 3<sup>rd</sup> March 2015. In the amended plaint plaintiff avers that in blatant breach of their obligation under Banking Act, the 1<sup>st</sup> defendant breached their fiduciary duty to their customer the plaintiff and neglected, refused and/or failed to perform their obligation of ensuring safety of their customers money in their custody according to contractual terms.

The plaintiff was at all times material holder of Kenya Commercial Bank Visa Card Number **418087126673** while the 1<sup>st</sup> defendant is a limited company incorporated under the Company Act of Kenya and carrying its banking business under Banking Act having a branch in Webuye within Republic of Kenya. The 2<sup>nd</sup> Defendant is the Attorney General of the Republic of Kenya being enjoined in this suit as a friend of the court (Amicus Curiae)

On or about 4<sup>th</sup> March 2014 the plaintiff while on a routine check visited her bank with view of making some withdrawal but she was informed she had no sufficient funds in her account as requested and on inquiry she was informed of unknown withdrawals from her bank account between 7<sup>th</sup> February 2014 to 25<sup>th</sup> February 2014 by unknown people at Mumias Branch ATM.

The Plaintiff averred that she never used the KCB Visa Card Number 418087126673 and she never used the said card for any transaction as the card was safely kept in her custody and only 1<sup>st</sup> Defendant had personal Identification No. (PIN) in respect to the Card. The 1<sup>st</sup> Defendant allowed money to be withdrawn between 7.2.2014 and 25.2.2014 without plaintiff consent and thus the 1<sup>st</sup> Defendant is wholly liable for the negligent actions of its employees.

Particulars of breach on part of defendant are set out in paragraph 27 of the amended plaint as follows;

- i. Failing to update and inform the plaintiff on the withdrawals from her account.*
- ii. Failing to take reasonable measures to protect the plaintiffs account.*
- iii. Failing to exercise proper skills and care required of a banker.*

As a result of the negligence of the defendant the Plaintiff suffered loss and damage.

The particulars of loss are set out in paragraph 18 of the plaint as follows;

- i. Plaintiff was unable to pay rent during the said period*
- ii. Plaintiff lost her business opportunity she was operating*
- iii. Plaintiff subjected to considerable amount of distress, humiliation, agony and mental torture*
- iv. Plaintiff lost his income*
- v. The Plaintiff is not in a position to meet her financial obligation during the said period.*

The 1<sup>st</sup> defendant entered appearance and filed amended defence dated **4<sup>th</sup> May 2015** in which it admitted that the plaintiff maintained a salary account number 1106173104 in its Webuye Branch and further admitted that Plaintiff collected her ATM on 4<sup>th</sup> October 2013.

The 1<sup>st</sup> Defendant denied contents of paragraph 6 of the amended plaint and stated it diligently performed all its obligations and duties with respect to Plaintiff's Account. The 1<sup>st</sup> Defendant without prejudice stated that if any withdrawals were made, from the Plaintiff's Account such withdrawals were made with the consent and knowledge of the Plaintiff and that the plaintiff was under obligation to keep ATM card Pin certificate safe.

The matter proceeded to full hearing. The evidence before the trial court was that Pw1 Joan Khaindi, was operating a salary account number 1106173104 at KCB Webuye Branch. That in October 2013 she was issued with ATM card number 418087121012 which was valid from September 2013 to September 2018 and copy of ATM was produced as P. Exhibit 1. On the 3<sup>rd</sup> February the plaintiff withdrew some money Kshs.25,000/= which she did across the counter and balance remained Kshs.436,059.55/=

On the 4<sup>th</sup> March 2014 she went back to the bank and on inquiry of her balance before making a withdrawal she was informed that the balance was kshs.330,828.55/= on inquiry from Dw1 (Stella) she referred her to manager who issued her with a statement exhibit 2 herein which indicated the account was less by Kshs.105,000/= and that the following withdrawals had been made;

***On 7/02/2014 Kshs.20,000/=***

***On 13/02/2014 Kshs.20,000/=***

***On 18/02/2014 Kshs.10,000/=***

***On 18/02/2014 Kshs.5,000/=***

***On 19/02/2014 Kshs.10,000/=***

***On 24/02/2014 Kshs.20,000/=***

***On 25/02/2014 Kshs.20,000/=***

The total amount withdrawn was Kshs.105,000/= and that withdrawals were done from an ATM in Mumias. On inquiry about the bank CCTV footages he was not furnished with same and the plaintiff testified that he did not receive any notification on the withdrawals Plaintiff blamed the bank for negligence.

The defence called Dw1 Stella Simiyu, the customer care service Consultant. Her witness statement was adopted in which she stated that on the 17/09/2013 they issued plaintiff with ATM card and she collected the same on the 4/10/2013. The 1<sup>st</sup> defendant diligently performed all her duties and obligation and if any withdrawals happened the same were made with consent of the Plaintiff.

After close of both parties hearing, the parties filed written submissions and the trial court magistrate after consideration entered judgement in in favour of plaintiff against the 1<sup>st</sup> Defendant and awarded Kshs.105,231/= being refund for the monies withdrawn from plaintiff's account, general Damages of Kshs.350,000/=, interest on the sum Kshs.105,231/= at court rate and costs of the suit.

The Appellant being aggrieved by the said judgement filed this appeal faulting the judgment on the following grounds;

- i. The learned Magistrate erred in fact and law in finding that the 2<sup>nd</sup> Respondent was enjoined as a friend to the court in so doing the learned magistrate failed to appreciate that the 2<sup>nd</sup> respondent was party to the suit.***
- ii. The learned magistrate erred and misdirected himself in law when he found and awarded general damages for breach of contract when such damages as unknown in law;***
- iii. That the learned magistrate erred in fact and law in awarding damages for breach of contract in the absence of evidence of such breach;***
- iv. The learned magistrate erred in law and fact in awarding damages which were manifestly excessive and punitive;***

v. *That learned magistrate erred in law and fact in ordering the appellant to refund the Kshs.105,231/=.*

vi. *That learned magistrate erred in fact and law in finding that the appellant should have called the branch manager to testify as a defence witness when there was no basis in law or in fact or such finding.*

vii. *That learned magistrate erred in fact and law in relying solely on evidence of PW1 and disregarding evidence of defence witness;*

viii. *That learned magistrate erred in fact and law in failing to accord the appellant opportunity to respond to the respondent's written submissions and the authorities in support thereof.*

ix. *That learned magistrate erred in fact and law in relying on wrong case law authorities relied upon by the 1<sup>st</sup> respondent.*

By consent of the parties and court directions, this appeal was canvassed by way of written submissions. Mr. Mukele for the appellant submitted on whether the 2<sup>nd</sup> defendant was wrongly enjoined as a friend of the court that the trial court failed to consider that 2<sup>nd</sup> Defendant was a party in the subordinate court. He submitted that the 2<sup>nd</sup> defendant did not file any application to seek leave to be enjoined as amicus curiae and he submitted that issues before trial court were not public interest and therefore the assertion that Attorney General was enjoined as a party was an error of the law. He relied on the decision in *Moses Kiarie Kuria & 2others Vs. Ahmed Isaack Hassan & Another (Petition No.3,4 and 5 of 2013)[2013] eKLR.*

He submitted on whether there was breach of duty of care by the appellant that the respondent failed to demonstrate that the appellant negligently breached its fiduciary duty and that the relationship was contractual in nature that imposes bank to exercise reasonable care and skill in its dealing with the customer. He referred to *Simba Commodities Ltd Versus Citibank N.A. Civil Case No.236 of 2003 (2013) eKLR.* He submitted that the Dw1 affirmed that the appellant diligently performed its obligation and this evidence was not controverted.

He submitted that the respondent despite the withdrawals the 1<sup>st</sup> respondent did not give evidence that she changed the pin number or closed the account therefore the trial court was wrong to conclude that the withdrawals were irregular or there was breach of fiduciary relationship.

He submitted on production of the CCTV footage that it was upon trial court to order the production of the same by production order under order 11 Rule 3 (2) (f) of the Civil Procedure Rules,2010 at the instant of the respondent but the trial court failed to make order of notice to produce.

He submitted that the trial magistrate erred in awarding general damages for breach of contract and consequently failed to appreciate and consider that such damages were unknown and invites this court to find so.

He submitted that since breach of appellant's duty of care which formed basis of judgement was not proved the award of refund of money withdrawn was error both in law and fact. The respondent filed submissions through Counsel Lusweti. He submitted that the trial court did not err in enjoining the Attorney General as friend of the court as the issue at hand was of public interest.

He submitted that the General Damages awarded by the learned magistrate were reasonable in the circumstance relying on the authority in *Kanga V Manyoka[1961] EA 705,709,7013* and other authorities that I have fully considered. He submitted that the trial magistrate exercised his discretion in awarding the damages. He submitted on award of refund of Kshs.105,000/= that there was overwhelming evidence from the pleadings filed in court and submitted that the memorandum of appeal doesn't raise any triable issues and ought to be dismissed.

This being a first appeal, this court is obliged to reevaluate and reexamine the evidence before the lower court and arrive at our own independent conclusion. This is the principle of law that was well settled in the case of *Selle V Associated Motor Boat Company Ltd [1968] EA 123* where Sir Clement De le Stang stated that:

***“ This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.***

***However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally ( Abdul Hamed Sarif V Ali Mohammed Solan [1955] 22 EACA 270).***

I have carefully considered the evidence adduced and as analyzed by the trial court in the judgment. I have also considered the submissions made before this court by the appellant and the respondent taking into account all the decisions relied on. In my view, the issues for determination in this appeal are;

(a) *Whether there was breach of fiduciary duty between appellant and Respondent?*

(b) *If (a) is in the affirmative whether the quantum of damages awarded by trial court properly accessed.*

It is not in dispute that the Respondent was a customer of appellant and owner an account and holder of Kenya Commercial Bank Visa Card Number **418087126673.**

It is the respondent's contention that on the 4<sup>th</sup> March 2014 she went back to the bank and on inquiry of her balance before making a withdrawal she was informed that the balance was Kshs.330,828.55/= and on inquiry from DW1(Stella) who referred her to manager and who issued her with a statement exhibit 2 herein which indicated the account was less by Kshs.105,000/=. She blames the bank for the negligence and breach of duty of care to her as their customer. The Appellant on the other hand contends that it diligently performed all its obligations and duties and if any withdrawals were made from the plaintiff's account, the same were made with the consent of the plaintiff. At this stage I'm obliged to establish whether there was breach of duty of care by the Appellant to 1<sup>st</sup> Respondent.

I wish to state that the bank's duty to care regarding a customer's account and matters relating to it is never in dispute. The banks, whether collecting banks or paying banks, have a duty to ensure that customer's account and matters relating to it are kept secret or are made confidential. There is no doubt about that for it is on that understanding that anybody either as individual or as a corporate body would ever think of putting his money in a bank.

Further, if the same confidentiality was not assured, many crimes would be committed as a consequence of knowing what one has in his or her account, and further, commercial transactions would not flourish.

In the case of *Tournier vs National Provincial and Union Bank of England Ltd [1923] All ER 550*, Banker LJ stated as follows:

***“The case of the Banker and his customer appears to me to be one in which the confidential relationship between the parties is very marked. The credit of the customer depends very largely upon the strict observance of that confidence.”***

Therefore from evidence on record the appellant owed respondent a duty of care and the same was in breach when irregular and unauthorized withdrawals were made to plaintiff's account.

The appellant allowed money to be withdrawn from plaintiff's account between 7<sup>th</sup> February 2014 to 25<sup>th</sup> February 2014 thus causing plaintiff loss and damage due to negligence of part of the Appellant. The fact that the Respondents were unable to produce CCT footage for this ATM as stated does demonstrate lack of duty of care in safeguarding clients funds. Nothing could have been easier than the defendant demonstrate duty of care by producing CCTV footage to show who withdrew the amount.

It is my finding that from evidence on record the plaintiff did not use the Visa Card for any irregular transaction and therefore appellant is solely liable for the loss of the money and was liable to refund Kshs.105,000/= to the plaintiff.

On second issue whether the damages awarded were excessive in nature. The appellant herein submits that the learned trial magistrate erred in law in awarding the plaintiff/Respondent award that was excessive given in the circumstances. The respondent on the other hand states that the damages were properly assessed and awarded.

It is trite law that a court of law sitting on Appeal can only interfere with an award for damages if the award is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damages. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the trial Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie [1941] 1 ALL E.R. 297*. It was echoed with approval in *Butt v. Khan [1981] KLR 349* when it held as per Law, J.A that:

***“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”***

I have reviewed the entire record at trial and the judgment passed regarding assessment of damages. The trial court awarded the plaintiff general damages of Kshs.350,000/= for breach of contract. The Respondent in the Judgment was awarded the refund of money unlawfully withdrawn costs and interest on the same. The Respondent prayed for damages for breach of fiduciary duty. Where a court has made order for refund of money illegally withdrawn, it should take into account that award in assessing damages. There is no evidence that the appellant act was deliberate. The amount involved was Kshs.105,000/= which should be refunded. Taking all the factors into account, I find that the award of Kshs.350,000/= as general damages was not supported by the loss incurred by the Respondent. I find the same excessive; to warrant this court interfere with same. I hereby set aside the general damages of Kshs.350,000/= and substitute thereof with general damages of Kshs.100,000/=. The order for refund of Kshs.105,000/= is upheld.

**Dated and Delivered at BUNGOMA this 26<sup>th</sup> day of Nov, 2019.**

**S.N. RIECHI**

**JUDGE**