



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 150 OF 2000

CO-OPERATIVE BANK OF KENYAAPPELLANT

VERSUS

DC ONDUSORESPONDENT

J U D G M E N T

This appeal is against the decision of the Senior Principal Magistrate (Mrs N.M. Okwengu) in Civil Case No. E.J 761 of 1998 delivered at Milimani Commercial Courts Nairobi on 7th June, 1999.

In the case giving rise to the appeal dated 10th and filed in the Chief Magistrates Court Milimani on 14th September, 1998 the respondent had claimed a sum of Kshs.320,000/= which was allegedly wrongly debited to his account number 0446681006 or 8 at the Co-operative Bank University Way Branch Nairobi through cheque No. 000362.

The respondent blamed this on the negligence and or carelessness on the part of the defendant as a result of which the former suffered great loss.

The particulars of negligence are particularized in paragraph 6 of the plaint.

The respondent prayed that the court enter judgment for him for Kshs.320,000/=-, general damages, interest and any other relief the court deems fit to grant.

In a defence dated 14th October 1998 the defendant denied the particulars of negligence as alleged in paragraph 5 of the plaint and said it paid the above cheque in good faith and without negligence and in the ordinary cause of business.

The defendant also denied that the plaintiff was entitled to general damages as claimed and sought the dismissal of the suit with costs.

The case was placed before the Acting Senior Principal Magistrate on 26th March 1999 when the plaintiff and the defence witnesses appeared and testified in the case.

The plaintiff counsel filed written submission while the defence counsel made oral submissions on 7th April 1999 and judgment was delivered on 7th June 1999 wherein the learned Magistrate ordered the defendant to pay the plaintiff the sum of Kshs.320,000/= with interest at prevailing back rates (26%) from 27th July 1998 to the date of judgment plus costs and interest.

This is why this appeal was filed by the defendant in this court on 30th March 2000 in a memorandum of appeal which listed eleven (11) grounds of appeal.

The grounds questioned the courts award to the plaintiff of the sum of Kshs.320,000/= with interest at 26% from 27th July 1998 to the date of judgment, that the cheque had been paid to the payee in good faith; that the magistrate erred in finding that the defendant was negligent in the manner it handled the two cheques both numbered 000362, that if the plaintiff was entitled to any damages that it was only Kshs.2,500/= paid to one John Ochieng Ouma on cheque No. 000362 dishonoured upon presentation; that the magistrate erred in holding that the defendant had failed to discharge the onus on it to show that it acted without negligence, that she erred in shifting the burden of proof to the defendant; that she erred in failing to find that the two cheque numbers 000362 were similar in every respect save for the names of the payees, that she failed to find that the crossings on the two cheques had been opened, hence they were bearer cheques to be paid across the counter on production of the documents necessary to identify the bearer as the true owner, that the magistrate erred in failing to appreciate the protection offered to paying bankers by the Bills of Exchange Act, Chapter 27; that she erred in not appreciating the principles set out in the case of **Marfair & Co. Ltd versus Midland Bank Ltd. [1968] All. E.R 573** and that she erred in failing to find that the plaintiff had failed to prove his case on a balance of probabilities.

Counsel for the parties appeared before this court on 29th May 2002 to either present or oppose this appeal.

Counsel for the appellant stated that there was nothing on the face of the cheque presented for payment for Kshs.320,000/= to cause suspicion in the mind of the paying clerk that the respondent was being defrauded.

That the evidence of the handwriting expert called by the appellant showed that there was nothing to cause the appellant not to pay the disputed cheque.

That the cheque was paid in the ordinary course of business as it was not abnormal for the plaintiff - Respondent to withdraw such large sum of money.

According to counsel the magistrate shifted the burden of proof from the respondent to the appellant when she stated that the latter had failed to show that it had acted without negligence.

That the appellant discharged the onus that they paid the cheque in line with the duty of care owed to the respondent.

That being an open cheque there was nothing to stop the appellant from paying the amount thereon and that the respondent did not prove particulars of negligence on a balance of probabilities. He prayed for the appeal to be allowed with costs.

Counsel for the respondent opposed this appeal and submitted that it was the duty of the appellant to encash cheques from the respondents office and not from other unknown people to that office.

That though the two cheques were similar, the appellant was duty bound to be careful and make an inquiry considering the amount involved; and because of the hue and cry across the country due to copies of cheques being printed by the printing house.

Counsel submitted that the court correctly found that the respondent was put to an extra expense having lost money from his client account.

He prayed that the appeal be dismissed with costs.

These are submissions which have been made by counsel for both parties on which this court is being called upon to make a decision.

Both parties agreed in the lower court over the hue and cry in the country at around that time over the printing of copies of cheques by the printing firm.

The amount involved in this matter was not small by local standards.

The respondent stated in the lower court that if at any time he wanted to withdraw from his account more than Kshs.100,000/= he sent one of his two (2) employees, namely, John Boswayi or Celestine. This piece of evidence was not challenged.

If this be so, then their faces must be familiar to the appellant staff who deal with them in course of their duties from time to time.

Though the handwriting expert thought there were indications that the signatures on the specimen were by the same hand, they appeared lacking individual characteristics enough for a more conclusive opinion.

This gives the impression that the expert could not have reached a conclusive view that the signatures were truly by one and the same hand.

A proper person to say something about this aspect of the case would have been the employee of the appellant who actually paid out the money to the unknown customer.

He would also have told the court if he had dealt with the respondent and/or his employees on this account before apart from the date he paid the disputed cheque or whether in view of the out cry in the country over printing copies of the cheques by the printing house, he applied the diligence required of a banker in paying out such huge sum of money, given that the bearer of the cheque was unknown to him.

This was very crucial evidence going to the identity of the payee and without the appellant presenting this witness to court, the evidence of the Chief Manager could not help the defence at all.

From the evidence available then, it was not possible for the lower court to find if the appellant exercised the contractual duty of care and skill owed by them to the respondent, its customer in the payment of the disputed cheque and the learned magistrate was right in finding for the respondent and ordering the appellant to refund him Kshs.320,000/= and since the former was handling this money on business basis it was only fair that the same do carry interest at bank rates prevailing at the time, from 27th July, 1998 to the date of judgment.

I dismiss this appeal with costs.

Delivered, dated and signed this 24th day of July, 2002.

D.K.S. AGANYANYA

JUDGE