



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 85 OF 2019

ROSE NYANCHAMA NYANGWESO.....APPELLANT

VERSUS

LINET MONYANGI OGERO.....RESPONDENT

(Being an appeal from the decision of Hon. S. N. Makila (SRM) delivered in CMCC no. 137 of 2017 on the 14th June 2019)

JUDGMENT

1. On the 14th June 2019 judgment was entered against the appellant for Kshs.100000/- being damages for breach of trust and confidence. Aggrieved by the said decision the **Rose Nyanchama Nyangweso** (the appellant) filed this appeal. **Linet Monyangi Ogero** is the respondent (the respondent). The appellant seeks to have the orders of the lower court quashed.

2. The appellant in her memorandum of appeal raises the following grounds of appeal:

- i. That the learned trial magistrate erred in law and fact by entering judgment against the appellant for payment of general damages in the sum of Kshs. 100,000/- against the appellant when negligence was not proved against her.*
- ii. That the trial learned magistrate misdirected herself in that the appellant contributed to the negligence as pleaded without laying a basis and awarded costs when the appellant was not obligated to provide care to avoid any negligence.*
- iii. That the learned trial magistrate erred in law in according damages costs and interest against the appellant.*
- iv. That the trial magistrate erred in law and fact when she did not appreciate the evidence of the appellant which she dismissed.*

3. The appellant in the lower court case was the 1st defendant. The 2nd defendant was Cooperative Bank of Kenya. The case against the 2nd defendant was dismissed. This being the first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified (see **Selle & Another Vs Associated Motor Boat Company Ltd & Others [1968] EA 123**).

4. The respondent filed suit against the appellant and Cooperative Bank of Kenya Ltd (Cooperative Bank). In her plaint dated the 1st March 2017 she averred that she opened account No. [...] with Cooperative Bank who asked her to collect her ATM card with its PIN later. That later Cooperative Bank through its employee without her consent and or authorisation released her ATM card together with her PIN to the appellant. At paragraph 5 she states that the defendant under unclear circumstances withdrew all her deposits. She averred that actions of Cooperative Bank were negligent and that she suffered loss of all her deposits which was in her account at Cooperative Bank. She averred that the appellant secretly withdrew from the account all her deposits. She particularised the appellants and Cooperative acts of negligence at paragraphs 6 (i) to (iv).

5. She averred that Cooperative Bank failed to explain the circumstances under which it released the ATM card and PIN to the appellant whom they held responsible for the withdrawals on account of evidence in their possession. That she has repeatedly visited the offices of Cooperative Bank demanding to be repaid all the amounts she deposited but the Bank has failed to heed her request frustrating her efforts and is traumatised and has suffered loss and damage.

6. She sought an order compelling Cooperative Bank to tender a proper, accurate and up to date statement of her account No. xxxx. An order compelling the appellant and Cooperative Bank, severally and jointly to immediately settle in full all the amounts due to her together with interest till payment in full. She also sought general damages for suffering of loss and damages to be assessed by the court and lastly costs of the suit.

7. The appellant in her defence dated 23rd April 2017 denied the allegations against her as averred by the respondent and put her to strict

proof.

8. Cooperative Bank too filed a defence denying the respondents claim and put her to strict proof. The suit against Cooperative Bank was dismissed.

9. The respondent's adopted her written statement dated the 1st March 2017 at the trial, this was her evidence as per the said statement; she opened an account with Cooperative Bank No. [...] and also applied for an ATM card. She was asked to wait for the ATM card and PIN. She deposited monies in her account. Later after sometime she went to the Bank to collect her banking items and she learnt that the monies in her account had been secretly withdrawn without her knowledge and consent. The 2nd defendant on checking their systems informed her that it is the appellant who had been withdrawing the money from her account. The Bank advised her to report to the police. That her demand for a refund of the said monies was not fruitful. That the appellant insisted that an employee of the Bank released her ATM card and PIN. That the appellant and the Bank took her round and round with the appellant undertaking to settle but all in vain. That she has suffered loss and damage as she cannot access her money on account of the negligence actions of the appellant and the Bank.

10. The respondent stated the following in her oral evidence in court; that she filled the account opening form but the mobile number in it was not hers. She signed the form but it was filled the house of the appellant. She gave the appellant her ID card to collect her ATM card. The appellant gave her the account number and she began depositing money into the account. That at one time she went to check on her deposits and she was told she had no money in the account. That she was sent to the manager who told that the ATM card was given to the appellant sometime back. She never signed for the card when it was issued out nor did she withdraw the money. That the manager did not show her the signature or document relied on to release the ATM card to a 3rd party. That she had deposited about Kshs. 800,000/-. That she would give the appellant money to deposit for her in the account. That the appellant agreed to reimburse the money in writing.

11. The appellant too relied on her written statement filed in court on the 26th March 2019. In her statement she deposed that the respondent is known to her. That her bankers are Cooperative Bank. She opened her account with Cooperative Bank when they were with the respondent the same day. She collected her ATM later. She does not know when the respondent collected her ATM card. The bank gave her a PIN. The Bank could not give someone an ATM card of another person. The respondent's claim through her demand that she owed her money Kshs. 720,000/- is not true. That the respondent took her to the stadium where she was threatened and intimidated by community policing and they forced her to sign for the sum of Kshs. 500,000/-. She signed the document because she feared for her life. The community policing forced her to pay the sum of Kshs. 180,000/-. The respondents claim against her is malicious. That being a close friend the respondent used to send her to the bank to deposit money into her account. After depositing the monies, she used to give the deposits slips to the respondent. She cannot estimate the amount she deposited for the respondent into her account. The respondent withdrew funds from her account herself. She never withdrew any money from the respondent's account. She does not know how the respondent got her ATM card. The respondent did not say how much she withdrew from the account.

12. Cooperative Bank called a witness Yusubera Regina Casmir who adopted her written statement dated 3rd December 2018. In her statement she deposed that she is Service Desk Officer for the Bank in Kisii town. She admitted that the respondent opened and operated a bank account No. [...] with the bank and she also applied for an ATM card which was issued and collected by the respondent. That she began operating the account as of 31.03.2017. The respondent's account contained a book balance of more than Kshs. 100,000/-. That it's the bank's case that if at all there was a withdrawal by someone else from the said account which was not done by the respondent the same was done with the authorisation either express, constructive or implied of the respondent, but without the knowledge of the bank. That the Bank denied the allegations of negligence as particularized. She deposed further that after the Bank learnt of the complaint by the respondent it commenced internal investigations and the respondent was required to write a statement with the Bank's team of investigators. That on or about the 6.03.2017 the respondent visited the Bank Kisii branch where she declined to give information regarding her complaint making it difficult for the Bank to investigate and come to the root of the matter.

ANALYSIS AND DETERMINATION

13. The appellant filed written submissions. I have read and considered the said submissions. The respondent did not file any submissions. From the evidence pleadings and submissions the issue for determination is whether the respondent proved her case against the respondent and if so was she entitled to an award of damages.

14. The respondent's claim against the appellant and the bank on actions which she termed as negligence. She has particularized the said acts in her plaint. It is not in dispute that she was with the respondent when she opened her account. It is also not in dispute that respondent sent the appellant to make deposits into her account.

15. The respondent alleged that the bank issued her ATM card to the appellant. At paragraph 6 of the plaint the respondent claims that the ATM card together with the PIN was issued to the appellant. The Bank denied this and the appellant. The respondent did not support her assertions with any evidence that the Bank issued the ATM card and PIN to the appellant. The Bank adduced evidence that the respondent collected her ATM card. The respondent also claimed that there was failure to inform her when the ATM card and PIN was released. She collected the ATM card as per the bank record, this allegation too was not proved. The next alleged acts of negligence were that the appellant and the bank dealt with or transacted her account without authority and that her deposits were depleted. It was the evidence of the appellant that she only made deposits for the respondents and that she gave the respondent the deposit receipts. The respondent acknowledged that the appellant made the deposits. However she failed to adduce evidence that the appellant withdrew monies from her account as alleged. She also failed to adduce evidence on how her banking rights were infringed.

16. The trial magistrate found that the respondent had proved her case on balance of probabilities. It was her finding that there was a huge possibility that the appellant breached the respondent's trust and irregularly withdrew monies belonging to the respondent. The issue of withdrawal was an issue for determination and to prove the said allegation the respondent ought to have adduced evidence to demonstrate that it is the appellant who withdrew the monies. No such evidence was adduced. The trial magistrate held the appellant liable for signing an agreement to repay some money towards a debt fraudulently obtained by the appellant. I have read the said agreement it does not refer to the monies in the respondent account. If it had then the appellant would have been held liable. In my view the trial magistrate erred holding the

appellant liable. Lastly the trial court awarded the respondent damages for breach of trust and confidence. The respondent's case was anchored on acts of negligence not breach of trust and confidence. The respondent had a duty to prove the acts of negligence of the appellant and the Bank. She failed to do so. A party is bound by its pleadings. Section 107 (1) of the Evidence Act provides as follows; *Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

17. The result of this appeal is that I find that the trial magistrate erred in her findings as the respondent failed to prove her case against the appellant. I therefore set aside the judgment entered against the appellant for the Kshs. 100,000/- plus costs and interest awarded. The suit against the appellant was not proved on a balance of probabilities. Noting the relationship between the parties, each party will bear its own costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 16TH DAY OF JULY 2021.

R.E. OUGO

JUDGE

In the presence of:

Appellant Absent

Respondent Absent

Mr. Orwasa Court Assistant