REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CIVIL APPEAL NO. 18 OF 2015

THE COOPERATIVE BANK OF KENYA.....APPELLANT

VERSUS

PARSALOI LASOI.....RESPONDENT

(Being an appeal from the judgement of the Senior Resident Magistrate

Hon. Mary A. Ochieng (Mrs.) dated 11th February 2015)

JUDGMENT

The appeal before is dated 5th March 2015 and was filed on the 9th March 2015 against the judgment delivered on 11th February, 2015 in **Kajiado CMCC NO. 216 of 2013** at the Chief Magistrates Court in which the Learned Magistrate ordered an award of special damages to the tune of Kshs. 321, 000/-, general damages for negligence and breach of confidentiality, cost of the suit and interest at court rates.

The Appellant vide a Notice of Motion filed on 24th March 2015 applied for a stay of execution which was granted vide a ruling by this court dated 17th day of March 2015. The decree was granted to stay the execution against the Respondent pending *inter-partes* hearing and determination of this appeal.

BACKGROUND.

There existed a bank–customer relationship between the Appellant and the Respondent. The Respondent opened an account with the Appellant Bank at Isinya. He was issued with a card, account number and he was taught how to use it together with a debit card in case he wishes to make a withdrawal. When he went to withdraw money from the said bank account he was informed that the account had insufficient funds. The Appellant realized that money had been withdrawn from his account by an ATM card which had not been issued to him on the day the teller informed him that his account had insufficient funds. He then reported the same to the CID and later proceeded to seek services of an advocate for purposes of instituting these proceedings where the Respondent alleged negligence and breach of confidentially for the loss of his funds. The same was vehemently denied by the Appellant herein and labored to adduce evidence to that effect.

Having analyzed the evidence adduced during the hearing of the matter, several affidavits presented before court by both parties as well as exhibits, the lower court found the Appellant herein liable for the loss of the plaintiff's money from his account by way of an ATM machine withdrawal. The Respondent was therefore awarded special damages to the tune of Kshs. 321,000/=.

The court declined an award of general damages for negligence and breach of confidentiality basing on the fact that breach of confidentiality was not proved by the Respondent in view of the evidence on record.

It is from this decision that the appellant appeals to this Court on four principal grounds, namely:-

1. THAT the learned Magistrate erred in law and fact by finding that the Respondent had proved special damages as against the Appellant to the tune of Kshs. 321, 000.00/=.

2. THAT the learned Magistrate erred in law and fact by failing to consider the weight and probative value of the evidence adduced by the Appellant with regard to the Respondent's request for and issuance of an ATM Card and Pin Number.

3. THAT the learned Magistrate erred in law and fact by failing to consider the submissions adduced by the Defendant so as to arrive at a just conclusion.

4. <u>THAT</u> the learned Magistrate erred in law and fact by failing consider that by the Plaintiff own admission he could understand Kiswahili and was therefore not as illiterate as he claimed to be.

The Law, analysis and determination

The Appellant therefore requested this court to find that the judgement of the learned magistrate dated 11th February 2015 be set aside and that the Respondent do pay the Applicant the costs of this appeal and of the application in the lower court. The Learned Counsel for the Appellant presented his written submissions dated 1st December 2018. In opposition of the appeal, the Counsel for Respondent also presented written submissions dated 27th day of November, 2018.

On whether the bank was negligent in issuing an ATM Card to the Respondent and subsequent withdraws from the Respondent's account. The counsel for the Appellant stated the Banker customer relationship is governed by the General Terms and Conditions government banking with the Appellant and which were executed by the Respondent when opening the account in question. It was also stated that general terms and conditions constitute a binding contract between the parties upon which govern their relationship and any disputes arising therefrom.

It was averred that there was no dispute whatsoever that a bank customer relationship existed and the parties are bound by the general terms and conditions of the Appellant unless elements of fraud, undue influence or coercion were pleaded by the Respondent. Counsel relied on the case of ***National Bank of Kenya Vs Pipeplastic Samkolit (K) Ltd (2002) 2 EA 503 where it was stated that:***

> ***"We are alive to the hallowed legal maxim that is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved."***

The Counsel for the Appellant argued that the trial court ought to have borrowed guidance by the general terms and conditions when making its determination. It was further contended that a party cannot seek to escape the terms of an agreement on the grounds that the same does not favour it. The Appellant relied on the case of ***Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No. 51 of 2000) (unreported)***: where Shah JA stated as follows:

> ***"It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily not part of equity's function to allow a party to escape from a bad bargain."***

The Learned Counsel for the Appellant therefore argued that when a dispute arises the first point of reference should be contract between the parties and their respective duties therein. Further reliance was placed in the case of ***Chartbook Limited vs Persimmon Homes Limited (2009) UKHL 38.*** In that case Lord Craighead in the House of Lords stated as follows:

> ***"…….the very purpose of a formal contract is to put an end to the dispute which would invariably arise if the matter were left upon what the parties said or wrote to each other during the period of their negotiations. It is the formal contract that records the bargain, however different it may be from what they may have stipulated for previously"***

It was therefore argued on behalf of the Appellant Bank that while indeed the bank owes a duty of care to its customers, it is bound by the terms and conditions that the Respondent agreed to and signed; and a party cannot defer from an agreement that both parties had consented to. The Counsel for the Appellant submitted that in determining this suit this Honorable Court considers the terms and conditions that the parties agreed to when the account was opened above and beyond the general principle of neighborliness that the Learned Magistrate relied on.

On the negligence allegations made by the Respondent that the Bank allowed an unknown person to collect an ATM Card for the Respondent's account without his knowledge or authority; that the ATM Card was issued without adequately recording and documenting the collection; allowing an unknown person to access the Respondent's account.

The Counsel for the Appellant faulted the decision of the learned trial magistrate pointing out that she failed to take into consideration the report by the finger print expert which stated that a finger print had been used to open the account and collect the ATM card but he was unable to verify the due to the ink used and this in itself could not shift the burden of proving the case to the Appellant. It was averred that the bank had also maintained all records of the Respondent including account opening forms and statements which were produced and therefore the learned magistrate erred in finding that the Bank did not have proper records and that the Appellant's general terms and conditions exclude it from liabilities accessioned by misuse of the debit cards.

On the Respondent's allegation that neither he nor his agent facilitated any transaction with his personal ATM card thereby occasioning loss of Kshs. 321,000/=, the Counsel for the Appellant is of the view that the same was disproved before court when the defendant's witness adduced evidence of bank statements showing that withdrawals were made in the account holder's name and number.

It was pointed out that the general terms and conditions provide that in such instances, the bank shall consider its records of the same as conclusive and imposing liability on the Appellant on allegations that the Respondent did not make withdraws yet the records prove otherwise is not only unfair to the Appellant but also contrary to the agreement of the parties. Counsel cited clause 2.1.f of the said terms and conditions which states that:

> ***"In the absence of manifest error, the bank's record as to any transactions instructions or their consequences thereof shall be conclusive."***

Further that the bank is also not liable unless a complainant is lodged and it fails to act on it. The general terms and conditions provides thus that:

Delay by customer in lodging complaints

> ***"The Bank is not responsible for any matter unless the Customer has made a written complainant to the Bank as soon as reasonably possible."***

It was therefore humbly submitted by the Appellant that it was not negligent in any way as the bank's agents verified his details when opening the account and on issuance of the debit card.

On whether the Appellant is liable to the Respondent for the amount withdrawn from the Respondent's account, Learned Counsel for the Appellant holds the view that the trial magistrate failed to assess when the burden and duty of care shifts to the Defendant. In a case before the trial court had this fact been considered, then the Learned Magistrate would have arrived at a different conclusion. In that regard, the appellant resorted to the case of **East Produce (K) limited v Christopher Astiado Osiro C.A. No. 43 of 2001**where the court held that:

> ***"It is trite that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid down in the case of Kiema Mutuku v. Kenya Cargo Hauling Services Ltd. (1991) 2KAR 258, where it was held that "there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence".***

It was therefore stated in that regard that while it is undoubtedly that the bank owes its customers a duty of care, it is also paramount to note that the customer's themselves have duties as well. Further that it is the customer's duty as per the general terms and conditions to safeguard his card when issued to him and in case of theft or loss to report promptly to the bank.

The Counsel for the Appellant also pointed out that during the trial it was evident that the Respondent is illiterate and it is likely that he was not able to grasp every term explained to him when opening his account or on collection of his card. Counsel cited Clause 2.2 of the general terms and condition which state that:

> ***"A card holder must ensure at all times safety of the card and secrecy of the PIN to prevent loss or use of his card by any third party."***

It was therefore argued that the bank was not negligent as due care was exercised in issuing the ATM Card and in line with the Bank's policy not to turn away illiterate customers, having explained the terms in a language he understood and thereafter the customer placing his impression on the account opening forms and acknowledging receipt of the card.

Further that it is not disputed that indeed money was withdrawn from the Respondent's account but who withdrew it? The Counsel for the Appellant controverted the Respondent's claim that he did not request for an ATM card which fact was disproved by the appellant hence the only question remaining would thus be who was liable for withdrawals made after the bank issued an ATM Card. It was humbly submitted in that respect that while the defendant bank is determined to ensure safety of its client's money, it was the duty of the Respondent to safeguard his account by ensuring his ATM Card was safe and incase of loss reporting the same to the bank.

It was contended that the Respondent had not reported any theft or loss of ATM Card to the bank and the issue of loss of funds only came up when the Respondent tried to withdraw cash from the bank only to be notified he had insufficient funds. It was state that for the bank to safeguard its safeguard its customers' funds requires them to report any fraud on their accounts to the bank immediately to enable the bank to take reasonable measures. The respondent failed to make a report orally or in writing of the alleged fraud and hence cannot impose liability on the Appellant. The Appellants cited **clause *2.2 c to d*** which states that:

> ***"If a card is lost or stolen, or if a PIN is disclosed to an authorized person, the cardholder must immediately notify the bank of such loss, theft or disclosure. Any oral notification must be confirmed in writing immediately. The Card holder must be liable in respect to any transactions that occur prior to the notification such loss theft disclosure."***

It was therefore stated in light of the above that the appellant was only liable if the fraud had occurred after the Respondent had given notice to the bank. The Appellant is of the view that the judgement imposes an impractical stretch of the duty of care owed by the bank without placing due weight on the obligations to the customer. Further that, the bank being a business where the defendant interacts with various customers its *modus operandi* is governed by the general terms and conditions and is not liable for any loss occasioned by the illiteracy level of its customers or failure to understand the terms governing their relationship.

It was argued that the Respondent exploited his low literacy levels to escape liability in situation where Appellant had performed its role. It was humbly submitted that the trial court erred in fact and in law and this Honorable Court ought to re-evaluate the evidence afresh and arrive at the proper conclusion with regard to who is liable for the loss of money in the Respondent's account. They cited ***Oluoch Eric Gogo vs Universal Corporation Limited (2015) eKLR,*** where the court of appeal stated that:

> ***"As a first appellate court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of SELLE&ANOTHER VS ASSOCIATED MOTOR BOAT CO. LTD &ANOTHER (1968) EA 123, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect."***

The Respondent opposed the application by way of submissions dated 27th November, 2018. The counsel for respondent contents that the amount of special damages was Kshs. 321, 000/- after the Respondent proved a printed bank statement from the Appellant showing 19 ATM withdrawals carried out between 13th of January and 18th of February, 2018. The Counsel for Respondent cited several cases to that effect which include the case of ***Isaac Mworia M'nabea vs David Gikunda (supra),*** where the court held that:

> ***"[16] In so far as special damages are concerned, they must be strictly pleaded and proved. A careful perusal of the record clearly reveals that these two heads of damages were not strictly proved nor pleaded as required by law. In fact the Appellant only quantified them in his submissions.*** In **SANDE vs. KENYA CO-OPERATIVE CREAMERIES LTD (1992) LLR 314 (CAK)** the Court of Appeal held that:-
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> ***"As we pointed out at the beginning of this judgment, Mr. Lakha readily agreed that these sums constituting the total amount were in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved. We do not think we need to cite any authority for this simple and hackneyed proposition of the law."***

Similarly, in DOUGLAS ODHIAMBO APEL & ANOR vs. TELKOM KENYA LTD CA NO.115 OF 2006 it was stated thus;

> ***.....a Plaintiff is under a duty to present evidence to prove his claim. Such proof cannot be supplied by the pleadings or the submissions. Cases are decided on actual evidence that is tendered before the court..... unless a consent is entered into for a specific sum, then it behoves the claiming party to produce evidence to prove the special damages claimed.....***
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> ***Submissions, as he correctly observed, are not evidence. The only way the receipts would have been produced and acted upon by the court would have been by the Plaintiffs taking the stand and producing them on oath or the parties agreeing expressly that they be the basis for special damages. This did not occur."***

And the case of ***Bonham Carter vs Hyde Park Hotel Ltd (1948) 64 T.R 177, where it was stated as follows:***

> ***"The plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down particulars and, so to speak, throw them at the head of the Court, saying, this is what I have lost, I ask you to give me these damages. They have to provide it. (See Ouma – v- Nairobi City Council (1976) KLR 297, 304)".***

Further reliance was placed in the case of ***African Line Transport Company & Another vs Sylvester Keitany (2017) eKLR*** where it was stated that:

> *"17.* ***It is however the duty of the appellate court to look at what was produced in support of the claim in the lower court. The court agrees with the case in Kampala City Council v Nakaye [1972] EA 446 where the Court of Appeal was of the view that a special damage claim need not only be specifically pleaded but must also be strictly proved. This was the position too in Hahn vs Singh (1985) KLR 716 where the Court stated:***
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> ***"[S]pecial damages which must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the act themselves."***

The Counsel for the Respondent also resorted to the elementary principle in civil cases which states that he who alleges must prove. Reference was given to section 107 and 109

> ***"(1) 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.***
>
> ***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."***

Section 109 of the ***Act*** as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

It was therefore stated in light of the above that in view of the facts presented before the trial court by the Respondent, the threshold of the aforementioned principles and provisions of law were met through the pleadings and his testimony.

On ground two the Counsel for the Respondent submitted that the Learned Magistrate was right to uphold that the Respondent was illiterate and had clearly informed the Appellant that he would not need an ATM card. Further, that the Respondent had indicated that all his bank transactions would be undertaken over the counter at all material times. Counsel agrees with Learned Magistrate's finding that the Respondent had been issued with a temporary card which was renews after two (2) years to assist him to make the necessary withdrawals over the counter.

Further that the Appellant never took the initiative to call accounts service officer as a witness to confirm if indeed the Respondent had been

issued with and collected an ATM card and upon and after opening the account. Counsel cited the cases of **Cyprian Awiti & Another v Independent Electoral and Boundaries Commission & 3 Others (2018) eKLR** where the case of **Gatirau Peter Munya vs Dickson Mwenda Kithinji, Supreme Court Petition No. 2B of 2014** was cited with approval. It was stated therein that:

> ***"Much as the Court is free to navigate the evidential landscape on appeal, it must, in a distinct measure, show deference to the trial Judge: regarding issues such as the credibility of witnesses and the probative value of evidence. The Court must also maintain fidelity to the trial record. The evaluation of the evidence on record is only to enable the Court to determine whether the conclusions of the trial Judge were supported by such evidence, or whether such conclusions were so perverse, that no reasonable tribunal would have arrived at the same."***

On ground three, where the Appellant faults the Learned Trial Magistrate for failure to consider the submissions adduced by the Appellant so as to arrive at a just conclusion. Counsel holds the view that the Learned Trial Magistrate duly considered all the evidence submitted by both parties by way of pleadings and testimony. Reference was made to the case of ***African Line Transport Company & Another vs Sylvester Keitany (2017) (supra)*** to advance his argument that parties are bound by their principles. Further reference was made to the case of **Kweri Peter & 2 others v Ann Wanjiku Maina (2017) eKLR** as well as **order 21, rule 4** and **5** of the Civil Procedure Rules, 2010. It was therefore submitted that the Learned Magistrate passed her Judgement in full complaints of the law.

On the ground that Learned Magistrate failed to consider that the Plaintiff through his own admission could understand Kiswahili and was therefore not as illiterate as he claimed to be. It was submitted that the respondent was illiterate and understanding Kiswahili does not mean that he knows how to read and write. It was explained that the Respondent being a person with illiteracy was entitled to other appropriate means of communication (other than writing and reading). In particular, the Respondent was entitled to verbal explanations of applicable terms and conditions of the account opening.

The counsel for the Respondent pointed out that it is quite clear the Respondent had indicated from the start that he did not require an ATM card due to his illiteracy. In this regard, he adopted the over the counter model of transacting by being present in person and issuing instructions verbally before withdrawal of any monies from his account.

The Respondent is convinced that the Learned Trial Magistrate correctly stated that the lack of finger print identification on the pin mailer register and debit card register which could not be verified by the finger expert was a clear indication that there was fault on the part of the Appellant on using ink whose verification of any signature could not be confirmed or clearly ascertain and this further supports the Respondent's assertion that he never collected any ATM card from the Appellant.

It was also stated that the Learned Magistrate correctly held that the Respondent who was illiterate could only have used an ATM Card with assistance of someone who was literate. However, no CCTV footage was availed to the court to confirm who withdrew the amount of Kshs.321, 000/- further casting doubt on the Appellant's assertions in their defense that the Respondent was the one who undertook the withdrawals after being issued with an ATM card.

Further that the learned magistrate was correct in finding that the Respondent was illiterate was correct since a person with illiteracy like the Respondent is a person with disability and is entitled to the rights of persons with disabilities as protected in the Constitution and the relevant statutes. For persuasive purposes the counsel for Respondent made reference to the case of ***Stephen Miheso v Kaimosi Tea Estate Limited [2014] eKLR*** where the court stated as follows:

> ***"The court has considered the evidence on record and particularly the evidence by the claimant that he was illiterate and that he had been duped to sign the alleged resignation letter. The documents on record show that the claimant consistently signed by his thumb print. Accordingly, the court finds that the claimant was illiterate. What was the consequence and obligation placed upon the respondent in view of the claimant's illiteracy?***
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> ***Section 2 of the Employment Act, 2007 defines "disability" to mean a physical, sensory, mental or other impairment, including any visual, hearing, learning, or physical incapability, which impacts adversely on a person's social and economic participation. The court holds that a person with illiteracy like the claimant is a person with disability and is entitled the rights of persons with disabilities as protected in the constitution and the relevant statutes. The court further holds that under section 5 (3) (a) of the Employment Act, 2007, the claimant was entitled to freedom from harassment by the respondent on account of the disability of illiteracy and in particular, under the section the claimant was entitled to freedom from harassment in respect of termination of employment or other matters arising out of the employment relationship.***
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> ***It is the further holding of the court that the claimant being a person with illiteracy, he was entitled to other appropriate means of communication (other than writing and reading) as provided for in Article 54(1) (d) of the Constitution. In particular, the claimant was entitled to verbal explanations of applicable terms and conditions of service in a language that the claimant understood in view of the employment relationship. The Employment Act, 2007 specifically protects illiterate employees in section 9 (3) and (4) which provide as follows:***
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> > ***"9. (1)….***
> >
> > ***(2) ….***
> >
> > ***(3) For the purpose of signifying his consent to a written contract of service an employee may?***
> >
> > ***(a) sign his name thereof, or***

(b) imprint thereon an impression of his thumb or one of his fingers in the presence of a person other than his employer.

(4) Where an employee is illiterate or cannot understand the language in which the contract is written, or the provisions of the contract of service, the employer shall have the contract explained to the employee in a language that employee understands."

The court has taken into account the quoted sections, considers that by permutation and expansion they apply to a contract to end employment by agreement as may be initiated by the employer and finds that the claimant ought to have imprinted, on the alleged letter for agreement to resign, his thumb or one of his fingers in the presence of a person other than the respondent's appointed supervisor who asked the claimant to sign the letter. The court has arrived at that finding because the respondent had initiated the idea of resignation and it ought to have been an offer under which the claimant ought to have been invited to accept or reject. The opinion of the court is that it was fraudulent for the respondent to hatch a request to resign on the part of the claimant without the claimant harboring any such intention and in which case, the court's view is that the respondent ought to have made an offer for resignation and in good faith invited the claimant to accept or reject it but which never happened in the case. Thus, the court finds that there was no valid agreement to end the employment relationship by resignation as was submitted and suggested for the respondent. Further, the respondent was required to cause the contents of the alleged letter to be explained to the claimant in a language that the claimant understood. In the circumstances, the court finds that the respondent failed to discharge the crucial statutory obligations imposed upon the respondent as an employer and in protection of the claimant as provided for in the quoted section."

It was therefore submitted that there were no safeguards put in place by the defendant to protect the plaintiff in view of her being a person with illiteracy and Counsel urged this court to find that there was no valid agreement to end the employment relationship by way of the purported early retirement of the plaintiff.

DETERMINATION

In view of the above evidence as adduced by both the Appellant and the Respondent, I have noted that there is no dispute whatsoever that the Respondent opened a bank account with the Appellant Bank and that certain amount of money was deposited therein.

The first issue in contention herein is whether or not the Respondent was issued with an ATM card which was used to make the withdrawals in dispute herein. The Respondent denied having been issued with an ATM card by the bank according to the evidence on record. The Appellant is adamant that the same was issued to him upon his request and that all the necessary details required to inform him of its use were explained to him. In particular the evidence of DW2 a customer service officer at Cooperative Bank suggest that on the 5/1/2011 the Respondent went to collect his card. He signed in the debit card register/collection book using his thumb print and she counter signed her signature next to it. She produced the debit card collection book which was marked as exhibit 2. She told the honorable trial court that she then advised the plaintiff not to keep the said card and pin mailer together and directed her to the accounts opening desk to pick his card.

On the 6/1/2011, the Respondent is said to have made a withdrawal at the counter and DW2 produced a bank withdrawal slip 6th of January 2011 marked as defendant exhibit 3. In my view this issue was thoroughly interrogated and the Learned Trial Magistrate made a finding that the plaintiff made a withdrawal over the counter on 6th of January 2011 on which is the date he was issued with the ATM card and its pin hence he cannot therefore say it was issued to another person.

To the contrary, the evidence on record shows that the ATM alleged to have been given to the Respondent was issued on the 5th of January, 2018. According to the appellants statement dated 23rd June 2014, the alleged withdrawal made on the counter was made on the 6th of January, 2011. However according to the bank slip dated 6/1/2011, It is alleged by the appellant that the collection of the card and the said counter withdrawal was done on the same day but on record however no explanation given why the date at which the card was allegedly collected is at variance with the date indicated on the bank slip.

The disparity above raises questions as to whether the ATM card in question was issued to the Respondent or to someone else. This is further exacerbated by the fact that what ought to have been the best evidence to prove that was none responsive, to wit, the finger print evidence. The testimony of the finger print expert (exhibit 3) who testified as PW2 shows that the finger prints taken in the registers were blurred and did not show the ring characteristics that determine finger print identity. It was his opinion therefore that the documents were incomparable. This leaves the court with no other credible evidence to satisfactorily prove the issue on this limb. In the absence of such crucial evidence, one cannot therefore arrive to a well-considered view that the Appellant controverted the respondents case to the standard required in civil cases.

It is also not in dispute that indeed money was withdrawn from the said Respondent's account which money is the subject matter of the particular case. The question to cogitate on is as to who withdrew the money in question? The Respondent claims that he did request for an ATM Card and that neither he nor his agent facilitated any transaction with any personal ATM Card which caused the loss of Kshs. 321, 000/=. The Respondent's claim was vehemently disputed by the Counsel for the Appellant who sought to disprove the said claim by the evidence of the defendant's witness who averred proof of bank statements showing that withdrawals were made in the account holder's name and number.

In my view, banks are believed to be very secure institutions by their very nature that the hold money in trust and on behalf of their customers. Hence, it is presumed that they should make sure the money they hold do not go to any other person except the owner of the money unless otherwise is agreed upon the bank and its customer(s).

In light of the facts of this case, it was incumbent upon the Appellant to leave no stone unturned in a bit to ascertain who withdrew the

money in question. Thus, thorough investigations ought to have been done including unveiling the CCTV footage pertaining to the several dates when the money was allegedly withdrawn.

Further, the CCTV footage would have depicted the person who was issued with ATM card in question as well as the exact person who withdrew the suit monies. Most ATMs if not all, have CCTVs stationed on the ATM machine. In this case the Appellant avoided the discussion touching on its failure to furnish the honorable trial court with a copy of the footage pertaining the events of the material date. A CCTV footage could have given this court prima facie evidence as to who withdrew the money in question. No such evidence was adduced herein.

The Appellant alleged that the Respondent lost the ATM card that he was issued with and failed to report with it without unnecessary delay. It is an elementary principle of law in civil cases that he who alleges an existence of a certain fact must prove its existence. The Appellant herein only mentioned the above alleged fact but did not offer this court any credible evidence to prove the same. To my mind, the same remains an allegation and hence it was not proved on a balance of probabilities.

As regards the respondent's claim of special damages, I place reliance in ***Isaac Mworia M'nabea vs David Gikunda (supra),*** where the court held that:

> ***"****[16] In so far as special damages are concerned, they must be strictly pleaded and proved. A careful perusal of the record clearly reveals that these two heads of damages were not strictly proved nor pleaded as required by law. In fact the Appellant only quantified them in his submissions.* In **SANDE vs. KENYA CO-OPERATIVE CREAMERIES LTD (1992) LLR 314 (CAK)** the Court of Appeal held that:-
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> > ***"As we pointed out at the beginning of this judgment, Mr. Lakha readily agreed that these sums constituting the total amount were in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved. We do not think we need to cite any authority for this simple and hackneyed proposition of the law."***

In the instant case, it is not disputed that the Respondent lost money to the tune of Kshs. 321, 000/= which was in the hands of the Appellant. The respondent pleaded to the trial court to grant the same which the court granted. I have no reason to disturb the Learned magistrate's finding since it was properly made in due process of the law.

By dint of the principles in **Shah v Mbogo 1967 EA 116** the appellants has not shown that the trial learned Magistrate misdirected herself in some material evidence and as a whole it resulted in a wrong decision.

The upshot of this matter is that the Appellant failed to prove its case on a balance of probabilities. It ought to have utilized the opportunity to use the CCTV footage which would have put this matter to rest. It is my considered view that this appeal lacks merit and therefore it cannot be allowed to see the light of the day.

I hereby dismiss it with costs to the Respondent.

It is so ordered.

Dated, signed and delivered in open court at Kajiado this 7th day of June, 2019

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R. NYAKUNDI

JUDGE

<u>Representation</u>:

Mr. Kalwande holding brief for Mr. Sichangi for the appellant present

The Respondent absent