



**REPUBLIC OF KENYA**

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

Civil Suit 158 of 2005

**DR. ZULFIQUAR ALI JAFFERY.....PLAINTIFF**

**VERSUS**

**AFRICAN BANKING CORPORATION LIMITED.....DEFENDANT**

**JUDGMENT**

1. The plaintiff filed this suit vide a plaint dated 17<sup>th</sup> March, 2005 which was amended on 9<sup>th</sup> June, 2010 and further amended on 28<sup>th</sup> February, 2012. He stated that he was a customer of the defendant and had fixed deposit account numbers **Koinange Street No. 1309** and **Westlands branch No. 0936**. He stated that on diverse dates between 15<sup>th</sup> January, 1998 and 18<sup>th</sup> April, 2000, he deposited various amounts of monies into the accounts. At no time did he withdraw large sums of monies during the aforementioned period nor did he issue instructions to the defendant, its agents, employees or agents to withdraw any sums of monies from his accounts save for authorizing the transfer of **Kshs.9, 747,505/15** from the Koinange branch to the Westlands Branch upon advice of the defendant's former manager, **Abbas Zafar**. At all material times his intention was to earn interest on his investment and he had no intention to withdraw his savings haphazardly or at all.

2. With regard to the withdrawals, the plaintiff stated that he did not make any withdrawals of monies amounting to Kshs.9,747,505/15 or more from his accounts or instruct the manager, Abbas Zafar or any of the defendant's servants, employees or agents to withdraw any sums of monies from his account. He further stated that the defendant had refused to provide him with all pertinent information as to when the withdrawals were made from his accounts, or with details on whose mandate the withdrawals were made. He added that by a letter dated 12<sup>th</sup> January, 2010 the defendant's aforesaid manager acknowledged that the plaintiff had in his account an outstanding balance of Kshs.9,747,505.15.

3. The plaintiff averred that on or about 10<sup>th</sup> December, 2003 he requested for statements of his account and upon receipt of the same he realized that there had been unauthorized withdrawals from his accounts from both branches. On 19<sup>th</sup> December 2003 the plaintiff sought an explanation regarding the withdrawals but none was given.

4. The plaintiff stated that it was the duty of the defendant to exercise reasonable care in having internal checks and balances to protect his aforesaid deposits. He further stated that the defendant had breached the banker-customer contract by failing to safeguard his deposits. Further, he contended that the defendant was grossly negligent in failing to take any care of the plaintiff's Fixed Deposit Accounts and set out particulars of breach of contract and negligence as hereunder:

**“(a) The Defendant was negligent in that it failed to discharge its duty of care owed**

to the Plaintiff by failing to have proper internal check system to ensure that its employees do not commit acts of fraud.

(b) The negligent acts were committed in the course of employment and within the scope of the duties, which the Manager, Abbas Zafar, had been entrusted with, to wit, accepting deposits from the Plaintiff. In the circumstances the Defendant is liable for his misconduct.

(c) The Defendant failed to send any statements of account which would have alerted the Plaintiff to the gross discrepancies in his account from the very beginning.

(d) The Plaintiff failed to note the pattern of improper and irregular withdrawals considering that the withdrawals were highly irregular as the Plaintiff maintained a fixed deposit account and not a current account. The said withdrawals were significant enough to excite the suspicion and invite inquiry by the Defendant's employees or internal auditors.

(e) The debits and credits did not reflect if the payments were cash or cheque deposits/ withdrawals which was contrary to normal banking practice.

(f) The bank had no authority to debit the Plaintiff's account in the absence of his mandate to sanction any such withdrawals.

(g) The bank failed to be remitting statements of account to the plaintiff who would have discovered that his accounts had serious discrepancies.

(h) The bank had by its letter dated 12<sup>th</sup> January 2000 confirmed that the plaintiff had a deposit of Kshs. 9,747,505.15 while in reality this sum was missing or had been misappropriated from the plaintiff's accounts.

(i) By a letter dated 6<sup>th</sup> January 2004 the bank impliedly admitted

that it had no documents to corroborate the entries in the plaintiff's accounts hence its request for documents from the plaintiff.

(j) The withdrawals of monies from the Plaintiff's fixed deposit accounts by the Defendant's servant(s) was fraudulent and the defendant is vicariously responsible for the acts of its servants.

(k) The Defendant breached its duty as a banker and a trustee of the Plaintiff's funds and also failed to investigate the theft of the Plaintiffs funds."

In view of the foregoing, the plaintiff sought judgment for:

“(a) A declaration that the Defendant was negligent in maintaining the Plaintiff's account in accordance with normal banking practices and failed in having internal checks and balances to safeguard the sanctity of the plaintiff's account and is now liable to make good all sums it received from the plaintiff together with accrued interest thereon.

(b) An Order that the Defendant do pay to the Plaintiff such sums as may be found due upon taking the said accounts together with interest thereon at the bank's applicable rates at the time the deposits were made and would have matured.

(c) Payment of the sums in respect of the Plaintiff's Account Numbers 0936 and 1309 of Kshs. 22,014,459.55 made up as follows:

(i) Kshs. 5,198,150.00 with interest at court rates from 3<sup>rd</sup> September 2004 until payment in full.

(ii) Kshs. 16,681,421.00 with interest at court rates from April 2000 until payment in full.

(iii) Kshs. 134,880.55 with interest at court rates from 30<sup>th</sup> May 2005 until payment in full.

(d) Any further relief as the court deems fit in the interest of justice.

(e) Costs of the suit on an Advocate-Client basis and interest thereon at court rates.”

5. Subsequent to the filing of the suit the defendant furnished the plaintiff with a complete statement of accounts in respect of the plaintiff’s fixed deposit accounts. The accounts were analysed and the total credits showed that the plaintiff’s accounts had a total credit of Kshs. 21,879,579/= which was withdrawn on diverse dates.

6. As per the further amended plaint, the aforesaid sum was arrived at as hereunder;

<u>Account</u>	<u>Branch</u>	<u>Amount</u>
0936	Westlands-closing balance as at 3 <sup>rd</sup> September, 2004	Kshs. 5, 198, 158.00
1309	Koinange- closing balance as at 18 <sup>th</sup> April, 2000	<u>Kshs. 16, 681, 421.00</u>
	<b>TOTAL</b>	<b><u>Kshs. 21, 879,579.00</u></b>

7. The plaintiff also claimed a sum of Kshs.134,880.55 in respect of interest arising out of the balance of an amount that was carried forward to earn interest on 3<sup>rd</sup> September, 2003 and which was withdrawn in May 2005 without any mandate from him.

8. The defendant filed an amended statement of defence and admitted that the plaintiff was its customer and had fixed deposit accounts as stated in the amended plaint but denied that the plaintiff ordered it to transfer Kshs.9,741,505/15 from his account in its Koinange Street Branch to his account in the defendant’s Westlands Branch.

9. Further, the defendant stated that the plaintiff would from time to time make large withdrawals from his fixed deposit account No. 1309 in its Koinange Street Branch. The defendant also denied that its manager had acknowledged that as at 12<sup>th</sup> January 2000 the plaintiff had in his account an outstanding balance of Kshs. 9,747,505.15. The defendant stated that the final authority as to the balance in any of its customer’s accounts is evidenced by the official Account statement and that the plaintiff’s account being a fixed deposit account, the onus to demonstrate ownership of the account, the balance standing to the credit of the depositor and the interest payable thereon always lies with the depositor and not the bank.

10. The defendant further stated that if there was any letter issued from the defendant’s bank, the same was forged and/or fraudulently acquired through collusion between the plaintiff and the said Bank Manager, Abbas Zafar and set out the particulars of fraud, forgery and collusion as hereunder:

**“(a) Fraudulently making or colluding to make a false statement with the intent to defraud the defendant.**

**(b) Uttering as true and genuine a document, which the plaintiff knew or ought to have known that the same was forged.”**

11. The defendant at paragraph 9 of its amended defence averred that in a fixed deposit account, before

any deposit is made, parties first negotiate issues related to the amount deposited, the period of the deposit, the interest rate and the exposure to statutory deductions or interest payable thereon, after which the amount is deposited and the depositor is issued with a certificate in this case referred to as a Fixed Deposit Receipt. That this is what happened between the plaintiff and the defendant in this case. The defendant further stated that what it issued the plaintiff with was not a statement of account but summaries for all his various deposits and withdrawals.

12. The defendant at paragraph 12 of its amended defence reiterated that all withdrawals from the plaintiff's accounts were duly authorized by the plaintiff and the plaintiff.

13. The defendant denied all other averments in the plaint and urged the court to dismiss the plaintiff's suit.

14. Both parties testified and called witnesses. The plaintiff and **Mr. Mukesh Shah**, an Accountant, testified in support of the plaintiff's case.

15. The plaintiff is a medical doctor by profession and was 70 years old when he prepared his witness statement dated 15<sup>th</sup> October, 2010 which he sought to rely on. He further testified that he deposited monies into his various accounts with the defendant and had a balance of Kshs.9, 747,505.15 which information he received from Mr. Abbas Zafar, the defendants' former manager, vide a letter dated 12<sup>th</sup> January, 2000.

16. The plaintiff testified that he was issued with statements of his account after he involved the Banking Fraud Unit. Thereafter, he instructed one Robert Gacheche to analyse his account. He further testified that Robert Gacheche testified on his behalf in **H.C.C. No. 497/2004** where he obtained judgment for **Kshs.5,511,759.75** plus interest against Fidelity Bank Limited on account of theft of his monies by the same Mr. Abbas, who had previously been employed by the defendant. Mr. Abbas was charged with stealing by servant in **Nairobi Criminal Case No. 3158 of 2003** where the complainant was Fidelity Commercial Bank. The accused fled the country and there is a warrant of arrest issued against him to Interpol to apprehend him.

17. The plaintiff maintained that he did not make any withdrawals from his accounts, which were funds he was keeping aside for his retirement. On the allegation of collusion with Mr. Abass, the plaintiff testified that the bank has never made any complaint against him to the police.

18. In cross examination, the plaintiff testified that he had several accounts for various purposes. He also maintained that he never withdrew the money and had not given any instructions for the money to be used for any purposes, nor gave any instructions to transfer his monies to any other account save for the transfer of about Kshs.9 Million to the Westlands Branch when he needed to travel outside the country, and got receipts to evidence the deposits made.

19. With regard to the deposit receipt No. 014694 dated 5<sup>th</sup> April, 2000 in the defendant's bundle of documents at page 114, the plaintiff testified that he could not confirm whether it was the one that he was issued with. He further stated that the two signatures on the deposit slip at the back on the receipt did not belong to him.

20. **Mr. Mukesh Shah, PW 2**, relied on his statement dated 11/12/2011, and highlighted a few issues. He stated that he looked at the plaintiff's bundles of documents as well as the defendant's documents and the figure of the claim had been revised and was now **Kshs.22,014,459.55** and not the first figure of **Kshs.60,139,099.75** stated in the initial plaint. He further stated that whenever money is withdrawn before or after maturity of a fixed deposit there are instructions that are normally given and are signed for by the customer or a letter is written. He had not seen such instructions except in 5 fixed deposit receipts.

21. Mr. Mukesh further testified that with regard to monies paid, there was no signature of the plaintiff acknowledging receipt of the funds. With regard to the debit vouchers raised by the bank, he stated that they are all internally generated documents without the plaintiff's signature.

22. With regard to Caroline Opiyo's witness statement (the defendant's witness), Mr. Mukesh said that he did not see any evidence of authorization of renewals by the plaintiff. There was no evidence that the plaintiff gave any instructions regarding the alleged withdrawals.

23. In cross examination, Mr. Mukesh stated that he carefully checked all the fixed deposits to enable him come to the plaintiff's actual claim, which was based on the amounts that were withdrawn without the plaintiff's instructions and that signature alone was not sufficient.

24. The witness took the court through a bundle of Fixed Deposit Receipts (FDR), 20 in number, which had allegedly been paid by the bank but which had no signature of the plaintiff on the reverse side or any other form of acknowledgment of receipt of the funds stated thereon. The FDR numbers are listed in page 9 of his witness statement. Copies of the same are contained in the plaintiff's bundle of documents.

25. **PW2** further testified that although there were several FDR which had the plaintiff's signature on the reverse side there was no evidence or instructions as to how the payments had been made to him.

26. **Caroline Opiyo** and **Stanley Kariru Kibanya** testified for the defendant. In her testimony **Caroline Opiyo (DW1)** relied on her witness statement dated 13/3/2012 and stated that she is the Head of Retail Banking at the defendant's bank. She stated that the plaintiff initially had two accounts at the Koinange Street Branch, a fixed deposit account and a current account. Thereafter he transferred them to Westlands Branch.

27. She stated that in this instance, the customer used to go to the bank, give them his Fixed Deposit receipt and give various instructions, either verbally or in writing. She emphasized that the bank does not keep any customers' fixed deposit receipts. In her witness statement, she stated in paragraph 14 that:

**“14. The original Fixed Deposit Receipt is kept by the customer at all times and is only surrendered to the Bank upon the customer making withdrawal of the fixed deposit. In the event of loss of the Fixed Deposit Receipt, the customer is required to make a report with the Bank and after issuing an indemnity to the Bank, the customer is issued with a duplicate of the Fixed Deposit Receipt.”**

28. In cross-examination, Caroline Opiyo stated that she had seen the defendant's letter of 12/1/2000. She conceded that it was signed by Mr. Abbas, the Chief Manager. She further stated that she had worked with him for 7 years and was familiar with his signature. In her view, the contents of the letter were correct but could not however verify whether the plaintiff's deposits were Kshs.9,747, 505.15 as stated in the said letter.

29. She further stated that the defendant had not given any evidence of collusion between the plaintiff and Mr. Abbas and neither had she given any evidence of forgery by Mr. Abbas. She also stated that possession of the original fixed deposit receipts by the bank was sufficient evidence that the customer had authorized payment of the fixed deposits, and that if any payment was ever made the customer had to sign somewhere in acknowledgement of receipt of the funds. However, she alleged that the manager could also sign in acknowledgement of receipt of the funds on behalf of the payee, which allegation I found rather strange.

30. DW1 testified that there are times when the plaintiff would send a messenger, having talked to the manager. Payment could be made to the plaintiff in cash or by banker's cheque. According to the bank, all the payments were made in cash. She stated that the authority to pay would be given by Mr. Abbas and another officer whose name she could not remember. In all instances authority to pay had to be given by two bank officials. But contrary to that mandatory requirement, she stated, at page 17 of the defendant's bundle of documents there was one withdrawal of **Kshs.1,026,245/=** which had only one signature, that of Mr. Abbas, which she conceded was not proper. At page 95 of the defendant's documents there is also another payment of **Kshs.2,547,158/=** which had been authorized by only one person, **Mr. Augustine Nzomo**, who has since left the bank's employment. He left the defendant's employment after this suit was filed. She had discussed the matter with him and he told her that he did so by mistake. The bank's

auditors had examined these documents and queried the same. The witness added that the whole bank was aware that there was fraud involving this account, and that the bank conducted its investigations and established that.

31. DW1 further conceded that Mr. Abbas went to Fidelity Bank after he left the defendant and she was aware that he was charged in a criminal case. At Fidelity Bank the plaintiff was also defrauded by Mr. Abbas. The witness also admitted that there were several fixed deposit receipts which were paid without the customer's signature. The plaintiff's advocate showed her fixed deposit receipt Number 012458 for Kshs.150,000/= which she conceded did not have a stamp or signature on the reverse side yet it had been paid. She added that there was no evidence that the plaintiff collected the cash in issue.

32. In re-examination, Caroline Opiyo stated that there was no requirement that the customer signs the fixed deposit receipt provided he surrenders it to the bank and gives appropriate instructions. She added that a fixed deposit does not have statements because it is for a given period of time, which is a normal banking practice.

33. **Mr. Stanley Kariru Kibanya, DW2**, an Accountant in private practice, testified for the defendant and relied on his witness statement filed on 20<sup>th</sup> March, 2012. He stated that his role was to carry out forensic audit in respect of fixed deposit accounts held by the plaintiff in the defendant bank. He referred to the rules that govern the operations of fixed deposit accounts and laid emphasis on rules 3, 4 and 5. The rules state as follows:

**“Rule no. 3 –In case no specific instructions are given for renewal, the interest shall cease after the date of maturity of the deposit.**

**Rule no. 4 – Depositor is requested to take good care of the deposit receipt issued to him and keep them under lock and key. The Bank will not be responsible in any way for any unauthorized payments resulting from any disregard of these instructions and the burden of proof will be upon the depositor to show that he has not been negligent in the safekeeping of the deposit receipt.**

**Rule no. 5 – In the event a deposit receipt is lost or misplaced a depositor is advised to notify the Bank about the same in writing. Though the Bank will take all the necessary precautions, it will not accept any responsibility in case the deposit is paid due to pressure of business or otherwise. The depositor will not hold the Bank responsible or liable for any loss or damage due to delay in issuing the duplicate receipt for any reason whatsoever.”**

34. He also said that he saw various original fixed deposit receipts in the bank which, in his opinion, meant that the plaintiff had been paid, and that it was not a requirement for a fixed deposit receipt to be signed before a customer is paid.

35. He stated that at paragraph 25 of his statement, he had tabulated all the fixed deposit receipts that had matured and had been surrendered and the plaintiff had been paid and that a credit voucher was raised by the bank whenever a fixed deposit was re-invested.

36. He further stated that the plaintiff was actually paid **Kshs.19,876,409.15** and that there were fixed deposits that were terminated before the maturity date. He also stated that there were instances of partial payment of fixed deposits. He further stated that if a depositor did not have the original receipt he could not be paid. With regard to the letter dated 12/1/2000 at page 101 of the plaintiff's documents, he stated that it does not state how the sum of Kshs.9,747,505.15 was arrived at and that he did not see that kind of balance in the plaintiff's fixed deposit accounts.

37. PW2 also stated that the plaintiff's claim is not genuine since the original fixed deposit receipts were with the bank. In his view, the plaintiff had no valid claim against the defendant.

38. In cross-examination, he stated that he came across one letter by the plaintiff asking that money be transferred to his wife's account, however, he did not get any other express authorization by the plaintiff

requesting for cash payment for any of his fixed deposits. He also said that he learnt that the plaintiff used to go to the bank most of the time and cash some fixed deposits. Further, that Mr. Abbas was the Chief Manager and he signed a Transfer voucher for Kshs.540,000/= on 27<sup>th</sup> May, 1998 and also that all the credit vouchers were signed by Mr. Abbas. Regarding credit vouchers which the defendant was mainly relying upon as evidence of payment of all the plaintiff's fixed deposits, the witness agreed that a credit voucher is an internally generated document and that the customer has no obligation to sign anywhere.

39. Both parties filed their submissions. Mr. Gichuhi for the plaintiff stated that the plaintiff was a customer of the defendant and had invested in various fixed deposit with the bank. Counsel also submitted that the defendant had absolutely failed to prove that the monies were paid to the plaintiff on the basis of the fixed deposit receipts upon his express instructions and that there is absolutely no evidence to prove that he received his monies. Further, that no evidence had been adduced by way of bank books confirming that the plaintiff signed for receipt of the funds in cash, or that the funds were wired to another account upon his express written instructions.

40. **Mr. Gichuhi** submitted that bank must be satisfied with the payee's identity before it makes any payment to him. He cited the case of **WOOD v. CLYDESD ALE BANK LTD 1914 SC 397** where Lord Mackenzie held:

**“If a deposit-receipt bearing a genuine endorsement is presented to the bank, say by a stranger, there is no absolute rule in regard to the liability of the bank to pay over again if it ascertained that the person asking for payment had not the authority of the true holder.”**

41. Mr. Gichuhi further referred to E. P. ELLINGER, **MODERN BANKING LAW**, Clarendon Press Oxford, 1987, 4<sup>th</sup> Edition at page 220 where the learned author addressed the concept of a deposit-receipt from the perspective of an interest-bearing account. The author states:

**“A deposit receipt does not constitute a negotiable instrument. In AKBAR KHAN v. ATTAR SINGH [1936] 2 ALL ER 545, 548, Lord Atkin pointed out that unlike a promissory note, a deposit did not include an express promise by the bank to pay the amount involved. The sole object of the receipt was to constitute a record of the transaction involved. His Lordship thus treated the receipt as a document issued to evidence the existence of a debt.”**

42. Mr. Moya for the defendant submitted that the Standard of proof in civil proceedings is on a balance of probabilities and that the court must be satisfied that the version put forward by the plaintiff is more probable than that put forward by the defendant. In his view, the plaintiff did not adduce any evidence to anchor his allegations as to negligence or any proof that the bank owed him any money. The defendant's counsel further submitted that his client had shown proof that it had paid the money to the plaintiff as it was in possession of the fixed deposit receipts.

43. Both parties raised various issues for determination as hereunder:-

**The plaintiff:**

- “1. What were the terms governing the FDRs?**
- 2. Did the Plaintiff authorize any of the withdrawals from his FDRs totaling Kshs. 22,014,459.55?**
- 3. Did the bank prove any fraud, forgery or collusion between the Plaintiff and its former branch manager?**
- 4. Has the bank adduced any evidence to show that that the plaintiff received any payment arising out of his FDRs?**

## **5. Is the plaintiff entitled to judgment as prayed in the Further Amended Plaintiff?"**

43. With regard to issue 1, the plaintiff stated that the rules governing fixed deposit receipts, in particular Rule 2, was that the deposit receipt is repayable only upon maturity and at the office of issue. He further stated that no mention was made as to how payment was made, and that there was no rule saying that on surrender of the FDRs automatic payment would be made. That the Rules were silent on the mode of payment and receipt of funds by the owner of the FDRs. He added the bank only produced internally generated documents that do not bear any proof of physical payment to him.

44. Regarding issues 2 and 4, the plaintiff stated that there was absolutely no evidence adduced to show that the plaintiff authorized in writing any of the withdrawals or that he received payment by way of cash or cheque.

45. The plaintiff stated on issue 3 that no evidence was adduced to support the allegation that the plaintiff colluded with the defendant's former manager, Mr. Abbas Zafar. That was admitted by the banks witness, Caroline Opiyo.

46. In conclusion, regarding issue 5, the plaintiffs' counsel submitted that as a result, his client is entitled to judgment as prayed for in the Further Amended Plaintiff.

## **5. THE DEFENDANT RAISED THE FOLLOWING ISSUES**

**"1. Whether the Defendant was negligent in its handling of the Plaintiff's account in accordance with normal banking practices?"**

**2. Whether the Plaintiff withdrew a total of Kshs. 22,014,459.55 that he had deposited in his Fixed Deposit Account?"**

**3. Whether the Plaintiff is owed Kshs. 21,879,579 or any other amount at all?"**

**4. Whether the plaintiff has satisfied the required burden of proof to have judgment given in his favour?"**

47. The defendant, on issue 1, stated that a customer has a duty to immediately report any suspected fraud, not to participate in any fraudulent activities, not to behave in any way that enables others to commit fraud, to deal honestly with the bank and not participate in any forms of malpractice. Where there is a fundamental breach of any of the duties aforesaid by a customer, the bank cannot be expected to combat fraud or indeed be held liable for it when a customer deliberately flaunts the bank's internal control measures. As a result therefore, the defendant concluded that the plaintiff was guilty of contributory negligence.

48. With regards to issue 2, 3 and 4, the defendant stated that the rules governing operation of the accounts did not require signing at the back. Further that, where the customer had possession of a fixed deposit receipt (FDR), the bank owed him money. Where the bank had the FDR, it had discharged its obligations and had therefore paid the customer the amounts due. As a result, the defendant avers that it does not owe the plaintiff any monies as he has not been able to prove the same.

49. From the evidence adduced before this court, it is not in dispute that the plaintiff was the defendants' customer and had fixed Deposit Account Numbers, Koinange Street No.1309 and Westlands Branch No.0936. With regard to Account Numbers 0936, the plaintiff avers that he was advised by Mr. Abbas Zafar that he had a balance of Kshs. 9,747,505.15. I have looked at the bundle of documents adduced before this court and make particular reference to Mr. Abbas Zafar's letter, the defendant's former manager, dated 12<sup>th</sup> January 2000 confirming that the plaintiff had a deposit of Kshs. 9,747,505/15. In view of this, the plaintiff had no reason to believe otherwise, and the assumption that that was a true reflection of that particular account held cannot be questioned.

50. The plaintiff also maintained that he never withdrew any monies from both Fixed Deposit Account Numbers 0936 and 1309 and had not given any instructions for the money to be used for any purpose, nor gave any instructions to transfer his monies to any other account save for the transfer of the Kshs. 9, 747,505.15 above to his Westlands Branch when he needed to travel outside the country. This assertion was supported by PW2 who stated that when money is withdrawn before or after maturity, there are normally instructions given and are signed for by the customer or a letter written. In this instance, PW2 stated that he had not seen such instructions except in 5 fixed deposit receipts. With regard to monies allegedly paid, there was no signature of the plaintiff acknowledging receipt of the funds.

51. Ms. Caroline Opiyo, DW1, stated that she had seen the letter of 12/1/2000 and that the same was signed by Mr. Abbas, the chief Manager. She was familiar with his signature.

52. With regard to the withdrawals, she stated that there were times when the plaintiff would send a messenger, having talked to the manager, Mr. Abbas, and further that all payments were made in cash, amidst some irregularity of signature by one officer instead of the prescribed two with regard to some withdrawals. DW2 in his evidence also stated that Mr. Abbas had signed a transfer voucher for Kshs. 540,000/= as well as all the credit vouchers, which credit vouchers the defendant was relying on as evidence of payment of the plaintiff's fixed deposits.

53. Of interest is that the whole bank was aware that there was fraud involving the plaintiff's account, and further that the bank did investigations and established that. I note that after leaving the defendants' bank, Mr. Abbas went to Fidelity Commercial Bank and while in the employ of that bank, he defrauded the plaintiff and was charged in **Criminal Case No. 3158 of 2003**.

54. On the assertion that the defendant made payments to the plaintiff in cash, DW1 stated that there was no evidence that the plaintiff collected the cash in issue. DW1 stated that she was only aware of one letter by the plaintiff authorizing the bank to pay money to his wife.

55. This court is alive to the fact that Judgment had been entered against the Fidelity Commercial Bank where depositors' funds had been unlawfully withdrawn by Mr. Abbas when he was the bank's manager in two instances, that is, **DR. ZULFIQUAR ALI JAFFERY V. FIDELITY COMMERCIAL BANK, Milimani Civil Case No. 497 of 2004, FAZILA SHARIEFF TEJPAR V. FIDELITY COMMERCIAL BANK LTD Milimani HCCC No. 590 of 2009**. The Bank had been held liable for misappropriation of the parties' funds in the Fixed Deposit Accounts. While the burden of proof always is on he who alleges, the plaintiff, having proved that he presented several FDR for renewal of the deposits, the defendant failed to prove that any money was indeed paid to the plaintiff.

56. The plaintiff averred that he did not lose any deposit receipts and had never withdrawn any amounts therein. This court also notes that some of the alleged withdrawals were for as little as Kshs. 5,000/= which in my opinion does not make sense especially since in many instances the plaintiff was making deposits for as much as Kshs. 1, 000,000/=. Further, it would have been more practical to make such withdrawals from his current account which he maintained with the defendant.

The defendant's assertion that the plaintiff made withdrawals from his fixed deposit accounts is in conflict with the finding that there was fraud involving the plaintiff's account, and the bank did conduct investigations and established that.

57. For the defendant not to have records or evidence of how payments were made if at all, apart from the assertion that it had the Fixed Deposit receipts as evidence of payment is puzzling. It is evident that there were serious weaknesses in the defendant's internal systems which were unable to prevent irregularities and thus failed to guarantee safe keeping of its customers' monies. The fact that a senior officer could sign authorization for payment without a second signatory as is the procedure without question only goes to show that the defendant's system's weakness which I believe enabled Mr. Abbas or other employees of the defendant to misappropriate the plaintiff's money in his fixed deposit accounts.

58. Apart from the assertion that it possesses the fixed deposit receipts, the defendant has not been able to

show how payment to the plaintiff was effected.

59. In view of the foregoing, I find that the defendant is liable to the plaintiff and accordingly enter judgment in favour of the plaintiff as prayed in the further amended plaint.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF OCTOBER, 2012.**

**D. MUSINGA**  
**JUDGE**

**In the presence of:**

Muriithi – Court Clerk

Muiruri for Mr. Gichuhi for Plaintiff

Mr. Muchiri for Defendant