



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Madan, Wambuzi & Law JJ A )**

**CIVIL APPEAL NO 33 OF 1978**

**URMILA W/O MAHENDRA SHAH .....APPELLANT**

**AND**

**BARCLAYS BANK INTERNATIONAL LTD .....RESPONDENT**

**STANDARD BANK LTD.....RESPONDENT**

**JUDGMENT**

The appellant is a lady who in 1975 was trading in Nairobi as a wholesaler and dealer in garments and textiles under the name of “Measurewear”. The business was managed by her brother-in-law ZR Shah (to whom I shall refer as “Shah”) and D K Kuria (to whom I shall refer as “Kuria”) who was a salesman employed in the business. The respondents are banks having several branches in Nairobi; this appeal concerns the Market branch of Barclays Bank (hereinafter referred to as “Barclays”) and the Kimathi Street branch of the Standard Bank (hereinafter referred to as “the Standard Bank”).

The appellant’s case is that on 26th August 1975, one A A Rahiman, variously described as a Ugandan, a Somali, or a Ugandan Somali, came into her shop and ordered a large quantity of textiles. He was attended to by Kuria, who deposed that he told Rahiman that, as he was a stranger and not a customer, he would be required either to pay cash or to produce a bank cheque, and that he would have to wait until the cheque was cleared before the goods were delivered to him. On 4th September 1975 Rahiman returned to the appellant’s shop bringing with him what looked like a Standard Bank cheque (No 008846) drawn by the Standard Bank in favour of Rahiman in the sum of Shs 345,750. Rahiman endorsed the cheque over to Measurewear, and it was paid into Measurewear’s account at Barclays on the same day. Two days later, On Saturday 6th September, Shah and Kuria went to Barclays and asked to see the deputy manager, Mr A N Sodha. After waiting for a while, Sodha came and spoke to them. According to Shah and Kuria, they asked Sodha Whether the cheque had been cleared. Sodha replied, “It has been cleared and paid. There is no problem”. Sodha denied this. He deposed that he asked Shah and Kuria to what cheque they were referring. They said it was a bank draft, whereupon sodha told them that, if it was a bank cheque, it must have been paid and there should not be any problem. He denied saying that it had in fact been paid and cleared. There was evidence that the normal time taken to clear cheques was four to five days. Be that as it may, acting on what Shah and Kuria claim to have been Sodha’s representation that the cheque had been cleared and paid, they delivered the goods to Rahiman on the next day, Sunday 7th September. Rahiman took the goods away, and has not been seen or heard of since, notwithstanding efforts to trace him. From 10th to 16th September Measurewear, in the belief that its account with Barclays was in funds, drew a number of cheques on that account, mostly in payment of promissory notes which had fallen due.

The scene now changes to the Standard Bank, to whom the cheque was returned, after being credited to

Measurewear's account by Barclays. It was received by the Standard Bank on 5th September, and noted in the ledger or "waste" sheet. On the following Tuesday, (9th September) the account shown by the ledger was found to be short by Shs 345,750. The bank cheque (008846) for that amount could not be found. It had disappeared and has never been traced. The matter was reported to the manager, Mr Macdonald, on Wednesday 10th September. He at once notified Barclays that the cheque had been lost, and debited Barclays with the amount concerned. Barclays in turn debited Measurewear's account, on being given an indemnity by the Standard Bank, and thereafter returned to Measurewear the many cheques it had drawn after 10th September, refusing to honour them. This caused great damage to Measurewear. Its goods were attached and sold at the instance of unpaid creditors, the business collapsed, and Kneller J fixed the general damages to which the appellant would have been entitled, had she succeeded in the suit, at Shs 4,000,000, a figure which has not been challenged by cross appeal. However, the judge dismissed the suit, for reasons which will appear later, which are the subject of this appeal.

Further inquiries by the Standard Bank led them to the conclusion that cheque No 008846 made out to Rahiman had been forged. A cheque of that number had been issued by the Standard Bank on 9th August 1975 to pay an account owing to East African Posts and Telegraphs for Shs 3579/ 30. That cheque was duly negotiated and was produced in evidence. The cheque, the subject of this suit, must have been printed by an unauthorized person and then signed by someone in the Standard Bank. The Standard Bank has no account in the name of Rahiman which could have debited with the value of the cheque. Rahiman is unknown to the bank. Cash to the value of the cheque was not received by the Standard Bank at the material time, nor was any draft for that amount received from a bank in Uganda or elsewhere for that amount. The cheque itself disappeared from the Standard Bank's custody shortly after being returned by Barclays; it can only have been taken by an employee of the Standard Bank after it had served its purpose. Kneller J held that the cheque had been forged. He also held that the appellant had failed to prove that the alleged transaction of sale with Rahiman had ever taken place. He held that neither bank was estopped by anything it said or did from alleging that the cheque was forged. He held that the forgery had been committed by employees of the Standard Bank in the course of their employment, and that the Standard Bank was liable for this forgery. He found, however, that neither bank was estopped from alleging that the payment of Shs 345,750 made on the forged instrument by the Standard Bank to Barclays on 4th September 1975 was made under a mistake of fact. He held that the dishonour of cheques drawn by Measurewear after 14th September, when Barclays were informed of the alleged forgery, was not wrongful, and that the reversal by Barclays of the credit of Shs 345,750 was likewise not wrongful. He also held that the Standard Bank, but for such reversal, would have had a valid claim against Measurewear for Shs 345,750; and that if Measurewear delivered the goods to Rahiman, it was not in reliance of any representation made by either bank. He finally absolved the two banks from allegations made against them of fraudulent conspiracy, and of liability for conversion or wrongful detention of the Standard Bank cheque. In the event he dismissed the appellant's suit, on the general ground that the appellant had failed to show that she was an innocent holder in due course of the cheque.

Mr Lakha for the appellant, very properly in my view, did not press the ground of appeal framed against the finding that the banks had not been guilty of conspiracy. I shall deal later with the ground framed against the findings that the Standard Bank's cheque was a forgery. I do not see any merit in the ground directed at the finding that no representation was made that the cheque had been cleared. It was a pure issue of fact whether or not Sodha made any such representation, and I see no reason to doubt the judge's finding that he did not.

The substantial grounds of appeal argued by Mr Lakha, however, deserve much closer scrutiny. They are directed against the findings that there was no sale of any goods to Rahiman, and that the appellant was not an innocent holder in due course of the forged cheque. Kneller J decided these matters against the appellant, as he said, on a balance of probabilities. If that was the proper standard to apply, then I might be inclined to agree with these findings. The appellant's position in the matter is attended with many suspicious circumstances, which influenced the judge in coming to his findings. Shah and Kuria had been jointly convicted and fined in 1974 on exchange control offences. At that time Kuria was employed by the Standard Bank. He was dismissed, but was then given employment in Measurewear by Shah. Kuria still had friends in the Standard Bank in 1975. Both he and Shah deposed that they knew a bank's cheque to be as good as cash, yet two days after it had been paid into Measurewear's account at Barclays, both

went to inquire from Sodha whether the cheque had been cleared, although Kuria with his banking experience must have known that cheques in Nairobi are not cleared in two days. It is also relevant that Measurewear was in urgent need of funds at this time to meet bills and promissory notes which were falling due. The judge inferred from all this, justifiably in my view, that Shah and Kuria must have had some doubts about the genuineness of the Standard Bank cheque, doubts which they did not impart to Sodha, let alone to the Standard Bank. If they had done so, the forgery might have been discovered before any harm was done. But do these suspicious circumstances justify findings which amount in effect to findings that Shah and Kuria perjured themselves as to the alleged sale of goods to Rahiman, and were in some way implicated in the fraud? On a balance of probabilities, perhaps; but Mr Lakha submitted, after the suggestion was made by the Court, that such findings cannot be based on a mere balance of probabilities. A higher standard of proof is required to establish such findings, proportionate to the gravity of the offence concerned, and the judge did not direct himself to this effect. As was said by this Court's predecessor in *Ratilal Gordhanbhai Patel v Lalji Makanji* [1957] EA 314, 317:

There is one preliminary observation which we must take on the learned judge's treatment of this evidence: he does not anywhere... expressly direct himself on the burden of proof or on the standard of proof required. Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. There is no specific indication that the learned judge had this in mind: there are some indications which suggest he had not.

As regards the sale of goods to Rahiman, I do not think that a Court, properly directing itself, could reasonably hold that it had not taken place. The sale was pleaded in the plaint and, although not admitted in either defence, no cross-examination was directed at either Shah or Kuria suggesting that the goods were not in fact sold and delivered to Rahiman as they had deposed. Their evidence to this effect was supported by entries in the books of Measurewear, entries which appear to have been made in the ordinary course of business and are in the correct chronological order. Even on a balance of probabilities, I do not with respect think that the judge should have held that the appellant had not established that the transaction in fact took place. The evidence that it had taken place was unchallenged. The finding that the appellant was not an innocent holder in due course of the forged cheque is not a finding which, in my view, can be made on a balance of probabilities. It involves a finding of dishonesty, of implication in a fraud, and on the application of a higher standard of proof than a mere balance of probabilities. I do not think that the finding that the appellant was not an innocent holder in due course can be supported. If I am right, this appeal must be approached from the basis that the appellant was an innocent holder of the cheque, in due course and for value.

In these circumstances, Mr Lakha submitted that this appeal must succeed. He challenged the judge's finding that the cheque was forged. The cheque is no longer available for examination. It may well have been signed by an authorized officer of the bank. If so, in view of the judge's findings that whatever was done in relation to the cheque was done by a servant or servants of the Standard Bank in the course of his or their employment, Mr Lakha submitted that a master is liable for his servant's fraud perpetrated in the course of the master's business, and he relied in this respect on *United Africa Co Ltd v Saka Owoade* [1955] AC 130. As a general proposition of the law relating to master and servant, this is undoubtedly correct. Indeed, the *United Africa* case was considered and approved by this Court's predecessor in *Kisumu Trading Stores v K B Shah* [1965] EA 314. In *Muwonge v Attorney-General of Uganda* [1967] EA 17, 18, Sir Charles Newbold P stated the proposition as follows:

... the legal position is quite clear and has been for some considerable time. A master is liable for the acts of his servant committed within the course of his employment ... The master remains so liable whether the acts of the servant are negligent or deliberate or wanton or criminal. The test is: were the acts done in the course of his employment....

Mr Le Pelley, for the banks, submitted that one can only be a holder in due course of a valid instrument. A forged instrument is a nullity, and can never be other than a nullity, however many hands it passes through. Even a forged endorsement passes no title. A forged signature makes a cheque wholly inoperative. No-one thereafter can become a holder, in the absence of estoppel by representation and,

whatever representation was made by the Standard Bank through its employees when it handed the forged cheque to Rahiman, no representation was made by the Standard Bank to Measurewear when the cheque was endorsed over to Measurewear by Rahiman. Even if Measurewear gave value for the cheque, this did not transform a nullity into a valid instrument. Mr Le Pelley relies for these propositions on section 24 of the Bills of Exchange Act, which reads:

Subject to the provisions of this Act, where the signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefore or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce the bill is precluded from setting up the forgery or want of authority.

To my mind the result of this appeal must depend on whether or not the Standard Bank cheque was forged. If it was, then in the words of Kerr J in *National Westminster Bank Ltd v Barclays Bank International Ltd* [1974] 3 All ER 834, it was not in law a cheque or negotiable instrument but a mere sham piece of paper. If the alleged forgery in this case was but a sham piece of paper, then Measurewear, even if it became a *bona fide* holder in due course of it for value, acquired nothing at all in the absence of a representation by the Standard Bank which would preclude that bank from setting up that forgery. No such representation was made here. The banks are not estopped from setting up forgery, if they can prove it. What has been proved in this case? On my own evaluation of the evidence, I am satisfied that the cheque was drawn on a piece of paper other than an official Standard Bank cheque form. This by itself does not mean that the completed cheque was a forgery. A valid cheque can be drawn on any piece of paper. To constitute a forgery, it must be shown that the signature on it was forged, or was placed on it without the authority of the person whose signature it purports to be, or, of course, that it has been fraudulently altered in a material particular after it was drawn. No question of alteration arises in this case. Who signed the cheque? We do not know. Kneller J has held that it was signed by employees of the Standard Bank in the course of their employment. It may well have been signed by an employee authorized on that behalf. Certainly Barclays Bank accepted it as genuine, and did not feel it necessary to make inquiries from the Standard Bank as to its genuineness. I am driven to the conclusion that it has not been shown to have been a forgery. It was almost certainly drawn and signed by a dishonest employee, acting in concert with the persons to whom it was issued, but that does not make it a forgery if, as the judge has found, that employee was acting in the course of his employment. By section 30 of the Bills of Exchange Act, every holder of a bill is *prima facie* deemed to be a holder in due course, and to have become a party thereto for value, unless it is proved that the acceptance, issue or subsequent negotiation is affected with fraud, duress, force and fear or illegality. The judge found, in effect, that the appellant had been guilty of fraudulent conduct in relation to the alleged sale of the goods to Rahiman, in which case no value would have been given for the cheque. He did so on a balance of probabilities, which as I have already indicated is not enough. To establish fraud, a higher standard of proof is required, approaching proof beyond reasonable doubt. That higher standard has not, in my view, been established in this case.

It follows that in my opinion this appeal succeeds. The presumption that the appellant was a holder in due course for value of the Standard Bank's cheque has not been displaced, nor has it been proved that the cheque was a forgery. I have come to this conclusion with regret, because the banks have been the victims of a fraud and the finger of suspicion points with some force at complicity in the fraud by Shah and Kuria together with unidentified employees of the Standard Bank and, of course, the mysterious Rahiman; but this complicity has not been established with the requisite degree of proof. This type of swindle could so easily be avoided if a receiving bank, on presentation for payment of a cheque or draft for a large amount, inquired from the drawer, be it a bank, company or individual, whether it had in fact drawn such an instrument. A simple telephone call would be enough. No doubt this precaution is now being taken.

I concur in the order proposed by Madan JA.

**Wambuzi JA.** I have had the advantage of reading in draft the judgment prepared by Law JA with which I entirely agree. He has set out the facts, and I will not repeat them.

This appeal turns on the two questions, that is whether the appellant sold and delivered goods to Rahiman and whether the appellant was an innocent holder in due course of the bank cheque.

Had Kneller J properly directed his mind to the evidence before him and adopted the proper standard of proof, he would have found that there was a sale of the goods. It is true that the circumstances of the sale and the conduct of both Shah and Kuria as regards the banker's cheque are suspicious, but with the higher standard of proof than a mere balance of probabilities I agree that fraud was not proved against those two witnesses.

As regards the second question, whether the appellant was an innocent holder in due course of the bank cheque, I also agree that it was not proved that the cheque was in fact forged. I do not think that section 24 of the Bills of Exchange Act, relied on by Mr Le Pelley for the banks, applies to this case. The section is set out, in so far as it is relevant, in the judgment of Law JA. It is not suggested that any of the signatures on the bank cheque, which incidentally was not available in evidence, was not that of an authorized person. On the contrary, the finding by the trial judge, against which there has been no appeal, is to the effect that whoever signed the cheque was a person or persons authorised by the Standard Bank to sign such cheques. I think that it is common knowledge that the usual particulars of a cheque are, the date on which it is issued, the payee, the amount payable and the drawer's signature or signatures. It has not been even suggested, let alone proved, that any of these particulars was forged. What appears to have been forged according to the trial judge's finding is the paper on which the particulars were entered. This he found was probably printed in the city. With respect to the judge, this would be an unusual type of forgery unless of course the paper used in printing Standard Bank cheques is in some way authenticated. There is no evidence that the type of paper is one of the particulars required to establish the validity or genuineness of a Standard Bank cheque.

Like Law JA, I concur in the order to be proposed by Madan JA whose judgment I also had the benefit of reading in draft.

**Madan JA.** I have had the advantage of reading the judgment of Law JA in draft. I agree that this appeal should be allowed. If I am reiterative now and then it is in order to maintain the clarity of my mind.

The appellant was a wholesale garments merchant in Nairobi, trading in the firm name or style of Measurewear. The manager of the business was her brother-in-law named Zaverchand Ramji Shah. She also employed a salesman called Willy Kuria who was a former employee of the second respondent (the Standard Bank). There was also a company called Leshron Ltd which was run by Shah together with a former deputy mayor of Eldoret, and which the appellant called its sister firm.

The garments were made by Leshoron Ltd out of cloth bought by the appellant from various suppliers and then the appellant distributed them.

Shah and Kuria were convicted and fined in May 1974 for exchange control offences when Willy Kuria was employed by the Standard Bank in Harambee Avenue. He lost his job. In December 1974, Shah engaged him as a salesman in the appellant firm.

The appellant had a current banking account with the Market branch of Barclays Bank where a Mr Sodha was the assistant manager at the relevant time. The Standard Bank is another bank carrying on banking business in Nairobi. Its branch in Kimathi Street was involved in what happened between these parties.

A few days before 4th September 1975, there came to the appellant's shop a man who gave his name as A A Rahiman and who looked like a Somali and said he was from Uganda. He ordered a large quantity of goods consisting of six items whose details Willy Kuria wrote down in a ledger in due date order. Rahiman offered to pay for the goods with his cheque on his own account. Willy Kuria told him he was not their customer, they did not know him and could not accept his cheque; he must pay in cash or with a bank cheque before they would hand over the goods to him.

Rahiman went away and returned on 4th September with a bank payment order (No 008846) dated 2nd

September 1975, for Shs 345,750 drawn on the Kimathi Street branch of the Standard Bank, which he endorsed over to the appellant. Kuria told him it would have to be cleared before the goods could be handed over to him. Kuria wrote Rahiman's passport number on the back of the bank payment order, and also his Uganda address. Kuria made out a paying-in-slip and deposited the payment order into the appellant's current account at the Market branch, which sent it for clearing the same day to the Kimathi Street branch which it reached on 5th September. The Market branch credited the appellant's current account with the amount of the bank payment order which turned the appellant's account which was then overdrawn into a credit balance.

Willy Kuria also made out a cash sale invoice for the six items from Measurewear to Rahiman and also the details of the banker's payment order and added "Goods to be collected when cheque is cleared".

Shah and Kuria saw Mr Sodha at the Market branch on 6th September. I will not dwell on the finding of fact made by Kneller J (with which I can find no fault) that Mr Sodha did not make any representation to them on this occasion that the payment order had been cleared.

The next step was that Kuria told Rahiman on 7th September that the bank payment order had been cleared and he could collect the goods, which he did in the afternoon of the same day together with the cash sale invoice for them, and went away with them no doubt a very happy man. He has not been heard of or seen again.

The banker's payment order reached the Kimathi Street branch on 5th September 1975. Gitau of the bank was then in charge of the clearing department; he said that the "waste" for the branch balanced for that day so this bank payment existed at that point in time. The payment order would have been verified sometime between 5th September when it reached Kimathi Street and Monday 8th September, in the general ledger department by whoever was doing the posting; but it could not be verified because it had disappeared and could not be found. The general ledger was found not to have balanced on Tuesday 9th September. Mr Macdonald (the manager of the branch) was told, in the words of the judge, about this phantom banker's payment on 10th September.

The Standard Bank wrote to Barclays Bank for the first time on 10th September stating that cheque No 008846 for Shs 345,750 apparently drawn upon them in Barclays Bank clearance dated 4th September 1975 had been lost. The Standard Bank also sent a debit note to Barclays Bank in the name of the appellant for Shs 345,750, even though the appellant was not and had never been a customer of the Standard Bank. So that it had no authority to debit it with anything. Barclays bank obliged and without any authority whatsoever from the appellant debited the appellant's account by reversing the credit entry for Shs 345,750 which it paid the Standard Bank by special clearance.

Advocates inevitably joined in the arena. There was correspondence. It was alleged for the first time that the banker's payment order was a forgery in the letter of the Standard Bank's advocates which they wrote to the appellant's advocate on 14th October 1975. There had been no previous claim that the instrument was a forgery. Hitherto the instrument had been "lost" or "misplaced". The Standard Bank was able to say that the instrument was a forgery because it traced their banker's payment order (No 008846) which was dated 9th August 1975 for Shs 3759/30 which had been used to pay telephone bills. They had this document in their branch. It bore the same number as the banker's payment order deposited by Measurewear. The Standard Bank had no account for A A Rahiman and the amount of Shs 345,750 had not been paid to it to the credit of any account.

As a result of reversal of the credit entry several cheques issued by the appellant (which are enumerated in detail in the plaint) were dishonoured by non-payment of them by Barclays Bank.

Again, as a result of her cheques being dishonoured, the appellant's business suffered substantially to such an extent that it had to be closed down, as also the sister firm Leshoron Ltd which collapsed together with it. A creditor attached the appellant's goods which, after they had been released, had to be sold at much reduced prices.

The appellant instituted proceedings against Barclays Bank for general and special damages and other reliefs, particulars of which are set out in the plaint.

Against the Standard Bank the appellant asked in the main for judgment for Shs 345,750 for wrongfully dishonouring and refusing to pay the bankers' payment of which the appellant became a holder in due course.

Two sets of issues were presented to the court below. Kneller J said that he would answer the more lengthy detailed ones as follows. (1) The appellant did not prove, on the balance of probabilities, that she on or before 4th September 1975 agreed to sell and deliver any goods to Rahiman. (2) (a) Neither was estopped from alleging that the instrument of 2nd September 1975 was forged. (b) If the banks are not estopped, the instrument obtained by the appellant was forged. The banks said that it was, and it was proved on the balance of probabilities because the authorized officers of the Standard Bank signed it and they had general authority to do this, and the fact that they had appropriated the result did not mean that the payment was (not) a forgery: the instrument was probably made in the city and had nothing to do with the Standard Bank, Kimathi Street, or anywhere else.

The fact that it was then prepared or signed by officers of the bank authorised to do so (for authorised authentic bank payments) did not convert a forgery (a mere sham piece of paper) into a banker's payment. (c) (i) If the banks are not estopped, and if the instrument was forged, such forgery was committed by the servants or agents of the "Standard Bank in the course of their employment. The Standard Bank employed them. It gave them the task of preparing, signing and issuing these bank payments to them. (ii) The banks or one of them is liable for such forgery, if any committed by such servants or agents. (3) (a) The banks are not estopped from alleging that payment of Shs 345,750 made to Barclays Bank by the Standard Bank on or about 4th September 1975 was made under a mistake of fact. (b) If the banks are not estopped, the payment of Shs 345,750 was made under a mistake of fact. (c) The dishonour of the appellant's cheque described in paragraph 9 of the plaint by Barclays Bank was not wrongful. The judge added that if he was wrong on them, then "yes", but not in respect of five of the cheques dated after 14th September 1975 because the appellant had notice then. (4) (a) The reversal on 12th September 1975 by Barclays Bank of the credit of Shs 345,750 made by it on or about 4th September 1975 in the appellant's account was not made wrongfully. (b) But for such reversal of credit the Standard Bank had (or would have had) a valid claim against the appellant for Shs 345,750 as money had and received by the appellant to the use of the Standard Bank. (5) The appellant did not on 7th September 1975 in reliance on a representation made by Barclays Bank (ie Mr Sodha) on 6th September deliver the goods agreed to be sold to Rahiman. (6) Neither bank is liable for the conversion or wrongful detention of the banker's payment. (7) The banks are not liable for fraudulent conspiracy. (8) The appellant is not entitled to any of the reliefs claimed but (if that is incorrect) then the judge said that he would follow the prayers in the plaint and assess the general damages against Barclays Bank at Shs 4,000,000.

In assessing this sum of Shs 4,000,000 Kneller J said:

I have excluded from my mind for this reckoning my finding that the [appellant] is not entitled to any relief and I have, instead, approached the matter in this fashion. The Measurewear Shahs had to leave the country. It is not clear how long they had been here but they are citizens. It is not known what success, if any, they have made of their lives in Britain. Their business here collapsed. The goodwill of their shop in Njugu Lane was worth Shs 2,500,000. Their credit, reputation and standing were severely damaged. The behaviour of the banks did not aggravate the injury up to the time the payment was reversed but thereafter the banks took a stand on the fact that it was a forgery and through their advocates did not in two or three matters act frankly or generously as banks do in these matters but were not, in my view, guilty of arrogance, malice and so forth in any measure sufficient to warrant any increase in the damages for aggravation.... I have included in this award the stock that Rahiman took, if any, and the stock left in the shop ... The trouble they had with other banks and the litigation by their suppliers has not been forgotten. Weighing one thing with another and doing the best I can this is the figure I have reached.

An appeal from the High Court is by way of a retrial and the Court of Appeal is not bound to follow the

trial judge's findings of facts if it appears that either he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally. *Selle v Associated Motor Boat Co Ltd* [1968] EA 123. Following this case with approval in *Lalji Bhimji Sanghani v Chemilabs* [1978] Kenya LR 200, Law JA said that this Court on a first appeal is not necessarily bound by the findings of fact in the court below, but it will not usually depart from them unless it appears that the trial judge failed to take account of particular circumstances or probabilities, or if his impression of the demeanour of a witness is inconsistent with the evidence generally.

I think that on the evidence Kneller J erred in holding that the appellant on or before 4th September 1975 did not on the balance of probabilities prove that she agreed to see and deliver goods to Rahiman.

Rahiman ordered six items of cloth. Willy Kuria wrote down the amounts in metres and their type in a big purple ledger. When Rahiman returned on 4th September with a bank payment order (No 008846) Willy Duria told him it would have to be cleared before the goods would be handed over to him. Kuria wrote on the back of it Rahiman's passport number, and may be his driving licence number, and his Uganda address. Kuria deposited the payment order in the appellant's current account on the same day. Kuria made out the cash sale invoice for the six items and included in it all the details of the banker's payment order and added "Goods to be collected when cheque is cleared".

Now let us look at the pleadings. The agreement to sell and deliver the goods was pleaded in paragraphs 4 and 5 of the amended plaint; the averment, *inter alia*, being that the goods were to be collected or delivered to Rahiman by the appellant only after the draft had been cleared. The banks did not, however, make this a live issue in the issues framed by them for decision by the Court. They may even be said, as stated by the appellant's counsel, impliedly to have conceded the existence of Rahiman and to have accepted in their issue 4 that there was a bargain made for the sale of goods, as issue 4 reads: Did [the appellant] agree with Rahiman that he could not have delivery until draft cleared (paragraph 13, plaint)". Paragraph 13 of the amended plaint reads:

Further, or in the alternative, the [appellant] says that, having agreed with the said A A Rahiman that he should not and could not have delivery of the said goods until after the said draft had been cleared...

Shah and Kuria were the two witnesses who gave evidence on the appellant's side as regards the sale and delivery of the goods to Rahiman. There was no cross-examination of either of them about the existence or non-existence of Rahiman or any bargain made with him; no challenge at all. I feel that if the judge had taken into account these factors (which were reinforced by the production of the appellant's invoice book and the ledger) he would not have answered this particular issue in the manner in which he did. The presumption in favour of the appellant was not dislodged. The judge may have been influenced by Shah and Kuria's previous convictions. It is not unknown that after a conviction some dishonest man change and become honest because they have learnt their lesson.

I think that if it was a sham deal the appellant's story would have been that she let Rahiman have the goods when he produced the banker's payment order because it was regarded by the appellant as being as good as cash.

The judge said:

"Where there was any difference I thought the witnesses for the [banks] told the truth".

In so far the bargain with Rahiman for the sale and delivery of goods is concerned there was no difference between the parties over the evidence relating to this issue which the banks treated as an accomplished fact and the question of the balance of probabilities did not arise. There was thus no basis for saying that a sale and delivery of the goods did not take place on a balance of probabilities. To crown it all there was a certificate of good character issued by Barclays Bank itself in favour of the appellant. The manager of the Market branch said in his memorandum to the local head office on 11th September 1975:

We have no reason to suppose that Measurewear have acted other than in good faith and certainly, had they been party to a fraud, they have been slow to draw off the proceeds of it.

I think the judge misdirected himself in holding:

I did not, however, find the [appellant] proved on the balance of probabilities it was innocent holder of this banker's payment in due course or for value so that the upshot is that its claims are dismissed.

With respect, the judge overlooked the provisions of section 30 of the Bills of Exchange Act which provides:

(1) Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value.

(2) Every holder of a bill is *prima facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with fraud, duress or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that subsequent to the alleged fraud or illegality, value has in good faith been given for a bill.

In my opinion no fraud, duress or force and fear, or illegality on the part of the appellant was proved, not even when taking into account that the judge thought the appellant fraudulently claimed to have sold and delivered goods to Rahiman, which in effect would mean that the appellant gave no value for the cheque. I have already stated my reasons for rejecting this finding of the judge and I shall not repeat them.

With respect, I agree with Law JA that this appeal must succeed or fail on the basis whether the Standard Bank cheque was forged. I also agree, for the reasons given by him, that it has not been shown to have been a forgery. An outstanding feature of this case is that the judge held that the cheque was signed by employees of the Standard Bank in the course of their employment. I would go further and say that it must have been signed by an employee or employees of the Standard Bank authorized for the purpose, otherwise it may not have got such a smooth passage as far as payment is concerned. In the circumstances, the *dictum* of Sir Charles Newbold P in *Muwonge v Attorney-General of Uganda* [1967] EA 17, 18, quoted by Law JA in his judgment applies.

The net result can be stated in two sentences. The cheque was not proved to have been a forgery. The appellant was the holder of it for value in due course; therefore she is entitled to succeed.

For the reasons I have stated, I would allow the appeal, set aside the decree of the High Court and substitute therefore an order that judgment be entered for the appellant against Barclays Bank for Shs 4,000,000 damages which the judge assessed after a careful consideration of the various aspects affecting this issue. There has been no cross-appeal against the judge's assessment. I am not disposed to disturb it. The damages will carry interest from the date of this judgment at the usual court rate.

I would not grant the prayer against Barclays Bank for Shs 345,750 because the judge said that he included the stock that Rahiman took away in the amount of general damages. I would, however, enter judgment against the Standard Bank for Shs 345,750. As far as Barclays Bank is concerned, the decree will be so drawn that the decretal amount will be the balance after deducting any debt owing to it with interest by way of overdraft loan, and also, that if the sum of Shs 345,750 is paid to the appellant by the Standard Bank the decretal amount against Barclays Bank will be reduced accordingly. I would give costs of the appeal to the appellant with a certificate for two advocates.

I would also give costs of the suit in the High Court to the appellant with a certificate for Queen's Counsel and junior. Both set of costs will carry interest at the usual court rate. As Wambuzi and Law JJ A agree it is so ordered.

*Appeal allowed.*

On 20th July 1979, application was made to the Court of Appeal (Madan, Miller and Potter JJ A) under rule 35(1) of the Court of Appeal for East Africa Rules 1972 for the correction of an error in the judgment delivered on 19th March.

**Madan JA.** Having stated that the order was erroneous due to a slip on his part and that the Court had been able to discuss the application with Law JA before he went abroad (but unfortunately not with Wambuzi JA who had also gone abroad) continued: We would allow the motion, delete the order relating to payment of interest made in the judgment and substitute an order making interest on the decretal amount payable from the date of judgment of the High Court. We would make no order for costs of the motion because, if an application had been made (as it should have been) upon conclusion of the delivery of the judgments in the appeal, the error would probably have been rectified there and then.

*Order accordingly.*

**Dated and delivered at Nairobi this 19th day of March 1979.**

**C.B MADAN**

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**JUDGE OF APPEAL**

**S.W WAMBUZI**

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**JUDGE OF APPEAL**

**E.J.E LAW**

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**JUDGE OF APPEAL**

**I certify that this is a true copy of the original**

**DEPUTY REGISTRAR**