



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: G. B. M. KARIUKI, SICHALE & KANTAI, JJ.A)**

**CIVIL APPEAL NO. 40 OF 2009**

**BETWEEN**

**FIDELITY COMMERCIAL BANK LIMITED ..... APPELLANT**

**AND**

**FAZILA SHARIFF-TEJPAN ..... RESPONDENT**

***(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi, Milimani Commercial Courts (Okwengu, J) dated the 6<sup>th</sup> October, 2008***

***in***

**CIVIL CASE NO. 590 OF 2004)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The suit, the subject matter of this appeal, was commenced by way of a plaint filed on 29<sup>th</sup> October, 2004 by the respondent, Fazila Shariff-Tejpar (the then plaintiff). The respondent's prayers in the plaint as against the appellant, Fidelity Commercial Bank, were, *inter alia*, that the appellant be condemned to pay:

- i. Kshs. 3,100,000/=**
- ii. Interest at the rate of 11% from the date pleaded in paragraph 10 herein above until payment in full.**
- iii. Further interest at Court rates from the date of filing the suit until payment in full.**

The basis of the claim was that the respondent had placed several bank deposits with the appellant bank which deposits accrued interest for fixed periods and which deposits would often be rolled over upon expiry of the fixed terms. The respondent averred in the plaint that the appellant failed to account for the total sum of kshs. 3,100,000/=, being part of the money deposited with the appellant. The particulars of this claim as contained in paragraph 10 of the plaint was:

**“(i) The sum of Kshs. 200,000/= and interest at the rate of 11% per annum from 16<sup>th</sup> December, 2002 until payment in full as pleaded in paragraph 5 (c) herein above.**

- ii. **Kshs. 900,000/= and interest at the rate of 11% per annum from 13<sup>th</sup> January, 2003 until payment in full as pleaded in paragraph 7(b) (ii) herein above.**
- iii. **Kshs. 2,000,000/= and interest at the rate of 11% per annum from 26<sup>th</sup> April, 2003 until payment in full as pleaded in paragraph 9(c) herein above.**

**TOTAL (i), (ii) and (iii) ..... Kshs. 3,100,000/= together with interest at the stipulated rate of 11% per annum as pleaded herein above until payment in full.”**

In a defence filed on 6<sup>th</sup> December, 2004, the appellant denied the respondent’s claim. It averred that the respondent withdrew all the money deposited with the appellant and hence it did not owe her any money. Further, it was the appellant’s defence that if any money was lost, which was denied, then the money was lost

**“..... purely because of the plaintiff’s negligence .....**”

The appellant particularized the respondent’s negligence in paragraph 8 of its defence as follows:-

- a. **Failing to properly take any care of her own banking activities including when receiving fixed deposit receipts for the roll overs.**
- b. **Signing at the back of the receipts and leaving Mr. Azfar Abbas to write the instructions.**
- c. **Relying on handwritten advice from Mr. Abbas and failing to confirm its authenticity with the defendant.**
- d. **Allowing other parties to sign and collect the funds on behalf.**
- e. **Leaving the receipts with Mr. Abbas and collecting money from him directly and not through the defendant’s cashier as is normal practice.**
- f. **Entrusting all her banking activities to Mr. Azfar Abbas, an officer of the defendant who was also her agent.**

The matter proceeded to hearing before Okwengu, J (as she then was) who recorded the evidence of the respondent as well as that of her mother **ZARIN ALIBHAI SHARIFF (PW2)**. On its part, the appellant called **PHILIP MUOKA**, the Bank’s then Legal Officer as it’s witness.

Upon conclusion of the evidence the trial Judge rendered her judgment on 6<sup>th</sup> October, 2008 and found in favour of the respondent. The appellant was aggrieved by the said judgment and hence this appeal. In its memorandum of appeal dated 5<sup>th</sup> March, 2009 the appellant listed no less than four grounds of appeal. However, when the appeal came before us for hearing on 30<sup>th</sup> June, 2015, Mr. Gitonga, learned counsel for the appellant, condensed the grounds of appeal into two main grounds. Firstly, it was the appellant’s contention that the trial court failed to find that the deposits of Kshs. 2 million and Kshs 1.1 million had been collected by the respondent’s agent who had acknowledged the collection in writing. According to Mr. Gitonga, this agent had actually signed on the back side of the receipt, instructions of payment by cash. Secondly, Mr. Gitonga urged us to find that the respondent had been negligent in the handling of her deposits and invited us to apportion blame and hence find that there was contributory negligence attributed to the respondent.

Mr. Sehmi, the learned counsel for the respondent, opposed the appeal. It was his submission that contributory negligence had not been pleaded. He relied on **Charles Worth and Percy on negligence, Seventh Edition at pages 146 – 147** wherein it is stated:

**“If the defendant intends to rely upon an averment of contributory negligence such allegations**

***must be specifically pleaded against the plaintiff.”***

Mr. Sehmi’s further argument was that whereas the appellant’s position was that the respondent had withdrawn the deposits, the statements emanating from the appellant showed that interest continued to accrue even after the date of the alleged withdrawals. He urged us to find for the respondent and uphold the judgment of the trial court.

This is a first appeal before us. The position of the law as regards a first appeal is that we are entitled to re-evaluate and re-analyze the evidence tendered in the trial court and come to our own conclusion bearing in mind that the trial judge had the advantage of seeing and assessing the demeanor of the witnesses (see **Selle & Another vs Associated Motor Boats Co. Ltd [1968] EA 123**). In undertaking that obligation we are guided by the principle that a Court of Appeal will not normally interfere with a finding of fact of the trial court unless it is based on no evidence or on misapprehension of the evidence or the judge is shown to have acted on a wrong principle in reaching the findings he did (see **Jabane vs Olenja [1986] KLR 661**).

We have carefully perused and considered the record of appeal and the rival submissions made by counsel.

It is not disputed that the appellant and the respondent enjoyed the relationship of a banker – customer. It is also not disputed that during the pendency of that relationship the respondent made several deposits with the appellant bank. It is also true that apart from the respondent, her mother namely Zarin Alibhai Shariff acted as her agent as the respondent lived in Kisumu whilst her deposits were held in the appellant’s bank in Nairobi. In their dealings with the appellant bank the respondent and her mother who testified as PW2 dealt with Mr. Azfar Abbas the then Chief Manager of the bank.

In her testimony in court, the respondent narrated to the court her transactions with the bank which included the placement of deposits for purpose of accruing interest. Upon maturity of her deposits, she would give instructions which sometimes included purchase of foreign currency or deposits into her savings account or a roll-over of the fixed deposit. Her testimony was supported by the statements issued by the bank as the entries of deposits into her savings account were actually reflected. On the other hand, PW2 who also dealt with Mr. Abbas collaborated PW’1s evidence. She denied having collected the sum of Kshs. 2million and 1.1million on behalf of PW1 contrary to the appellant’s assertion. PW2 told the court that whenever she went to the bank, Mr. Abbas would ask her to append her signature at the back of the deposit receipts. As far as she was concerned, this was for the purposes of giving instructions for renewal of the deposits and was not for withdrawal of the cash. At the time of her signing, the receipts would be blank and words to the effect “pay cash” were inserted later.

On its part the appellant called one Philip Muoka as its witness. This witness was the appellant’s Legal Officer. He did not deal with the respondent as regards the fixed deposits. Neither did he know who had written on the back of the receipts “pay cash.” At the time he joined the bank, Mr. Abbas had ceased working for the bank. He got to know that the appellant had lodged a complaint against Mr. Abbas for fraud with the Anti-Banking Fraud Unit of the Central Bank of Kenya. He however did not know whether the respondent’s claim was one of those presented to that department.

In our view and given the evidence adduced during the trial, the learned Judge of the High Court was right in coming to the conclusion that the appellant had failed to account for the sum of Kshs. 3.1 million due to the respondent. In our view the entries in the statements emanating from the appellant tallied with the respondent’s evidence particularly as regards instructions on how the deposits and the accruals were to be applied. These were statements produced on a regular basis and it would appear that they were meant to hoodwink the respondent that her monies had been applied as per her instructions. The respondent cannot therefore turn around and claim that the sum of Kshs. 2million and 1.1million had been collected by the respondent’s agent and yet the contents of the statements issued by them showed otherwise. We find that the evidence of PW1 and PW2 was supported by the statements issued by the appellant. We are also in agreement with Mr. Sehmi’s submission that a litigant who alleges contributory negligence must so plead. In any event we do not think that the respondent contributed to the loss. The

respondent had no reason to doubt the appellant's employees, more so it's Chief Manager. As admitted by the appellant's witness (Philip Muoko), Mr. Abbas was reported to the Anti- Banking Fraud Unit and had since disappeared. The respondent cannot be blamed for negligence if the bank retained as its employee a person who had questionable integrity and who was less than honest. It was not anticipated that the respondent would be dealing with a potential fraudster. We therefore find that there was no contributory negligence on the part of the respondent.

We believe we have said enough to show that this appeal has no merit. It is dismissed with costs to the respondent.

**Dated and delivered at Nairobi this 25<sup>th</sup> day of September, 2015.**

**G. B. M. KARIUKI**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**