



IN THE COURT OF APPEAL

AT ELDORET

CORAM: OMOLO, ONYANGO OTIENO & OKWENGU, J.J.A.

CIVIL APPEAL NO. 200 OF 2006

BETWEEN

STANDARD CHARTERED BANK (K) LTD.....APPELLANT

AND

ZACHARY MOGENI.....RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Eldoret (Nambuye, J) dated 29th July, 2004

In

H.C.C.C. NO. 42 OF 1997)

JUDGMENT OF ONYANGO OTIENO, J.A.

The respondent in this appeal **ZACHARY MOGENI**, was upto 13th October, 1995, an employee of the appellant, **STANDARD CHARTERED BANK**, having been employed vide a letter of appointment dated and accepted by him on 26th November, 1975. The record shows that he worked efficiently till 11th

October, 1994 when the appellant Bank sent out a circular to all staff informing them of a proposal by the appellant to float a voluntary Early Retirement scheme offer. In another circular dated 14th October, 1994, the respondent together with all staff were informed that the management of the appellant Bank reconfirmed the terms of the Scheme and interested staff were invited to take advantage of the scheme. The respondent applied to retire under the scheme vide his letter dated 24th October, 1994, and the appellant's reply was contained in a letter dated 31st October, 1994 which stated as follows:-

***``Zachary Mogeni
Eldoret Branch***

31st October, 1994

Dear Zachary,

RE: VOLUNTARY EARLY RETIREMENT

Further to your letter dated 24th October, 1994 on the above subject, we are writing to advise you that your Voluntary Early Retirement application has been accepted. We are currently in the process of matching the applications with the roll-out plan for the Kenya Centralization Project and as soon as this is completed we shall inform you of the indicative departure date.

Please be guided accordingly.

Yours sincerely,

***OCHIENG O. OLOO
HED, HUMAN RESOURCES DIVISION***

OOO/vmk

I may add here that it is clear to me that although the respondents application under the Voluntary Early Retirement scheme (VER) was accepted, his date of departure was not specified but terms specified in a document entitled "Standard chartered bank of Kenya Limited development Plan" dated 22nd September, 1994 left no doubt on the appellant's view on the aspect. It states at the end at paragraph 3 as follows:-

"On-going treatment of staff who volunteer.

Regardless of whether an application is accepted or rejected the bank guarantees that it will not treat individuals differently, in any way, directly as a result of their applications.

In particular, accepted applicants will continue to be eligible for salary raises and any other changes to compensation right up to the date of their departure. Equally, company policies regarding their employment, confidentiality or client information, code of conduct, ethics and rules regarding the behavior of employees whilst at work and doing Standard Chartered bank Kenya Limited work, must be complied with at all times."

In short, in so far as he had not left the appellant's services, the respondent was expected to work under his normal terms and conditions of service. Thus, in so far as he had not been informed of the indicative departure date and in so far as he had not exited, he was still an employee of the appellant subject to the rules, regulations as required by his employer in his terms and conditions of service.

As ill luck would have it, before the respondent left service of the appellant and while still at his same station, Eldoret two incidences happened that resulted into the entire saga giving rise to this appeal. These two incidences resulted into the appellant serving the respondent with a letter of dismissal dated 13th October, 1995. As I view this letter as important in the entire case, I do reproduce it fully herebelow:-

“Dear Mr. Mogeni

RE: DISMISSAL FROM BANK’S SERVICE

After due investigations we are satisfied that between 8 August 1995 to 9 September 1995 you were grossly negligent and careless in the performance of your duties in that on 8 August 1995 when you requested the account opening staff Mrs. Masiva to open a new account in the books for a Mr. Samuel Omanwa Nyaosi she declined to do so since the new customer did not produce referees and the firm newly registered; you then appealed to the BFS Manager to open the said account but the latter rejected your request on similar grounds. You then invoked your authority as the Branch Operations Manager to force Mrs. Masiva to open the said account as she is answerable to you. You were therefore wholly responsible facilitating opening in the books of the branch an account which was used for fraudulent purposes while the same should not have been opened.

On 24 August 1995 you authorized payment of a crossed third party cheque for Kes.30,000 over the counter while the cheque had not been opened by the drawer. On 2 September 1995 you authorized a cash payment of Kes.700,000 to the drawer without first confirming the genuineness of the deposit of Kes.1,862,400 from the drawee branch, Yaya Centre. Yet you knew very well that this was a new account and Kes.700,000 was a large amount. Your actions were no doubt in contravention of the Bank’s rules and regulations. Your gross negligence has caused the bank a huge loss.

We are also disappointed to learn that between 10 June 1995 and 12 August 1995 you authorized reimbursement of your own fraudulent medical claims totaling Kes.27,936 direct to your account and debited the Bank’s books instead of your medical expenses account. Between 10 June 1995 and 12 August 1995 you also failed to produce the relevant medical receipts and did not complete the medical claim forms contrary to the Bank’s laid down medical expenses reimbursement procedure.

In the circumstances you are hereby dismissed from Bank’s service effective the date of this letter.

All your dues upto and including the date of this letter will be paid to you upon computation.

Kindly acknowledge receipt of this letter by signing on the attached copy and return the same to us.

Yours faithfully

**A.M. LUBIA
REGIONAL MANAGER
SALES & SERVICE BRANCHES”**

Prior to the above letter, the record shows that the respondent had been asked to and did explain his case in respect of the three matters. Apparently the appellant was not satisfied with the explanation and hence dismissal conveyed by the above letter. On 17th February, 1997, the respondent moved to the High Court for redress vide plaint dated 29th January, 1997 in which he sued the appellant seeking judgment for:-

“(a) The payment to him of his entitlement under voluntary Early Retirement Scheme.

(b) Damages for wrongful termination of employment

(c) **Costs**

(d) **Any other remedy this Honourable Court may deem fit to grant.”**

These claims were made by the respondent on grounds stated at paragraph 10 of the plaint that his dismissal was done without any evidence or reasonable justification. The appellant denied the allegation by the respondent that the dismissal was based on no evidence and/or reasonable justification and contended in its statement of defence dated 6th June, 1997 and filed on 12th June, 1997 at paragraph 13 of the defence that the termination of the respondent’s services was justified as the respondent was in breach of the contract of service between him and the appellant. Both the respondent in his plaint and the appellant in its defence referred to the incidences mentioned in the letter of dismissal I have reproduced hereinabove. The respondent filed reply to defence and denied the appellant’s allegations in the statement of defence.

After close of the pleadings and finalization of the procedural requirements, the suit landed before *Nambuye J* (as she then was) for hearing at the High Court sitting at Eldoret. The respondent gave evidence and did not call any other witness whereas the appellant called **William Bill Omoding (DW1)** who was the Bank Manager of the defendant Bank at Eldoret at the relevant time and *Sarah Ogero*, who was Credit Manager in charge of Business accounts at the relevant time at Eldoret Branch. After the close of the hearing of evidence, and after the submissions from the learned counsel, the learned Judge in a judgment which I would, with respect say was inordinately lengthy and which was read by *Dulu J* on 29th July 2004, decreed that the respondent was entitled to judgment against the appellant for the payment to him of his entitlement under the Voluntary Early Retirement Scheme; that the respondents entitlement under the said Scheme was to be worked out by the deputy Registrar of the Honourable Court in the presence of both parties and their counsel on a date that was to be fixed by them after the delivery of judgment and lastly that costs of the suit was to be paid to the respondent by the appellant.

The appellant felt aggrieved by that judgment and hence this appeal premised on seven grounds of appeal which are:-

- “1. That the learned Trial Judge erred in law and in fact in holding that the respondent was entitled to be paid benefits under the Voluntary Early Retirement scheme.**
- 2. That the learned trial Judge erred in law by switching the burden of proof of the respondent’s case to the appellant.**
- 3. That the learned trial Judge erred in law and in fact by proceeding on the basis that allegations of employment offences committed by the respondent in the course of his employment had to be proved by the appellant beyond reasonable doubt.**
- 4. That the learned trial Judge erred in law and in fact by coming to the conclusion that the respondent had proved his case beyond reasonable doubt.**
- 5. That the learned trial Judge erred in law and in fact by failing to consider the totality of the evidence before her and instead basing her decision on extrinsic evidence.**
- 6. That the learned trial Judge erred in law by granting reliefs on items not pleaded in the plaint.**
- 7. That the learned trial Judge erred in law in arriving at an inconclusive judgment.”**

In urging the above grounds before us, *Mr. Obura*, the learned counsel for the appellant submitted that the learned Judge of the High Court, in considering the case, acted as if she was dealing with a criminal matter and thus felt the appellant needed to prove the allegations that resulted into the dismissal of the respondent beyond reasonable doubt whereas the matter was civil and all that was required of the appellant and was in his view discharged, was proof within the standards of probability. In his contention, the respondent took active part in causing an account to be opened for a customer, which account was

used for fraudulent purpose and that was enough proof of the respondent's negligence. Further, the respondent also authorized the payment of the Kshs.700,000/- by opening a crossed cheque for a customer on the first day of maturity of cheque paid into the account. Secondly, the respondent also paid himself in respect of medical claims, for which no medical claim forms had been completed and sanctioned for payment. *Mr. Obura* submitted that as the respondent admitted that this was irregular, the learned Judge should have accepted this as a serious breach of his terms of service warranting disciplinary action. He maintained that the learned trial Judge had switched the burden of proof in the case such that in place of the respondent proving that his dismissal was unjustified, it was the appellant who, according to the learned Judge failed to prove that the respondent's dismissal was justifiable. Lastly, *Obura* complained against the order of the learned Judge directing the special damages to be worked out by the Deputy Registrar whereas no special damages were pleaded on the plaint and the trial court also accepted that, and thus none should have been awarded by the trial court. He urged us to allow the appeal.

Mr. Songok, the learned counsel for the respondent, on the other hand opposed the appeal, submitting that it was the appellant which had contended that the respondent's dismissal was justifiable and that meant, the appellant had to adduce sufficient evidence to demonstrate that contention, but instead, the evidence the appellant adduced fell far short of proving that contention as some essential evidence that would have proved that allegation was never produced. On the issue of award of special damages, *Mr. Songok's* stand was that the respondent had specifically pleaded special damages in that the respondent had sought that the court would order the terms in respect of Voluntary Retirement Scheme to be effected, and that was proper. As calculation of the same special damages or what was due to the respondent on account of Voluntary Retirements Scheme was an administrative matter, *Mr. Songok* felt the learned Judge's order to that effect cannot be faulted.

I have anxiously considered the record before me, the evidence that was adduced at the trial by the respondent and the appellants' two witnesses, the judgment of the learned trial Judge which as I have stated was, in my view unnecessarily lengthy, the memorandum of appeal, the able submissions by the two learned counsel and the law, as I must do, this being a first appeal.

The respondent contended before the High Court that his dismissal was not justified. He sought in the plaint part of which I have reproduced hereabove, that he be paid his entitlement under the Voluntary Early Retirement Scheme which the appellant had sanctioned before those allegations against him ensued, for the allegations were not founded and could not justify such draconian action. On the other hand, the appellant contended that the allegations were well founded and were serious enough to warrant dismissal and loss of the respondent's benefits under the Voluntary Early Retirement Scheme in respect of which he had allowed the appellant to benefit from. It was however not in dispute and was readily conceded by the respondent that although he had been allowed to proceed under the Voluntary Early Retirement Scheme, the which retirement was to take effect at the convenience of the appellant and that in so far as he had not been released under that Scheme, the respondent was, during that period, subject to the terms and conditions of service applicable to all other staff including regulations and any other rules that was to be applicable to the staff.

Mr. Obura's submissions that in civil cases such as the one before us the standard of proof is not like in criminal cases is obvious and cannot be challenged in any corridors of law and I readily agree with him. I agree that whereas in criminal cases, proof required is that beyond all reasonable doubt, in civil cases proof required is that within probability. However, even in civil cases, it must also be accepted that the concept of 'whoever asserts proves' an allegation is alive. In the case before us, the respondent stated that he was dismissed on grounds that he felt were not proper and produced a letter of dismissal the whole of which I have reproduced above. The appellant rebutted the allegations and asserted in its statement of defence at paragraphs 6,7,8,9&10 as follows:-

“6. The defendant shall aver that the plaintiff's services were dismissed in accordance with his contract of service and for good cause.

7. The defendant denies the contents of paragraph 8 of the plaint and avers that the plaintiff did in fact open an account for one Samuel Omwanwa Ngosi in disregard of instructions from his

colleagues who had every reason to believe the account would be a source of fraudulent transactions.

8. *The defendant shall contend that the plaintiff did not exercise due diligence in the performance of his duties and was negligent in failing to take necessary steps to ensure that the defendants interest (sic) were not put to risk.*

9. *The defendant shall further aver that due to the plaintiff's negligent conducts and omissions the bank incurred a loss of Kshs.1,900,000/=.*

PARTICULARS OF NEGLIGENCE

(a) *Sometime in August 1995 the plaintiff directed one Mrs. Masiva an employee of the defendant to open an account for a customer against the rules of procedures of the bank.*

(b) *On or about 24th August, 1995 the plaintiff authorized payment of a crossed third party cheque over the bank counter against the rules of procedure of the bank.*

(c) *On or about 2nd September, 1995 the plaintiff authorized payment of a sum of Kshs.700,000/= without confirming that the cheque against which the payment was being made had been honoured.*

(d) *Giving a false assurance to his fellow workmates that a cheque of Kshs.1,862,400/= deposited with the defendant was a good cheque.*

10. *The defendant shall further aver that the plaintiff received medical refunds totaling Kshs.27,936/= through the defendant's Medical Aid Scheme on diverse periods between 10th June and 12th August 1995 based on falsified information."*

These were the assertions that the appellant made to justify the dismissal of the respondent. It had the burden of proving them within the required standard of probability, and the trial court had a duty to ensure that that was done before it could accept that the respondent's dismissal which was conveyed to him in the letter I have reproduced above, and which allegations in the letter are no more than a summary of the allegations above, was justified. To require the same cannot in my view, with respect be termed as requiring proof beyond reasonable doubt, nor can it be termed shifting the burden of proof. The respondent had alleged at paragraph 10 of the plaint I have referred to as follows:-

"10. That for the aforesaid reason and without any evidence or reasonable justification the defendant company by letter dated 13th October, 1995 wrongfully determined the plaintiff's employment and dismissed the plaintiff."

He had in his evidence produced the same letter which as I have stated was a summary of the appellant's allegation. In my view, it was on the appellant to rebut that allegation at page 10 and in doing so demonstrate what it alleged in its statement of defence, that there were justifiable grounds for the respondent's dismissal. I cannot fault the learned Judge of the High Court on that approach, for to do so was neither seeking proof beyond reasonable doubt as in criminal cases nor was it shifting the burden of proof.

I now turn to consider whether indeed the dismissal was justified. In doing so, I do remind myself that this is a first appeal and that being so, I am duty-bound to revisit the evidence that was adduced at the trial afresh, analyse it, evaluate it and come to my own independent conclusion but always aware that the trial court had the advantage of seeing the demeanour of witness and hearing them and thus I need to give allowance for that in my fresh evaluation and consideration of that evidence – See the case of **SELLE & ANOTHER VS. ASSOCIATED MOTOR BOAT COMPANY LTD & OTHERS (1968 EA 123)**.

The main allegations that necessitated the dismissal of the respondent were five. In the statement of defence they are specified and these are that the respondent directed one Mrs. Masiva, a colleague to open

an account for a cashier against the rules of procedure; that on 24th August, 1995 he authorised payment of a crossed third party cheques against the rules of procedure; that on 2nd September, 1995 he authorized payment of a sum of Kshs.700,000/- without confirming that the cheque against which that cheque was drawn had been paid; that he gave false assurance to his fellow workmates that a cheque of Kshs.1,862,400/- deposited with appellant was a good cheque and that he received medical funds totaling Kshs.27,936/= through the appellant's Medical Aid Scheme on diverse dates between 10th June and 12th August, 1995 based on falsified information.

As I have stated above the appellant called two witnesses in support of its case, which was that the respondents dismissal was justified. The first and the main witness *William Bill Omoding*, started off his evidence by stating:-

“I remember the current account was opened in our branch. The account was opened with my authority as the branch manager. The account is in the name of Samwel Omenua Nyaosi All (sic) number 10013868400. It was a personal current account period (sic) on 8.8.8.95.”

Having authorized the opening of the offending account, he went to attend a seminar in Nairobi leaving the respondent to act as the branch manager. It is when he went back to his branch that he realized several big payments had been made on the account and he became curious and started to check with Yaya Centre whether the cheque deposited in the bank against which three large cheques were made was genuine. He was informed by a person whose name he did not state that the account in respect of that cheque did not exist. He stated further:-

“That is when I reported the matter to our internal investigations department.”

Thereafter, this witness proceeded to give evidence on what the internal investigations department allegedly found and not on what he knew of his own. That investigations report was never produced in court and none gave evidence for the investigations team. Indeed he admitted that he authorized the issuance of a cheque book for which the offending cheques were contained. He stated in his evidence that the respondent authorized payments of cheques for Kshs.30,000/= and for Ksh.700,000/- and these transactions were not proper but he never produced any document on bank procedures barring the same. Instead he admitted that a similar withdrawal was made on the account in respect of a cheque dated 7th September, 1995 for Kshs.450,000/= which was authorized by ledge keeper *Kinyanjui* but no action was taken against the same *Kinyanjui*; another for Kshs.460,000/= was withdrawn on 9th September, authorized by *Mr. Ndenga* and again no action was taken against *Mr. Ndenga* who also authorized amount payment of Kshs.300,000/= raising serious doubt as to whether such rules existed and if so why were they not applied to all staff. They were transactions on the same account. He (DW1) authorized its opening; *Kinyanjui* authorized a withdrawal of Kshs.450,000/-, *Ndonga* authorized the withdrawal of Kshs.460,000/-, and respondent authorized withdrawal of Kshs.30,000/= and Kshs.700,000/-, all from this account, yet the respondent is dismissed for the same while no action is taken against the others. I readily accept that two wrongs do not add to right, but where no such rules of procedure and/or regulations are availed, one wonders whether these were never rules of practice or trite rules of which violations would call for dismissal. In short, whether dismissal in such circumstances was justified. Yet this allegation of his having authorized payment of cheques irregularly without confirming the genuineness of the deposits of the cheques drawn on sister bank was one of the main reasons for his dismissal. This witness says towards the end of his evidence in chief.

“Mr. Mogeni was eventually dismissed vide Exh. 10. It was noted with concern by the management because

(1) He initially authorized payment of cheques irregularly and without confirming the genuineness of the deposits of cheques drawn on our sister branch.

One wonders whether *Kinyanjui* or *Ndonga* confirmed with Yaya Centre whether the cheque drawn against which they also authorized payment was genuine. Further, in cross examination, this witness

conceded that the cheque for Kshs.30,000/= was properly authorized as there was money in the account as the account holder had deposited Kshs.10,000/= and a cheque for Kshs.50,000/= and at the time it was authorized, the respondent was the Acting General Manager. *Mr. Omoding* admitted that other than the Kshs.700,000/-, the respondent had nothing to do with the other payments and although the matter was reported to police, the respondent was not prosecuted. As to the allegations that the respondent directed *Mrs. Masiva* to open an account for a customer, while in the dismissal letter, it is stated that he requested *Mrs. Masiva* to open a new account and on her declining to do so, he then appealed to the BFS Manager to open the said account and on her refusal he then forced *Mrs. Masiva* to open the said account, *Mr. Omoding* said in evidence:-

“In our cause of investigation we discovered that Nyaosi had approached us to open a business account and we refused. He prevailed upon Mrs. Masiva to open an account with Mrs Masiva in his own name.”

Mrs Masiva was never called to confirm that allegations which was indeed hearsay evidence as *Omoding* only talked of what the investigation report stated, which report was never before court and none of the investigators gave evidence. Further, the only other appellant’s witness *Sarah Ogero (DW2)*, who handled part of the initial aspects of this saga stated on opening of the account:-

“He brought customers for account opening purposes. He came with a Mr. Nyaosi and said he wanted to open a business account. He left and I interviewed the customer. He had to identify himself and bring a certificate that he is the owner of the business and that the business should have been in existence for two years. Nyaosi did not satisfy that requirement. The business was very new. It had just been registered and so it was very new.

He later on opened a personal account the subject of this case.”

On cross-examination this witness said:-

“It was courteous for him to bring a customer. There was nothing wrong with a staff bringing a customer. I am not the one who opened the personal account.”

Upon that evidence, one wonders where the appellant got the allegation that *Masiva* had been forced to open the offending account for *Nyaosi*. In order to justify that allegation and by extension to justify dismissal on that account, *Mrs. Masiva* had to give evidence to establish within the standards of probability that the respondent invoked his authority to get *Mrs. Masiva* to open the personal account for *Nyaosi*. In any case, *Mrs. Ogero* to whom the respondent went first did not claim that the respondent in any way coerced her to open business account for *Nyaosi* and said once the respondent took *Nyaosi* to her, he left and she interrogated *Nyaosi* on her own and found his application for business account lacking and the respondent never raised any objection to that independent decision. There was no dispute that whereas one could not open an account for business that was still very new, one could open a personal account and that is what happened. The respondent’s version was that he knew *Nyaosi* very well and when *Nyaosi* went to him with another person seeking to open business account, he took him to *Ogero* and left him with her. When *Mrs. Ogero* declined to open business account for him, he took him to *Mrs. Masiva* as he wanted to open personal account instead of the business which could not be opened. He said he did all this in good faith and personal account was opened by *Masiva* normally after going through all the required documents. As to opening of the cheques for Kshs.30,000/- and Kshs.700,000/- his evidence was that the customer presented a cheque for Kshs.700,000/- on his account. He called for computer printout to check the balance on the account. On checking the balance he found that there was a cleared balance of Kshs.2,555,565/50 and he authorized the payment. It was a self cheque – i.e. drawn on his account and payable to himself. He said he authorized payment when maturity time for the other credit into the account had expired as the upcountry cheque for Kshs.1,862,400/= issued and deposited into that account was deposited on 23rd August, 1995 and so as on 2nd September, 1995 when cheque for Kshs.700,000/= was presented the seven clear days for clearing the deposited cheque had expired. Further another deposit for Kshs.50,000/= had also been paid into that account and the two deposits were the basis for clearing the cheque for Kshs.700,000/=. The Yaya Centre had acknowledged receipt of the

deposit of Kshs.1,862,400/= in Form 7, and as they did not communicate to say the cheque had not been paid, the respondent felt it was proper to clear the cheque for Kshs.700,000/=. He added that the other cheques for Kshs.300,000/= paid on 6th September, Kshs.450,000/= paid on 7th September, 1995 and for Kshs.460,000/= had been cleared in similar circumstances over the counter by *Mr. Ndonga* but nothing was done to that member of staff.

In my view, the fact the respondent was dismissed from the service of the appellant was clear and was not in dispute. He alleged that his dismissal was not justified, whereas the appellant which had all the records, asserted that the dismissal was justified. As concerns the appellant justifying the dismissal on the basis of the respondent introducing the customer to the staff who opened the account for him, I am far from being persuaded that the appellant was justified. The allegations it made that the respondent used his authority to force *Mrs. Masiva* to open the account were not proved at all as *Mrs. Masiva* was never called as witness by the appellant which made the allegations. I am equally not persuaded that in the absence of investigations evidence, and in the absence of the report itself, and no evidence having been called from Yaya Centre on the fate of the cheque for Kshs.1,862,400/=: that the appellant, through hearsay evidence demonstrated respondent's negligence in his actions. That view covers the allegations of forcing the opening of account for Nyaosi, and authorizing third party cheque to be paid over the counter. Authorizing payments and opening crossed cheques were apparently in practice at the bank and other members of staff did the same but were not dismissed. I would also say there was need to produce in court the Rules and/or Procedure that the appellant was said to have acted against so as to justify allegations of breach of those rules.

The other assertion the appellant made to justify dismissal of the respondent was that the respondent gave false assurance to his fellow workmates that a cheque for Kshs.1,862,400/- deposited with the appellant was a good cheque. No attempt was made by the appellant to prove this. Perhaps what the appellant meant was that by respondent authorizing the payment for a sum of Kshs.700,000/-, the other members of staff followed suit thinking that cheque for Kshs.1,862,400/- deposited with the appellant earlier had been honoured and therefore withdrawals based on it could be approved. If that is what the allegation was alluding to, then my view is that each employee is in law bound to follow strictly the applicable procedures and should not have relied on another employee's action however senior that other officer was. However, in this case, no witness alleged that he was falsely assured by the respondent that the cheque was a good cheque. I think nothing turns on this allegation and no dismissal could have been justified on it.

The last allegation was that respondent received Kshs.27,936/= through Medical Aid Scheme based on falsified operation. In the letter of dismissal the respondent was alleged to have authorized reimbursement of his own fraudulent medical claims totaling Kshs.27,936/= direct to his account and debited the Bank's books instead of his medical expenses account. In a letter dated 16th September, 1995, addressed to the Manager of the appellant Bank, Eldoret Branch, the respondent admitted that on 9th June, 1995 he was treated by his Doctor (*Dr. Onshangwa*) at a cost of Kshs.5406 and on 15th and 23rd June, his wife was also treated by the same Doctor at a cost of Kshs.6,590/= and Kshs.9350/= respectively. On all those three occasions, he debited staff medical expenses account to pay the Doctor before obtaining receipts and without filling medical claim forms. He admitted that that procedure was irregular. He went on in another letter and said that to correct the anomaly he had since obtained the receipts from the Doctor and also completed the medical claim forms. He enclosed the claim forms in that letter. When cross examined on this complaint, *Mr. Omoding* stated inter alia:-

“The medical claim were irregular because there was no claims then. He had already taken the money before presenting. I asked him to explain what he knew about the transactions exhibit 2 a,b,c.

Although Mogeni completed the forms he had already taken the money. We did not go beyond this to confirm that he had been treated and made payment.”

The respondent in his evidence in court said that he did not fraudulently authorize medical disbursement for himself. He made the reimbursement correctly according to Human Resources Order No. 23/94, as being the Operations Manager at that time, he was empowered to approve the medical claims. In re-

examination, he agreed that what he did was irregular but insisted that it was not against his terms and conditions of service and went on to say:-

“I did not normalize it after investigations started. I talked to the head of Human Resources on the issue and he advised me to place the receipts with a letter of apology which I did and I thought the matter rested at that.”

That evidence, taken together with the evidence of *Omoding* that after respondent completed the forms the appellant did not go beyond that to confirm that respondent had been treated and made payment tend to suggest that the appellant had forgiven the respondent. In the scenario, I cannot fault the trial Judge in her holding that:-

“Failure to do so adds credence to the plaintiff’s assertion that the issue had been settled.”

She saw the witness give evidence and his demeanour and her view tallies with mine that the reason why the appellant did not report this matter to the police and did not follow up by investigating further and establishing whether or not the respondent and his wife were indeed treated by *Dr. Onshongwa* and whether the receipts he allegedly produced were genuine or falsified and that to establish whether or not fraud had been committed as the appellant alleged in the letter of dismissal, was that the matter had been settled when the respondent responded to the advice from *Mr. Omoding*, his boss.

To conclude on the issue of liability, the sum total of all the above, is that having revisited the entire evidence that was before the trial court afresh, analysed it and evaluated it, I come to the same inevitable conclusion as the trial Judge of the High Court, that the dismissal of the respondent by the appellant was, as the respondent stated not justified both in law and in fact. It was wrongful.

On the award made against the appellant, *Mr. Obura*’s contention was that it was not proper as the respondent did not plead and prove strictly special damages yet what the court awarded amounted to special damages. *Mr. Songok* in his submissions referred us to the judgment and submitted that though the court did agree that special damages as such was not pleaded, however the respondent spelt out his entitlement in the plaint which was the package he was to be paid under the Voluntary Early Retirement Scheme. The learned Judge considered this issue which *Mr. Obura* had also raised before her in the High Court and having considered it, addressed herself as follows concerning it:-

“It is the finding of this Court that failure to plead what he (plaintiff) was entitled to under the Scheme is not fatal to his claims because they had not been worked out by the defendant and the figures he has given are subject to proof and verification by the defendant. The plaintiff has therefore succeeded on prayer (a). Prayer (b) is not applicable here as the plaintiff was aware of the terms of the scheme when he opted to retire under the Scheme and he is bound by that. Prayer (b) is therefore disallowed. Prayer (c) is allowed. Prayer (a) is exhaustive and O (sic) other relief can be granted under prayer (a).”

I have anxiously considered this aspect of the appeal. In law, special damages must be pleaded and strictly proved before the court can allow the same. This however was in my view a unique case in the sense that at the time the respondent was dismissed his application to retire under the Voluntary Early Retirement scheme had been accepted and all he was waiting for was to move out under that Scheme, which date of retirement was delayed by the appellant. Although in his evidence he made certain claims some of which were what would have been done to him under normal circumstances and some could have been done to him under the Scheme, in his plaint, he sought payment of his entitlement under the Scheme. In my view as his retirement under the Scheme had been allowed, the dismissal which both the High Court and I have found to have been wrongful could have only affected that provision of Voluntary Early Retirement as at the time of his dismissal, that was benefit he was due to reap in his employment. It was thus proper and I find it so, that the benefits that accrued to him under that Scheme were correctly restored to him. These benefits were at the time of his dismissal not fully ascertained in the Standard Chartered bank Kenya Limited Development Plan which was produced in court. All that is set out in that document as to benefits are at page 3 and is entitled VER Scheme Details and states:-

“The VER Scheme details are set out in the attachment, “Standard Chartered Bank Kenya’s VER Scheme September, 1994.” The key elements of the package are:-

- **Payment in lieu of notice**
- **A lump sum payment**
- **A payment of an immediate pension (for qualifying staff over 50 years old) or a deferred pension (for qualifying staff under 50) in accordance with the rules.**
- **A discount on all existing staff loans repaid on departure.**
- **Payment of full compensation benefits right upto date of departures.”**

These are matters that were not made specific in terms of actual amounts and so could not be pleaded in specific monetary terms although the respondent was entitled to them as his application to retire under the Scheme had been accepted. In my view, the court, faced with that situation, did its best in solving it by ordering that respondent’s benefits under the Scheme be worked out by Deputy Registrar of the High Court in presence of both parties and/or their counsel to be taken by the parties before the same Deputy Registrar. I have no reason to disturb that decision and it will stand.

The sum total of all the above is that this appeal lacks merit and as **Okwengu JA** also agrees, it is dismissed with costs to the respondent.

This judgment is delivered pursuant to **Rule 32(3)** of this Court’s Rules.

DATED and DELIVERED at ELDORET this 18TH day of September, 2012.

J.W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

STANDARD CHARTERED BANK (K) LTD.....APPELLANT

AND

ZACHARY MOGENI.....RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Eldoret (Nambuye, J) dated 29th July, 2004

in

H.C.C.C. NO. 42 OF 1997)

JUDGMENT OF OKWENGU, J.A.

I have read in draft the judgment of *Onyango Otieno J.A.* I fully concur with the judgment and have nothing useful to add.

DATED and DELIVERED at ELDORET this 18th day of September, 2012.

H.M. OKWENGU

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR