



REPUBLIC OF KENYA



**John v Safaricom Limited (Civil Appeal E422 of 2019)
[2024] KEHC 6116 (KLR) (Civ) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6116 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E422 OF 2019

HI ONG'UDI, J

MAY 30, 2024

BETWEEN

PENNA WANJIRU JOHN APPELLANT

AND

SAFARICOM LIMITED RESPONDENT

(Being an appeal against the Ruling delivered by M/s E. Wanjala - Senior Resident Magistrate on 11th July, 2019 in Milimani Commercial Courts Civil Suit No. 6539 of 2016)

JUDGMENT

1. Penna Wanjiru John the appellant herein was the plaintiff in the lower court. She sued the respondent for Ksh 21,000/= which had been debited from her Mpesa account (0723-489-964) without her consent. She claimed interest on the said amount bringing the claim to Ksh 23,030/=.
2. The respondent denied the claim and the matter was heard after which the learned trial Magistrate dismissed the suit vide the Judgment delivered on 11th July, 2019.
3. Being aggrieved the appellant filed the appeal dated 23rd July, 2019 on the following grounds:
 - i. The learned trial Magistrate erred in fact and in law in finding that the Appellant disclosed her PIN number to fraudster in the fact of clear evidence to the contrary.
 - ii. The learned trial Magistrate erred in fact and in law in finding that the Appellant requested for a Sim swap contrary to the evidence on record.
 - iii. The learned trial Magistrate erred in fact and in law in holding that the Appellant requested for Sim swap in the absence of any evidence supporting the allegation.



- iv. The learned trial Magistrate erred in fact and in law in holding the Appellant did not proof her case to the required threshold on a balance of probabilities.
 - v. The learned trial Magistrate erred law and in fact in holding that the Appellant must have played a part in the Sim swap when an unknown identity card was used for this purpose.
 - vi. The learned trial Magistrate erred in law and in fact in holding that the Appellant requested for a Sim swap when the Respondent could not tell where the Sim swap took place.
 - vii. The learned trial Magistrate erred in in law and in fact in failing to find the Sim swap agent was at all times an agent of the Respondent.
 - viii. The learned trial Magistrate erred in law and in fact in holding that the Sim swap warrants an Mpesa transaction.
 - ix. The learned trial Magistrate erred in law in fact and in failing to attach any weight to the Appellant's submissions.
 - x. The learned trial Magistrate erred in law and in fact in failing to afford the Appellant's her right of reply to the Respondent's submissions.
4. The appellant testified as PW1, saying she held an Mpesa registered account with the respondent under cell phone no. 0723489964. On 4/01/2016 morning she noted that her phone did not have network for quite sometime and she had not received any phone calls/text messages. She decided to go to the respondent's agent for assistance. While still on the queue at the agent's she unlocked her phone and the network was regained. She learnt that her Ksh 21,200/= in the Mpesa account had been used to purchase bundles which was not done by her. She denied having shared her Mpesa PIN with anyone. She produced her Mpesa account (PEXB1) and the contract of storage plus demand letter to the respondent PEX 2 & 3. It is her evidence that the respondent runs Mpesa services and should have secured her money.
 5. In cross examination she said that morning she only spoke to her employee. She later noted the phone indicating "sim card not working". She blamed the respondent for the loss of her money as they should have explained who bought bundles using her money. The customer care agent advised her to change her PIN.
 6. With leave of the court, PW1 was recalled to testify. She stated that the time 12.18 – 12.25 pm when she allegedly bought bundles she had finished talking to the fraudsters and her phone went off. In further cross examination she said she had been called by people who asked whether she was Wanjiru John. They then asked for her PIN which she never gave to them. She denied having been sent the Kshs10/=. She could not recall the number that was used to call her, and she did not verify if it was the Safaricom number 0722-000000.
 7. The respondent called one witness Gideon Mwahya Mwanzige (PW1) who worked for the respondent under Fraud Investigation department. He has a degree in I.T and is a Certified Investigator. He produced documents, (Report of fraudulent, sim swap dated 13/8/2018, supplementary documents subscriber sim registration Form, conditions of use for the Safaricom Prepay Services; copy of Safaricom sim user starter guide) which he relied on. In his investigations he established that on 4/01/2016 11.17 a caller from Mulot of Narok County made a call to the respondent and the call lasted 438 seconds.
 8. After the call was a request to do a sim swap from the Safaricom agent who is independent. The request went through and the swap was completed, the victim could not go through since network had gone



to the new sim card. For an Mpesa agent to do a swap, the customer needs to be there as there has to be an ID card and an original PIN that was bought with the card. He explained that a customer should never disclose their PIN to anyone. The card is normally lost, after a sim card. And a Sim swap is asked for if the sim card is not working or is damaged or when doing an upgrade.

9. In this instant case after the swap the new sim card made several calls including the person who just called the respondent. He also noted that a person sent Ksh 10/= to establish the Mpesa balance and thereafter bought the bundles.
10. In cross examination he said the request for sim swap was from an Mpesa agent though he couldn't tell from where. The request was through USSD. He said his investigations revealed that the respondent shared the Pin.
11. The Appeal was canvassed by written submissions.

Appellant's submissions

12. These were filed by Wahito & Co advocates and are dated 12/03/2014. Counsel submitted that the respondent filed a defence but departed from it while testifying in particular paragraph 6 & 7 of the defence. That the evidence adduced was about sim swap and not disclosure of Mpesa Pin. This to him was contrary to the known principles of law. The court should not have allowed it to stand. Counsel cited the case of Meru HCCA No. E030 of 2021 Mohamed Guyo Boru V Richard Mwilaria Aritho by W.T.W Cherere J. Counsel further submitted that the respondent admitted clearly in his witness statement that the appellant never disclosed her Mpesa Pin.
13. Its his submission, that DW1's evidence infringed the hearsay rule. He proceeded on the basis that the appellant requested for a sim swap which was not the case. That the respondent as a corporate body operated through individuals. The required evidence could only have come from the appellant or the agent who carried out the swim swap. That the appellant having denied that she requested for a sim swap and having stated that she had no problems with her line No. 0723-489-964 the burden of proof shifted to the respondent.

Respondents submissions

14. These were filed by Mahmoud Gitau Jillo and are dated 20th February, 2024. Counsel submitted that the appellant had initially testified that her employee had called her on 4/01/2016 and later realized her phone had no network. After sometime she went to the respondent's agent who unblocked the phone and it regained network. That's when she realized her Ksh 21,000/= was no longer in her Mpesa account. Later after the respondent filed their investigation report, she reopened her case stating that she had been called by fraudsters. She did not verify the number used to call her. The fraudsters asked for her Mpesa PIN which she did not reveal.
15. Counsel submitted that the respondent's witness (DW1) produced several documents and the investigation report. The said report showed all the transactions on the appellants sim card. That from his explanation any sim swap could only be done when the following are availed: Mobile number, customers original sim Pin and Customers ID number. All these were only within the appellant's knowledge. He thus submitted that all the evidence points to none other than the appellant as the person who gave out her PIN.
16. Counsel contends that the respondent undertook all measures to ensure the safety of the appellant's funds. The respondent does not divulge the details of one's particulars and ensures protection of the



PIN, by warning clients never to disclose their PIN. Secondly its made known that the respondent only calls a customer using No. 0722000000.

17. Its his submission that this duty was not breached by the respondent as there was no negligence on its part. He relied on the case of Eastern Produce (K) Limited V Christopher Atiado Osiro [2006] e KLR where the court stated:

“Negligence is the omission to do something much a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something, which a prudent and reasonable man would not do.....

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

18. I have carefully considered the grounds of appeal, the record of appeal, both parties submissions, the authorities cited and the law. The issue that comes out for determination is whether the respondent was negligent in its duty of care in respect of the appellants loss of Ksh 21,000/=.
19. This being a first appeal this court has a duty to re-evaluate and re-consider the evidence on record and arrive at its own conclusion. See:
- i. Selle & another Vs Associated Motor Boat Company Ltd & others (1968) E.A
 - ii. Peters V Sunday Post Ltd 1958 E.A 424
20. There is no dispute that the appellant is the respondents customer. Its further not disputed that on 4/01/2016 the appellant lost a sum of Ksh 21,000/= from her Mpesa account. It is also not disputed (as this is in public domain and emphasized by DW1) that the respondents customers have been warned against:
- i. Sharing their PIN with anyone
 - ii. Engaging strange telephone numbers on matters related to the respondents. The official displayed number for engagement is 0722000000.
21. When the appellant first testified on 10/7/2018 her evidence was that on 4/01/2016 while at work she noticed that her mobile phone had no network. This went on for sometime until she decided to visit the respondents agent at Nakumatt Mega along Mombasa road. She was on the queue, when her money in her Mpesa account was used to buy bundles between 12:18:57pm and 12:25:47pm. She also told the court that before all this happened it was only her employee (whose name she never gave) who had called her at around 9.00am
22. When she was recalled on 27/3/2019 to reopen her case and after going through the investigation report and even doing a further statement she gave a different version of what had happened. Its during this time that she revealed that she had been called by fraudsters. That it was after talking to the fraudsters at 12:18 – 12:18:25 that her phone went off. In cross examination she said the people who called her asked whether she was Wanjiru John and then asked for her PIN, which she did not disclose. She did not reveal details of the number that was used to call her. She confirmed that when she was given her sim card the same was sealed.



23. The respondent who testified through DW1 gave a detailed explanation on what happens if there is need for a sim swap. That such a swap cannot be done without the PIN, ID number and phone number of the customer. One may argue that one's telephone number and ID card may be in the public domain for one reason or another. What of the PIN? One's PIN is a personal thing and very private.
24. When the investigation report was released showing the transactions and what actually took place, the appellant admitted that she had communicated with fraudsters. At this point it was not only her "employee" who had called her before the network went off. Infact the issue of her "employee" never came up again however, DW1 mentioned in his evidence that after the swap the sim card was placed in a phone and several calls were made one of them being the number from the person who first called the appellant.
25. The appellant from her second piece of evidence did not only deal with one person. She talks of fraudsters. They asked for her name which she confirmed before they asked for her PIN. She was threatened with blockage of her phone if she did not give her PIN. There is no way the phone would be blocked without her PIN. The appellant was and is in total control of her PIN and she cannot shift this duty to anybody else. She does not claim to have been forced or threatened to give her PIN to the fraudsters. This matter was a criminal act yet no report was made to the police for investigations to be conducted.
26. The respondent having carried out its investigations and filed its report, the duty fell on the appellant to prove her facts as stated under the Evidence Act sections 107 – 109 which provides follows:

Section 107

1. Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies with that person.

Section 108

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 109

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

27. The burden of proof to the required standard in civil cases lay on the appellant herein. In *Evans Nyakwana Vs Clephas Bwana Ongaro* [2015] e KLR it was held:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmation of the issue. That is the purport of section 107(1) of the Evidence Act chapter 80 Laws of Kenya.

..... The appellant did not discharge that burden and as section 108 of the Evidence Act provides that the burden lies on that person who would fail if no evidence at all were given as (sic) either side”



28. The requirements for a sim swap have been stated. It is the appellant's claim that she never gave out her PIN number but her money was nevertheless withdrawn. This takes the court back to the appellant's two versions of her evidence. Had investigations not been carried out by the respondent she would never have admitted having been on call with some unknown people who even demanded for her PIN after she confirmed her names to them.
29. From what occurred next, it is clear that despite her general denial she gave out her PIN number after which her phone went off due to the sim swap. In the face of all the evidence before the court and on a balance of probabilities it is clear that the appellant gave out her Mpesa PIN to the unknown person/ persons. The respondent had no control over that. It is the appellant who had the control by keeping her PIN number as confidential.
30. I am in agreement with the Judgment by the trial court which I hereby uphold. The upshot is that the Appeal lacks merit and is dismissed with costs.
31. Orders accordingly

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 30TH DAY OF MAY, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

