

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO. 149 OF 2017

(Originating from the JUDGMENT AND DECREE OF Civil Case No. 110 of 2011 of the District Court of Ilala delivered on 24th November 2013 by Hon K. T Mushi, RM)

NATIONAL MICROFINANCE BANK (PLC..... APPELLANT

VERSUS

DELPHINA IKANDA MAMA.....RESPONDENT

JUDGEMENT

Date of last order: 28.02.2020

Date of Judgement: 31.03.2020

EBRAHIM, J.:

The Respondent is the customer of the Appellant with **account number 3072507424** residing in Shinyanga region. The Respondent sued the Appellant herein for the loss of **Tshs. 9,337,000/-** alleged to have been withdrawn from the account without her consent. She also claimed for the costs she incurred in following up the matter and general damages. Upon hearing the evidence from both parties, the trial magistrate ruled in favour of the respondent by awarding her costs of the suit, special damages to the tune of Tshs. 9,337,000/- and general damages to the tune of Tshs. 18,000,000/-.

The decision of the trial court aggrieved the Appellant. She lodged four grounds of appeal in this court faulting the trial court that it is impossible for anyone to access respondent's account and withdraw money while the ATM card is in possession of the respondent. The appellant also faulted the trial court for the award of Tshs.9,337,000/- as special damages and the award Tshs. 18,000,000/- as general damages without substantiating the same. Lastly, the Appellant faulted the trial court for failure to analyze evidence presented before him.

When parties appeared before me for hearing of the appeal, the Appellant was represented by advocate Kambo and the Respondent had the services of advocate Gloria Ikanda who on that particular day was holding brief of advocate Ntigingola.

This court ordered the appeal to be argued by way of written submission and set a schedule thereto. Both parties adhered to the schedule.

Submitting in support of their grounds of appeal, Counsel for the Appellant argued that much as the trial magistrate found issue number one in affirmative that the plaintiff joined mobile banking; he

missed the fact that someone else could join NMB Mobile system by using his mobile number and respondent's particulars. He argued that the respondent knowingly or negligently disclosed her password to someone else.

Submitting on the second and third grounds of appeal, he argued that the award of Tshs. 9,337,000/- as special damages was without strict proof as required by law. He cited the case of **Zuberi Augustino VS. A. Mugabe** [1992] TLR 138 to cement his argument. As for the issue of general damages he cited the case of **Materu Leison & J Foya Vs. R. Sospeter** [1988] TLR 102 in proving his argument that there was no evidence to prove trial magistrate's conclusion and that he acted on his own speculative views on reaching the conclusion to award Tshs. 18,000,000/- as general damages. Lastly he challenged the judgement of the trial court for failure to critically analyze evidence as largely emphasized in the case of **Amiri Mohamed Vs Republic** [1994] TLR 138, (CA).

Responding to the submission by the Counsel for the Appellant, Counsel for the Respondent vigorously recanted the argument that the respondent admitted to be a member of NMB mobile banking

system. He referred to page 9 of the proceedings. He argued further that even the number used for withdrawal of the money from the respondent's account was not hers as she has Tigo number while the number used was a Vodacom number.

Counsel for the respondent further distinguished the cited case of **Zuberi Augustino (supra)** with the circumstances of the instant case on the issue of special damages that in this case Tshs. 9,337,000/- was pleaded and proved by tendering and admission of the bank statement of the respondent. He also referred to pages 9, 10, and 11 of the trial court proceedings on the proof of the same.

Citing a number of authorities on the award of general damages including but not limited to the case of **Yara Tanzania Limited Vs Charles Aloyce Msemwa and 2 Others**; Commercial Case No. 5 of 2013 (HC); he emphasized that general damages are awarded at the discretion of the court. He also commented on the expenses incurred by the respondent in following up the matter and conducting the case.

Submitting on the failure of the court to analyze evidence presented before him, he concluded that the mistakes of the court should not be a reason to hinder one's right.

I have duly considered the rival submissions and dispassionately reviewed the judgement and proceedings of the trial court. In considering the present appeal I am mindful of the principle of the law that being a first appeal I am obliged to appraise the evidence on record and come up with my own finds of fact if the evidence so reveals (see the case of **Yohana Dionizi and Shija Simon Vs The Republic**, Criminal Appeal No. 114 of 2015 (CAT))

In addressing the appeal I shall straight away begin by appraising the evidence in line with the 4th ground of appeal.

Testifying in chief, the respondent told the trial court that she had never joined mobile banking and the mobile phone number she uses is Tigo number. She said she always draws her money from the teller. She narrated the series of events from when she came to Dar Es Salaam on 09.06.2012 and reporting to the police after finding that money has been withdrawn from her account and after being advised by the Bank. She testified further that she read her statement

and realized that the money was stolen through NMB mobile transfer and pesa transfer and also transferred from her account to another account.

The exhibits tendered in support of the respondent's claim at the trial (plaintiff) were; Proforma Invoice from Royal Motors and Co. Ltd as **exhibit P1**, NMB Card with registration No. 3072507424 as **exhibit P2**, Demand letter to the Bank as **exhibit P3** and Bank statement and Bank Balance as **exhibits P4 and P5**.

On the other hand the Appellant's witness DW1 told the court that to access mobile banking what you need is the customer's account number, five digits of the card number and the card's secret pin number. In explaining how to register to NMB Mobile, he stressed that bank has no consent to withdraw client's money without his/her consent. He also insisted that Bank cannot know the secret pin number of its clients.

What is predicated in this case is whether the respondent managed to prove firstly; that the money was stolen from her account and secondly; it was due to the appellant's negligence.

Indisputably is the fact that the respondent is the appellant's customer holding an **account number 3072507424** with the appellant's bank. It is the position of the law in a civil case that **"he who alleges must prove"** – See the case of **Attorney General & Others V Eligi Edward Massawe & Others**, Civil Appeal No 86 of 2002, CAT (unreported). See also **the provisions of Sections 110 and 111 of the Law of Evidence Act, CAP 6, R.E. 2002**. Again, the party with legal burden also bears the **evidential burden on the balance of probabilities** as stated in the case of **Anthony M. Masanga V Penina (Mama Mgesi) and Another**, Civil Appeal No. 118 of 2014, CAT (Unreported).

Certainly, the legal burden and evidential burden in this case firstly lies on the respondent. **Exhibit P5**- the bank statement of the respondent reveals that the mobile transactions started on 24.05.2012 where various amounts were transferred from account no. **3072507424 to mobile no. 0682905784**. On the same date i.e. 24.05.2011, the two ATM withdrawals were also recorded. The numbers that the mobile transfers were effected to were **0687104982** and **0788131614**. The money was also transferred from account

number **3072507424** to account number **3072507655**. Those transfers were conducted between 24th May 2011 and 28th May 2011. On the same 28th May 2011, cash ATM withdrawal of Tshs. 50,000/- was recorded. The mobile transfers to the above outlined mobile numbers were recorded as well as to account number **3072507655**. There was also another cash ATM withdrawal on 02.06.2011 of Tshs. 200,000/-.

I have retrieved some of the transactions recorded in the statement to show that while the so called theft transaction were occasioning in the respondent account, the respondent was also accessing her account. The question here is didn't she notice the suspected transactions? What efforts did she do to mitigate the loss? She told the court that when she came to Dar Es Salaam she was told to report the matter to the police. She admitted to have reported the incident but neither the respondent nor her lawyers made follow up to at least establish if those people with the said telephone numbers were traced and known or no. Otherwise it would not be known as to whose numbers the money was transferred to considering the fact that the respondent herself apart from saying that her number was

Tigo, she did not provide the court with such proof. The respondent neither mentioned her Tigo number nor did she provide any proof that indeed she is a registered owner of the so called TIGO number that the court never had an opportunity to know.

I agree that the Bank has a **fiduciary duty** to ensure that the clients' money are safe and protected from all sorts of theft while in their custody; but equally the same, the duty is also placed to the clients to ensure that they protect their money and mitigate the loss in case of any theft or mishaps.

DW1 has evidenced before the court that no one can register on mobile banking or access the same without having a mobile phone, a pin number and the ATM number of the user. He said that infact the bank does not know those pin numbers and they only provide one time access pin numbers. PW1 said she has never registered with the mobile banking but still money was transferred from her account to three different numbers and another account. Nevertheless, in the absence of proof of what is the respondent's mobile number how can the court ascertain that the respondent's money was actually stolen? What if those numbers are well known to the respondent or

it is one of the respondent's number? It is my strong views that the respondent ought to have brought evidence to prove what is her number and that the transactions are unauthorized then it would have been the duty of the appellant to disapprove by showing the respondent was actually registered and which mobile number was used in the registration. Otherwise, the respondents claim was based on empty allegations and all that was eventually ruled out in the trial court were based on speculations. I entirely associate myself with the principle held in the case of **Materu Leison & J Foya Vs. R. Sospeter** [1988] TLR 102 that *there was no evidence to prove trial magistrate's conclusion and that he acted on his own speculative views.*

It is on that background without even laboring on other grounds of appeal, I find that the respondent did not prove her case on the balance of probabilities at all at the trial. I accordingly allow the appeal with costs and quash the judgement and decree of the District court dated 24th November 2013.

Accordingly ordered.



R.A. Ebrahim
Judge

Dar Es Salaam
31.03.2020