

**IN THE HIGH COURT OF TANZANIA  
IN THE DISTRICT REGISTRY  
AT MWANZA**

**HC. CIVIL APPEAL NO. 51 OF 2020**

*(Originating from Resident Magistrate's Court of Mwanza Civil Case No. 68/2015)*

**NATIONAL MICROFINANCE BANK LTD ..... APPELLANT**

**VERSUS**

**MICHAEL OBEY DAUD ..... RESPONDENT**

**JUDGMENT**

*18/01/2020 & 20/04/2021*

**W. R. MASHAURI, J;**

This is an appeal by National Microfinance Bank Ltd (the Appellant) it arises from the decision of the Resident Magistrates' court of Mwanza at Mwanza in Civil Appeal No. 51 of 2020.

Being dissatisfied with the judgment and the decree of the Resident Magistrates' court (supra), the appellant has fronted to this court three grounds of appeal as to wit: -

1. That, the learned trial magistrate erred in law by holding that the appellant is liable for the loss of the plaintiff's money while it is in record that PESA FASTA transaction is operated using the customer's

secret Numbers (The PIN number the system of which is out of the appellant's control.

2. That the learned Trial Magistrate erred in law and fact by failing to consider the appellant's evidence on record by so doing he failed to hold that the respondent's money was withdrawn from his account by unknown person out of his own negligence.
3. That the trial magistrate erred in law and fact by failing to analyse the evidence on record and hold that the respondent had failed to prove his case on the balance of probabilities.
4. The appellant prays that this appeal be allowed with costs.

The appellant in this appeal is represented by Mr. Geoffrey Kanga and the respondent is enjoying the services of Mr. Deya Outa learned counsel.

When the matter was called in court for hearing on 26/11//2020, Mr. Deya Outa for the reasons beyond his control, he prayed the court to dispose of this appeal by filing written submissions the prayer of which was not objected by Mr. Geoffrey Kanga learned counsel.

Following that concession to the prayer by counsel for the Respondent this court blessed the same and the schedule of filing pleadings was set.



In their written submission in support of the appeal the Galati Law Chambers addressed this court and submitted that, the Respondent Michael Obey Daud filed in the Resident Magistrates' court for Mwanza at Mwanza Civil Case No. 68 of 2015 claiming inter alia the refund of Tshs. 1,000,000/= alleged to have been withdrawn from his bank account through NMB transfer service (PESA FASTA and M-Pesa without his knowledge.

That, according to the Respondent, the said withdrawal was a result of the appellant's negligence and breach of a duty of care. The Respondent further alleged that, according to the withdrawal, the Respondent has suffered of legitimate expectation in business at the tune of Shs. 5,000,000/= and general damages at the tune of Tshs. 7,000,000/=.

That, it was the appellants defence during the hearing of the case in the trial court that since the said Shs. 1,000,000/= was withdrawn from the respondent's account through NMB PESAFASTA and M-Pesa the appellant could not be held liable in any way whatsoever with the said withdrawal because it is only the respondent who had access to his PIN number (secret number as such it is by necessary implication that the said withdrawal could not be done by anybody save the respondent and/or a person who has been given the PIN number by the respondent to mention the name of a person appeared on the ATM card number used to withdraw the money as it is a

tendency of the machine to show in a receipt the end four digits of the ATM card number used to withdraw the money also a police officer failed to mention the name of the owner of an ATM card number used to withdraw the money.

On that regard, the evidence of a police officer falls short of merits.

On the basis of the foregoing and all said I done, I conclude by saying that, the respondent had failed to prove his case on the balance of probabilities.

In this matter, when the respondent opened his bank account with the appellant was asked to state his PIN number of four digits of which he filed it in a device and confirmed it twice and upon confirmed it was served and he was warned to keep it at his paril as well as not to disclose the PIN number to anybody and once the respondent was given his PIN number and an ATM card, the of duty of care moved from the rightful owner of the ATM card as well as the PIN number to a new finder. It was therefore a mere presumption that the money was withdrawn by the appellant.

The ATM machine is a 24 hours operating device and it is always kept open waiting for operators be it a thief or whatsoever.



It is said by the plaintiff witness evidence in particular the police officer who investigated the matter that she pursued her investigation well. This is not correct because in her evidence, she did not mention the name of owner of a person who found the ATM card and command it to release the amount demanded by the operator who at the time being was not known by the machine to be banker or not of the appellant as anybody could command the machine to release money provided that he or she has used an ATM card as well a PIN number collected by a 3<sup>rd</sup> party be it a lost or well-kept by the owner.

It must therefore also be noted that, once a customer lost his PIN number together with his ATM card and found by a 3<sup>rd</sup> party, the responsibility of the appellant to the loss of the respondent's money was not proved against the appellant on the balance of probabilities, as any person could have withdrawn the money.

The appellant's appeal is allowed and I make no order as to costs to the respondent.



  
**W. R. MASHAURI**  
**JUDGE**  
**20/042021**

Date: 20/04/2021

Coram: Hn. W. R. Mashauri, J

Appellant:

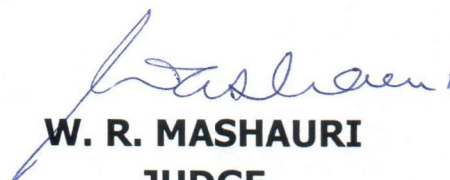
Respondent:

B/c: Elizabeth Kayamba

**Court:** Judgment delivered in court in presence Mr. Outa, Advocate for respondent and Mr. Gwakisa, Advocate for the appellant this 20/04/2021.

Right of appeal explained.



  
**W. R. MASHAURI**  
**JUDGE**  
**20/042021**