

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**[IN THE DISTRICT REGISTRY OF ARUSHA]**

**AT ARUSHA**

**DC CIVIL APPEAL NO. 05 OF 2020**

*(Originating from District Court of Arusha at Arusha Civil Case No. 3/2019)*

**MR. RIZWAN MOHAMEDALI REMTULA.....APPELLANT**

**VERSUS**

**M/S EXIM BANK (TANZANIA) LIMITED.....RESPONDENT**

**JUDGEMENT**

26 September and 03 October, 2022

**KOMBA, J**

RIZWAN MOHAMEDALI REMTULA, the Appellant herein, appeals against the decision of the District Court of Arusha which decide Civil Case No. 3 of 2019 in favor of the respondent. To escalate the points of contention in this appeal, it is pertinent that a brief outline of the antecedent facts is given.

Applicant is the owner of ATM card which control account number 578788783 owned and maintained by the respondent. Parties has the agreement of maximum withdraw and purchaser per day. On 9<sup>th</sup> April 2017, while in South Africa, the applicant wanted to use ATM services and failed. The card went missing and when he came back home, he visited the respondent office only to find that on 9<sup>th</sup> April 2017 his account in various

transactions withdraw the total of Tsh 32,926,747.17 through ATM withdraw and POS. Respondent denied the refund of stated amount hence Civil Case No. 3/2019 At Arusha District Court which decided in favor of the Respondent on the ground that applicant failed to prove negligence on the said of respondent. Dissatisfied with District court decision applicant prefer this appeal.

During hearing of the appeal on 26 September 2022, the Appellant was represented by Mr. Abdala Ally learned counsel while Mr. Gripriely Simon Mnyele represented the respondent. The appeal was argued by way of oral submission.

Submitting on the first and second ground of appeal where Mr. Abdala opted to join them, he contended that during trial the appellant appeared himself and testified as the owner of card with account number 578788783 (ATM Card) and tendered 3 exhibits which are Exhibit P1 as bank contractual limit of withdraw and purchase, P2 a demand letter from appellant to Respondent and last is a bank statement all of them were admitted. He went on testify that the ATM Card which he owned and operated himself has a transfer limit of up to sum Tanzania 1,200,000 as a cash withdraw per day and up to 1,500,000 for daily purchase. He noted illegal transfer of money identified by him during trial were the ATM transaction exceeding the amount

mandated by the respondent. On the fateful day illegal transaction amounted to 1, 296,956.15 per a slot were withdrawn. The purchase went up to 7,295,878.36 per a single purchase instead of 1,500,000 as purchase limit per day. Mr. Abdala said all the evidence adduced at a trial court were supported by evidence of two respondent's witness and referred this court Page 23 of proceedings DW1 testified that exhibits P1 shows limit withdraws only to the tune of 1,200,000 per day and 1,500,000 and such a limit cannot exceed the withdraw or purchase limit unless upon application by the customer for removal of the said limit and managed to identified a remote cash withdraw which was beyond the prescribed limit. Mr. Abdala go on saying DW2 further testify to the effect that the withdraw limit as per bank is 1,200,000 per withdrawal in ATM and 1,500,000 in a POS per day. He stated that there is no possibility of any one to do transactions higher the stated amount unless it is a fraud. At this juncture he submitted that is elementary principle of the law that the burden of proof lies to one who allege pursuant to Section 110 (1) of the Evidence Act, CAP 6 R.E. 2019 and said this position was reiterated in the case of **Paulina Samson Ndawavy V Theresia Thomas Madaha, Civil Appeal No. 45 of 2017** at page 16 where the court stated that-

NA

*' the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the part who denies for negative is usually incapable of proof. '*

He said appellant when at the trial court he discharged his duty imposed under the law by proving his allegation to the balance of probability. From what has been testified by applicant resulted to mis appropriation of the appellant money to the tune of 32,926,747.17. Neither any document was tendered on trial no witness was paraded to contradict the evidence used by appellant and prayed for this court regarding ground 1 and 2 to allow the appeal herein with costs.

Mr. Abdala while argue ground 3 and 4 jointly he said the appellant while at trial court, on fateful date that is on 9<sup>th</sup> April, 2017 he was in South Africa and wanted to use his debt card in the ATM machine but he face difficulties in using it and while he was trying to use the machine a man volunteer to impart him on how to use but unfortunately the man snatched the ATM card from the appellant unknowingly until later came to his knowledge that the said man has already snatched the ATM card and immediately report the matter through a phone call to one Mr. Ahmed who failed to attend the reported matter, he again reported the matter to Ms. Judith. Counsel Abdala go on saying it was evidenced by DW1 during cross examination that when

the card is blocked upon report by the customer on either being stolen or lost there is no avenue for someone to withdraw or purchase using blocked card and if the same happen it will be on a bank fault. He quotes the book of **Sakar, the Law of Evidence**, 17<sup>th</sup> Edition, 200, Vol. II at page 1868. The author stated that "the burden of proof in the second sense (duty of Adducing Evidence) is contained in Section 102. It lies at first on that party who would be successful if no evidence at all were given on either side. This being the test this burden of proof cannot remain constant but must shift as soon as he produces evidence which prima facie gives rise to a presumption in his favour'. The position was reiterated in the **case of Paulina (supra)** and further the evidence adduced by the appellant at trial court shift the burden of proving that it was because of the appellant negligence in failure to report the incidence as adduced by Respondent at trial court or it was because of the man who snatched the ATM card thus the sum of money value Tsh.32,926,746 was withdrawn from his account lies to the respondent.

Further said respondent failed to prove that in deed appellant money was nether genuinely withdrawn from the account nor the appellant applied for the removal of withdrawn limit. It was his considered opinion that the trial Magistrate misdirect herself on shifting the burden of proof on the alleged

difference of negligence rose by respondent as such the same ought to be proved by Respondent instead of appellant, he said this was reflected at page 8 of judgement "*likewise the Defendant succeeded to establish that the ATM card being exposed to skinner who might be exposed to high technology could have trap the system and managed to make various transaction beyond the mandate limit*". In the circumstances Mr. Abdala come to the conclusion that the only evidence that would have dispose this matter in the plaintiff favor could have been the evidence that the Defendant acted negligently.' He said, he understands the position that it is duty of trial court to analyze, evaluate and take into account evidence adduced by parties in reaching fair decision. In that regard he cited the case of **Stanslause Lugaba Kasusura & Another Vs Fares Kabuye, 1982**, TLR 338 Mr. Abdala was of the concerned opinion that if the trial court would have properly analyzed, evaluated and took into account the evidence adduced by appellant while at trial Court, it could have not reached decision in favour of respondent herein.

Contesting this appeal, Mr. Mnyele submitted that the controversy that the issue at large is not whether the respondent is negligent on allowing withdrawing over the limit, rather the issue here is about the negligence

involved if any in withdraw of money amount 32 million Tanzanian Shillings and above.

He said in order to appreciate the whole matter, the cause of action is appreciated in the plaint where the appellant had identified what constitute negligence on the party of the respondent which are respondent allowing the skinner to draw over 32 million Tanzanian Shilings over and above the limit and the failure of alleged head of credit to stop the withdraw of money on 9<sup>th</sup> April, 2017.

He was of the view that wide issue on those two grounds of appeal is whether the bank was negligent in the circumstances where the money was withdrawn by the ATM skimmer. Negligence can be tortious or contractual all the same, a part who alleges negligence against another part must prove that the respondent (then Defendant) had a duty of care against the applicant (Plaintiff), second the Plaintiff must prove that the Defendant has breached that duty of care, 3<sup>rd</sup> the Plaintiff must prove damages suffered because of that breach of duty of care. In his submission Mr. Mnyele refer the case of **Wilfred Mkubwa V. SBC Tanzania Limited Civil Appeal No. 150 of 2018** Court of Appeal of Tanzania at page 9 the Court clearly stated those principles. He said generally, banks have duties to their customers to ensure that customers' accounts are not withdrawn without the mandate of



customer. It follows that the respondent as a banker has that duty of care to appellant as a customer.

The last issue is whether the Respondent did breach that duty of care thus facilitating the drawing of money by the skimmer Mr. Mnyele submissions was to the effect that respondent never breach that duty of care giving reasons that respondent is not prevy to the circumstances under which the ATM card was taken, the incident took place in South Africa which is outside the operation area of respondent. He said from testimony the appellant is trying to hide something thus he referred to Section 122 of Evidence Act, CAP 6 which says-

*"A Court may infer the existence of any facts which it thinks lack to have happen regard the heard to the common cause of natural events. Human conduct and public and private business in relation to the facts of particular case."*

He prays the court to refer to two sets of facts which are, the ATM card was not grabbed by the ATM skimmer and appellant must have punched (inferred) his ATM pin in the presence of the skimmer otherwise, the ATM skimmer could not have access of the money without being aware of PIN.



Mr. Mnyele further submitted that appellant appear to rely on Exhibit P1 saying there was a limit to draw, and that the bank was wrong in allowing the ATM skimmer to draw but there was no evidence that the bank allowed and that appellant had the duty to prove the breach of duty because who allege has the duty to prove in balance of probability as was in the case of **Charles Richard V. Evarani Mtungi and others Civil Appeal No. 38 of 2012** at page 6 Court of Appeal of Tanzania case.

On ground 3 and 4 Mr. Mnyele said they have no bases because while composing judgment the trial judge appeared to have been analysing the evidence. he said in circumstance like this, if the court form opinion that evidence was not analyzed this being the 1<sup>st</sup> appeal the court has power to review and analyze evidence on record and make its own opinion. He humbly submitted that the appellant was still duty bound to prove the breach of duty of care to him and while praying the application be dismissed with costs.

In rejoinder Mr. Abdallah refer to Exhibit P1 and statement of DW1 where he conceded that the contents are prepared by Exim Bank for clients and he admitted that the withdraw limit Is 1,2000,000 per day further admit that the bank can extend limit upon application. Generally, he said the respondent had a duty of care to the appellant.

I have carefully gone through the Petition of Appeal, the lower courts' records, and the submissions by the advocates for the parties. The issue for determination in this appeal is whether the respondent had a duty of care to the applicant.

In analyzing this I will buy the doctrine which has more than 87 years in the case of **Donoghue V. Stevenson [1932] AC 532** where three questions has to be answered in order to prove duty of care in tort of negligence which are whether there is a duty of care, whether that duty has been breached and whether upon such breach the applicant suffer damage. See **Wilfred Mkubwa V. SBC Tanzania Limited (supra)**. This being the first appeal I dispassionately visited the evidence on record in seeing whether the said duty of care was proved for the applicant to be entitled to claim tort of negligence, hence redress.

In instance case there is no doubt that there exists duty of care on the side of respondent because of the nature of their business (bank and client) as admitted by Mr Mnyele for respondent, in his submission that banks have duties to their customers to ensure that customers' accounts are well maintained. Applicant is the client of the Respondent owning an account bearing his name, in which respondent imposes some conditions concerning maintenance and operation of that account as revealed by DW1 that

respondent set a limit of withdraw in two different scenarios which was not disputed by either party.

In material day when the card was missing (not in control of the applicant), it is on record that there was transaction concerning the applicants ATM card beyond the limit authorized by respondent to the applicant as adduced by DW1 and DW2 and that there was no evidence of waiver of that limit. Regardless that ATM card is in whose possession, so far as the service provider is the same, for this case is the respondent, then respondent had the duty to make sure that allowed amount in both scenarios of withdraw and purchase per day are maintained. Admittedly in breach of the same, DW1 explained that customer is not able to withdraw beyond limit unless there an application to that effect. Evidence on record, bank statement, which was admitted show that on a single day the applicant ATM card was used in various withdraw and purchase worth Tshs. 32,916,747.14. Respondent fail to maintain the agreed or rather set amount of withdraw per day. Mr. Mnyele once submitted that there was no evidence that the bank allowed the withdraw and that appellant had the duty to prove. I reading carefully judgement of Civil Case No. 3 of 2018 at page 8 the trial judge is actually telling where the negligence on the side of respondent is, the technology. Skimmer used higher technology than that of respondent that's

why he managed to withdraw beyond the required limit. Respondent acted negligently without considering the new technology and allow withdraw beyond limit to the ATM Card. This prove the second question that there is a breach of duty of care. Respondent ought to have modern technology used to protect clients account, lack of it, resulted to this mars. Guided by the **Charles Richard case (supra)**, this issue is answered in affirmative that respondent did breach his duty to client.

It goes further that due to the breach as elaborated in foregoing paragraphs, applicant lose amount of money as indicated in the plaint which is subject of this appeal.

Guided by the cardinal principle of law that *the duty of care is not only a duty not to act carelessly, but also the duty not to inflict damage carelessly.*

**-Clerk and Lindsell on Touts, Sweet and Maxwell, 17<sup>th</sup> Edition (1995).** In view of the clear evidence on record and submission, I am satisfied that the appellant has established his case on the standard required. I allow the appeal, judgement and decree of the trial court is hereby quashed; I enter judgement in favor of the applicant as per reliefs thought in the plaint. It is so ordered.

Right of Appeal explained.

**M. L. KOMBA**

**JUDGE**

**03/10/2022**

Judgment delivered this 03<sup>rd</sup> day of October, 2022 in chamber in the presence of Mr. Abdallah Ally, Advocate for the Appellant also holding brief for Mr. Mnyele, Advocate for the Respondent.



  
**M.L. KOMBA**

**JUDGE**

**03/10/2022**

