

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
(COMMERCIAL DIVISION)

CIVIL APPEAL NO. 007 OF 2019

ARISING OUT OF CIVIL SUIT NO. 1055 OF 2017

POST BANK UGANDA LTD ::: APPELLANT

VERSUS

EGESA NOAH ::: RESPONDENT

BEFORE: HON. JUSTICE GRACE HARRIET MAGALA

[Appeal from the decision of H/W Patience Lorna Tukundane dated and delivered on 28th January 2019]

JUDGMENT

Background.

This is an appeal from the decision of **Her Worship Patience Lorna Tukundane**, trial magistrate in Civil Suit Number 1055 of 2017 dated and delivered on the 28th day of January 2019 at the Chief Magistrates' Court of Kampala holden at Mengo.

The Appellant herein was the Defendant in *Civil Suit Number 1055 of 2017*, wherein the Respondent/Plaintiff sued it to recover *Ugx 16,428,626/- (Uganda Shillings Sixteen Million Four Hundred Twenty Eight Thousand Six Hundred Twenty Six only)*.



The brief facts that led to the suit as set out by the trial court and in the pleadings were that the Plaintiff/Respondent was a customer and an account holder with the Appellant/Defendant Bank.

Between the 2nd August 2016 and 27th April 2017, while the Respondent was detained in Makindye Barracks, a total of *Ugx 16,428,626/- (Uganda Shillings Sixteen Million Four Hundred Twenty Eight Thousand Six Hundred Twenty Six only)* was on several occasions withdrawn from his bank account number **1030000008284** held with the Defendant purportedly without his authorization.

The Plaintiff/Respondent sued the Defendant/Appellant under *Civil Suit No: 1055 of 2017* seeking to recover *Ugx 16,428,626/- (Uganda Shillings Sixteen Million Four Hundred Twenty Eight Thousand Six Hundred Twenty Six only)*, general damages, interest and costs of the suit.

Decision of the Trial Court

The learned trial magistrate gave judgment in favor of the Plaintiff/Respondent and held that once the Plaintiff denied making the withdrawals and contended that he never exposed his ATM card details to a third party, the burden shifted onto the Defendant to show that the Plaintiff was responsible for the disputed transaction either directly or by disclosing his PIN to some third party.

Further, that the defendant took no action from the time the loss of the money was reported, provided *icam* images of the culprit a year after knowing about the incident, declined to provide the plaintiff with a *CCTV video footage* and the *icam* images provided were not clear to indicate what happened on the fateful days. Thus the Defendant was in breach of her duty of care to the Plaintiff and thus liable for the unlawful withdrawal of the sum of *Ugx 16,413,041/- (Uganda Shillings Sixteen Million Four Hundred Thirteen Thousand Forty One only)*. The trial court went ahead to award *Ugx 5,000,000/- (Uganda Shillings*



Five Million only) as general damages to the Plaintiff, interest at 10% and costs of the suit.

Grounds of this Appeal.

The Appellant filed their Memorandum of Appeal with this honorable court on the 26th day of February 2019 with the following grounds:

1. *The learned Trial Magistrate erred in law and fact when she held that the Appellant was in breach of his contractual duty of care to the Plaintiff;*
2. *The learned Trial Magistrate erred in law and fact when she held that the Appellant was liable for the withdrawal of monies from the Respondent's bank account using an ATM Card;*
3. *The learned Trial Magistrate erred in law and fact when she departed from the agreed issues and facts thereby arriving at a wrong decision; and*
4. *The learned Trial Magistrate erred in law and fact when she failed to evaluate the evidence on record as a whole thereby arriving at the wrong decision.*

Representation

At the hearing of this Appeal on **29th September 2022**, the Appellant was jointly represented by Ms. Racheal Bogere and Mr. Eden Mulondo of Akamba and Company Advocates. The Respondent's advocate was not present in court that day but written submissions of the Respondent and other correspondences on this case, are on record and were filed by *Taskk Advocates*.

The court gave directions for filing written submissions by both parties which was respectively done. I have considered submissions of both parties and their pleadings in deciding this matter.



Appellant's Submissions

The Appellant's counsel reminded this court of its obligation to subject evidence presented at trial to a fresh and exhaustive scrutiny and to a reappraisal before coming to its own conclusion on issues of fact as well as law. She cited the case of ***Father Narsensio Begumisa and three others Versus Eric Tibebuga SCCA No. 17 of 2002*** to buttress her argument.

On ground one of this Appeal, counsel argued that the learned trial magistrate disregarded all the cogent and uncontested evidence of DW1 and DW2 in holding that the appellant was in breach of its bank-customer relationship and contractual duty because it took considerably long to avail the Plaintiff with the *icam* images taken by the CCTV cameras in the room that housed the ATM on the days the impugned transactions took place.

Counsel relied on **Hapgood Mark 10th Edition of Paget's Law of Banking at Page 163** where it is noted that the duties and obligations owed by the Bank to a customer primarily relate to carrying out the customer's payment instructions and dealing with securities deposited with the bank among others. She observed that an ATM is one mode through which the Bank pays money owed to the customer and the Respondent admitted to being issued an ATM card by the Appellant to carry out transactions on his account.

Counsel further submitted that in issuing this ATM card, the Appellant followed the customer protection guidelines regarding ATMs, ATM cards and PIN issuance as explained by DW2 and these guidelines include cautioning customers not to share the PIN, memorize the PIN, destroying notifications immediately, not to write down the PINs, not to keep PIN with card in same place, change passwords occasionally and post warning signs of customers take caution about fraudsters.

Learned counsel went ahead to elaborate that DW2 explained how an ATM operates, as automated interactions between customer and the machine and

all the information fed in was correct i.e. PIN and ATM Card and human intervention occurs where a wrong PIN is fed in the machine thrice or when the customer reports of the loss of the card.

Therefore, the Bank was under an obligation to honor the customer's demand instructions to pay when a correct ATM card was inserted in the machine and the right PIN was inserted on the machine since with the ATM system transactions did not require identity of the person transacting but focus on the ATM card and the PIN.

As to the investigation on the Respondent's account, counsel submitted that this was done and it was discovered that the monies were withdrawn with the same and correct PIN and that the Respondent was arrested in August 2016 and his ATM card taken away by force but the bank was not informed to take any measures to secure the his account.

She concluded on this issue that had the learned trial magistrate adequately evaluated the evidence provided by DW1 and DW2, she could not have found that the Appellant was in breach of the Bank-customer contract/relationship.

On ground two, counsel submitted that amongst the conventional duties and obligations of the bank is to honor its customer's instructions and this must be done according to the customer. She relied on the case of ***Stanbic Bank (U) Ltd versus Uganda Crocs Ltd SCCA No. 4 of 2004*** to support her argument.

In counsel's opinion these instructions were through an ATM, as a teller by the insertion of the ATM card in its slot and the correct secret PIN as per the log reports between August 2016 to May 2017, which entitled the customer to his money.

It was further argued that the relationship between a customer and a bank is of the nature of a contract and both sides have obligations to perform. This was



supported by the case of ***Joachimson Versus Swiss Bank Corporation (1921)***
3 KB 110.

On this basis, the Appellant submitted that the Respondent had the obligation to report the loss of his ATM card to the Appellant - who could have become alert about the disputed transactions.

The Appellant's counsel further submitted that the Respondent never adduced any witness to corroborate his evidence as to the date of his arrest. The case number is UPDF/CGM 005/17, to counsel, this meant that the case was opened in 2017 but the transactions were effected between September 21, 2016 and January 11, 2017 and her conclusion is that the Respondent was not in detention at the time as alleged.

On ground three, learned counsel for the Appellant submitted that the issues for determination in the joint scheduling memorandum were: (i) whether the defendant breached its duty as a Banker to the Plaintiff by paying out money through the Automated Teller Machine (ATM), (ii) whether the defendant is liable for the loss, the plaintiff incurred and, (iii) what remedies are available to the parties?

But the Plaintiff, in his submissions argued the issues as: (i) whether the Defendant breached the Banker-Customer contract (ii) whether the plaintiff is entitled to the reliefs sought. To counsel, this was departure from the pleadings and hence the submissions ought to have been struck out. She cited **Order 6 Rule 7 of the Civil Procedure Rules** and the case of ***Mbambu Stellah Versus Monday Nicholas HCCA No. 10 of 2016.***

Counsel for the Appellant further submitted that the issues formulated by the trial court that were: (i) whether the defendant is liable for the unlawful withdrawal of the sum of Ugx 16,428, 626 from the Plaintiff's personal account with the said defendant and (ii) whether the plaintiff is entitled to the relief before the court.

According to the Appellant's counsel, these issues did not address the controversy as the question before the court was whether the defendant breached its duty as banker to the plaintiff by paying out money through the ATM, after the Respondent's ATM Card and PIN were used in this transaction. The first issue formulated by the court restricted the scope of the trial magistrate to resolve the issue exhaustively and to counsel, this is why the reasoning was primarily premised on delay to share the *icam* images with the Respondent.

Under ground four of the Appeal, counsel submitted that evaluation of evidence must be approached as a whole and the court ought to consider both sides of the parties with each point on the balance of probabilities. She cited ***Odongo Ochama Hussein Versus Abdul Rajib HCCS No. 119 of 2018.***

According to counsel for the Appellant, the learned trial magistrate relied on the Respondent's denial of the transactions in question and disregarded the cogent and undisputed evidence of the Appellant.

Further, the learned trial magistrate wrongly shifted the burden of proof to the defendant by holding that once the Plaintiff denied the withdrawal and contended that he never exposed his ATM details to a third party, the burden shifted onto the defendant to show that the plaintiff was responsible for the disputed transactions and misdirected herself when there was evidence of the appellant's witnesses on how ATM transactions operate, the Plaintiff's laxity to report the incident of the loss of his card and, by basing her judgment on the delay to produce pictures of a CCTV footage of the transactions to hold the defendant liable for the withdrawals.

Respondent's Submissions

The Respondent's counsel submitted on the first ground that the relationship of a banker/customer is a contractual one, with the bank having duties relating to carrying out the customers payment instructions, dealing with

securities deposited with the bank and the way the banker handles information concerning the affairs of the customer, as noted by **Grace Tumwine Mukubwa** in **African Banking Law and Practice**.

Counsel cited the case of *Donoghue Versus Stevenson (1992) AC 502* that establishes the ingredients of negligence as that the defendant owed a duty of care to the plaintiff, there was a breach of that duty by the defendant and the plaintiff suffered injury as a result of the breach.

Thus, the Bank owed the plaintiff the duty of care by virtue of the contractual relationship existing as banker and customer and the Appellant failed to secure the monies of the Respondent while he was incarcerated thereby causing him loss.

According to counsel for the Respondent, the defendant's witnesses confirmed that the person seen in the CCTV footage withdrawing was not the Plaintiff and hence the learned trial magistrate was right in shifting the burden to the defendant to prove that it was the Plaintiff who disclosed the confidential information to the third party who withdrew the monies.

On ground two of the Appeal, counsel reemphasized that the relationship of the banker to customer is one of contract; with obligations and duties which include the duty of care and duty to safeguard customer's deposits.

The Respondent's counsel submitted that the plaintiff was in detention from 2nd August 2016 to April 2017 and there is no way he could have walked to the ATM to make any withdraws and the fact of detention was never disputed at trial, and thus the Appellant is estopped from denying it on appeal.

Further submissions were made that the Appellant's acting unbothered and willfully declining to provide CCTV footage after the loss of money had been reported. The bank at all times had a duty to ensure that the monies entrusted to it by the respondent customer were always safe and by allowing them to be

withdrawn by an unauthorized party, the appellant breached this duty and thus the learned trial magistrate was justified to hold that the Appellant was liable for the withdrawal of monies from the Respondent's bank account by using an ATM card.

On ground three of the Appeal, counsel for the Respondent argued that under **Order 15 rule 5(1) of the Civil Procedure Rules**, the court has powers before passing a decree to amend issues or frame additional issues and thus the learned trial magistrate did not depart from the earlier issues framed and neither did the issues introduce new facts nor grounds for argument and the amendment was for proper determination of the matter between the parties.

On ground four, it was submitted for the Respondent that the learned trial magistrate considered the evidence of both parties as a whole. Counsel referred to paragraph two of page 102 of the record of appeal and page 107 and 108 where the learned trial magistrate made reference to the written statement of DW2 and the amended written statement of defense when she noted that delay by the Appellant in producing icam images was a questionable act.

Consideration of this Appeal

This is a first Appeal. The court is therefore mindful of her duty as a first Appellate court to review the evidence of the case and to reconsider the material facts the trial magistrate. The appellate Court, as established in ***Kifamunte Henry Versus Uganda SCCA No. 10 of 1997*** and reemphasized in ***Fr. Narsensio Begumisa and three others Versus Eric Tibebaga SCCA No. 17 of 2002***, must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it.

The grounds of this Appeal are four and both counsel argued them in their chronological order of their appearance in the Memorandum of Appeal. However, I shall first resolve ground number three since it involves the crux of what was disputed at trial and here in this Appeal. Its resolution shall guide

this honorable court on easier resolution of the other grounds. I will then go ahead to resolve ground one which is interrelated with ground two, hence I shall resolve both together and then proceed to ground four.

Ground three

The learned trial magistrate erred in law and fact when she departed from the agreed issues and facts thereby arriving at a wrong decision.

In the Appellant's written submissions, the Appellant's counsel submitted that it was deliberate departure from pleadings when counsel for the Plaintiff/Respondent argued issues different from issues as framed in the joint scheduling memorandum filed by both parties. He cited ***Mbambu Stellah versus Monday Nicholas (supra)*** to state that this was departure from pleadings. But I note that the case of ***Mbambu (supra)***, can be distinguished from the present case because in the ***Mbambu case***, the Appellant had abandoned her only ground of Appeal and introduced new grounds unlike in this case where contention is on altering the issues at the trial by the Plaintiff/Appellant.

The Respondent's counsel made no submission regarding the alteration of the issues on trial in their submissions but in my opinion submissions of counsel are a mere tool of arrangement of law and facts coupled with the use/application of persuasive language by advocates or parties. They are not facts or law.

In the case of ***Kiraza Paul Versus Musa Ssekera HCCA 058 of 2012, Hon. Kwesiga J*** observed that, '*Advocates' submissions where available and correct, no doubt, are helpful to the Court but they are not the determinant factor in decision making. The paramount factors are the evidence and the Law.*'

In my opinion, therefore, how or the format through which the Respondent's/Plaintiff's advocates addressed the issues in their submissions at



trial matters not. However, how the trial court frames or addresses the issues in its decision or judgment is a matter of law.

Counsel for the Appellant submitted that the issues formulated by the trial court that is: (i) whether the defendant is liable for the unlawful withdrawal of the sum of Ugx 16,428, 626 from the Plaintiff's personal account with the said defendant and (ii) whether the Plaintiff is entitled to the reliefs before the court.

In counsel's opinion, the issues framed by the learned trial magistrate did not address the real issue of controversy and that is why the first issue limited the court's scope to resolve the matter and the reasoning was premised on Appellant's delay in forwarding *icam* images to the Respondent.

The Respondent retaliated that, the trial court was right in addressing the issues as it did since under **Order 15 rule 1(5) of the Civil Procedure Rules** as amended, the court can amend issues framed by the parties.

Order 15 Rule 1 (5) of the Civil Procedure Rules S.I 71-1, as amended, grants court powers to amend issues of controversy between the parties in a particular trial. This power, exists in the case where the issues at hand i.e. before amendment, in the opinion of the court did not well address or assist in the determination of the real dispute between the parties.

In the instant case, the issues at scheduling were, (i) *whether the defendant breached its duty as a Banker to the Plaintiff by paying out money through the Automated Teller Machine (ATM)*, (ii) *whether the defendant is liable for the loss, the plaintiff incurred* and, (iii) *what remedies are available to the parties?* But, the trial court formulated the issues as: (i) *whether the defendant is liable for the unlawful withdrawal of the sum of Ugx 16,428, 626 from the Plaintiff's personal account with the said defendant* and (ii) *whether the Plaintiff is entitled to the reliefs before the court.*

The Appellant objected to the framing of the first issue by the trial magistrate. However, if studied well, the controversy between the parties was, who is liable for the withdrawal transactions on the Plaintiff's/Respondent's bank account held with the Defendant/Appellant bank.

As framed by the trial magistrate, to determine liability, the issue had the word 'unlawful' meaning, unauthorized or illegal. By this, my understanding is that between the parties, one breached their duty to the other; neglected or ignored what they ought to have done. This is why the learned trial magistrate in resolving issue number one at page five of her judgment, held that by the defendant/appellant delaying in providing *icam* images to the plaintiff/respondent and lack of action towards a criminal matter that involved one of their ATM facilities was very questionable and in breach of their contractual duties towards the plaintiff/respondent.

Hence, I am constrained to hold that the learned trial magistrate's scope of determination of the matter at hand was limited by the formulation of the issues as she did. The issues before the trial court addressed the matter of controversy between the parties and were rightly framed from the law and facts by the learned trial magistrate.

I would answer ground three in negative.

Ground One and Ground two

The learned Trial Magistrate erred in law and fact when she held that the Appellant was in breach of his contractual duty of care to the Plaintiff and;

The learned Trial Magistrate erred in law and fact when she held that the Appellant was liable for the withdrawal of monies from the Respondent's Bank Account using an ATM Card.

The Appellant submitted that it was mandated to pay the Plaintiff his money when asked as a duty of a banker to a customer. That paying through the

Automatic Teller Machine is one mode in which the bank effects customer's payment instructions.

That the Respondent admitted to have received an ATM card to carry out transactions and this issuance was made by following the customer protection guidelines regarding ATMs, ATM Cards and PIN issuance. The customers are advised to strongly protect their PINs.

It was the submission of the Appellant counsel's that when the ATM card left the Respondent's possession and the Bank was not informed of the loss to take any measures to secure the monies of the Respondent.

Conversely, the Respondent's counsel argued that the Appellant had a duty of care to the Respondent virtue of their contractual relationship as banker and customer and this duty was neglected when it failed to secure the monies of the Respondent while he was in custody thereby causing him a loss and this was confirmed when the Appellant's witnesses admitted that the person in the *icam* images, DEX4, was not the Respondent.

The learned trial magistrate in her judgment at pages 4 and 5 held that:

"The defendant willfully declined to provide CCTV footage video in its possession which had been requested for by the Plaintiff but they chose to provide icam images of a party whom they claim executed unathorised withdraws. The production of icam images was even done a year later on 17th July 2018 on filing the amended written statement of Defense and yet this matter was brought to the attention of the defendant on 2nd May 2017. To top it up the icam images provided did not provide a clear picture of what happened then. Lack of action towards a criminal matter that involved one of their ATM facilities is very questionable. In the circumstances I must as I should hold the defendant was in breach of his contractual duty of care to the plaintiff and therefore liable for the unlawful withdrawal of the sum of 16,413,041/= (Sixteen Million, four hundred

thirteen thousand forty one shillings only) from the personal account of the plaintiff.”

The learned trial magistrate held that the defendant was in breach of the duty of care towards the plaintiff based on the fact that there was laxity to resolve the Respondent’s complaint by the Appellant. That is refusal to avail the CCTV footage, delay in providing the *icam* images and poor quality of the *icam* explaining what happened during the transactions. She however earlier and rightly observed , that the key aspect of the dispute was if the Respondent authorized the withdrawal either expressly or by necessary implication.

With the utmost respect to my learned colleague, in my opinion this was a deviation from the issue of controversy between the parties which whether the Appellant, in the circumstances owed a duty of care to the Respondent and if that duty was breached by the Appellant.

Both counsel for the parties have rightly addressed this court on the relationship between the banker and customer as that of being a contractual one with each party owing the other specific duties and obligations.

The bank has a duty to honor or act in accordance with the legal instructions or requests of the customer in the normal operation of its customer’s account. This was emphasized by the **Court of Appeal in *Ben Mushari Versus DFCU Bank Ltd CACA NO. 0188 of 2013.***

The Supreme Court of the **United Kingdom** faced with the question of the Bank’s duty towards the customer observed in the case of ***Phillip Fiona Lorraine Versus Barclays Bank UK PLC [2023] UKSC 25***, on what has developed in modern terms as the ‘*Quincecare duty*, and held at **page 40**, that the Bank had the right to decline the instruction of payment made by Ms. Phillip if there was reasonable belief by the Bank that the instruction issued by the customer was a result of APP fraud but this was not the same as **being under a duty** to do so.

McDiaguer

The facts of the case of ***Phillips Versus Barclays Bank UK PLC (supra)*** briefly were:

Mrs Phillip, the claimant in **High Court Case** cited **[2021] EWHC 10 (Comm)** was a customer and account holder with the Respondent Bank. In March 2018, she fell victim of Authorized *Push Payment (APP Fraud)* that led to her losing 700,000 British Pounds by making two international payments from her bank account which the fraudster(s) deceived her into making and with the belief that the monies would be safe and that she was assisting an investigation by the *Financial Conduct Authority* and *National Crime Agency*.

She filed a claim before the High Court to hold the Bank accountable in damages for the loss she suffered by making the two payments arguing that the Bank failed to comply with a suggested duty upon it to protect her from their financial consequences; that the bank ought to have delayed or stopped the transactions which she authorized or initiated.

The Bank filed an application for summary judgment arguing that the alleged duty to protect Mrs. Phillip from consequences of the payments willingly made by her in reliance upon the fraud induced belief is one which was not recognized in law, and should not be recognized, not least because it conflicts with the established duty upon a bank to comply with its customer's mandate.

The learned **Judge HH Russen QC** reemphasized what, **Steyn J** had noted in ***Barclays Bank plc versus Quincecare Ltd [1992] 4 ALL ER 363 at 376*** i.e.

“The law should not impose too burdensome an obligation on bankers, which hampers the effective transacting of banking business unnecessarily. On the other hand, the law should guard against the facilitation of fraud, and exact a reasonable standard of care in order to combat fraud and to protect bank customers and innocent third parties. To hold that a bank is only liable when it has displayed a lack of probity would be much too restrictive on approach. On the other hand, to impose liability whenever speculation might suggest

dishonesty would impose compromise, which strikes a fair balance between competing considerations, is simply to say that a banker must refrain from executing an order if and for so long as the banker is 'put on inquiry' in the sense that the order is an attempt to misappropriate funds of the company (see proposition (3) in **Lipkin Gorman versus Karpnale (1986) [1992] 4 ALL ER 331 at 349. [1987] 1 WLR 987 at 1006**). And the external standard of the likely perception of the ordinary prudent banker is the governing one." (emphasis added)

Judge Russen QC concluded that the *Quincecare duty* is ancillary to the primary duty of the banker to honor the instructions of the claimant who had intended to raise the duty for the bank to second guess her decision as how she wished to spend her money and the **existence of such duty would involve the triumph of unduly onerous and commercially unrealistic policing obligations over the bank's basic obligation to act upon its customer's instructions**. He thus entered summary judgment in favor of the bank.

The Claimant appealed before the **Court of Appeal** under **[2022] EWCA Civ 318** and which reversed the judge's decision and held that the matter ought to have gone to full trial and the *Quincecare duty* would arise in any case when the bank was on inquiry that the order was an attempt to misappropriate funds like in this case of APP fraud.

When the matter came before the **Supreme Court**, the **Court** at **page 35** observed that the validity of the instruction was not in doubt and provided the **instruction is clear and is given by the customer personally or by an agent acting with apparent authority, no inquiries are needed to clarify or verify what the bank must do. The bank's duty is to execute the instruction and any refusal or failure to do so will prima facie be a breach of duty by the bank.**

McGowan

In the instant facts, the evidence on record by PW1 was that he was incarcerated between 2nd August 2016 and 27th April 2017 at Makindye Military Barracks and adduced PEXH.1, a bail bond form to prove this.

I should note that at trial, the issue of the detention of the respondent was not disputed as the learned trial magistrate noted at paragraph 2 of page four of her decision, but the Appellant's counsel contested the same and made an argument on the accuracy of the Respondent's imprisonment; he is estopped from disputing . See. **Section 28 of the Evidence Act cap. 6.**

While under custody, several transactions in particular, cash withdrawals happened through Automatic Teller Machines manned and operated by the Appellant between August 2016 and April 2017 as explained under PEXH.2 and DEXH. 6. The Respondent/Plaintiff denied making the withdrawals nor authorizing the withdrawals. The question thus is, who was at fault for the withdrawals on the Respondent's account between the impugned dates of the transactions.

The said transactions all occurred through operation of Automatic Teller Machines (ATMs) with the use of an ATM card and a secret PIN.

DW2 explained how ATMs operate. It was his evidence that ATMs are computerized systems acting as Tellers and the transactions are controlled by the machine/computer which is monitored and updated according to the data received on a day to day basis.

He elaborated that correct ATM Card No. 6050080204200167864 in the names of **Egesa Noah**, at all times was entered into the ATM and correct secret Personal Identification Number entered and transaction was processed 'OK.' That the ATM system reports input of wrong PIN and in this case, it happened only once on October 4, 2016 at 16:59:40 and few seconds later, the customer input a correct PIN and the transaction was successful, as seen under DEXH.3 and DEXH.1. He explained that an ATM card can only work together with a

correct PIN and if a wrong PIN is input thrice, the status of the card changes from cool to warm state i.e. temporarily inactive and cannot be used for any transaction until the customer identifies themselves at a Post Bank branch.

Further, the witness stated that there being no irregularities flagged on the transactions between August 2016 and May 2017 and with the invalid PIN entered only once throughout the period, the person who withdrew the Respondent's money had access to the Respondent's ATM card and his secret PIN.

DW1 testified that the Respondent applied and was given an ATM card to operate his account with the Appellant and he got a generic Personal Identification Number and was advised to memorize the PIN and avoid keeping the card with the PIN and not to share with anyone his PIN.

That from the bank's records, the Respondent's card had never been deactivated permanently indicating that there was never a report of loss of the ATM card and all the transactions between 21st September 2016 to January 11, 2017 were successful effected through the ATM because correct card, and PIN details were used. That the respondent ought to have reported his detention to the bank to deactivate the card.

It was the witness' evidence that once correct Card and PIN are entered in the ATM, the bank cannot inquire into the physical identity of such customer since the secret PIN entered acts as the identity card of the customer and that is why he customers are advised against disclosing the secret PIN to a third party, and notices on ATMs advising customers not to share their cards or PINs to any third party are placed on ATM premises.

Counsel for the Appellant submitted that the ATM card was issued to the Respondent in accordance with customer protection guidelines regarding ATMs, ATM cards and PIN issuance.

Regulation 7(4) (b) of the Bank of Uganda Financial Consumer Protection Guidelines, 2011 provides that;

“For purposes of protecting and securing a consumer’s PIN, including for ATM services, phone-banking, internet banking, e-banking, mobile banking services and wireless banking, a financial services provider shall advise a consumer:

(i) not to allow anyone else to use his or her card, know his or her PIN or any other security information;

(ii) to memorise his or her PIN and other security information and destroy the notification immediately;

(iii) not to write down his or her PIN or password;

(iv) not to keep a record of his or her PIN or password together with his or her card;

(v) not to use easy-to-guess dates, numbers or passwords such as his or her passport number or birthday as the PIN or password; and

(vi) to change his or her PIN or password regularly

(c) The security advice provided for under paragraph 7(4)(a) and (b) above shall be given at the time the service is provided to the consumer.

(d) A financial services provider shall post security advice at its branches, websites and any other communication channels which it uses alerting consumers about scams and other fraudulent practices involving the services which they offer.

(e) A financial services provider shall provide the consumer with a 24-hour telephone service to enable consumers to report a lost or stolen card, cheque book or passbook or a suspected scam or fraud.” (Emphasis is mine)

The bank is under duty to ensure that the customer is aware of how they can protect their account from unauthorized access by third parties. However, it is upon the customer to ensure that his or her bank credentials are well protected for example in the case of ATM banking, it is the duty of the customer to keep his or her secret PIN by himself and ATM Card so as they are not accessed by any other person. **See. *Aida Atiku Versus Centenary Rural Development Bank Ltd HCCS No. 754 of 2020.***

Once the Bank establishes that the mechanisms and policies existed to ensure that the customer or his/her account was protected from unauthorized access of his or her account, the burden is on the customer to prove that he or she did not disclose her or her details to a third party or authorize the said transactions. Although, I must say this depends on the circumstances of the case. For example herein, the ATM card was issued to the Respondent, it is only him who knew the secret PIN for the ATM Card and the transactions were made at all times through the ATM and no other mechanism. It would be overstressing the duty of banks towards the customers that it was upon them to prove the fact of existence or nature of the PIN which was in the hands of the customer/Respondent. Stretching this would be burdensome to banking business and other commercial transactions.

The plaintiff admitted that while at military barracks in Makindye, his property was taken including ATM card and he only retrieved at his release only his National Identity Card and never notified the bank about the loss of the ATM Card for temporary blocking and/or replacement.

The learned trial magistrate based her decision on the laxity and failure to release to the respondent CCTV footage of the incidents and *icam* images of what happened on the impugned dates.

However, it is my opinion that the *icam* devices or cameras in the ATMs have no connection with the operation of a customer's account through ATM

banking procedure. There is no requirement for example that one's picture has to be captured before they access the account of an individual with the bank. The ATM acts in the place of a teller who sits at the counter in the banking hall who receives a customer, verifies their signature, fingerprint and then issues the amount requested to the customer.

By juxtaposition, as explained by DW2, the ATM receives a customer through insertion of an ATM card, the secret PIN is then requested and once the PIN input is correct, transactions like withdrawals, PIN reset and balance inquiries among others are then authorized by the machine. If the PIN is wrong, and input thrice, the card is temporarily blocked. At no point in this case was the card blocked. The correct PIN was used; this PIN was only known by the Respondent and not even bank officials.

Thus, whoever conducted the transactions must have been at all times either the Respondent or a person authorized by the Respondent i.e. had the Respondent's ATM card and the Respondent released to him/her, his Secret Personal identification Number; either willfully, negligently or forcefully which action, no duty existed for the Appellant to be liable. The admission of the Appellant that the person in the *icam* images is not the Respondent does not raise any duty or liability since the ATM card and PIN can be shared to another individual; but this can be done by only the Respondent.

Be as it may, can it be said that the Bank was under duty to use the CCTV camera footages to stop payment or assist recover the withdrawn monies. I think not. This could have been done if the Respondent has reported the loss of his ATM card both to the Bank and the police in a timely manner.

The bank's mandate is to carry out its customer's instructions to make payments as instructed i.e. not to disregard the interest of the true owner as observed in ***Bank of Baroda (U) Ltd Versus Wilson Kamugunda [2006] 1 EA 11.***



This mandate in absence of express contractual requirement must be carried out in a way that a reasonably skillful and careful banker would.

Several cases including ***Kamugunda case (supra) and Phillips V Barclays Bank Plc (supra)***, have noted that the bank in some circumstances ought to be put on notice to reasonable belief that payment of the instructions would lead to loss of the customer's money . To put the bank on inquiry includes large and unprecedented sum of the money received on the account, the payments were made abroad to new companies never dealt with before among others. None of these circumstances existed in this case.

The Respondent knew from August 2016 that his ATM was no longer in his possession, and never notified the Appellant until May 2017 as per DEX 5.

Given that no red flag had been raised on the account, there is no way the bank could have known that it was an unauthorized person and not the Respondent, who was dealing with the account of the Respondent.

Having said so, I would allow grounds one and two of this Appeal.

Ground four.

The learned Trial Magistrate erred in law and fact when she failed to evaluate the evidence on record as a whole thereby arriving at the wrong decision.

Counsel for the Appellant strongly argued against the manner in which the learned trial magistrate arrived at her decision. She argued that evidence must be considered as a whole and the court ought not consider the plaintiff's story and then finally decide which of the two to prefer. She cited the case of ***Odongo Ochoma Hussien Versus Abdul Rajab HCCS No. 119 of 2018*** to support her argument.

The Appellant argued that the learned trial magistrate relied on the Respondent's denial of the transactions in question and disregarded the cogent

and undisputed evidence of the Appellant, wrongly shifted the burden of proof to the defendant by holding that once the Plaintiff denied the withdrawal and contended that he never exposed his ATM details to a third party, the burden shifted onto the defendant to show that the plaintiff was responsible for the disputed transactions and misdirected herself while there was evidence of the appellant's witnesses on how ATM transactions operate.

On the other hand, counsel for the Respondent submitted that the learned trial Magistrate wholly evaluated the evidence on record and on page 106 of the record of Appeal paragraph 2, she stated that both submissions of both counsel, pleadings and evidence adduced had been considered in the judgment and on page 107 of the record of appeal, the trial magistrate refers to the written statement of DW2 and amended written statement of defence on page 108 of the record of appeal.

It is trite law that there is no standard format or style on which evaluation of evidence must be conducted while giving the reasons and explanations for their decisions. It is on the style or format of the presiding judicial officer. See.

British American Tobacco (U) Ltd v. Sedrach Mwijakubi and four others, SCCA No. 001 of 2012.

While evaluating evidence is a matter of the style of the judicial officer, the basis of the decision reached by a judicial officer ought to be well and clearly stated in the judgment to reflect articulation of the facts at hand and evidence of both parties on record.

The learned trial magistrate based her decision on two reasons; firstly, that the Respondent was incarcerated at the time the money was withdrawn and thus when he denied exposing this ATM details to the third party, the burden shifted to the Appellant to show that the Respondent was responsible for the disputed transaction. By shifting the burden of proof to the Appellant, the Learned trial magistrate acted in contravention of sections 101, 102 and 103 of the Evidence

Act. Secondly , that the Appellant refused to avail the Respondent with the CCTV footage and the *icam* images provided did not establish or explain what happened. By this, the defendant was liable.

I have observed under ground one and two that the issue of CCTV camera footage and *icam* images is secondary and not a procedure in the transactions conducted by the ATM while banking, and that the secret PIN and ATM card which were used to conduct the transactions had been in the possession of the Respondent and known by only him. Further there existed not any duty that the bank/Appellant owed to the Respondent.

The trial magistrate respectfully overlooked the evidence presented by DW2 and DW1 on the operation of the ATM while doing banking and roles, duties and obligations of both parties to the transaction i.e. the account holder and the custodian of the account, the bank, and the explanation by DW1 that the Plaintiff had been explained to, how to keep his secret PIN, ATM card and notices had been issued on how customers ought to carry out transactions; which was in accordance to the established consumer protection guidelines regarding ATM Banking.

Had she considered evidence that the secret PIN is only known by the customer, the Respondent and the ATM card is held by the customer, and the fact that the Respondent admitted that his ATM was lost but the he made no effort to have it blocked by the Appellant months after knowing that fact, she would have held that the Appellant was not liable for the withdrawal of Ugx 16,413,041/- from the Respondent's account.

In the premises, I would allow ground four of this appeal.

This Appeal having substantially succeeded on grounds one, two and four, I allow the appeal and make the following orders:

A) The Judgement and Orders in Civil Suit No. 1055 of 2017 are hereby set aside.

B) Costs of the appeal are hereby awarded to the Appellant;

C) The Appeal having been allowed, **Misc. Application No. 1254 of 2022: Post Bank Uganda Limited vs Egesa Noah** is overtaken by events.

Delivered electronically this 18 day of September 2023 and uploaded on ECCMIS.



Harriet Grace MAGALA

Judge

18th September 2023