

TANZANIA / JUDGMENT

crdb bank plc vs bossy kassian makongo 2021 tzhc 9212 23 november 2021

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IN THE HIGH COURT OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA (IRINGA DISRICT REGISTRY) AT IRINGA CIVIL APPEAL NO. 19 OF 2020 (Originating from Njombe Resident Magistrate in Civil Case No. 05 of 2017) CRDB BANK PLC..... APPELLANT
VERSUS BOSSY KASSIAN MAKONGO.....RESPONDENT 21/10 & 23/11/2021

JUDGMENT

MATOGOLOJ. This is an appeal filed by the appellant CRDB BANK (PLC) after being aggrieved by the judgment and decree of the Resident Magistrates' Court of Njombe in Civil Case No. 05 of 2017 dated 12th November, 2020. The brief background of the matter is that, the Appellant maintains current account (A/C) No.0150350663700 in the name of Mhapa Motors & Insurance Agency, the account is operated by Niko John Mhapa. 1 | Page Qn 04/11/2016, the said Niko Mhapa visited the appellant's Branch at Njombe, where he filled cheque deposit slip and thereafter handled the cheque (Exhibit DI) and the cheque deposit slip to the Bank Officer one Leah Sambala (DW1) at the customer service desk who after receiving them she signed and stamped the cheque deposit slip (Exh.PE1) and gave a copy to Niko Mhapa who left the Bank premises. The said cheque (Exh.DI) had instructions to debit Mhapa Motors A/C with TZS 20,000,000/= and credit the same to the respondent A/C No. 0150472812500 which is maintained by the appellant at Makambako. When the cheque was sent by Customer service officer to back office for clearance and payment processes, it was found by Jactan Kihombo that, Mhapa's A/C had no sufficient fund to pay TZS 20,000,000/= as it was instructed, the fact which was communicated to Niko Mhapa via Mobile phone and it was endorsed insufficient fund at the back that it is returned to drawer. The Bank statement of Mhapa Motors and insurance Agency was tendered by DW2 and admitted as Exhibit.D2 which showed that, the A/C had no sufficient balance to honour the cheque. On 31st March, 2017 the respondent filed the above mentioned suit at the Court of Resident Magistrate claiming against the appellant payment of TZS, 20,000,000/= as specific damages on ground that, the bank was negligent in endorsing on a cheque deposit purporting to deposit the money in the respondent A/C while the same was not deposited. He also prayed to be paid TZS. 80,000,000/= as general damages. 2 | Page The trial Court decided in favour of the respondent and ordered the appellant to pay the respondent TZS 20,000,000/= as specific damages and TZS 10,000,000/= as general damages. The appellant was aggrieved and filed to this court memorandum of appeal

with a total of eight (8) grounds as follows:-

1. That, the trial court erred in law and fact in holding that, the Appellant has the duty to ensure that drawer's account has sufficient fund before receiving the cheque and endorsing/ issuing the cheque deposit slip (Exhibit Pl) to the drawer.
2. That, the trial court erred in law and fact in holding that, cheque deposit slip (Exhibit Pl is the evidence/ guarantee that fund was deposited into the client's account.
3. That, the trial court erred in law and fact in holding that, the Appellant was negligent and owes the duty of care to the respondent following endorsement/ issuance of the Cheque Deposit Slip to the drawer, Mhapa Motors& Insurance Agency (Nicko John Mhapa) after Nicko John Mhapa deposited Cheque (Exhibit DI).
4. That, the trial Court erred in law and fact for not taking into account Exhibit D3, the terms and conditions which requires that any deposits other than cash payments will be credited into the respondent account subject to receipt of the amount by the appellant. 3 | Page
5. That, the trial court erred in law and fact for considering only the evidence of PW3, the Appellant's defaulter and victim of Appellant recovery action and failure to consider the evidence of DW1, DW2 and DW3 in procedures of handling the cheque.
6. That, the trial court erred in law and fact for not holding that, insufficient fund in the drawer's account is the sufficient reason of dishonoring the cheque.
7. That, the trial court erred in law and fact for awarding and assessing general damages to the respondent.
8. That, the trial court had no pecuniary jurisdiction to hear and determine the suit. The Appellant prays for this Court for the appeal to be allowed, the judgment and decree of the lower court be quashed and orders thereof be set aside with costs. The appeal was disposed off by way of written submissions. At the hearing of this appeal parties were represented by an Advocates, the appellant was represented by Mr.M.K.Mboneke learned Advocate while the respondent was represented by Mr.Frank Ngafumika learned Advocate. 4] Page Mr. Mboneke in supporting of this appeal he argued ground of appeal no. 1,2,and 6 together, ground No.4 and 5 while ground No. 3,7 and 8 separately. With regard to grounds No. 1,2 and 6 he submitted that, it is not disputed that, the appellant only signed and stamped on cheque deposit slip which it only guarantees that cheque has been deposited/ received by appellant/ Bank and not that the cash was received. To support his argument, he cited the case of Sayi s/ o Kapaie vs The Republic, Criminal Appeal No. 85/2020 HC at Mwanza (unreported) it was held that; "A cheque or check (American English) may simply be defined as a document that orders a bank to pay a specific amount of money from person's bank account to the person in whose name the cheque has been issued. The person who is the author of the cheque is called the Drawer". The person in whose favour cheque is signed is called the "payee" and the bank which is directed to pay the amount is called the drawee" Mr. Mboneke submitted that, it is from the above cited case he argued that, the appellant by signing and stamping on

the cheque deposit slip guarantee that, the document (cheque) bearing instructions/ orders was received and not cash indicated by trial court. The appellant has never 5 | Page endorsed that it shall pay cheque the respondent even when there is no sufficient balance to pay the amount stated therein. He went on submitting that, it is the duty of the drawer of the cheque to ensure that, it's A/C has sufficient balance to honour the cheque and not the appellant (Bank), and it is the common practice for the bank to return the cheque for the sufficient balance after receiving the same and issuing the signed and stamped on the cheque cannot be received by the Bank without issuing the cheque deposit slip evidencing that the cheque was real received by the Bank. To support his argument he cited the case of SayiS/O Kapale Pesa{ supra). Mr. Mboneke submitted further that, the appellant/ Bank has no duty before signing and stamping (endorsing) on the cheque deposit slip which is taken by the depositor to ensure that, the client A/C has sufficient balance to pay the same but only guarantee that cheque was received. Also, the appellant was entitled to dishonor the cheque when it found that, the drawer A/C had insufficient balance. It was his submission that the trial court erred in not holding that, the Bank was entitled not to pay the respondent for insufficient balance in the drawer A/C. With regard to ground of appeal No. 03, he submitted that, it is not a duty of the appellant to ensure the drawer's A/C had sufficient balance to pay the cheque but the duty of the drawer or owner himself of the A/C who in this case Niko Mhapa. 6 | Page He contended that, the appellant was not aware and is not duty bound to know any underlying objective of the transaction, and the matters related between the respondent and Niko Mhapa at the time of presentation or handling of cheque and it could by no way foreseen anything which could impute negligence on the part of the Appellant/ Bank in handling the transaction. He submitted that, the trial court erred to hold that the appellant was negligent. With regard to ground of appeal No. 4 and 5 Mr. Mboneka submitted that, the trial court erred for failure to consider the appellant witnesses' evidence and provide its analysis on its value. He contended that, the appellant's witnesses at page 65 of the proceedings tendered among other documents, Exhibit.D3, General Terms and Conditions for Operating with CRDB Pic, which were signed by the respondent while opening A/C which indicated in the cheque as beneficiary. Clause 1 (d) of that Terms and Conditions read as follows:- "Reservations on Deposits; Any deposit made in the customer's account other cash payments will be credited to the account subject to the receipt of the amount by CRDB Bank Pic. This also applies to deposits made by cheques drawn on other accounts with CRDB Bank Pic including accounts with other Banks paying the cheque. 7 | Page The reservation applies even if it has not been stated on the receipt or credit advice" He submitted further that, the respondent admitted to sign exh D3 in opening the said A/C at page 17 of the trial court proceedings, this is binding undertaking to the respondent. To bolster his argument he referred the case of Kitunda Engineering Company Limited and 2 Others versus CRDB BANK PLC at Arusha, Civil Appeal No. 63 of 2013 (unreported), where the Court held the appellants liable for the undertaking they made in opening the A/C. It said that:- "Z/7 order to satisfactory answer the issue, we begin with the Bank/customer fiduciary relationship. The relationship, in this case was initiated by a letter of undertaking signed by the appellants at die time of opening the relevant account. In the letter of

undertaking which was admitted at the trial as exhibit "P1" the appellants made the following undertakings; It was through Exhibit "P1" that the Appellants assumed a legal duty of care towards the 8 | Page respondent Bank and the duty of care lasted as long as the appellants maintained that account" He went on submitting that, the trial court has never considered Exhibit D3 and other Appellant evidences, had it considered the same it could have found that, the respondent was bound by its undertaking and the Appellant was not liable until the amount is made available in the drawer's A/C. With regard to ground No. 07 it is the complaint by the appellant that, the trial court erred in awarding and assessing the general damages to the respondent. Mr. Mboneke submitted that, although the general damages are awarded at the discretion of the court but in doing so the court must consider and deliberate on the available facts/ evidence to justify the award and assessments. And must assign reasons for such award, to support his argument he cited the case of Ashraf Akber Kahn vs Ravji Govind Varsan, Civil Appeal No. 05/2017 CA at Arusha (unreported) at page 27 it was held that; "we think Mr. Sambo's Complaint against the award of damages is fully Justified. In his entire testimony from page 124 through page 134 of the record, the respondent proffered no factual basis to justify his prayer for 9 | Page general damages. For example, he did not adduce any evidence on so called psychological torture or unwarranted disturbances. He may have hired a debit collector but he did not reveal the expenses that was Incurred. It would appear to us, therefore, that the learned Judge awarded the damages as a matter of course. The award was based on her own assumptions but not necessarily on hard facts of the case..... in consequence, we vacate the entire award for general damages" Mr. Mboneke went on submitting that, in our case there is nothing which said by the respondent in his evidence from page 13 to 18 of record of proceedings to justify the award of general damages, it was just the trial court which without any basis decided to award the respondent TZS 10,000,000/= contrary to the legal principles as stated in the above cited case. As to ground of appeal No. 08, Mr. Mboneke submitted that, the trial court lacked pecuniary jurisdiction to try the above said case, as the amount involved in the dispute was TZS 20,000,000/= which as per section 10 J P a g e 18(l)(ii) of the Magistrate Court Act, Cap 11 R.E 2019, it is within the jurisdiction of the primary Court and not Resident Magistrate Court. Mr. Mboneke concluded by submitting that, it has never made any endorsement committing itself to pay the Respondent apart from stamping and signing on cheque deposit slip and he prayed before this court to allow the appellant appeal, quash and set aside the judgment and the decree of lower court with costs on the above ground. In reply Mr. Ngafumika submitted that, the definition of the term Cheque or check under paragraph 7 of the written submissions is without any assistance to the present appeal at the decision subject of this appeal did not deal with the issue of what the term cheque or check means. He contended that, the cited authority is therefore misplaced. He went on submitting that, to say that it is the duty of the drawer to ensure that the account has sufficient balance to honour the cheque and not the Bank, is so to speak to abdicate the duty which the bank owes to the clients. The relationship between the banker and a client is one of fiduciary nature so it is a miscalculation to think that the bank has no duty to ensure sufficient balance is available before honoring or endorsing on a cheque, that is why even the

authority relied upon by the counsel for Appellant in respect of paragraph 9 mentions insufficiency of funds as being reasons for the bank to dishonor a cheque. The question to ask is if the bank has no obligation to ensure there is balance sufficient to honour the cheque then how could it return on similar reasons? 11 | P a g e Mr. Ngafumika went on submitting that, by endorsing on a cheque, the bank is presumed to have satisfied itself with the requisite ingredients contained in the cheque. Had the cheque not been dated for example, would the bank endorse thereon. Or suppose if the cheque contained no name of the beneficiary would it be endorsed? Answer to such questions irresistibly point out to a simple conclusion that the bank was duty bound to satisfy itself if the requirements of the cheque have been complied with before endorsing thereon and by doing otherwise as in this case, the bank has blatantly acted negligently and caused loss to the respondent. He submitted further that, when the Bank handles business between clients the bank acts as a collection agent. It cannot at any rate be said that the bank had no duty against the respondent. It had duty of care and the said duty was breached the breach which resulted into loss of to the respondent. The objective of transaction between the drawer and beneficiary was transfer of funds by way of cheque and the appellant was the facilitator of such a transaction, so the bank had a duty of care. He submitted that, paragraph 11,12 and 13 are therefore answered. With regard to the EX D3 quoted by the appellant counsel does not exonerate the Appellant from the duty of care. If we read between the lines the part which the learned counsel seeks to find rescue from, it does not contain any words authorizing the bank to endorse without satisfying itself as to the correctness of the particulars and insufficiency of the balance. 12 | P a g e Regarding the complaint of general damages, Mr. Ngafumika submitted that, the authority cited by the counsel for the appellant is clearly distinguishable from the case at hand. While in the cited case there was no words showing how the act affected the claimant, in our present case the facts are different and the evidence on record clearly stipulates how the respondent was affected by the negligent act of the appellant. Acting on belief of the endorsement, the respondent proceeded to Mafinga on business deals sincerely believing that the appellant had already credited his account the fact which he had all reasonable reasons to believe to be true but unfortunately, the appellant negligent as she acted endorsed without affecting the deposit and did not bother to communicate to the respondent that credit could not be made for any reasons (if any). With regard to the 8th ground of appeal, Mr. Ngafumika submitted that, the provision of the law cited by the learned counsel is a general provision for jurisdictional matters. The case between the parties hereto was specifically a commercial case. There is a clear provision providing for pecuniary jurisdiction of the district courts in commercial cases and that is section 40 (3) of the same cited law. Had the learned counsel memorized the said provision they are sure he would not have argued that the court acted without jurisdiction. He concluded by praying for the appeal be dismissed with costs on its entirety for being devoid of merits and the decision of the trial court be left undisturbed. 13 | P a g e Having read the respective submissions by the parties and examining the courts records as well as grounds of appeal, what calls for determination by this court is whether the trial court rightly condemned the appellant, conversely whether this appeal has merit. I will determine

grounds No. 1, 2 and 6 together as argued by Mr. Mboneke. The main complaint here is that, the trial court erred to hold that, the bank had a duty before signing and stamping on cheque to make sure that the drawer had sufficient fund and the trial court failed not to hold that, the insufficiency fund in the drawer's A/C is the sufficient reasons for dishonoring cheque by the bank not paying the money to the beneficiary. Upon examining the arguments by the parties with regard to ground No. 1,2 and 6, the evidence on record reveals that, it is the drawer who sent the cheque to the Bank and upon receiving it the bank stamped it and endorsed it, and when proceedings with the process of transferring the said cash, it was discovered that, in the drawers' account the remaining amount was not enough and it was endorsed at the back of the cheque that the drawer's A/C has insufficient funds, it was the same day the cheque was received by the Bank, this is according to the evidence of DW2 as can be seen at page 63 of the trial court typed proceedings. For that reason it means the cheque was dishonored as the drawer's account has insufficient fund. It was held in the case of SayiS/O Kapale Pesa (supra) that:- "A cheque may be returned by the drawee bank unpaid. When such a situation occurs, t 14 1 P a g e the cheque is said to be dishonored. A cheque may be dishonored on any of the following or a combination thereof namely, a cheque may be returned by the drawee bank because of any of the following reasons, insufficient funds, non- applicability of fund, irregular signature" On the basis of that decision, it was proper for the bank to return the cheque because the drawer's account has insufficient fund and the bank has nothing to do with the said cheque. It is not correct as contended by Mr. Ngafumika that, by endorsing on a cheque, the bank is presumed to have satisfied itself with requisite ingredients contained in the cheque. I say so because there is clear evidence that before the cheque is processed for payment must be endorsed by the account holder and fill the deposit slip and all details must be filled in the cheque, thereafter the drawer has to send the cheque to the customer service department, who after receiving the same they check in the system on the genuineness of the cheque. After satisfying themselves that, the cheque is genuine, they have to sign it in a duplicate and gave the depositor a copy of deposit slip. Thereafter they discharge the customer. After that, the banking officer has to register the cheque in the cheque book then the same is sent to the Manager Administration for approval and for authorization, it is at this stage the Manager of Administration has to check whether the Drawer's A/C has a sufficient 15 | P a g e amount to effect the transfer process, at this stage it is when the cheque can be honored or dishonored. This was well explained by DW1 in her evidence, the evidence which was not controverted. I agree with the counsel for the appellant that, it is not a duty of the Bank to satisfy itself on the amount of fund available in the Drawer's account after receiving the cheque, rather it is the duty of drawer of the cheque to make sure that his A/C has sufficient balance for his Cheque to be honoured and not the Bank. It is my considered opinion that, by a mere depositing the cheque does not mean that, the drawer's account has sufficient fund. The appellant was therefore correct to return the cheque after found that the Drawer's account has insufficient funds and the drawer's was informed through his mobile phone. For that, reason it is my considered opinion that, the trial court misdirected itself to hold that, the cheque deposit slip guaranteed that fund was deposited into the client's account. Thus,

grounds of appeal No. 1, 2 and 6 have merit. With regard to ground No. 3 the complaint is that, the trial court erred in holding that by signing and stamping on the cheque deposit slip, the appellant was negligent as owed the duty of care towards the respondent. This ground of appeal need not to detain me here, as I have already demonstrated herein above that, a mere fact that the cheque is signed and stamped by the bank it does not mean that, the same is matured, it is just a step ahead in processing the same. It is just a stage showing that, the Bank has received it and thereafter other steps follows. It was a drawer's duty to make sure that, his A/C has sufficient amount to 16 | P a g e pay the intended payee the amount indicated in the cheque before even issuing the cheque. For that reason the appellant cannot be condemned to be negligent, this ground has merit too. As to grounds No. 4 and 5, the complaint is that, the trial court erred for failure to analyze the evidence of the appellant's witnesses and consider its value. This ground of appeal has merit. Upon going through the evidence tendered by the appellant's witnesses specifically the General Terms and Conditions for operating CRDB Bank PLC, "Exh D3" and the fact that the respondent agreed to have signed it when opening A/C. Clause 1

- (d) of the Terms and Conditions binds the respondent as bank customer. The same read as follows:- "Reservations on Deposits; Any deposit made in the customer's account other cash payments will be credited to the account subject to the receipt of the amount by CRDB Bank Pic. This also applies to deposits made by cheques drawn on other accounts with CRDB Bank Pic including accounts with other Banks paying the cheque. The reservation applies even if it has not been stated on the receipt or credit advice" 17 | P a g e Basing on the clause reproduced above, as I have said binds the respondent as a customer. Had the trial court considered it, would have come to a different decision because the drawer's account had no sufficient amount for the bank to deposit the said cash to the payee. The cash is credited where there is sufficient amount in the account holder. This ground has merit too. With regard to ground No.7 the complaint is that, the trial court erred in awarding and assessing the general damages to the respondent. Mr. Mboneke submitted that, general damages are awarded at the discretion of the court but the court must consider and deliberate on the available evidence to justify the award and assessment. In the case of Antony Ngoo and Another versus Kitinda Kimaro, Civil Appeal No. 25 of 2014 (unreported) the court held that:- "77?e law is settled that general damages are awarded by the trialJudge after consideration and deliberation on the evidence able to Justify the award. The judge has discretion in the ward of general damages. However, the Judge must assign a reason which was not done In this case" In the instant case Mr. Mboneke submitted that, the respondent in his evidence from page 13 to 18 of the proceedings of the trial court did 18 | P a g e not lead sufficient evidence to justify the award of general damages. It is the trial court which without any basis decided to award the respondent TZS 10,000,000/= contrary to the principles of awarding general damages. Upon reading the trial court judgment, I have found that, there is no reason given by the trial magistrate for awarding the respondent with the sum of TZS, 10,000,000/= as general damages. This ground also has merit. Going to ground of appeal No. 8, the complaint is that, the trial court lacked pecuniary jurisdiction to entertain this matter

as the same was within the pecuniary jurisdiction of the primary court, due the amount involved that is TZS. 20,000,000/=. Mr Mboneke referred to section 18 (l)(ii) of the Magistrate Court Act. Mr. Ngafumika on his side submitted that, the case between the parties was specifically commercial case thus according to section 40 (3) of The Magistrate Act, the District Court has jurisdiction. I have read the provisions of the MCA cited by the learned counsel, I agree with Mr. Ngafumika that, as the case between the parties is a commercial case, the trial court had pecuniary jurisdiction to entertain the same and not the primary court as contended by Mr. Mboneke thus, this ground has no merit. Having discussed as herein above it is my considered view, save for ground No. 8 this appeal has merit, the same is allowed with costs. 19 I P a g e It is so ordered. DATED at IRINGA this 23rd day of November, 2021. JUDGE. 23/11/2021 20 | P a g e Date: 23/11/2021 Coram: Hon. S. R. Ding'ohi - DR Applicant: Watson Peter Kimbe for Advocate Mugishe Mboneko. Respondent: Absent C/ C: Grace Mr. Kimbe: The appeal is for judgment today. COURT: Judgment delivered this 23rd day of November, 2021. 21 | P a g e

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