

-REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. E191 OF 2022

SAFARICOM PLC APPELLANT

-VERSUS-

RONALD WILSON KAFWA RESPONDENT
(Being an appeal from the judgment and decree of Hon. VELNIAH MOCHACHE (RM) in SCCC No. E028 of 2022 delivered on 14/3/2022)

JUDGMENT

- 1) The respondent RONALD WILSON KAFWA filed a statement of claim against the appellant SAFARICOM PLC seeking a refund of ksh.751,680 which was withdrawn from the respondent's mpesa account after the respondent lost his mobile phone and took necessary steps to block all the transactions.
- 2) The appellant filed a response to the respondent's statement of claim denying the claim.
- 3) The trial court found that the respondent was liable for the money he lost before making the report i.e ksh.292,812.
- 4) Judgment was entered in favour of the respondent against the appellant for the difference i.e ksh.452,869/= with costs and

interest at court rates from the date of filing suit until payment in full.

5) The appellant appealed against the said judgment and decree on the following grounds;

a. Failing to consider that the impugned transactions were on a third-party platform.

b. Failing to consider material facts pertaining to the M-PESA Customer Terms and Conditions limiting the Appellant's liability.

c. Disregarding material evidence as to the Respondent's culpability and failure to have identification to facilitate assistance from the Appellant.

d. Finding that the Respondent disclosed his PIN yet holding the Appellant responsible for the loss of funds.

6) Both the appellant and the respondent filed written submissions as follows; the appellant submitted that on 10th October 2021 the respondent the owner of phone number

0714912532 reported the loss of his phone and requested the Appellant's call center to block his M-PESA account. However, since the Respondent was subscribed to the Advantage Hybrid Tariff, his request to block the M-PESA account could not be immediately processed, and he was advised to visit the nearest retail center to effect this request.

- 7) Later that day, the Respondent visited the Appellant's retail store on Moi Avenue and as he did not have proof of his identity, he was asked to get this or a police abstract. A total of Kshs. 298,812/- had already been withdrawn at 2:09 p.m. from the Respondent's MPESA account at an Equity Bank ATM before his M-PESA account was suspended. The Respondent presented the police abstract, after which his SIM card was blocked on 10th October 2021, at 2:00 p.m.
- 8) On 11th October 2021, the Respondent requested the unblocking of his SIM card and after a successful verification, additional amounts of Kshs. 116,505/- were withdrawn from his MSHWARI account. On the same day, the Respondent

requested a second SIM card block, and the same was effected after the Appellant verified the Respondent's identity.

- 9) The appellant submitted that the M-PESA statement revealed that a sum of Kshs. 418,331/- was withdrawn from the Respondent's M-SHWARI account. The M-SHWARI Terms and Conditions, state that the Appellant is not responsible for ensuring the security M-SHWARI as this service is provided by NCBA Bank to its customers.
- 10) The appellant contended that it does not jointly or otherwise operate the MSHWARI product or its security protocols, and consequently, it bore no responsibility for third-party products that are linked to its M-PESA service as indicated in its terms and conditions.
- 11) The appellant submitted that as regards MPESA terms and conditions the respondent was responsible for keeping his PIN confidential to ensure that only he could initiate transactions. That the respondent's disclosure of his PIN established as a factual finding by the trial court should have absolved the appellant from liability. The appellant relied on the case of

Cooperative Bank of Kenya v Parsaloi Lasoi [2019] eKLR,

where the court accepted that the terms and conditions constitute a binding contract between the parties and governs their relationship and any disputes arising from it.

- 12) The appellant submitted further that the trial court disregarded the fact that the Respondent's SIM card was not blocked at first instance because he did not have his original identification card when he initially made the request at the Appellant's retail centre. The Appellant acted prudently by requiring a police abstract to verify the Respondent's identity and ownership, and promptly blocked the SIM card once this was provided. The subsequent unblocking and transactions on the Respondent's account were done after further verification of his identity and ownership.
- 13) It was submitted that the theft of the respondent's mobile phone is what led to the compromise of the security of his account, which was in no part occasioned by the Appellant. Due to interference by a third party, losses incurred by the Respondent should not have been attributed to the Appellant.

there was therefore no breach of duty and no damages are attributable to the actions of the appellant.

- 14) The appellant finally submitted that the trial court contradicted itself when it found the respondent liable for sharing his details with a third party and still held the appellant liable. According to the evidence presented, the transactions carried out on the Respondent's account were either conducted by the rightful owner of the SIM card or by someone he authorized to do so.
- 15) The respondent on the contrary submitted that it was the appellant's laxity of and double standards on the security protocols it employed in unblocking the respondent's MPESA account which facilitated the third parties to gain unauthorized access to the respondent's MPESA account and in turn MSHWARI account. that furthermore the cause of action brought before the small claims court was in negligence as opposed to a cause of action for breach of contract.
- 16) It was submitted that nowhere did the Appellant before the trial Court point the Court towards any provision in the M-PESA Customer Terms and Conditions which excluded the Appellant

from liability for breach of its own duty of care. In fact, Clause 14.3 on limitation, as opposed to exclusion, of liability states that the Appellant will not be responsible for any claim unless caused by willful default attributable to the Appellant.

- 17) The respondent argued that the Respondent by the law of negligence promptly discharged his duty of care by reporting to the Appellant when his phone was stolen, and instructed the Appellant to block his telephone line and M-PESA account. By the time he reported the loss of his phone to the Appellant, some Kshs. 298,812.00 had already been lost. that the moment the Appellant personally presented himself physically at the Appellant's Customer Care Centre to report the theft of his phone and instructed the Appellant to block his telephone line and MPESA account, the duty of care shifted to the Appellant to keep the telephone line and M-PESA account blocked until such a time that the Respondent again personally presented himself physically at the Appellant's Customer Care Centre and personally gave instructions to the Appellant to unblock the line and M-PESA account.

- 18) The Appellant breached its duty of care when a fraudulent third party called its customer care representative pretending or purporting to be the Respondent, and the Appellant negligently permitted the unauthorized access without properly ascertaining that the person calling was in fact the Respondent by appearing at its Customer Care Centre physically and presenting the Respondent's original identity card as it did when the Respondent had initially blocked the line.
- 19) The respondent contended that he could only properly be liable for any negligence up to the time in which he reported to the Appellant and gave instructions for the line to be blocked. The Appellant was bound to honour the Respondent's instructions and keep the Respondent's line blocked until such a time that the Respondent, properly identified and verified by the Appellant, gave instructions for the line can be unblocked.
- 20) This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had

the opportunity to see the witnesses. In **Selle -Vs- Associated Motor Boat Co. [1968] EA 123** in the following terms: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that

he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

- 21) The issues for determination in this appeal are as follows;
- i. Whether the trial court failed to consider that the impugned transactions were on a 3rd party platform.**
 - ii. Whether the appellant was responsible for the loss incurred by the respondent.**
 - iii. Whether the respondent was responsible for the loss he incurred.**
 - iv. Who pays the costs of this appeal?**
- 22) On the issue as to whether the trial court failed to consider that the impugned transactions were on a 3rd party platform, I find that involvement of the appellants was indispensable whether there was a 3rd party involved or not.
- 23) The appellant owed the respondent a fiduciary duty of care to act with diligence after the respondent reported the loss of this

telephone and took all the necessary steps to have all the transactions blocked.

- 24) On the issue as to whether the appellant was responsible for the loss incurred by the respondent, I find that the answer is in the affirmative.
- 25) The appellant was in breach of the duty of care owed to the respondent and as a result the respondent lost kshs.452,868/=.
- 26) On the issue as to whether the respondent was responsible for his own loss, I find that the trial court was right in holding that the respondent was responsible only for the loss incurred before he reported to the appellant.
- 27) I find that the respondent took the necessary steps to being the issue to the knowledge of the appellant.
- 28) I find that there is no evidence that the respondent disclosed his pin to 3rd parties or that he was involved in the fraudulent withdrawals.
- 29) I find that it was the duty of the appellant to ensure that the sim card was blocked after the respondent reported the matter.

30) On the issue as to who pays the costs of the appeal, I find that the appellant is responsible for the same.

31) I accordingly dismiss the appeal with costs to the respondent.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 21st day of June, 2023.

.....
A. N. ONGERI
JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent