

**IN THE SUPREME COURT OF ZAMBIA**  
**HOLDEN AT NDOLA**  
(Civil Jurisdiction)

**APPEAL NO. 196/2012**  
**SCZ/8/341/2012**

BETWEEN:

**BERNARD MULENGA**  
AND

**STANDARD CHARTERED BANK**



**APPELLANT**

**RESPONDENT**

**CORAM: Mwanamwambwa, Muyovwe, JJS and LISIMBA, AG.JS**  
On 04<sup>th</sup> June, 2013 and 4<sup>th</sup> July, 2014

*For the Appellant:*  
*For the Respondent:*

*In person.*  
*No Appearance.*

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## **JUDGMENT**

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Mwanamwambwa J, delivered the Judgment of the Court.

**CASES REFERRED TO:**

1. **KHALID MOHAMED V THE ATTORNEY-GENERAL (1982) Z.R. 49**
2. **NKHATA AND FOUR OTHERS V THE ATTORNEY-GENERAL OF ZAMBIA (1966) Z.R. 124**
3. **SELANGOR UNITED RUBBER ESTATES V CRADOCK (A BANKRUPT) AND OTHERS (NO 3) (1968) 2 ALL ER 1073**

This is an appeal against the judgment of the High Court, upholding the Subordinate Court's decision, to dismiss the Appellant's case. The Appellant issued a writ in the Subordinate Court of the first class in Chililabombwe on 12<sup>th</sup> October, 2011, seeking an order to compel the Respondent to release information on the withdrawals for the months of June and July 2009, relating to his Bank Account Number 0150132109900.



The Appellant's case is that his wife and her boyfriend withdrew and stole K50 million from his bank account, using an ATM card. He approached the Respondent in 2009, for Closed Circuit Television (CCTV) footage. The Appellant then disappeared and only reappeared in December, 2010. The Respondent said by then that the CCTV footage was no longer available. It was only kept for a maximum period of three (3) months. The Subordinate Court so found and dismissed his case. He then appealed to the High Court. The High Court dismissed his case and confirmed the Subordinate Court's decision. He now appeals to this court.

The Appellant has advanced two grounds of appeal. The first ground is that the learned Judge misdirected herself by not considering the evidence of the Appellant and holding that the Appellant seemed to be making an application to allow him view the CCTV when the order sought is to compel the Respondent to release information on the withdrawals including ATM withdrawals where CCTV is a factor. The second ground is that the learned Judge misdirected herself by not holding that information on withdrawals made on the Appellant's account held with the Respondent included withdrawals monitored on CCTV.

When we heard this appeal, we gave the Appellant sixty days within which to file written heads of arguments but he failed to do so. There was no appearance from the Respondent,



although the record shows that the Respondent was served with the record of appeal on 2<sup>nd</sup> April, 2013. In the circumstances, we have decided to proceed with our judgment.

We have carefully considered the record of proceedings before the trial court, as well as, the judgment which is subject of this appeal. We have also carefully evaluated the evidence which was adduced by the parties at trial. We will start by giving a summary of that evidence since the Appellant has in the first ground of appeal alleged that the learned Judge did not consider his evidence.

The Appellant called four witnesses. He was the first witness and deposed that on 8<sup>th</sup> June, 2008 he withdrew K5 million from his account and left a balance of K50 million. He then went home to prepare for a trip. At home he discovered that his ATM card was missing. His wife told him that she had not seen it. The Appellant tried to look for it but could not find it. When he suggested blocking it, his wife discouraged him. On 25<sup>th</sup> September, 2009, he went to the bank to deposit a K5 million but found a balance of K4 million plus. The Appellant was surprised because on 8<sup>th</sup> June, 2009 he had left a balance of K50 million. The Respondent told him that some withdrawals using the ATM card were made. He was advised to report to the police so that he would view the video footage



showing the person who was withdrawing the money. A bank statement was also given to him.

The Appellant reported the matter to the Police. He told them that his wife and step son were his first suspects. The nephew to his wife was apprehended and was found with the lost ATM card. At the police station, his wife promised to pay back the money and the Appellant was advised to withdraw the case. He told the court that she never paid back the money. He sued in the High Court and she repaid K23 million. Consequently, the Appellant divorced his wife. Later, his wife wanted to come back to him but he refused and called the police. He told them that the only way to settle the matter was to go to the bank and see the person that was withdrawing the money. He then obtained a court order and went back to the Respondent with the police. The Respondent told him that the video footage was no longer there as it was only kept for a maximum period of three months. The Appellant further testified that it was because of this change of events that led him to bring this action against the Respondent. In cross examination he told the court that the only person he gave the PIN number was his wife.

P.W.2 was Bernadette Chilando Mulenga, the Appellant's wife then. Her testimony was similar to that of the Appellant. She confirmed having discouraged the husband to block the



ATM card. She further testified that her nephew got the money after getting the ATM card from where her husband had dropped it. She also deposed that her nephew got the PIN number from a note book he found in the wardrobe but the husband was suspecting her. She added that her nephew admitted having withdrawn K28 million.

P.W.3 was Dina Mulenga, the Appellant's daughter. Her evidence was similar to Appellant's testimony. She stated that they went to the bank in December 2010 but the ATM card was lost in July 2009.

P.W.4 was Lewis Anthony Ngulube, a police officer from Chililabombwe. His evidence was that in December 2010, he went to the Respondent with a search warrant after getting a report from Appellant. He testified that the bank manager told him that the information had been erased to give room for more information since it had taken long. Further, that information was only stored for three months.

The Respondent called two witnesses. D.W.1 was Pearson Chibuye, the Respondent's operations manager at Chililabombwe. His evidence was that the on 26<sup>th</sup> September, 2009, he gave the Appellant a bank statement from June to September 2009, at his request, after he complained about the money that was withdrawn from his account. The witness



deposed that he advised the Appellant to go to the Police, since this was a criminal case. That the Appellant then went away and only re-appeared at the beginning of December 2010, seeking a video footage concerning his complaint. That the Appellant then came with the police on 6<sup>th</sup> December, 2010. He told them that a video footage is only kept for a maximum period of three months and it was no longer available. He also produced an extract of the Respondent's rules on information.

D.W.2 was Victor Chitoshi Chikafya, the Respondent's Branch Manager, Chililabombwe. His evidence was substantially the same as that of D.W.1, the gist of which was that CCTV had limited space and could only be kept for a maximum period of three months.

The learned trial Magistrate, after evaluating the evidence, wondered why the Appellant had brought these proceedings because his own evidence was that the police apprehended the nephew to his wife and found him with the ATM card. Further, that his wife even promised to reimburse him and a sum of K23 million was repaid after he sued in the High Court. The trial magistrate also found that it was the Appellant's own evidence that he withdrew the case at the Police, after being satisfied that the nephew to his wife got the money. The trial Magistrate held that there was no evidence



to show that the Respondent was deliberately hiding information. She further observed that the Respondent may have refused to disclose information to the Appellant but could not have disobeyed the court order which was issued in December 2010, instructing the police to search the Respondent. She wondered where the Respondent would have then gotten the information the Appellant wanted even if she was to make another order.

When this matter was heard in the High Court, the Appellant told the court that he knew that his wife and her boyfriend withdrew the money. He added that his wife knew the pin number for the ATM card, but did not know how to use it. So, she allowed the boyfriend to withdraw the money.

In rendering its decision, the Court below upheld the judgment of the trial Magistrate. The learned Judge pointed out that the trial Magistrate was on firm ground and even quoted from the judgment of the trial Magistrate. She added that the Appellant had stated when he appeared before her that he knows his wife and the boyfriend got his money. The learned Judge stated that she was in total agreement with the trial Magistrate that the Appellant failed to prove his case against the Respondent and she dismissed the appeal.



Our perusal of the judgment by the learned Judge shows that she considered all the relevant evidence in arriving at her decision. We are only left to wonder as to which evidence the learned Judge allegedly ignored, which the Appellant wanted her to consider. The Appellant should have filed heads of arguments in order to highlight the evidence which was allegedly ignored by the court. He did not file heads of arguments at his own peril. Of course the case record shows that the Appellant talked about many other issues that were immaterial to his case. We wish to advise that the court is not obliged to consider evidence which is irrelevant to a party's case. His evidence was assessed as against that of the Respondent and he needed to prove his case. In the case of **Khalid Mohamed v The Attorney-General**<sup>(1)</sup>, Ngulube, D.C.J., as he then was said:

**"An unqualified proposition that a plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgment. I would not accept proposition that even if a plaintiff's case has collapsed of its inanity or for some reason or other, judgment should nevertheless be given to him on the ground that defence set up by the opponent has also collapsed. Quite clearly a defendant in such circumstances would not even need defence."**

The Appellant in this case should have proved that the Respondent was in possession of the relevant information which it was obliged to release but had unreasonably refused to do so. Instead, his evidence at page 20 of record of appeal



was that he was in fact given a bank statement from 1<sup>st</sup> June to August 2009. The bank statement was produced before court. He was also advised to report the matter to the police so that he would be shown who had withdrawn the money. The Appellant reported the matter but later withdrew the complaint. The evidence further revealed that the Appellant disappeared after approaching the Respondent for the CCTV footage in 2009, and only resurfaced in December, 2010, when the footage was no longer available. On the other hand, the evidence of DW1 and DW2 was that information on CCTV footage was only kept for a maximum period of three months. That CCTV had limited space. On the totality of this evidence, we do not agree with the Appellant that the learned Judge did not consider his evidence.

The Appellant further alleges that the Judge misdirected herself when she held that he seemed to be making an application to allow him view the CCTV, when he sought an order to compel the Respondent to release information on the withdrawals including ATM card withdrawals where CCTV is a factor. The record shows that the relief sought by the Appellant, as initially endorsed on the writ, was for an order to compel the defendant to release information on the withdrawals for the months of June and July, 2009, relating to account number 0150132109900. In our view, information on bank account withdrawals is primarily seen through bank



statements, although it may also be seen on CCTV footage, when available. In this case, bank statements were availed to the Appellant and were even produced in court. The CCTV footage was no longer available. However, on appeal to the High Court, the Appellant no longer wanted information in the general sense as initially claimed, instead he only wanted to watch the CCTV footage. This can be seen at pages 32 to 33 of the record of appeal. We cannot, therefore, fault the learned Judge for holding that the Appellant seemed to be making an application to allow him view the CCTV footage yet the matter was before her on appeal. An Appellate Court cannot easily disturb the findings of fact made by a trial court. The factors which are considered were laid down in the case of **Nkhata and Four Others v The Attorney-General of Zambia**<sup>(2)</sup>, where it was held that:

**“A trial Judge sitting alone without a jury can only be reversed on facts when it is positively demonstrated to the Appellate Court that:**

- (a) by reason of some non-direction or mis-direction or otherwise the Judge erred in accepting the evidence which he did accept; or**
- (b) in assessing and evaluating the evidence the Judge has taken into account some matter which he ought not to have taken into account, or failed to take into account some matter which he ought to have taken into account; or**
- (c) it unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the Judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or**
- (d) in so far as the Judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he accepted it is not credible, as for instance,**



**where those witnesses have on some collateral matter deliberately given an untrue answer.”**

The Appellant has not shown that any of these conditions obtain in this case. Accordingly, we cannot disturb any of the findings of fact made by the trial court or the learned Judge in the Court below. There is no merit in ground one. Therefore, it fails.

We now turn to ground two. As stated above, the evidence before the court below was that the CCTV footage which the Appellant wanted was no longer available. Although information on withdrawals can generally also be seen through CCTV footage, the learned Judge could not have found in this case, that the information on withdrawals relating to the Appellant's account included the CCTV footage because it was no longer there. This notwithstanding, the Respondent is reminded to exercise reasonable care and skill in keeping information on customers' accounts, where there are impending queries. In cases like this one, we are of the view that a banker should endeavour to store relevant information for a reasonably longer period. In discussing the banker's duty to exercise reasonable care and skill, Ungood-Thomas J in the case of **Selangor United Rubber Estates v Cradock (a bankrupt) and Others (No. 3)**<sup>(3)</sup>, stated as follows:

**“To my mind, in accordance with those quotations, a bank has a duty under its contract with its customer to exercise “reasonable care and skill” in carrying out its part with**



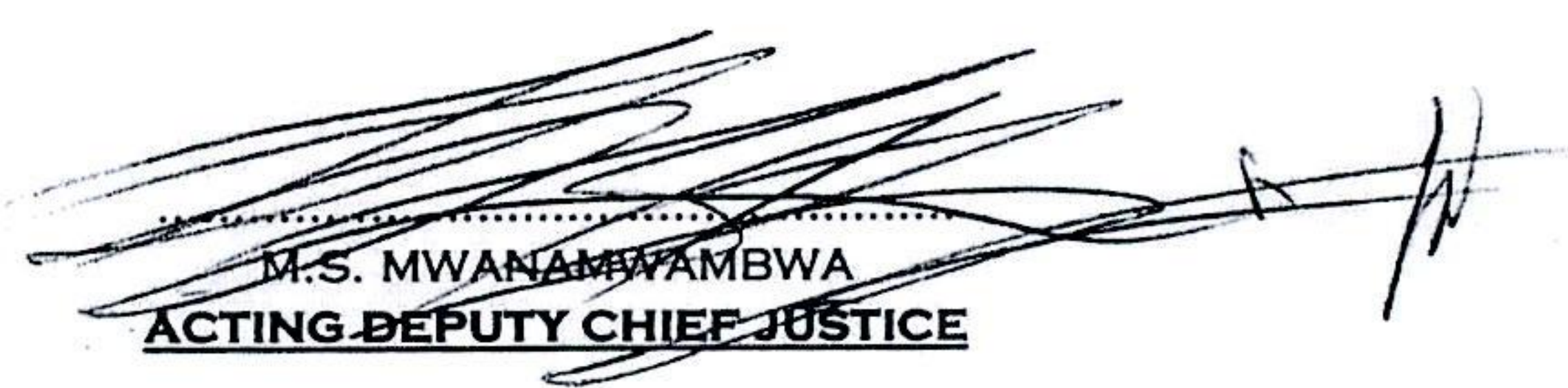
regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely. The relevant considerations include the prima facie assumption that men are honest, the practice of bankers, the very limited time in which banks have to decide what course to take with regard to a cheque presented for payment without risking liability for delay, and the extent to which an operation is unusual or out of the ordinary course of business."

On the facts of this case, we also decline to make an order for the release of information which does not exist anymore. The law does not allow courts to make orders which cannot be enforced. We find no merit in ground two. It is hereby dismissed.

We must add that this appeal is totally frivolous. We say so because the Appellant told the learned Judge in the court below, at page 33 of the record of appeal, that he knows that his wife and her boyfriend stole his money. We, therefore, do not see any logic in the Appellant's frantic efforts to view the CCTV footage which is no longer there. For the foregoing reasons, we hereby dismiss this appeal in its entirety. We order that the parties should bear their respective costs.



**-J13-**



**M.S. MWANAMBWA**  
**ACTING DEPUTY CHIEF JUSTICE**



**E.C. MUYOVWE**  
**SUPREME COURT JUDGE**



**M. LISIMBA**  
**ACTING SUPREME COURT JUDGE**