

A Review of the Court of Appeal's Decision in Moses G. Jwan v. Ecobank Plc & United Bank for Africa Plc CA/J/132/2019; (2021) 10 NWLR (PT 1785) 449; (2020) LPELR-55243(CA)

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ABSTRACT

This paper is a review of the Court of Appeal's decision where it held that banks owe their customers a duty of care which extends to the responsibility of ensuring that a customer is paid cash whether he makes a withdrawal request whether through the use of a cheque or an automated teller machine (ATM) provided that there are sufficient funds in the customer's account. It is a decision that hopefully would bring to the awareness of Nigerian banks that customers are owed a duty of care and failure to discharge that duty is negligence on their part. This is necessary especially as it has become common sight to find a long queue of customers waiting to file one complaint or the other at the customer service section of almost every bank in Nigeria.

Keywords: ATM, banker-customer relationship, duty of care, negligence.

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I. INTRODUCTION

“Temporarily unable to dispense cash,” “User’s service provider is unavailable,” “No service”: these are common captions that the average Nigerian that regularly uses the Bank Automated Teller Machines (ATM) has seen at least once since 1989 when ATM was introduced into the Nigerian banking system. The defunct Societe Generale Bank of Nigeria (SGBN) installed the first ATM in Nigeria. Although the ATM was introduced in 1989, it was not in regular use by Nigerian bank customers until almost two decades later. (Odusina, 2014). The ATM was introduced to ease the stress of having to go into the banking hall to make cash withdrawal requests as a lot more transactions can be done on the ATM including airtime recharge, money transfers, payment for electricity bills, etc., but the most common transaction done on ATMs in Nigeria is cash withdrawal. Whereas it is beneficial to bank customers, it also reduces the workload on the bank staff that regularly have to process withdrawal transactions for hundreds of customers in a day. It also reduces the risk of errors that the bank cashiers are likely to make in dispensing cash to requesting customers; this is unexpected as they are humans, and every human is likely to make mistakes at some point or the other. There have been numerous occasions where the cashiers overpay and sometimes underpay the customers, who have now learned to recount the money paid at the bank counter before they leave to be sure that they received the exact amount of money requested for. The ATM is different as it is accurate in dispensing the exact amount of cash requested. Despite all of these good points occasioned by the introduction of the ATM withdrawal system, there have been several complaints ranging from the inability to dispense cash to the inability of the customers of Bank A to use the machines of Bank B. Sometimes, it gets so bad that after inserting the ATM cards into the machines, the customer would be unable to retrieve his card unless he goes into the banking hall to make a complaint. All of these complaints defeat the purpose of ease which the ATM was supposed to introduce as the customers are eventually forced to go into the banking hall or look for another ATM machine nearby where he may still encounter the same complaint. These are pressing issues that many have complained about, but no one has thought about filing a legal suit against the banks for their failure to uphold the duty of care until the instant case under review was filed by Moses Jwan.

What began as a normal and quick trip to the ATM, possibly with other destinations for the day resulted in court litigation and an appeal which is probably the first of its kind in the Nigerian judicial system. The Court of Appeal's decision has stirred up awareness and arguments among bank customers since the judgment was read, especially when the Court held that “The ATM card issued by a bank being akin to a cheque, must be honored on request once there is enough funds in the customer's account, and

failure to do that means the bank is in breach of the duty of care owed to its customer” (Jwan v. Ecobank & anor).

Since the Court of Appeal held that an ATM card could be likened to a cheque and demands as much attendance from bank officials as they would to a cheque withdrawal, there have been several speculations as to the likely legal battles that may ensue in the nearest future between Nigerian banks and their customers. Whereas many have taken this to mean that ATM withdrawal requests must always be honored as long as the customer has the requested amount in his account, some others have debated the duty of care banks owe their customers and whether negligence can be inferred at any point an ATM withdrawal transaction fails. In considering whether or not the tort of negligence can be inferred, one has to examine the facts of the case and check if the ingredients of negligence are present.

II. FACTS OF THE CASE

The appellant was a customer of the 1st respondent, Ecobank Nigeria Plc and attempted to withdraw the sum of ₦10,000 using the ATM card issued by the 1st respondent on an ATM of the 2nd respondent, United Bank for Africa Plc. There were sounds from the ATM indicating that money was being counted but no cash was dispensed. However, the machine read that the transaction was successful. Following a debit of his account, the appellant filed a complaint with the officers of both respondents. The 1st respondent informed him that its records showed that the cash was dispensed and that he received the money during the transaction. He pursued the complaint for a long time and incurred a lot of expenses in the process. When it was obvious that the respondents were unwilling to refund the money, the appellant filed a suit of negligence against the respondents at the Plateau State High Court of Justice claiming the following reliefs:

- 1) The sum of Ten Thousand Naira (₦10,000) being the amount debited from his account with the 1st defendant and for which the 2nd defendant surcharged him.
- 2) Special damages of One Hundred Thousand and Twenty Naira (₦100,020.00) on being the amount expended by the plaintiff in pursuit of his claim from the defendants shown above.
- 3) The sum of Five Hundred Thousand Naira (₦500,000) against the defendants jointly and severally as general damages for negligence (Jwan v. Ecobank & anor)

The general rule in negligence is that the burden of proof rests on the plaintiff. However, the plaintiff claimed *res ipsa loquitur* (the facts speak for themselves) arguing that the fact that he did not receive the cash payment from any of the respondents and was debited by the 1st respondent showed that there was negligence on the part of the respondents to exercise duty of care. In its judgment on 22nd November 2018, the trial judge, Hon. Justice I.I Kunda held that the appellant had not successfully discharged the burden of proof of negligence and so dismissed the case. Aggrieved at the High Court’s judgment, the appellant filed an appeal at the Court of Appeal, Jos judicial division. The appeal was heard by Adzira Gana Mshelia JCA; Tani Yusuf Hassan, JCA and Balkisu Bello Aliyu, JCA, who read the leading judgment. Judgment was delivered on Monday, March 23, 2020, where the Court of Appeal unanimously held that the appeal had merit and went ahead to set aside the judgment of the High Court. All of the appellant’s reliefs were granted jointly against the respondents in addition to a cost of fifty thousand Naira (₦50,000) against the respondents jointly.

III. CASE REVIEW

At the Court of Appeal, the appellant filed three issues of appeal which the court adopted as its guide in the determination of the appeal. The issues are as follows:

- 1) Whether the learned trial Judge was right in admitting Exhibit 19 and in giving probative value. (Grounds 1, 2, 3 and 4).
- 2) Whether the learned trial Judge was right in holding that in the circumstances the case, the doctrine of *res ipsa loquitur* was inapplicable and in placing the burden of proof in the case on the appellant. (Grounds 5, 6 and 7).
- 3) Whether the learned trial Judge was right when he held that the respondents were not negligent and in dismissing the appellant’s claims. (Grounds 8, 9, 10 and 11) (Jwan v. Ecobank & anor).

The first issue was based on the admission of documentary evidence by the trial judge. Exhibit 19 that was referred to be a copy of a banker’s journal which was faded and was presented by one of the respondents’ witnesses in court. The witness’ testimony was that the original got lost during a system upgrade and that although faded, the copy was legible. The appellant contended that not only was the exhibit a photocopy instead of an original, but it was also faded and not legible. As the trial court rightly held, whether or not the document is an original, Section 83(1) of the Evidence Act permits the admission of a document if it is found to be relevant to the case.

Section 83(1) of the Evidence Act 2011 states as follows:

In any proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document which seems to establish that fact shall, on the production of the original document, be admissible evidence of that fact if the following conditions are satisfied:

(A) *If the maker of the statement either:*

- 1) Had personal knowledge of the matters dealt with by the statement; or
- 2) Where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with by it are not within his personal knowledge) in the performance of a duty to record the information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

(B) *If the maker of the statement is called as a witness in the proceeding...*

The admission of the document is only because it is relevant to the case; it does not mean that the court should attach probative value to it when reading its judgement. In addition to this, Section 89(h) of the Evidence Act allows the admission of secondary evidence, which is any document that is not in its original form, provided it is an entry in a banker's book and it has been "examined with the original entry and is correct, which proof must be given by some person who has examined the copy with the original entry" (Section 90(1)(e)(i) to (4), Evidence Act 2011). The Court of Appeal held that the trial court was right in admitting the banker's journal in evidence because it was relevant to the main issue of the case. The main issue was whether or not the appellant was debited and paid N10,000. The Court of Appeal further held that its admissibility did not mean automatic proof of its contents. The proof of what the document contains would be determined alongside oral evidence given. The banker's journal was said to be faint and unreadable, however, the respondent's witness was able to read same in court. It was the observation of the court of appeal that the respondent's witness testified that the document had "faded away." The dictionary meaning of the word "fade" means that whatever was on the document was no longer visible and readable to the human eyes. Interestingly, the trial court did not consider the contrast in the oral evidence and the strange ability of respondent's witness to read from the faded document in court. Based on this, the court of appeal held that such a document cannot be accorded probative value and, in its words, "is a worthless piece of paper" (*Jwan v. Ecobank & anor* at 46) which was thereafter expunged from the records of appeal. Hence, the first issue was resolved in favour of the appellant.

The Court of Appeal considered issues two and three as one and the same and so resolved them together. The crux of both issues was whether the appellant successfully proved the case of negligence by citing *res ipsa loquitur*. In law, the general rule is that the onus of proving that a party was negligent rests on the plaintiff (White, 1938) and until he discharges that burden, the defendant cannot be found liable for the tort of negligence. However, to every law there is an exception. In proving the tort of negligence, the exception is that where it would be impossible to find direct evidence linking the defendant's act with the resultant damage, the doctrine of *res ipsa loquitur* can infer the presence of negligence (Thronton, 2002). The ATM cannot be blamed neither can it be taken to court to enforce a refund of the debited money and although none of the respondents' officials had direct contact with the appellant at the time of the transaction, the respondents were still connected to the failed transaction. In such a case, the appellant was right to have stated before the court that the fact speaks for itself. If there was a debit, as the respondents' witnesses acknowledged but the appellant received no cash, there was no need to go to further length to prove a case of negligence. The fact of account debit with no cash speaks for itself. In such a situation, the appellant had discharged the burden of proof.

The respondents insisted that from their records, the appellant had been paid the money requested from the ATM, but the appellant insisted otherwise. It is not within the capacity of the appellant to explain how his account was debited without him receiving the cash. What the respondents could have done which would have laid the matter to rest was to present image or video evidence showing the moment the appellant made use of the ATM. That evidence would have shown whether or not the ATM dispensed the money. This evidence, under normal circumstances should be in the possession of the 2nd respondent but it claimed not to have it. It is very likely that the image or video evidence, if it existed, had been assessed and it had been determined that the appellant's claim was true, but the 2nd respondent decided against presenting it as evidence in court because that would have been enough to determine the case in favour of the appellant.

Another crucial point to note in negligence is the duty of care one party owes another as well as the connection between that duty and the damage the plaintiff claimed to have suffered. The Supreme Court has in an earlier case explained that in a banker-customer relationship, there is a duty of care owed the customer by the bank. In *U.B.N. Plc v. Chimaeze*, the Supreme Court held that "...the appellant is a fiduciary to the respondent. It owes the respondent a duty exercises a high standard of care in managing the respondent's money. Therefore, for dishonouring his cheque when his account was in credit to accommodate the amount on the cheque, the appellant had breached the fiduciary relationship between them, to which the respondent was entitled to compensation by way of damages" (Per Ariwoola, JSC in

Jwan v. Ecobank & anor at 40–41). It was based on this decision that the Court of Appeal held that “The ATM card issued by a bank being akin to a cheque, must be honoured on request once there are enough funds in the customer’s account, and failure to do that means the bank is in breach of the duty of care owed to its customer” (Jwan v. Ecobank & anor at 54). The ATM card is the “cheque” of almost every Nigerian banker and since the Court of Appeal has held that the ATM card must be accorded as much honour as a cheque, what is left to be determined is whether the appellant successfully proved that the respondents were negligent in discharging the duty of care. In discharging this duty of care, banks have the responsibility to maintain their ATMs and ensure that mechanical faults that could result in failed transactions are minimised as much as possible. Any time there is a failed transaction, the bank has breached its duty of care and is thus liable for whatever damage that may result therefrom. The second issue was also resolved in favour of the appellant.

One may be quick to argue that in any case, there cannot be a case of negligence against the 2nd respondent and that the 2nd respondent owed the appellant no duty of care because there is no banker-customer relationship between them. At first glance, that may be true; however, the case of negligence could be argued against both banks. Although, the appellant was the customer of the 1st respondent, he had a customer relationship with the 2nd respondent because it was on the 2nd respondent’s ATM that the disputed transaction occurred, and it was the 2nd respondent who charged him and would be a beneficiary of the N100 service charge for use of its ATM.

IV. AN ACT OF NEGLIGENCE OR ACCIDENT?

The act of negligence simply refers to the failure of a person who has the responsibility or duty to take care of another, to do so, thereby causing unintentional harm to the other party (Dias, 1955; Raz, 2010). The duty of care is not restricted to physical care; it extends to any and every area of human interaction and may be activated as soon as there is some form of relationship between the parties involved.

There are four ingredients necessary to prove the tort of negligence. The plaintiff must prove that:

- 1) The defendant owed him a duty of care.
- 2) The defendant breached that duty.
- 3) The breach of that duty resulted in and did in fact cause the damage or harm the plaintiff complains of; and
- 4) He suffered damage or harm from the breach of duty. (Owen, 2007; Scholle Law).

It is not enough for a plaintiff to claim that he suffered damage as a result of the defendant’s action. If he must prove the tort of negligence, he must show that there is a relationship between the breach of the defendant’s duty of care and the damage he suffered. If this condition is not fulfilled, then the careless action of the defendant would be declared no more than an accident. Accidents and negligence are quite similar. Both are caused by an action of the defendant and both result in damage suffered by the plaintiff. The thin line of division between accident and negligence is the duty of care inherent in one of the parties. The legal duty of care was established in the landmark case of *Donoghue v. Stevenson* where Lord Atkins held that:

The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour... Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

Can the appellant be considered a neighbour of the respondent in the instant case? The answer is in the affirmative because by whatever act or omission the bank does, whether in the banking hall or with its ATMs, the appellant and other customers are going to be affected either positively or otherwise. In the instant case, the respondents owed the appellant a duty to provide him money whenever he requested as long as he had the requested money in his account. At the time the appellant attempted to withdraw money from the ATM, was debited but could not get the cash requested for, the respondents had breached the duty of care owed the appellant. The 1st respondent breached this duty by debiting the appellant’s account without ensuring a reversal of the funds as was expected. The 2nd respondent breached this duty by not providing the services requested for but still deducting the service charge of N100. The 2nd respondent had the responsibility to ensure that the ATMs on its premises were functional and in good use. Its failure to do so resulted in the inability of the machine to dispense the requested cash even after debiting the appellant’s account.

The entirety of the respondents’ argument was that by their records, the appellant was debited and paid. To them, their duty to the appellant had been discharged and there was no argument sufficient enough to dispute their computer records of the appellant’s statement of account and bank journal. Perhaps, if their

line of defense had been that it was an accident which occurred from time to time (as one of the respondents' witnesses testified at trial that it was not uncommon for a customer's account to be debited without being paid and that sometimes, the transaction would not be reversed until the customer filed a complaint at the bank), the respondents could have had judgment in their favor. As great as this line of defense may have been, could the respondents' argument that the problem was caused solely by the mechanical fault of the ATM have sufficed? Could it have exempted them from the burden of the duty of care owed to the appellant as their customer? The answer is most likely no. Even if it was a mechanical fault, the 2nd respondent had the responsibility to ensure that its ATMs were in good condition and the 1st respondent had the responsibility to follow up the appellant's complaint by reaching out to the 2nd respondent to compare records of the transaction for that day. None of the respondents discharged this duty but rather chose to insist that the appellant had been paid even when they knew that such failed transactions occurred regularly. Without a doubt, it was a case of negligence and not an accident.

V. CONCLUSION AND RECOMMENDATION

The appellant had apparently been denied justice at the High Court; fortunately, the Court of Appeal reviewed the judgment and did justice. It is the authors' belief that the trial court erred when it gave probative value to the faded banker's journal. If it had faded, it would have been impossible for the witness to read it in court. It is then possible that the witness had been reading whatever he decided out of his imagination. Fortunately, the Court of Appeal corrected this error and saved the appellant a grave injustice that would likely have occurred should the banker's journal have been considered in determining the appeal. Also, it is important to note that the Court of Appeal has established that banks owe their customers a duty of care for withdrawal services rendered. This duty of care may not be restricted to cheques and ATMs but may also include transfer transactions on bank mobile apps. This is also another menace in the services of the Nigerian bank industry. Inter-bank transfer transactions could be made and would be successful whereas the transaction was not completed. It would take hours, sometimes days before the failed transaction is reversed. For many, the reversal would only be done if a formal complaint is filed with the bank. This brings the question: why then do customers have the mobile app designed to be used in the comfort of their homes if they still have to visit the banks to correct transaction errors? It is the responsibility of the banks to ensure that all services offered -banking hall services, ATM services, mobile app services and internet banking services- are functioning and in good working order.

Although Moses Jwan, the appellant, succeeded in claiming reliefs against the respondents, whatever relief he got has definitely been affected by the inflation and double periods of recession that Nigeria has recorded since the case was initially filed in 2012 (World Bank, 2020). He had definitely incurred more expenses, including legal fees, since the filing of the case which the reliefs granted would not cover. The implication of this is that although he emerged victorious in proving a case of negligence against the banks, he incurred much more loss in the process. Tens of Nigerian bank customers experience cases of bank negligence everyday but not all complaints yield results. Many like Jwan's case would have to seek the court's intervention before they are accorded the duty of care that they deserve as customers. Unfortunately, not many Nigerians have the capacity and wherewithal to institute an action against defaulting banks. Many would have to resort to daily trips to the banks and writing several letters hoping that the error would be detected and reversed. This should not be the case.

Although the decision in the Jwan case has emphasized the bank's duty of care, it is not likely that there would be a change in the negligent attitude that banks exhibit in their bank-customer relationship. The Central Bank of Nigeria as the regulatory body of the banking sector may have to set up a complaint platform where unsatisfied customers can file their complaints if they are not getting the desired response from the banks.

CONFLICT OF INTEREST

Authors declare that they do not have any conflict of interest.

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