**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY**
**IN THE ABUJA JUDICIAL DIVISION**
**HOLDEN AT APO**
**CLERK: CHARITY**
**COURT NO. 16**
**SUIT NO: FCT/HC/CV/432/12**
**DATE: 30/06/2020**

**BETWEEN**

**MAZI UKOHA SOLOMON J. OJUKWU ……. PLAINTIFF**

**AND**

**ACCESS BANK PLC …… DEFENDANT**

**JUDGMENT**

**(DELIVERED BY HON. JUSTICE S. B. BELGORE)**

The Plaintiff by the name Mazi Ukoha Solomon J. Ojukwu has dragged the Defendant, Access Bank Plc, to this Court claiming the following reliefs vide a Statement of Claim dated 15th October, 2012;

1. Immediate payment of the sum of N6,300,000 (Six Million, Three Hundred Thousand Naira) withdrawn from the Plaintiff's Bank account number 0168001000225044 now account number 0039274014 without his authorization back to him.

2. The sum of N10,000,000 (Ten Million Naira) as general damages; or

IN THE ALTERNATIVE

3. The sum of N10,000,000 (Ten Million Naira) as exemplary damages.

4. Cost of this action.

5. 10% interest from the date of judgment until the final liquidation of the money.

In proof of the above claim, the Plaintiff testified for himself and called one additional witness. They both testified as PW1 and PW2 respectively. Exhibits A1 – A6 and B were tendered in Evidence in support of the Plaintiff's case.

Exhibit A1 – the Statement of account of the Plaintiff with the Defendant.

Exhibit A2 – MTN call log relating to Plaintiff's various calls.

Exhibit A3 – Plaintiff's Cheque book.

Exhibit A4 – Plaintiff's lawyer's Letter of Demand to the Defendant dated 1st November, 2011.

Exhibit A5 – Defendant's reply letter to the Plaintiff's lawyer.

Exhibit A6 – another letter from the Defendant to the Plaintiff's lawyer dated 24th November, 2011.

Exhibit B – Police Investigation Report.

Upon service of the writ of summons and statement of claim on the Defendant, they filed a Statement of Defence.

The plaintiff in reaction or in consequence also filed a reply to the statement of defence of the Defendant. It is dated 2-12-2014 but filed on 24-2-14. He also filed another written Statement on Oath.

The Defendant also amended the witness Statement on Oath dated 23-5-2016. It was the Statement on Oath of one Rasaq Abiodun Adetuyi, the sole witness for the Defendant in this case. Exhibit C and D were tendered in Evidence through him.

Exhibit C – the Mandate Form wherein the specimen signature of the Plaintiff is inscribed.

Exhibit D – a photocopy of the cheque used in withdrawing a sum of Two Million Naira (N2,000,000) only.

With the testimony of DW1 – Mr Rasaq Biodun Adetuyi – the Defendant closed their case.

## REVIEW OF EVIDENCE

PW1 (1st Prosecution Witness) was Solomon James Ojukwu. He swore with the Bible to speak the truth and lives in Zone 1, Wuse Abuja. He is a retired civil servant. A customer of the Defendant Bank, this PW1 adopted his previously filed Statement on Oath as his Evidence. Like I said earlier, Exhibit A1 – A6 were admitted in Evidence through him on 17 – 6 – 13 when his Examination-in-Chief was taken.

PW1 was cross-examined by the learned counsel to the Defendant and two different dates – first on 16 – 6 -14 and 16 - 2 – 15.Under cross-examination, this witness said; *interalia*;

> *"At the end of investigation, my son was recommended for prosecution"*
>
> *"the call log I tendered in this case is not prepared by me. I don't work with MTN. I am not in a position to explain anything contained in the log"*
>
> *"I did not write to the Bank that no cheque should be honoured if not written in capital letters."*

> *"I gave instruction that whenever I issue a cheque, the Bank must get back to me for confirmation. It was a written instruction. I did not give instruction as to the amount."*

There was no re-examination on this 16 – 2 – 15 when the cross-examination was concluded.

Following a motion on notice filed by the plaintiff's counsel, and which was argued and granted on 1 – 12 – 16. PW1 was re-called to the witness box on 14-2-17. Another Statement on Oath of this PW1 was filed in support of the Plaintiff's reply to the Statement of Defence. The witness (PW1) adopted it as his further testimony in this case. The PW1 on recall could not finish his Evidence on that 14 – 2 – 17 and we adjourned to 29 – 3 – 17. On that 29 – 3 – 17, the PW1 concluded his second time Evidence-in-chief and Exhibit B – the Police Report I referred to earlier was tendered through him. He (PW1) was cross examined that day. Part of answers to some questions asked reads:

> *"I used to write my cheque myself. I do follow the cheque book serially. The illegal withdrawals were done during the period my telephone was not working. During that period I made personal withdrawal."*

On the issue of police investigation, this is what he said:

> *"I am not a Policeman. I did not partake in the investigation of this matter. So, I don't know how the police arrived at their findings. The police recommended my son for prosecution."*

There was no re-examination.

Before PW1, was re-called for further evidence, PW2 had given evidence.

PW2 was one Ugochukwu Ojukwu and is the Plaintiff's son. He testified on affirmation and lives at Kaolack Street, Zone 1 Wuse, Abuja. He also adopted his Statement on Oath as his evidence.

Under cross-examination, he said;

> *"My relationship with my father is cordial. I can't go to my father's room unless he calls me. I don't know where my father keeps his cheques. I have not been charged to court for anything. But the police recommended me for prosecution."*

The Plaintiff closed his case with the end of the PW1 testimony on recall on 29 – 3 – 17.

We adjourned to 24 – 5 – 17 for defence to begin. But on that day, the Defendant's witness was not in court. So, we adjourned again to 13 – 7 – 17. By this 13 – 7 – 17, the court had proceeded on annual vacation.

We reconvened in court on 5 – 10 – 17 for the Defendant to enter their Defence. On that day the sole witness of the Defendant testified. He is Rasaq Abiodun Atuyi of Ubiaja Crescent, Garki, Abuja. The witness said under affirmation to speak the truth adopted his witness statement on Oath as his evidence. Exhibits C and D were admitted in Evidence through him.

Under cross-examination, DW1 said:

> *"I am not a friend of Prince Abdulkadir Suleiman. I don't know him. I don't have anything about him in the record. I have been working as a Banker for 9 years. I never met the Plaintiff before this case. I never met Ugochukwu Ojukwu before this case. I have never seen the Plaintiff's account officer in the Defendant's Bank…"*

Probing further by the Plaintiff's Counsel, DW1 said:

> *"I don't have record of oral discussion on Plaintiff's account… I do not have the Plaintiff's phone number. I have never called him on his line before. The withdrawals were three. We were unable to retrieve all the cheques except Exhibit D. The signature on Exhibit D is very clear."*

Mr. Adetuyi further told the Court that one Mr. Daniel was a staff of the Bank before he joined the Bank. He said it is on record that it was the Mr. Daniel that reported the issue to the Police.

When asked about the meaning of 'Regiscope", Mr. Adetuyi defined it as taking picture of a 3rd party withdrawal. He, however added that there was no record of it (Regiscope) being used by Intercontinental Bank Plc at the time of occurrence of the alleged unauthorised withdrawal. This is moreso that there is no law or regulation on 'Regiscope'.

Furthermore, and still under cross-examination, this Banker/Witness said;

> *"I have seen Exhibit C. The account is not a joint account. The Bank has no obligation to alert a customer on his account withdrawal but they do have a security measure."*

Finally, this witness confirms that the signature of the Plaintiff as appeared in Exhibit C and D shown to him are the same.

There was no re-examination and the defence was then closed. That was on 5 – 10 – 17 and we adjourned for address and fixed 18 – 1 – 18.

Counsel for the two parties delayed in filing their respective written addresses.

On 18-1-18, Defendant's Counsel told the Court his address was not ready. He asked for an adjournment to enable him prepare same.

The Plaintiff's Counsel had no objection to the Application and we adjourned the case to 22 – 2 – 18.

On 22 – 2 – 18, the Defendant's Counsel brought a Motion on Notice number M/2208/18 for extension of time within which to file their final address. Plaintiff's Counsel did not object and we adjourned to 1 – 3 – 18.

On 1 – 3 – 18, the Defendant's Counsel informed the Court they were unable to file their prepared written address because they had no NBA Stamp to affix as required by law. He said their efforts to get same from the Supreme Court had by then yielded no positive result. He therefore asked for an adjournment and the Plaintiff's Counsel was similarly inclined. We then adjourned to 5 – 3 – 18.

On 5 – 3 – 18, it was the same story as narrated on 1 – 3 – 18 - i.e. No N. B. A. Stamp to affix to the processes to be filed. We adjourned to 19 – 4 – 18 but the Court could not sit until 3rd July, 2018.

By that 3 – 7 – 18, all the addresses were already filed, because of my ill-health, the case was fixed for 13 – 3 – 19 for adoption of addresses.

On 13 – 3 – 19, learned counsel to the Defendant was not in Court and another unfortunate adjournment beckoned.

It was not until 18 – 2 – 2020 that the final addresses were taken due to this Court's Tribunal assignment.

Before, I proceed fully to the argument of Counsel in their addresses, I consider it pertinent to deal with the facts of this case as put in evidence.

The following facts are not in dispute. They were agreed to by both parties:

1. the Plaintiff is a customer of the Defendant Bank operating a current account.

2. Between the Months of August and September, 2011, three (3) withdrawals were made from his account to the tune of Six Million Three Hundred Thousand Naira (N6, 300, 000.00) only. The Plaintiff alleges the

withdrawal were not with his knowledge and therefore unauthorised.

3. When he became aware of the unauthorised withdrawal, he raised alarm in the Banking hall and the whole problem between him and his Banker started.

4. The Defendant promptly caused an internal investigation to be carried out by an Auditor. The Auditor discovered that the sum of N6,300,000.00 was withdrawn in the following sequence:

   a. N2, 800,000 withdrawn on 15 – 8 – 2011.

   b. N200,000.00 withdrawn on the same 15 – 8 – 2011 but at a different time.

   c. N3,300,000 withdrawn on 7 – 9 – 2011.

5. The Auditor was handed over the Plaintiff's statement of account and then is MTN call log as requested by him.

6. The Plaintiff agreed that for some time during the period, his MTN line known to the Defendant was not working. And he did not notify the Bank of this fact.

7. Following the Auditor's internal investigation, the Defendant saw the need to report the matter to the Police and they promptly did.

8. The Police in their investigation interrogated same staff of the Bank and the son of the Plaintiff (PW2).
9. At the end of the police investigation, one Prince Abdulkadir Suleiman, Chima Charles, Rose Ogugo, Stacy Denke, Ndubuisi Henry and the son of the Plaintiff were recommended for prosecution.

10. Up till the time the case landed in this Court, indicted persons including the son of the Plaintiff were never arraigned in any Court for any offence.

Two of the factsare however hotly disputed. To wit:

1. The Plaintiff claimed he had given instruction to the Bank in writing that no cheque of his should be honoured without confirmation from him. The Defendant strongly denied this contention of the Plaintiff. They said this is not true.

2. The Plaintiff claimed the Bank was negligent on the payment and withdrawal or honouring of the Cheque without his due authorization. The Defendant denied any act of negligence on their part. On the contrary they claimed that due process was followed when the 3 cheques were presented for payment. For instance, they said they confirmed that the signature on the three Cheques were consistent with the regular signature of the Plaintiff as submitted to the Bank.

## ISSUES FOR DETERMINATION

Having set out the facts as borne out of the evidence presented before this Court, we can now proceed to examine the issues(s) that falls for consideration.

Mr. Chimezie Ojiabo, counsel to the Defendant submitted three issues for determination, they are:

1. Whether the Plaintiff has proved by cogent and credible evidence the allegations raised in his pleadings, and any wrong doing on the part of the Defendant causing him any injury or damage.

2. Assuming but without conceding that the Plaintiff has established any wrong doing on the part of the Defendant, whether the defence of the contributory negligence has not been established by the Defendant.

3. Whether the Plaintiff is entitled to the reliefs claimed by him.

Mr. M.O. Onyilokwu, Counsel for the Plaintiff submitted two (2) issues for determination, to wit:

1. Whether in the light of the facts of this case and the evidence led thereon, the Plaintiff has discharged the burden of proof on him to entitle him to the reliefs sought.

2. Whether by the strength of the Defence adduced by the Defendant, a defence of contributory negligence was established by the defendant.

The Defendant's Counsel, Mr. Ojiabo, adopted the two final addresses he filed as all his arguments in this suit. All his arguments are on record. I will refer to them as I find relevant and expedient later in this judgment. It suffices for now to say that he added 3 additional points orally in Court. They are;

1. That Exhibit A2 (MTN Call log) and Exhibit B (Police Report) did not comply with the provision of **S. 84(2) of the Evidence Act.** Learned Counsel submitted that no Certificate accompanied the two Exhibits and as such are not admissible. He urged the Court to expunge them from the record.

2. That the Plaintiff having claimed that he gave written instruction to the Bank that before any payment on his cheque, his consent must be obtained, then he (the Plaintiff) must tender the written instruction in Court Counsel argued that was not done and the oral evidence of such cannot be given without complying with **S.91 of the Evidence Act.**

3. That since the Plaintiff is claiming full sum of what he had allegedly lost, then he cannot again claim general damages. According to Mr. Ojiabo, granting general damages in this instance would amount to double compensation.

For all his written arguments, Mr. Ojiabo cited the cases of **AGI VS ACCESS BANK PLC (2014) 9 NWLR (P.T 1411) 121, JULIUS BERGER (NIG) PLC VS OGUNDEHIN (2014) 2 NWLR (PT. 1391) 388, NDOMA-EGBA V ACB PLC (2005) 14 NWLR (PT. 944) 79, SALE VS BANK OF THE NORTH LTD (2006) 6 NWLR (PT. 976) 316, OLOLO V NIGERIAN AGIP OIL CO LTD (2001) 13 NWLR (PT. 729) 88 AND ELOCHIN (NIG) LTD V MBADIWE (1986) 1 NWLR (PT. 14) 47.**

Learned defence Counsel urged the Court to dismiss the Plaintiff's case with cost.

Plaintiff's Counsel, Mr. Onyilokwu, also adopted his written address as his argument in support of the Plaintiff's case. In court orally and by way of adumbration this is what he said;

> *"The issues raised by the Plaintiff were not contested by the Defendant. The Plaintiff put his money in the Bank and the money got missing. The Defendant/Bank camein, inspected the mandate and reported to the Police. The Police submitted their report (Exhibit B) to the Defendant.*
> *There are 3 cheques involved. The Defendant tendered one and refused to tender the remaining two. I urge the Court to presume that if they had*

*tendered the remaining two, it would have been against them."*

Concerning Exhibit A2 and B, Mr. Onyilokwu submitted that they are not print out from any computer. He said Exhibit B is just a letter written informing the Defendant of the Police report. Ditto Exhibit A2.

On the issue of damages, learned counsel submitted that they are claiming exemplary damages in the alternative which is meant to be punitive. Learned Counsel said the Plaintiff is suffering because of the negligence of the Defendant and should be punished even if what they are claiming is special or general damages.

Mr. Onyilokwu's full arguments are also on record and would be referred to as appropriate later in the judgment.

For all his written submissions, learned Counsel relied on cases of **FIRST BANK (NIG) PLC V EXCEL PLASTIC INDUSTRY LTD (2003) 13 NWLR (PT. 837) 412; BARRISTER ANIEKA UKPANAH V AYAYA (2011) 1 NWLR (PT. 1227) 61; BARRISTER SUNNY A. ANUEBUNWA (2012) 4 NWLR (PT. 1291) 560; R.O. IYERE V BENDEL FEED AND FLOUR MILL LTD (2008) 18 NWLR (PT. 1119) 300; NDOMA EGBA V ACB (SUPRA), FLASH FIXED ODDS LTD V AKATUGBA (2001) 9 NWLR (PT. 717) 46; STEPHEN HARUNA V A.G. FEDERATION (2012) 9 NWLR (PT. 1306) 419, M.J. EVANS VS S.A. BAKARE (1973) NSCC 127,**etc

I now turn to the nucleus of this Judgment – my decision. In order to avoid proliferation of issues I think we should confineor concern ourselves with only one issue. It is an all embracing issue. It is all encompassing. It is issue number one and issue number three of the Plaintiff's Counsel and the Defendant's Counsel's address respectively. Albeit, differently worded and numbered, they both mean the same thing. This issue is;

> ***"Whether in lightof the facts of this case and the evidence led thereon, the Plaintiff has discharged the burden of proof on him to entitle him to the reliefs sought."***
>
> OR
> Simply put,
>
> ***"Whether the Plaintiff is entitled to the reliefs claimed by him."***

Before dealing with the issue, however, let me consider some tangential or adjunct issues, to wit:

1. Learned Counsel to the Defendant asked me to expunge Exhibit A2 (MTN Call log) and Exhibit B (Police Report) from the record for non-compliance with **S.84 of the Evidence Act.** He submitted as I said earlier that no certificate was attached to it and therefore wrongly admitted in evidence. Of course, learned counsel to the Plaintiff disagreed with him saying the two documents were just letters and not Computer print out.

I have viewed the two documents myself. I agree with the learned counsel to the Defendant that Exhibit A2 has a computer print-out attached to the letter forwarding the call log to the Defendant Bank. To that extent, that call log generated from a computer must have a Certificate as provided in **S.84** attached to it. This was not done. So, Exhibit A2 in my view was wrongly admitted as documentary evidence and it is hereby expunged from the record.

But Exhibit B cannot suffer the same fate. I agree with the Plaintiff's Counsel that Exhibit B (Police Report) is just a letter signed by one Umaru Musa Muri, an Assistant Commissioner of Police, 'D' Department (CID). It is not a computer generated document.

2. Learned Counsel to the Defendant said it would amount to double compensation to be claiming the actual sum lost and also general damages. In reply, learned Counsel to the Plaintiff submitted that the general damages is in alternative to Exemplary damages they are claiming.

   In my view, this objection or submission of the learned Counsel to the Defendant which I consider to be anticipatory is not of the moment. What is double compensation here? I have not granted any relief. And in any case, a Plaintiff is free to couch his relief in anyway that suit his fancies. It is for the court to decide. We would soon get there in this judgment.

3. Learned Counsel to the Defendant submitted that since the Plaintiff pleaded that he gave written instructions to the Bank that they must clear all his cheques with him before payment, he cannot give oral evidence only. The written evidence must be produced. I agree with him. And I looked at Exhibit 'C' which is the mandate card embedding all his instruction, no such written instruction is therein.

Now, it is the strong contention of the Plaintiff that the Defendant Bank are liable to him in negligence and must pay back. The Plaintiff's counsel, Mr. M. O. Onyilokwu argued at paragraph 3.33 of his written address thus;

> *"……..we again submit that this action is founded on the tort of negligence. The Plaintiff on whom the burden rest primarily to prove damages for negligence has shown that he has suffered injury for the negligent act and or omission for which the Defendant is in law responsible. The Plaintiff in clear terms proved the existence of duty of care owed to him by the Defendant. The Plaintiff in clear terms proved the existence of duty of care owed to him by the defendant. The plaintiff proved by credible evidence the breach of that duty and the Plaintiff clearly established that he has*

*suffered damage connected with the breach of duty of care… the Defendant in law is liable for negligence."*

But the Defendant's Counsel, Mr. Chimezie Ojiabo, disagreed with his learned colleague. He submitted in paragraph 4.16 thus,

*"We further submit that from the evidence before the court, the Defendant is not liable for negligence as it did not fail to exercise reasonable care and diligence in paying the cheques. The Defendant gave evidence of what it did in processing the cheques for payment…"*

In paragraph 4.18, Mr. Ojiabo said;

*"We further submit that whether a Bank is negligent in paying a cheque is a question of fact which must be proved by evidence. We submit that evidence from the Defendant shows that it exercised reasonable care and diligence in paying those cheques and*

*therefore not liable for negligence. Defendant did not fail to abide by terms of mandate – Exhibit C, Neither did it fail to exercise reasonable care and diligence in processing the cheques before paying them…"*

With due respect to Mr. Olumezie Ojiabo of Counsel to the Defendant, it is with the argument of M. O. Onyilokwu that I found comfort. This is upon a deep reflections of the evidence and arguments advanced. My reason for so saying are clear. I found a number of circumstances which are immaterial to which I like to prefix with the words "EVEN IF":

1. Even if, the son of the Plaintiff and one other fellow who is a staff of the Defendant, were indicted by the Police in their investigative report, that is a criminal matter and should be dealt with as such. This is a Tort of negligence matter which do not stand on the same footing with criminal issue.

2. Even if, the Plaintiff did not report to the Defendant that his telephone was bad during the period of the incident, the Defendant cannot thereby be excused of discharged from the duty of care they owed the Plaintiff. The Defendant is expected to due caution in the process of honouring the cheque. This is more so that the amount being withdrawn at the three different times were huge.

Why the hurry to pay? There is even no evidence before the Court that they tried to call or reach the Plaintiff during the period. Why did the Bank not ask the drawees to bring or link them with the Plaintiff before payment.

I laughed when I read the paragraph 4.21 of Mr. Ojiabo's written submission. He wrote;

> *"… The Plaintiff failed to inform the Defendant of the non- functioning of his MTN GSM No: 08035176822 which, in the Plaintiff's evidence is the only telephone line known to the Defendant during that period of the 3 withdrawal…*
> *Had the Plaintiff notified the Defendant of the faulty telephone line… the withdrawals, especially the third which took place on 7 – 9 – 2011 would have been stopped."*

3. Even if, the Plaintiff did not report to the Defendant that some leaves of Cheque Book were missing is no reason

but an untenable excuse not to take due care in the payment of those cheques.

As I said, herein before, the submission of Mr. Ojiabo, in his paragraph 4.22, is with great respect laughable and also amount to trivialising a very serious issue of duty of reasonable care. Learned counsel said;

> *"Assuming but without conceding that the three cheques in issue were not signed by the Plaintiff and were actually missing from his cheque booklet, those withdrawals could not have taken place if the Plaintiff had informed the Bank about the faulty state of his phone and the missing cheque leaflet."*

4. Even if, there is no express written instruction from the Plaintiff to the Defendant to clear all cheques with him before payment, the duty remains under a heavy duty of exercising reasonable care before making payment to the third party on his cheques.

So, all the above circumstances which the Defendants placed much reliance and made a heavy weather of as constituting contributory negligence, are with due respect to them and their course, is so weak, very weak, too weak and cannot be

allowed by any serious judex to displace a clear incidence of lack of diligent care and negligence.

So, the idea of contributory negligence in the circumstances of this case is a fathom and nonsensical.

Undoubtedly, the strongest evidence of carelessness, breach of duty of care and therefore negligence I found in this case is the issue of signatures on the cheque. And quite expectedly, it was the hotly disputed fact before this Court. It is the fulcrum of the cases of both parties.

The Plaintiff was categorical that he did not sign any of the three cheques. The Defendant Bank challenged him on this. They said the signature on the Cheques are regular. Meaning the Plaintiff signed them. What do I find in evidence? Whose assertion as between the two parties is true?

The Defendant produced one of the three cheques – Exhibit 'D' and did not produce the rest two. They also produced the mandate card containing the Plaintiff's specimen signature – Exhibit 'C' very beautiful situation. Is the signature in Exhibit 'D' – the Cheque that was used in cashing the whooping sum of Two Million, Eight Hundred Thousand Naira (N2,800,000) only on 12th of August, 2011 the same with the signature of the Plaintiff on Exhibit 'C' – the mandate card?

Why did the Defendant not produce the remaining two cheques that was now used in withdrawing the balance of Three Million, Five Hundred Thousand Naira (N3,500,000)

only? After all, they produced or tendered in evidence one of the Cheques and the mandate card.

In venturing an answer to the first question, I took cover under **S.101(1) of the Evidence Act, 2011**. That section reads;

> *"In order to ascertain whether a signature, writing, seal or finger impression is that of the person by whom it purports to have been written or made, any signature, writing, seal or finger impression admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing, seal or finger impression has not been produced or proved for any other purpose."*

See.**ODUTOLA V MABOGUNJE (2013) 7 NWLR (PT. 1354) 52**.
I viewed the signatures on Exhibit 'C' and Exhibit 'D'. There are even 3 signatures purporting to be the signatures of the Plaintiff – one in front and two at the back. I took a long look and hard look at them. My findings are that the signatures on both Exhibits (Exhibit 'C' and Exhibit 'D') are not the same. They did not mirror each other. Even the signature on the front page of Exhibit D is not the same with the two

signatures at the back of the same Exhibit D. I could perceive clearly strenuous effort to make them look similar. The forgery was clear to me.

In my bid to answer the second question, I quickly adverted to **S.131 and S.167(d) of the Evidence Act**.

Section 131 states:

1. *"Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts shall prove that those facts exist."*

2. *"When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person*."

The general principle is that he who asserts the positive must prove. Here, the Plaintiff says he did not sign any of the cheques. The Defendant says, NO, capital NO, you signed.

So, since the Defendant are asserting the positive, they must prove. The Burden is squarely upon them. The case of **NDOMA EGBA V ACB PLC (2005) 14 NWLR (PT. 944) 78** which the learned Counsel to the Plaintiff cited at paragraph 3.15 of his address is very apt here. The Supreme Court in that case held;

> *"… the plank of the Plaintiff's case was that he did not sign the cheques.*

> *On the other hand the Defendant in paragraphs 11 and 17 reproduced above pleaded that it was the Plaintiff who signed the signatures ascribed to him on Exhibits 2, 3 and 4. Indeed, the Defendant could have escaped liability for Plaintiff's claim only if it established that it was the Plaintiff and not anyone else who signed Exhibits 2,3 and 4."*

See also **TEWOGBADE CO V AROSI AKANDE AND CO (1968) NMLR 404.**

The Defendant in this case similarly could not establish that it was the Plaintiff that signed those cheques and no one else. They couldn't have been able to do that in the face of Exhibit B – Police Report –indicting some other fellows apart from the Plaintiff. And to make the matter worse, the Defendant could not produce or tender the rest two cheques in Evidence.

So, how would the Court know the Plaintiff signed those cheques. They failed woefully to discharge the burden. The only conclusion or presumption open to the Court in this instance is that if the two cheques had been produced (since it is in their custody), it would have been unfavourable to

them. See **S.167(d) of the Evidence Act**. In the case of **AWOSHILE V SHOTUMBO (1983) 3 NWLR (PT. 29) 471**, the court restated that the presumption could be invoked if the Court is satisfied that;

a. that the evidence exists
b. that it can be produced
c. that it has not been produced
d. that it has been withheld by the person who should produce it.

See **OKPARAJI & ANOR V OHANU & OR (1999) 6 SCNJ 27**.

I am satisfied that all four parameters exist in this instance. Therefore, I agree with the learned counsel to the Plaintiff – Onyilokwu Esq. when he wrote at paragraph 3.14 of his final address as follows;

> *"The purported signatures of the Plaintiff on Exhibit D are not consisted and similar not to talk of being consistent to that of the Plaintiff in Exhibit C. The two signatures at the back of Exhibit D… and when one compares the letters in the signatures, there is clear difference in the style of the writing from that in Exhibit C. Why did the Defendant choose not to tender the other two cheques…"?*

Perhaps more baffling on this same point of withholding a vital evidence is that Exhibit D, (the only cheque tendered) was stamped "REGISCOPED". Regiscope means or indicates that the drawee of the cheque was photographed shortly before payment. See DW1's evidence. So the question is where is the drawee of the cheque? Why was his photograph not produced for all concerned to identify him? This raises a strong suspicion or presumption that if the Defendant had done so, it would have revealed that staff of the Bank were deeply involved.
In conclusion, I find the Defendant liable in the tort of negligence to the Plaintiff. They breached the duty of care owed the Plaintiff and I find no evidence of contributory negligence in this case.

Finally, the Plaintiff is claiming a refund of his money – Six Million, Three Hundred Thousand Naira (N6,300,000.00) only. There is considerable merit in this claim and it is hereby granted.

The Plaintiff also wants a sum of Ten Million Naira (N10,000,000.00) only as general damages.

General damages have been defined as a pecuniary compensation sought or awarded as a remedy for breach of contract or for tortuous acts. It is a monetary compensation obtainable by success in an action for a wrong which is either a tort or a breach of contract, the compensation being in the form of a lump sum awarded at the time unconditionally and generally. See **SHELL PETROLEUM DEVELOPMENT COMPANY**

**LTD VS TIEBO VII AND 4 ORS (1996) 4 NWLR (PT. 445) 657; SEVEN UP BOTTLING COMPANY PLC VS ABIOLA AND SONS BOTTLING COMPANY LTD AND ANOR (2002) 2 NWLR (PT. 750) 40**.

In recent times, the Courts have taken the position that in awarding general damages, the prevailing economic bad situation or down turn or spiralling inflationary trend may be taken into consideration. In **Julius Berger Vs. Ogundehin** (Supra), the Court of Appeal held;

> "Generally speaking, monetary damages awarded under the headings of "pains" and "sufferings" by the Courts are no longer to be as in the past. The Courts have moved from being misery or economical like Shylock Holmes to make awards that take cognisance of spiralling and inflation and depreciating value of Naira. "

The Plaintiff has suffered the pain of being deprived of access to his money. He could not spend his money for a long period of time. The psychological pain is better imagined than experienced. He deserves to be compensated no matter how minimal. I therefore award the sum of One Million Naira (N1,000,000.00) only as general damages in favour of the Plaintiff against the Defendant.

So, with the above decision and reasoning, it manifest that the earlier contestation of Mr. Oyiabo of Counsel to the

Defendant that any award of general damages when the Plaintiff also claims a refund of his money would amount to double compensation has no basis in law. They are two different claims with two different limbs to stand on.

The Plaintiff also wants 10% interest from the date of Judgment until the final liquidation of the money. I also grant same to him having considered the general circumstances of this case.

Lastly, the Plaintiff asked me to grant a relief he couched as "cost of this action". This claim is vague, unspecific and not certain. How much does he want? It is not stated. And it is not proved. No evidence of the amount expended in the prosecution of this case. This claim is therefore refused.

As closing remark, let me emphasis the point that this case lasted this long in this court due to Election Petition Tribunal assignment I was engaged in at various times from 2015 – 2019. I served in Kebbi, Anambra, Bayelsa, Ekiti and Delta States.

Claims A,B, and E of the Plaintiff succeeds. Claim D is refused.

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Suleiman Belgore
(Judge) 30-6-2020.