THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

(CIVIL DIVISION)

CIVIL APPEAL NO. 61 OF 2017

(ARISING FROM MENGO CHIEF MAGISTRATES COURT CIVIL SUIT NO. 710 OF 2012)

STEVEN MUSEBE
T/A Namirembe Rest House---------- APPELLANT

VERSUS

SSESANGA MARTIN…….. RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The facts giving rise to this appeal are that the appellant who had a guest house with a large parking was approached by a respondent who owned a Motor Cycle Bajaj Boxer Reg No. UDT 072N for parking his motor cycle overnight for security reasons. The defendant accepted and entered a verbal agreement with the plaintiff to park the motor cycle overnight at a sum of 15,000/= per month. The respondent was informed on 30th day of December 2011 that the motor cycle .

The respondent filed a suit in 2012 against the appellant demanding for compensation of a sum of 3,700,000/= for the value of the Motor cycle, lost income of 15,000/= per day from the date of the loss of the Motor cycle, General damages, Interest and costs of the suit. The trial court found that the appellant was in breach of an oral contract and ordered for the compensation for the lost Motor cycle, awarded general damages of 3,000,000/=, Interest of 10% per annum and costs of the suit.

Being dissatisfied with the Judgment, the appellant appealed to this court and set out 8 grounds of appeal as hereunder;

The grounds of appeal as they appeared in the Memorandum of Appeal were;

1. The learned trial Magistrate erred in law and fact when she failed to properly consider and evaluate the evidence on record as a result of which she came to a wrong decision that there was in existence an oral agreement between the appellant and respondent.

2. The Learned trial Magistrate erred in law and in fact when she held that the Respondent made monthly payments of 15,000/= to the appellant as parking fees.

3. The Learned trial Magistrate erred in law and in fact when she held that the respondent's motor cycle was stolen from the defendant's premises.

4. The learned trial Magistrate erred in law and in fact when she held that the Respondent was not bound to ascertain whether Nabweteme was authorized to allow persons to park at the premises as a result of which the Magistrate wrongly held the appellant liable for the acts of Nabweteme.

5. The learned trial Magistrate erred in law and in fact when she held that the appellant liable to make good the loss of the respondent's motor cycle.

6. The learned trial Magistrate erred in law and in fact when she ignored the contradictions and inconsistencies in the respondent's case which go to the root of the case.

7. The learned trial Magistrate erred in law and fact when she awarded general damages of 3,000,000/= as compensation.

8. The learned trial Magistrate erred in law and fact when awarded 2,800,000/= to the respondent.

The appellant prayed for the appeal to be allowed, the judgment of the lower court be set aside, varied and substituted with an order dismissing the suit with costs to the appellant.

At the hearing of the appeal, the appellant was represented by *Learned Counsel Bamwite Edward* and the respondent was represented *Learned Counsel Mungoma Justin*. In the interest of time the court directed that the matter proceeds by way of written submissions. However, counsel for the respondent did not file any submissions.

It is true that the duty of this Court as first appellate court is to re-evaluate evidence and come up with its own conclusion.

This position was reiterated by the Supreme in the case of ***Kifamunte Henry v Uganda SCCA No. 10 of 1997***, where it was held that;

> "*The first appellate court has a duty to review the evidence the evidence of the case and to reconsider the materials before the trial Judge. The appellate Court must make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it*."

I have taken the above principles into account as I consider the Appeal. I have considered the record of proceedings and the lower Court and have considered the written submissions of both parties.

Counsel for the appellant argued grounds 1,2 and 6 together and or jointly.

THE LEARNED TRIAL MAGISTRATE GRADE 1 ERRED IN LAW AND IN FACT WHEN SHE FAILED TO PROPERLY CONSIDER, EVALUATE AND SCRUTINY EXHAUSTIVELY THE EVIDENCE ON RECORD AS A RESULT OF WHICH SHE CAME TO A WRONG DECISION;-

1) ***THAT there was in existence an oral agreement between the Appellant and the Respondent.***
2) ***THAT the Respondent made monthly payments of Shs.15,000/= to the Appellant as parking fees.***

3) THAT the learned trial Magistrate ignored the contradictions and inconsistencies in the Respondent's case which went to the root of the case.

For the alleged oral agreement and monthly payments of Shs.15,000/=, the learned trial Magistrate held that there was an oral agreement between the Appellant and the Respondent and that the Respondent indeed made monthly payments in the sum of Shs.15,000/= as parking fees.

The appellant's counsel submitted that there was no evidence to establish that there was an oral agreement where the Appellant allowed the Respondent to park a motor cycle overnight at the Appellant's premises.

Possession of the motor cycle:

For such an agreement to be entered into, the Respondent had to show that he owned or had a motor cycle but the evidence adduced was not sufficient to establish that the Respondent had a motor cycle which he parked at the Appellant's premises. The Respondent stated:-

> ***"I have a logbook in my name I even have a receipt ……."***

But the Respondent later stated that the logbook was in the names of CAPITAL AUTO PARTS LTD. which shows that the logbook was not in the names of the Respondent. However, he later stated:-

> ***"I have an agreement made on 23.06.2011 …… shows that I bought the motor bike ……"***

So, the Respondent diverged from his earlier statement and stated that he bought the motor cycle and that he had a sale agreement for the motor cycle.

The sale agreement is Exh. P.2 at page 40 of the proceedings and the logbook is Exh. P.1 at page 39 of the Record of Appeal.As may be observed, the sale agreement Exh. P.2 is in the names of MART MIX COMPANY LTD. implying that the Respondent bought the motor cycle from Mart Mix Auto Company Ltd. Since the logbook is in the names of CAPITAL AUTO PARTS LTD., Capital Auto Parts Ltd. was the owner of the motor cycle.

There is nothing to explain how the Respondent bought the motor cycle from Mart Mix Auto Co. Ltd. yet the motor cycle was owned by Capital Auto Parts Ltd. as per the logbook at page 39 of the Record of Appeal.

The implication is that Capital Auto Parts Ltd. did not sell the motor cycle to the Respondent.

I submit that this shows that the Respondent did not own or have in his possession the motor cycle so as to enter into any agreement with the Respondent.

Evidence of P.W.2, Kakenga Godfrey:

Secondly, the learned trial Magistrate relied on the evidence of P.W.2, Kakenga Godfrey to find that P.W.2's evidence supported the Respondent's evidence that there was an oral agreement. The learned trial Magistrate erred in law and in fact when she found that P.W.2 proved that there was an oral agreement between the parties. The evidence of P.W. 2 does not state anywhere that there was an oral agreement between the parties for the Respondent to keep a motor cycle at the Appellant's premises.

P.W.2 stated that the Respondent was his father and was keeping the motor cycle at Namirembe Restaurant and that he started keeping the motor cycle at Namirembe Restaurant before he was friends with **"Steven Salongo"**.

But it should be noted that the Appellant did not run a parking place but premises for accommodation and Bar Services. This witness testified that his father used to tell him to take the money to Jessica at the premises and he used to take the money to Jessica Nabweteme.

The appellant's counsel submitted that the mere fact that the witness used to take money to Jessica Nabweteme was not proof of an oral agreement between the parties.

Monthly payments of Shs.15,000/=:

On the payments for Shs.15,000/=, the trial Magistrate decided in her Judgment that the Respondent made monthly payments of Shs.15,000/= to the Appellant as parking dues. The appellant's counsel submitted that there was no evidence to support the claim that the Respondent was paying Shs.15,000/= per month to the Appellant. At page 19 of the Record of Appeal last line of paragraph two, the Respondent stated:-

"He accepted to keep it and told me to pay Shs.15,000/=".

But the Respondent does not state when they entered into the alleged oral agreement and as to how and when he would pay Shs.15,000/=.

When cross examined by Counsel for the Appellant, the Respondent stated that he kept his motor cycle with the Appellant since June 2011 paying Shs.15,000/= per month and he claimed that he was given receipts. But the Respondent could not present to Court receipts as evidence to show that he paid Shs.15,000/= every month for parking from June 2011 as he claimed.

The Respondent claimed that the receipts got lost and presented to Court only one receipt Exh. P.3 . There was no evidence of loss of receipts by the Respondent and further to that, the only receipt Exh. P.3 presented to Court does not show for which period payment was made. The Respondent admitted at page 25 of the Record of Appeal line 5 paragraph 1 that Exh. P.3 did not bear any names of the person who made the payment, so it does not have the Respondent's names.

For the aforesaid, I submit that the receipt Exh. P.3 at page 41 does not support the Respondent's case that he used to pay Shs.15,000/= per month to the Appellant for parking.

Alleged loss of motor cycle in December but receipt in support is for October:

Secondly, whereas in his Plaint at page 3 paragraph 4 and in his evidence at page 20 of the Record of Appeal paragraph 2 and in the evidence of P.W.2 at page 25, it was alleged that the motor cycle was parked in December 2011, but the receipt produced in Court as Exh. P.3 was dated 6th October 2011. There is no explanation given as to why the Respondent presented to Court a receipt dated 6.10.2011 yet

the claim is that the motor cycle was parked and stolen from the Appellant's premises in the night of 29 – 30/12/2011. The receipt dated 6.10.2011 cannot be for parking services of December 2011.

Respondent not customer:

Thirdly, in his evidence in chief, the Appellant stated in paragraph 2 that he operates business premises for Accommodation, Bar and Restaurant but did not have night parking. The Respondent admitted that he did not sleep at the Appellant's house and did not have any function to attend at the premises. The Respondent supports the Appellant's evidence that the Respondent was not his customer at the premises. The Appellant explained to Court that the receipt, Exh. P.3 presented to Court was not for parking at all but was for venues at the premises. This was supported by the evidence given by D.W.2, Robert Nteemu, manager at Namirembe Rest House who testified that the receipt, Exh. P.3 relied on by the Respondent was for venues not parking.

However, the trial Magistrate did not at all consider and evaluate this evidence given by the Appellant and his witness D.W.2 showing that the Respondent did not have anything to do at the premises on the material date and that the receipt Exh. P.3 could not support the Respondent's case.

The appellant's counsel faulted the trial Magistrate for failing to consider and did not scrutinize the evidence from the Appellant's side as a result of which she came to a wrong decision that there was an oral agreement between the parties and to a wrong decision that the Respondent used to make monthly payments of Shs.15,000/= for parking at the Appellant's premises.

Contradictions and inconsistencies:

It is now settled that inconsistencies and contradictions in a case which are major and go to the root of the case ought not be ignored.

The learned trial Magistrate erred in law and in fact when she failed to consider the contradictions and inconsistencies in the Respondent's case especially:-

1) As to who sold the motor cycle because whereas Exh. P.1, the logbook at page 39 of the Record of Appeal shows that owner of the motor cycle was Capital Auto Parts Ltd., Exh. P. 2, the sale agreement at page 40 did not show that Respondent purchased the motor cycle from the owner but from Mart Mix Auto Company Ltd. This discrepancy was not explained.

2) There is a sharp discrepancy in the dates when the motor cycle is said to have been parked and stolen.

Whereas Plaint states that the motor cycle was parked and stolen on 30.12.12, Respondent in his evidence says the motor cycle was stolen on 29.12.2011 and P.W.2, Kakenga talked of 28.12.2011. The receipt Exh. P.3 at page 41 presented to support the Respondent's case is dated 6.10.2011. There is no explanation made for these inconsistencies in the dates for Respondent's case. The learned trial Magistrate should not have ignored these inconsistencies.

These contradictions and inconsistencies which went to the root of the Respondent's case and indicate that there was falsehood in the Respondent's case intended to mislead Court. Uganda –vs- Draru 2011 1 HCB 15 at page 16 holding 5.

The respondent during the examination in chief stated that; "I acquired the motor cycle on 23/06/2011 from Mat Mix Auto Co Ltd…….i have a receipt for payment when buying….it shows I bought motor bike Bajaj Boxer Reg No. UDT 072N….It is in the name of Capital Auto Parts Ltd"

The appellant had the original log book and the same was tendered in court and during cross examination the appellant's counsel cross examined the respondent who reiterated that the " I had a sale agreement for the motorcycle, I bought the motorcycle on 23/06/2011. The sale agreement has no registration but it has the engine number. The logbook does not have my names it's in the company name"

The appellant never denied ownership of the motorcycle by the respondent and according to his written statement of defence he acknowledges that the plaintiff now respondent had a motorcycle. The trial court never considered this as an

issue and therefore it was never part of her decision. If the appellant had wanted this to be an issue for determination, he should have raised the same as an issue.

This court is satisfied that the respondent was the owner of motor cycle UDT 072N and it does not matter whether it had been registered in his names or not. He had physical possession of the motorcycle and an original logbook. Above all the respondent also had a sale agreement for the said motorcycle.

In the case of ***Osapil v Kaddu [2000] 1 EA 193*** The Court of Appeal held that a contract of sale of a motor vehicle is a contract for sale of specific property and the property in the vehicle passes when the agreement is executed.

Likewise in this case the execution of a sale agreement for the said motorcycle UDT 072N between the respondent and the owner, coupled with the possession of the original logbook meant that the respondent's ownership could not be questioned in anyway.

Whether the respondent had an oral contract with the respondent? The learned trial magistrate quoted extensively the testimony of the respondent in respect of this issue of existence of an oral contract at page 3 of the judgment;

> "*…..my motorcycle was stolen, it was at musebe's place…the defendant undertook to keep my motorcycle. He showed me the place to keep it. He accepted to keep it and told me to pas shs 15,000/=. I used to pay the money to the receptionist at the rest house. She used to sign on the receipts…when the rest house owner told me to pay parking fees to her; this is when I started dealing with Jessica.*"

In cross examination, PW1 testified that;

> "*I do not have a written agreement with Musebe…it's the defendant who told me to pay the money to Jessica. Jessica is the defendant's employee. I had been keeping the motor cycle there since 2011….he showed me a place where to keep the motor cycle and that I would pay shs 15,000/= per month… the agreement was oral*"

In re-examination PW1 testifies that;

"*When I approached him, he showed me the place to park himself (sic). He told me to pay to Jessica. He showed her to me…. They used to give me receipts. He did not ever refuse me to park there. He is the one who showed me where to park* "

The learned trial magistrate made the following observation;

"*I noted that the demeanour of plaintiff as he testified. He impressed me as a candid, frank credible and truthful witness; while the defendant was very evasive and cagey in his answers. Given the chronology of events; I have seen no reason to doubt the plaintiff's evidence at all. It shows very clearly that there was an oral agreement between himself and the defendant and that he indeed made a monthly payments in the sum of shs 15,000/=*"

The testimony of respondent and PW 2 was also corroborated by the Pexh 3 which is a receipt of the appellant's rest house and it clearly shows that the respondent paid for parking. He further testified in re-examination that "*Even when I was parking many times, I used to find the defendant present. So many times I could not count. He did not ever refuse me to park….*"

The appellant during his testimony did not refute or counter the said evidence advanced by the respondent in his re-examination,

The learned trial magistrate rightly found that there was on oral agreement to park the respondent's motor cycle at the appellant's premises.

What the appellant alludes to as contradictions in the respondent's evidence are minor and do not point to deliberate falsehoods. I have already noted herein above, the issue of ownership of the motorcycle was never contested and the respondent was in possession of the original logbook and indeed no evidence has been proved to the contrary by the appellant that the said motorcycle was not owned by the respondent.

The respondent had an agreement of sale of the said motorcycle and was at all material times in physical possession of the same.

The discrepancy in the alleged dates when the motorcycle was parked and stolen does not take away the fact that the motor cycle was stolen. The respondent testified that on the night of 29th December 2011 his motorcycle was stolen. It should be appreciated that a night has two days following each other. Therefore, it would mean that the night of 29th -30th December 2011 is the when the motorcycle was stolen. This is not a contradiction and does not point to a deliberate falsehood.

Grounds 3, 4 and 5 of Appeal are that:-

THE LEARNED TRIAL MAGISTRATE ERRED IN LAW WHEN SHE HELD THAT THE RESPONDENT'S MOTOR CYCLE WAS STOLEN FROM THE APPELLANT'S PREMISES AND THAT THE APPELLANT WAS LIABLE TO MAKE GOOD THE LOSS OF THE RESPONDENT'S MOTOR CYCLE.

The appellant's counsel submitted that the evidence on Record did not establish that the Respondent owned or possessed motor cycle Registration No. UDT 072 N in view of the inconsistencies in the documents of ownership exhibited for the motor cycle.

However, even if it can be taken that the Respondent had a motor cycle, the evidence did not establish that a motor cycle was stolen from the Appellant's premises. At page 20 paragraph 2 line 13 of the Record of Appeal, the Respondent as P.W.1 stated that he reported the theft of the motor cycle to Police and got a reference. However, no evidence of report of theft at the Police was presented to Court. No explanation is given as to why such important evidence was not presented. The inference is that not theft of a motor cycle was made to Police or to any law enforcement authority implying that no such theft ever took place.

It was counsel's submission that failure to produce evidence of Police report cast a doubt on the Respondent's case as to whether there was any theft of Respondent's motor cycle from the Appellant's premises. The learned trial Magistrate erred in law and in fact when she accepted and found that the Respondent's motor cycle was stolen from the Appellant's premises.

The learned trial Magistrate noted as follows;

" It was the plaintiff's evidence that he was awoken by a one Jessica Nabweteme, on the night of 30/12/2011 that his motorcycle had been stolen from the defendant's premises and that he reported the matter to the area police station the next day subsequently leading to the arrest of Nabweteme. This testimony was re-emphasized by PW 2 in cross examination and re-examination. On the other hand the defendant stated during cross examination that he has subsequently dismissed Nabweteme when he realized that she had allowed parking at the premises.

The defendant duly identified the receipts in issue, Pexh 3, he further testified that, the same were signed by his employee, Nabweteme. He also stated;

….she was not authorized to issue receipts…

DW2, Ntembu Robert, defendant's manager testified the receipt issued to the plaintiff was for a wrong purpose; it should have been venue and not parking (sic). He also confirmed the receipt was issued by Jessica, an attendant at the defendant's premises"

The learned trial Magistrate indeed found that Nabweteme was an employee of the defendant/appellant. As to whether she had authority to allow person to park at the premises and issue receipts was not for the plaintiff to ascertain. The defendant cannot set up his own wrong or negligence in ensuring that his employees carried out their specific duties as a defence against outsiders/plaintiff. To allow that would work a great injustice against bonafide *'transactors'* like the plaintiff in the instant case and offend against the tenets of fairness. The outsider dealing in good faith with the defendant in a business transaction is entitled to assume that the defendant employees who transacted with him were duly clothed with requisite authority and competence to do what they are doing or what they ought to do."

This court agrees with the reasoning of the learned trial magistrate that on the balance of probability the respondent's motorcycle was stolen from the appellant's premises. The argument of the appellant's counsel that there was no

police report about the stolen motorcycle does not mean that the respondent's motorcycle was not stolen.

In addition, the respondent during his testimony testified that "*he reported to police and he got a reference. Jessica was arrested by police…..defendant later came to police to have Jessica released, he denied knowing me"*

The appellants counsel has further submitted that the acts of Jessica were an authorized acts of her as room attendant and that her acts were a frolic of her own.

The respondent testified that the Rest House Owner, told me to pay parking fees to her(Jessica), this is when I started dealing with Jessica. During cross examination the respondent further stated that It is the defendant who told me to pay to Jessica. Further during re-examination of the respondent, he stated that when I approached him he agreed, he showed me where to park. He told me to pay money to Jessica a receptionist. He showed me Jessica.

It can be deduced from that evidence that the issues raised of acts of unauthorized acts or frolic of Jessica cannot arise since the respondent dealt with the appellant in person who directed him to deal and pay the money to Jessica who in turn issued receipts to the respondent. Jessica who was allegedly acting without authority could not issue official receipts for acts which are not in the course of her employment as the appellant would wish to make this court believe.

The authority to park the motorcycle was given by the appellant to the respondent and the respondent only dealt with Jessica on clear instructions of the appellant. The argument of frolic cannot be sustained in the facts and circumstances of this case.

The learned trial Magistrate was correct in her finding and reasoning that the appellant was liable to make good the loss of the plaintiff's motorcycle that was stolen from the appellant's premises.

Grounds 7 and 8:

THE LEARNED TRIAL MAGISTRATE ERRED IN LAW AND IN FACT WHEN SHE AWARDED SHS.2,800,000/= AS VALUE OF THE MOTOR CYCLE AND SHS.3,000,000/= GENERAL DAMAGES TO THE RESPONDENT:

The learned trial Magistrate relied on Exh. P.2, the sale agreement to award Shs.2,800,000/= to the Respondent for the value of the motor cycle allegedly bought from Mart Mix Auto Company Ltd..

But the Respondent just stated in his evidence at page 19 paragraph 2 that he acquired the motor cycle Registration No. UDT 072N but did not state how much he paid for the motor cycle. In the Plaint, the Respondent claimed Shs.3,000,000/= with no basis for that money.

The Respondent should have summoned officials of Mart Mix Auto Company Ltd. to show Court how they got to sell to the Respondent a motor cycle in the names of Capital Auto Parts Ltd. and to prove that they received Shs.2,800,000/= on the agreement from the Respondent.

I do not find any merit in the appellant's submission on this point. The respondent tendered in court a sale agreement for the said motorcycle in his names and the amount agreed and paid for the said Motorcycle was 2,800,000/=. The court awarded the same amount to the respondent as the value of the Motorcycle that was stolen. This ground equally fails.

The learned trial magistrate awarded general damages of Shs.3,000,000/=, the learned trial Magistrate observed at page 74 of the Record of Appeal paragraph 4 of page 7 of the judgment:- ***"The general principle is that general damages are awarded to compensate the Plaintiff".***

This court equally agrees with the learned trial Magistrate in the award of general damages. General damages are such as the law will presume to be direct natural probable consequence of the act complained of. In quantification of damages, the court must bear in mind the fact that the plaintiff must be put in the position he would have been had he not suffered the wrong. The basic measure of damage is

restitution. See ***Dr. Denis Lwamafa vs Attorney General HCCS No. 79 of 1983 [1992] 1 KALR 21***

The character of the acts themselves, which produce the damage, the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstance and nature of the acts themselves by which the damage is done. See ***Ouma vs Nairobi City Council [1976] KLR 298.***

It is now settled that general damages in principle are imposed on persons to have accrued from a wrong complained of and one must establish loss or inconvenience suffered and must be proved by evidence on record to justify the award of general damages.

The learned trial Magistrate was justified to award the Respondent Shs.3,000,000/= for general damages.

This ground of appeal equally fails.

In the final result for the reasons stated herein above this appeal fails on all the grounds and is dismissed with no order as to costs in this court since the respondent's counsel never filed any written submissions to oppose the appeal.

It is so ordered.

SSEKAANA MUSA
JUDGE
19th /10/2018