THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA
AT KAMPALA

CORAM: KIRYABWIRE, JA; MUGENYI, JA AND KASULE, AG. JA

CIVIL APPEAL NO. 111 OF 2020

BETWEEN

ANATOLI MULETERWA ..... APPELLANT

AND

ADRINE KEMIREMBE ..... RESPONDENT

(Appeal from the Judgment of the High Court of Uganda at Kampala (Mugambe, J) in Civil Suit No. 200 of 2010)

JUDGMENT OF MONICA K. MUGENYI, JA

A. Introduction

1. Ms. Adrine Kemirembe ('the Respondent') was the registered owner of a motor vehicle Reg. No. UAE 130H – a Nissan Datsun pick-up ('the suit vehicle') and, until 14th November 2008 when the car went missing, she was in possession of it. The missing motor vehicle was reported to numerous police stations in Kampala, including Central Police Station under Reference No. ERU/999/CPS SD REF 15/29/12/0.

2. On 28th April 2010, the missing car was found in Kisenyi, Kampala doing car hire business, and subsequently impounded at Makerere University Police Station. The driver and turn boy that were in possession of the car intimated that it belonged to Mr. Anatoli Muleterwa ('the Appellant'), a senior police officer at the rank of Assistant Superitendant of Police.

3. The Respondent's attempts to secure its release from the police yielded no results. She therefore instituted **Civil Suit No. 200 of 2010** against the office of the Attorney General (the First Defendant in the trial court), attributing vicariously liability to it for the negligence of the Uganda Police Force in its handling of her car. She did also sue the Appellant, holding him personally liable for his purported role in the loss and subsequent sale of her vehicle.

B. Trial Court Proceedings

4. The Appellant averred that upon engaging the Second Defendant on his purported purchase of her vehicle, he proposed that she either refunded the monies he had spent on it or sold it to him, both of which propositions she declined. She therefore instituted legal proceedings against him and the State, whereby she sought to recover her vehicle or its monetary value in the sum of Ushs. 12,000,000/= in lieu thereof, as well as the following additional remedies:

    a. Special damages of Ushs. 59,750,000/=.
    b. General damages.
    c. Punitive/ Exemplary damages.

d. Interest on (a) and (b) at market rate from 14th November 2008 till payment in full.
e. Costs of the suit.

5. The First Defendant denied responsibility for any negligence, seeking to deflect personal liability to the Appellant, as well as two other police officers – AIP Kintu and Sergeant Samuel Bazigu. This is the import of documentation on the Record of Appeal that was apparently annexed to the First Defendant's Written Statement of Defence. On his part, the Appellant (as Second Respondent) averred that the suit did not disclose a cause of action against him; was frivolous and vexatious, and wrongfully enjoined him as a party with the First Defendant. He further averred that he had applied for the auctioning of the suit vehicle following advice from Sergeant Bazigu (the Officer-in-charge of Police Exhibits Stores) to dispose of unclaimed items that had been in police custody for over one year, and the said auction had been duly undertaken pursuant to a court order and by court-appointed bailiffs.

6. At trial, the following issues were framed for determination:

   i. Whether the Defendants were negligent in failing to act on the Plaintiff's report of the loss of the suit vehicle.

   ii. Whether the motor vehicle was disposed of and, if so, whether the disposal was proper.

   iii. Whether the Plaintiff is entitled to the remedies sought.

7. The trial court adjudged the Appellant to have been involved in the misappropriation of the Respondent's vehicle, and condemned him and the First Defendant in general and special damages at 15% interest from the date of filing the suit until payment in full. In addition, the Respondent was entitled to recover the monetary value of the vehicle in the sum of Ushs. 12,000,000/=, as well as the costs of the suit. The Appellant was specifically ordered to pay Ushs. 50,000,000/= of the total decretal sum.

C. **The Appeal**

8. Dissatisfied with the trial court's decision, the Appellant lodged this Appeal preferring the following grounds of appeal:

    I. **The learned Trial Judge erred in law when she failed to properly evaluate the evidence on record and she arrived at an erroneous decision by finding the Appellant individually liable for the loss of the Respondent's motor vehicle thereby occasioning miscarriage of justice.**

    II. **The learned Trial Judge erred in law and in fact when she misdirected herself on the law relating to awarding of special and general damages thereby occasioning a miscarriage of justice against the Appellant.**

    III. **The learned Trial Judge erred in law and fact when she ordered the Appellant to pay Ugx 50,000,000/= (Uganda Shillings Fifty Million) out of the Respondent's total award or be committed to civil prison.**

    IV. **The learned Trial Judge erred in law and fact when she failed to give a reasoned judgment and, instead, she was emotional and biased against the Appellant.**

    V. **The learned Trial Judge erred in law when she awarded costs to the Respondent.**

9. The Appellant was represented at the hearing by Mssrs. Patrick Mugisha, Emma Kigenyi and Albert Mooli, while Mr. Raphael Baku appeared for the Respondent. The Parties solely relied upon written submissions filed in the matter.

D. **Determination**

Ground 1: *The learned Trial Judge erred in law when she failed to properly evaluate the evidence on record and she arrived at an erroneous decision by finding the Appellant individually liable for the loss of the Respondent's motor vehicle thereby occasioning a miscarriage of justice.*

10. The Appellant's case on this issue is two-fold: he denies individual liability for the conversion of the Respondent's car, as well as any negligence on his part in

relation to its sale. It is argued that section 43(1) of the Police Act, Cap. 303 insulates police officers from personal liability for acts undertaken in obedience to a court warrant therefore, the Appellant having acted in accordance with a court order issued under **Miscellaneous Application No. 4694 of 2009**, the trial court wrongly attributed personal liability to him. The contested trial court decision reads as follows:

> *There is no satisfactory explanation why or how the plaintiff's car illegally got listed on the auctioneers list that led to its illegal sale when it was not authorized by court in its order of 17th December 2009. It is easy to infer in the circumstances of this case that the 2nd defendant's hand was behind the grand scheme to illegally sell the plaintiff's car.*

11. Learned Counsel for the Appellant took issue with this conclusion, arguing that it was not borne out by the evidence on record. In his view, given that the vehicle in question is listed as item 248 in an amended list of properties due for disposal, the question of wrongful disposal would not arise. He further argued that the Appellant having denied knowledge of Ms. Margaret Kiiza (the purchaser of the vehicle), there was no proof of a spousal relationship between her and the Appellant, as adjudged by the trial court. The onus of proof of that relationship was opined to lie with the Respondent.

12. With regard to allegations of negligence in the investigation of the Respondent's lost vehicle, learned Counsel reverted to the ingredients of negligence espoused in the case of **Donoghue v. Stevenson (1932) AC 362** to contend that no such tortious conduct had been established against the Appellant. He opined that the evidence on record is that the Appellant joined the Uganda Police Force in September 2007 and was attending police cadet training when the vehicle went missing on 14th November 2008. He therefore could not have investigated the lost vehicle as he was not yet a police officer; there was no evidence that its disappearance had been reported to him personally, and he thus owed no duty of care to the Respondent. It is further argued that by the time the auction took place the Appellant was no longer at the Central Police Station (CPS) having been transferred to Kampala Metropolitan as Community Liaison Officer. Accordingly,

the trial court was faulted for its finding that '*the 2nd defendant who was fully aware of the search operation for the lost car at the material time was grossly involved in the misappropriation of the plaintiff's said car. The plaintiff's car was sold to the 2nd defendant's wife illegally.*'

13. In any event, it is opined, on the authority of **Christopher Ssebuliba v. Attorney General, Supreme Court Civil Appeal No. 13 of 1991** the Appellant should not have been held personally liable for the impugned actions alongside the State, his employer. In that case, it was held (per Wambuzi CJ):

> **In the premises, it is my view that the judgment against the defendants 2 and 3 in their personal capacities cannot stand. The Appellant cannot sustain the claims against the government and also against the defendants 2 and 3 in their personal capacities in respect of the same claim. The defendants 2nd and 3rd were in occupation either as employees of the Government or in their own private capacities. The Appellant's claim against the defendants 2 and 3 in their personal capacities must therefore be in the alternative. I would accordingly set aside the judgment against defendants 2 and 3 and the orders made against them as a result.**

14. Conversely, it is the Respondent's case that the provisions of the Police Act cited by learned Counsel for the Appellant would only protect police officers that have not committed illegalities in the performance of their duties. Section 43 of that Act was opined to be inapplicable to the Appellant given his non-compliance with the court order for the disposal of properties that is in issue in this case. The Respondent took issue with his recommendation of the Respondent's car for sale yet it was not on the list in respect of which the court order was made; buying the car for his wife; negotiating a refund of his money prior to the release of the recovered car; sale of the car instead of returning it to its owner, and failure to confirm ownership of the car or act on the reports of its loss in order to return it to its owner.

15. Learned Counsel for the Respondent supported the trial court's finding that the Appellant bore personal liability in the matter because, despite being aware of the search operations for the lost car, he was complicit in its illegal sale to his wife. In

his view, upon recovery of the lost car a simple search in URA records would have yielded the identity of its owners but this was not done. Secondly, the driver and turn boy found in its possession by the Respondent's spouse had cited the Appellant as the owner of the car. In Counsel's estimation, that was sufficient proof of the Appellant's personal liability for the illegal sale of the car. Learned Counsel faulted the sale of the car to the Appellant's wife contrary to the discipline expected of a police officer under Article 211 of the Constitution, as well as his failure to explain the circumstances under which the car was included in the list of unclaimed properties for sale at CPS.

16. I carefully considered all the material on record in this Appeal. It is necessary to establish from the onset the specific claims raised against the Appellant by the Respondent. Paragraph 4 of the Plaint raises a cause of action in conversion (or illegal possession) against both the State and the Appellant. The Respondent (plaintiff in the lower court) sought to hold the State vicariously liable for the said conversion by its police officers, which allegedly resulted in the sale of the Respondent's car to the Appellant. *See paragraph 10 of the Plaint.* In addition, whereas paragraph 11 of the Plaint specifically attributes fraud in the car's acquisition and possession to the Appellant, in paragraph 12 he and other police officers are faulted for negligence. The foregoing pleadings would suggest that the Respondent sought to hold the State vicariously liable for the negligence that underpinned the conversion of the suit vehicle at the hands of police officials (including the Appellant), while specifically attributing personal liability to the Appellant for the supposed fraud in the car's acquisition.

17. On its part, the trial court inferred from the circumstances of the case that '*the 2nd defendant's hand was behind the grand scheme to illegally sell the plaintiff's car*', before concluding as follows:

> *I find that the 2nd defendant who was fully aware of the search operation for the lost car at the material time was grossly involved in the misappropriation of the plaintiff's said car. The plaintiff's car was sold to the 2nd defendant's wife illegally. … Issues one and two are resolved in the affirmative and the Plaintiff is entitled to remedies.*

18. The import of this decision requires interrogation. In resolving *Issue No. 1* in the affirmative, the trial court essentially held that both defendants were negligent in failing to on the plaintiff's report of the loss of the suit vehicle. This decision would run afoul of the decision in **Christopher Ssebuliba v. Attorney General** (supra) in so far as it attributes vicarious liability against the State in negligence and concurrently attributes personal liability to the present Appellant for the same cause of action in negligence. In the **Christopher Ssebuliba** case, it was held to be untenable for a litigant to institute a claim against the State and concurrently proffer the same claim against its employees. The Supreme Court held that the employees either performed the impugned acts in the course of their occupation as government employees (for which the State would be vicariously liable) or in their personal capacity, for instance on a frolic of their own (for which they would bear personal liability), but not both. I respectfully agree. The rationale behind that decision is fairly clear. As was pertinently observed (per Wambuzi CJ), '**the defendants 2nd and 3rd were in occupation either as employees of the Government or in their own private capacities. The Appellant's claim against the defendants 2 and 3 in their personal capacities must therefore be in the alternative.**'

19. Similarly, in the instant case, the Appellant was either negligent as an employee of the State or in his private capacity. Therefore, the trial court having held the State vicariously liable for his negligence as a government employee, he could not be concurrently adjudged personally liable for the same cause of action in his private capacity. Accordingly, with respect, I would set aside the judgment and orders made against the Appellant in negligence.

20. On the other hand, the allegation of fraud was apparently addressed under the trial court's consideration of *Issue No. 2*, to wit, whether the motor vehicle was disposed of and, if so, whether the disposal was proper. Although the judgment of the trial court states that this Issue was resolved in the affirmative, it is apparent from the final orders made that the first leg thereof as to whether the suit vehicle was disposed was answered in the affirmative but the second leg as to the propriety of the disposal was resolved in the negative. I deem it necessary to restate the

principles governing vicarious liability as they would inform my determination of the merits of the personal liability attributed to the Appellant in fraud.

21. In general terms, an employer would be vicariously liable for a tort committed by an employee in the course of his or her employment. Thus, as a serving police officer, the State would ordinarily be vicariously liable for any fraud by the Appellant if proven to have transpired within the scope of his authority or employment. Stated differently, the State would bear vicarious liability for tortious conduct by the Appellant that is expressly or implicitly authorized by it, as well as acts done by him in the course of his employment. This is most succinctly articulated in Halsbury's Laws of England, Vol. 97A (2021), para. 366 as follows:

> **Vicarious liability is not strictly confined to acts done with the employer's authority but extends to acts so closely connected with acts the employee was authorised to do that, for the purpose of the liability of the employer to third parties, the wrongful conduct may fairly and properly be regarded as done in the ordinary course of the employee's employment. An employer is liable for the wrongful acts of his employee authorised by him or for wrongful modes of doing authorised acts. ... Courts have used various expressions and concepts to express the test of when a tort is or is not committed 'in the course of the employee tortfeasor's employment'. The most generalised test is whether the tort is so closely connected with the employment (that is what was authorised or expected of the employee) that it would be fair and just to hold the employer vicariously responsible. The various different formulations have to be considered in the context of the particular facts of the case in hand.**

22. The mischief behind the principle of vicarious liability is to be found in policy considerations articulated in **Majrowski v Guy's & St. Thomas's NHS Trust (2006) 4 All ER 395**[1] as follows:

> **These factors are that all forms of economic activity carry a risk of harm to others, and fairness requires that those responsible for such activities**

[1] Professor Fleming's *Law of Torts* (9th Edition), 1998, pp. 409 – 410 cited with approval.

should be liable to persons suffering loss from wrongs committed in the conduct of the enterprise. This is 'fair', because it means injured persons can look for recompense to a source better placed financially than individual wrongdoing employees. It means also that the financial loss arising from the wrongs can be spread more widely, by liability insurance and higher prices. In addition, and importantly, imposing strict liability on employers encourages them to maintain standards of 'good practice' by their employees.

23. Turning to the instant case, the disposal of unclaimed properties in the custody of the Uganda Police Force is governed by section 42(1), (2) and (3) of the Police Act. For ease of reference, those legal provisions are reproduced below:

> **(1) Every police officer shall take charge of all unclaimed movable property and shall furnish an inventory or description of it to a magistrate.**
>
> **(2) If any property to which subsection (1) applies is neither money nor property subject to speedy and natural decay nor property the immediate sale of which would, in the opinion of the magistrate, be for the benefit of the owner, the magistrate shall detain or give orders for the detention of the property and shall cause a notice to be posted in a conspicuous place at his or her court and at the police stations within his or her jurisdiction specifying the property and calling upon any person who may have any claim to it to appear and establish his or her claim within six months from the date of the notice.**
>
> **(3) If within six months from the date of the notice no person establishes his or her claim to the property, the property may be sold or destroyed by order of the magistrate.**

24. For present purposes, therefore, the Appellant did derive express authority to dispose of the unclaimed properties within his official custody from Section 42(1) and (3) of the Act. Under section 42(2), however, recourse could only have been made to the sale of the Respondent's car following a six-month notice '**calling upon any person who may have any claim to it to appear and establish his or her claim**.' I find no proof on record that this was done in respect of the

Respondent's car. The action party under section 42(2) is the magistrate to whom an application for disposal of unclaimed property is made. There is no evidence either that the magistrate in the present case gave orders for the display of notice of intended auction of the suit vehicle, as is required under that legal provision. To that extent, therefore, the disposal of the suit vehicle was procedurally flawed and illegal. The question is what was the Appellant's duty in these some circumstances. Although section 42(2) and (3) of the Police Act places the duty to make the order for notice of disposal on the magistrate granting the order of disposal, as a senior police officer the Appellant would have been so conversant with the pre-disposal notification process as to cause due notice of the impending sale, the absence of the requisite order notwithstanding. Therefore, his dereliction of duty as a police officer did contribute to the conversion of the Respondent's car to another.

25. Be that as it may, the Appellant is also personally faulted for fraudulently including the Respondent's car on the list of unclaimed properties well knowing that it had been reported missing at various police stations in Kampala. The Respondent did also question the manner in which the warrant for the disposal of the properties was secured, her vehicle having been excluded from the list of properties that were the subject of the disposal application but subsequently included on an additional list. It will suffice to observe here that fraud is a tort that arises from '**a knowing misrepresentation, concealment of material fact, or reckless misrepresentation made to induce another to act to his or her detriment.**'[2]

26. The Common Law approach to employer-employee liability is that in so far as an employer has put the employee in a position to do a particular class of acts on his behalf, he must accept responsibility for the manner in which the employee conducts himself in the performance of any such act.[3] However, an employer's vicarious liability would not in itself negate its employee's personal liability in damages to the person that has suffered injury as a result of the tort. Thus, Halsbury's Laws of England, Vol. 97A (2021), para. 365 compellingly posits as follows:

---

[2] See Black's Law Dictionary, Eighth Edition, p. 685.
[3] Halsbury's Laws of England, Vol. 97A (2021), para. 365.

> **As a general rule an employee who commits a tort is liable in damages to the person injured, and his liability is not affected by the existence of a contract of employment or, where he commits the tort in the course of his employment and within the scope of his authority, by the existence of the corresponding liability of his employer for the same tort, since he is the actual tortfeasor.**[4]

27. As was observed in **Majrowski v Guy's & St. Thomas's NHS Trust** (supra), vicarious liability is '**a form of secondary liability. The primary liability is that of the employee who committed the wrong**.' Thus, the Appellant in this case being the alleged tortfeasor would not necessarily be precluded from personal liability for fraud on account of the said fraud having ensued in the course of his employment thus rendering his employer susceptible to vicarious liability therefor. The tortfeasor bears the primary responsibility for the tort, while the employer assumes secondary responsibility. This legal position is in tandem with the decision in **Christopher Ssebuliba v. Attorney General** (supra) given the observation in that case that an employee may be personally liable for a tortious act ***in alternative*** to a claim in vicarious liability against his employer, but the two claims should not be brought concurrently. The Supreme Court thus acknowledged the legality of a tortfeasor's personal liability. Simply stated, any person that suffers loss from wrongs committed in the course of the wrongdoer's employment would have a right of action either against the employee (in his official capacity as such) or the employer in vicarious liability. However, it would not be tenable to bring an action against the employee in his/ her private capacity, as well as against the employer, as the latter would bear no vicarious liability for a tort committed by the employee in his/ her personal (not official) capacity.

28. In the present Appeal, the particulars of fraud that were pleaded in paragraph 11 of the Plaint as against the Appellant are as follows:

    a. Taking hold of the motor vehicle well knowing it belonged to the plaintiff.

[4] Ibid. at para. 356.

b. Being in possession of the motor vehicle well knowing it was the property of the plaintiff.
c. Doing business with the motor vehicle well knowing it was the property of the plainitff.
d. The defendants hiding the motor vehicle from the plaintiff after it was reported lost.
e. The 2nd defendant and other officers failing to inform the plaintiff that the motor vehicle was in police custody.
f. The 2nd defendant purporting to have purchased the said motor vehicle from the police when the plaintiff had long reported it to the same police station several police stations and police posts as lost property.
g. Refusing to release the motor vehicle to the plaintiff.
h. Attempting to extort money from the plaintiff and her husband when they discovered it was in the 2nd defendant's possession.

29. On the face of the pleadings, save for paragraphs 11(d) and (e), the rest of the particulars of fraud enlisted above would have ensued in the Appellant's private capacity and not in the course of his employment. He would therefore be personally liable for those actions, if proven against him. On the other hand, paragraphs 11(d) and (e) represent actions that were so closely connected with his employment (that is what was authorised or expected of him) as to fall within the course of his employment. Although the State could have been vicarious liable for the non-action alleged therein, the Respondent preferred to lodge a claim against the tortfeasor personally. The said fraud having been imputed to the Appellant personally, the fact of the impugned non-action having arisen within the course of his employment would not negate his personal liability for the alleged tort (if proved), given that he is the actual tortfeasor. Needless to state, the standard of proof of fraud is a higher balance of probability, that is, a standard of proof that is higher than the ordinary balance of probabilities but lower that proof of beyond reasonable doubt. The question is, was this standard of proof discharged by the Respondent? A review of the evidence on record is pertinent.

30. The Respondent called four witnesses, herself inclusive. Testifying as PW1, it was her evidence that she was the owner of the suit vehicle, which had been stolen

from Makerere University on 14th November 2008 but was, on 26th April 2010, spotted by her husband, Alex Sebagala (PW2) in Kisenyi being used for car hire services. He hired the car and had it transport him to Makerere Police Station, where it was impounded. Upon questioning the young men that had been operating it, they attributed the car's ownership to the Appellant. On personally engaging him on the matter, the Respondent attested to the Appellant having asked for a refund of the monies he had spent on the car in the sum of Ushs. 4,000,000/=, a request she declined.

31. Her evidence was materially supported by PW2 in terms of his first-hand account of the loss and recovery of the suit vehicle. The witness further attested to the Appellant having admitted buying the vehicle from an auction and having spent Ushs. 4,000,000 on it that he wanted refunded. The Respondent's account of the discussion between herself, PW2 and the Appellant was further corroborated by a personal friend (PW3), who testified that the Appellant admitted to having bought the vehicle for his wife and gave the Respondent two options: either she refunded the Ushs. 4,000,000/= he had spent on the car, as well as the tyres and battery he had replaced on it, or he pays her some money and retains the car for himself. The Respondent reportedly rejected both options. Meanwhile, in respect of the issue of fraud, PW4 – the Appellant's former driver simply attested to the car having been stolen.

32. Conversely, the Appellant himself and the court bailiff that oversaw the auction (DW2) testified in support of the Appellant's case. The Appellant testified that in November 2008, when the vehicle had been reported missing, he was undergoing police cadet training, only being deployed as a Community Liaison Officer, Central Police Station (CPS) on 20th December 2008, following completion of his police training on 2nd December 2008. He was subsequently appointed DPC (District Police Commander), CPS around May/ June 2009, a position he held until January 2010. It was in that capacity that he received a letter from the officer in charge of the Exhibits Store informing him of unclaimed property that had been in police custody for over six months, following which he applied for the disposal of the said property in accordance with sections 41 and 42 of the Police Act. It was his evidence that the application was allowed but by the time the property was

auctioned he had moved on to a new redeployment as Community Liaison Officer – Kampala Metropolitan. He denied any knowledge of Margaret Kiiza, the buyer of the vehicle.

33. That testimony was materially restated under cross examination. In addition, the Appellant testified that Makerere does not fall within the four zones under the mandate of CPS, and he did not know the circumstances under which the suit vehicle had come to be parked at CPS as there were no records to show when it had been brought there. He denied either stating that he had bought the car for his wife or claiming compensation therefor in the sum of Ushs. 4,000,000/=. Whereas under cross examination, the witness denied having been called to Wandegeya Police Station to provide clarity on the matter or having met the Respondent there, in re-examination he sought to clarify that he was called to Wandegeya Police Station after the sale of the vehicle to explain the circumstances under which it left CPS, which explanation he purportedly provided.

34. On the other hand, DW2 attested to having received a list dated 15th December 2009 bearing items for auction pursuant to a court order of 17th December 2009. It was his testimony that he was later given an additional list of items for auction dated 15th January 2010, the suit vehicle was among the listed properties for auction, it was advertised on 22nd January 2010 in the Sunrise Newspaper and was duly sold on 5th February 2010 to Margaret Kiiza. Under cross examination, the witness testified that he received the two lists of properties for auction from the officer in charge of Stores at CPS. The first list bore 209 properties for auction, was not signed and was titled *'list of unclaimed properties up to 31st October 2008 for public auction in 2009'*, and accompanied the application for disposal of unclaimed properties dated 10th December 2009. The second list was signed by the Appellant, bore 251 properties and was dated 12th January 2010 but was received in court on 15th January 2010. It was the witness' testimony that the suit vehicle was listed in the second list but the order of 17th December 2009 that authorized the disposal of unclaimed property was in respect of the first list.

35. The totality of the foregoing evidence establishes that the Respondent's missing car report of 14th November 2008 was made before the Appellant became a police

officer or took up his duty station at CPS. There is no evidence that he was personally aware of the said report so as to denote mala fide intent on his part in the auction thereof. On the contrary, the investigative reports that were attached to the First Defendant's pleadings would appear to lay the blame for that on AIP Kintu, who took the car to CPS but did not record it as a lost and found car or make any entry in respect of the car at that station. Although this piece of evidence might indeed denote negligence by the Appellant in his supervision of the CPS staff (as was the thrust of the investigative reports), it does not necessarily establish fraudulent intent on his part to the required standard, to wit, the higher balance of probabilities.

36. Learned Counsel for the Respondent considered the admission by the driver and turn boy found in possession of the car that the Appellant was its owner was sufficient proof of his personal liability for the illegal sale of the car. With respect, it seems to me that that statement would simply suggest that he acquired ownership of an illegally auctioned car. However, neither the driver nor turn boy attested to that allegation in court nor was the veracity of that allegation verified in cross examination. On the contrary, the Appellant did controvert that position when in his testimony he denied having bought the car for himself or his wife. Undoubtedly, the suit vehicle was indeed illegally disposed of in the absence of due notice to persons with a claim over it as encapsulated in section 42(2) and (3) of the Police Act. However, the question before the Court presently is whether the Appellant was culpable for any fraud that supposedly underpinned the said disposal.

37. Learned Counsel for the Respondent faulted the alleged sale of the car to the Appellant's wife contrary to the dictates of Article 211 of the Constitution, as well as his failure to explain the circumstances under which the car was included in the list of unclaimed properties for sale at CPS. Although the Record of Appeal does not bear the first list that accompanied the disposal application, DW2 did in his evidence on record attest to its existence, conceding that it did not include the Respondent's car. However, the court record does bear a list that indeed reflects the suit vehicle as item 248 which would appear to represent the contested, additional list. Under cross examination, DW2 admitted that the disposal order of

17th December 2009 pre-dated the additional list, which is dated 12th January 2010, but that list was subsequently presented to the court on 15th January 2010. His evidence was not controverted and is thus deemed to represent a factual account of what transpired. That contested list having been presented to the court, it was incumbent upon that court to uphold the provisions of section 42(2) of the Police Act and ensure due notification of any persons with interest in the items listed therein prior to their disposal. Any lapses in the implementation of that legal provision cannot be visited upon the Appellant personally.

38. Considerable mileage was made of the alleged spousal relationship between the Appellant and the purchaser of the vehicle, as well as the purported request for a refund for monies spent on the car by him, to impute *mala fide* intent and thus fraud on his part. However, whereas PW3 attested to the spousal relationship having been mentioned by the Appellant, the latter flatly denied knowledge of Ms. Kiiza, the purchaser, or that he had purchased it for his wife and solicited a refund of his money. He thus rebutted PW3's evidence, which rebuttal was not impeached in cross examination. I therefore find no proof of such a relationship between the Appellant and Ms. Kiiza.

39. In the result, in the absence of proof to the required standard, I am unable to impute fraudulent misconduct by the Appellant. I would therefore resolve *Ground 1* in the affirmative.

Grounds 2, 3, 4 & 5: *The learned Trial Judge erred in law and in fact when she misdirected herself on the law relating to awarding of special and general damages; ordered the Appellant to pay Ugx 50,000,000/= (Uganda* Shillings *Fifty Million) out of the Respondent's total award or be committed to civil prison & failed to give a reasoned judgment, being emotional and biased against the Appellant.*

40. The learned Trial Judge is faulted for her award to the Respondent of Ushs. 12,000,000/= (twelve million) as the value of the sold vehicle; special damages of Ushs. 120,000,000/= (one hundred and twenty million); Ushs. 150,000,000/= (one hundred and fifty million) as general damages, and the costs of the suit. She is

also faulted for ordering the Appellant to pay Ushs. 50,000,000/= of the total award personally, a decision that has been perceived as being indicative of her bias towards him. The case of **Robert Coussens v Attorney General, Supreme Court Civil Appeal No. 8 of 1999** was cited in support of the proposition that '**an appellate court will not interfere with an award of damages by a trial court unless the trial court has acted on wrong principles of law or that the amount is so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled**.'

41. Learned Counsel for the Appellant argues that the present case does warrant interference with the trial court's award on account of the excessively high amounts awarded as special and general damages. With regard to the monetary value of the sold car as special damages, it is argued that the sum of Ushs. 12,000,000/= was not proven to have been the purchase price of the car, given the disparities in the evidence of PW1, PW2 and DW2 on the subject. Similarly, it is the contention that special damages arising from lost income had not been proven given that the car was, at the time it was stolen, being put to personal rather than commercial use. Furthermore, the trial court is faulted for awarding Ushs 150,000,000/= in general damages without basis yet the Respondent had prayed for Ushs. 50,000,000/=. It is argued that the Respondent did not prove that the general damages sought were a direct and probable consequence of the Appellant's impugned actions.

42. In the same vein, it is opined that the award of Ushs. 50,000,000/= against the Appellant personally was devoid of legal basis but indicative of the trial judge's bias. In the estimation of learned Counsel for the Appellant, courts' impartiality can only be demonstrated by them furnishing reasons for their decisions but none were forthcoming from the trial court in this case with regard to the court's deference to the Respondent's evidence despite the contradictions and apparent hearsay therein. Learned Counsel contends that in so far as there was no proof of wrongdoing by the Appellant, there was no justification for costs to follow what was considered an erroneous 'event'.

43. Conversely, learned Counsel for the Respondent considers the trial judge to have duly applied the principles in the **Robert Coussens** case when she awarded special damages of Ushs. 120,000,000/-, an amount that was purportedly proven by PW4 and is not excessive. It is further opined that Ushs. 12,000,000/= that was awarded as the value of the car was proved by the Respondent's evidence, while the Ushs 1,000,000/= (one million) that had been proposed by the Appellant remained unproven in the absence of a valuation report. The contradictions posed by PW2's evidence that the car cost Ushs. 11,000,000/= (eleven million) are postulated to be minor inconsistencies owing to the passage of time.

44. It is argued that a judge has wide discretion to determine the general damages awardable depending on the circumstances of a case. Thus, having supposedly found the Appellant complicit for fraud and negligence, the trial judge correctly assessed the general damages awardable therefor at Ushs. 150,000,000/= rather than the Ushs. 50,000,000/= that had been pleaded by the Respondent. In learned Respondent Counsel's view, those damages represent adequate recompense for and are a natural consequence of his client's pain, stress and suffering since her car went missing. In any case, they reflect her pleaded claim for Ushs. 50,000,000/= as general damages and Ushs. 100,000,000/= as aggravated damages.

45. Learned Counsel supports the trial court's order for Ushs. 50,000,000/= of the total decretal amount to be paid by the Appellant personally on the premise that he was indeed complicit for fraud and negligence. It is further argued that the Appellant fell short on proof the allegation of bias advanced against the trial judge. The judge's impeachment of the Appellant and DW2's sets of evidence was postulated to have been borne from her observation of their demeanor at trial rather than bias and, in any event, the allegations of bias had not been presented to the trial judge in the course of the hearing so as to give her the opportunity for recusal.

46. Counsel for the Respondent cited section 27(2) of the Civil Procedure Act (CPA) and **M/s Tatu Naiga & Co Emprorium v Verjee Brothers Limited, Civil Appeal No. 8 of 2000** to support the proposition that in the absence of derogatory conduct

by the Respondent, she would as the successful party in the trial proceedings have been entitled to the costs thereof.

47. I am alive to the legal precept that an appellate court will not interfere with an award of damages by a trial court unless it is satisfied that the lower court acted on a wrong principle(s) of law or the amount awarded is so high or so low as to render it an erroneous estimate of the damages to which the plaintiff was entitled. *See* ***Robert Coussens v Attorney General*** *(supra),* ***Interfreight Forwarders (U) Ltd v EADB, Civil Appeal No. 33 of 1992*** *(Supreme Court) and* ***Traill v Booker (1947) 20 EACA 20***. The broad principle governing the measure of damages applicable to both torts and contractual breaches was stated as follows in **Livingstone v Ronoyard's Coal co. (1880) 5 App. Cas 259**, as cited with approval by the Supreme Court in **Robert Coussens v Attorney General** (supra):

> **That sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting compensation or reparation.**

48. In terms of claims arising from pecuniary loss, such as is the case presently, the foregoing rule was applied in **Robert Coussens v Attorney General** (supra) to distinguish special damages from general damages in the following terms (per Oder JSC):

> **It is easy enough to apply this rule in the case of earnings which have actually been lost, or expenses which have actually been incurred up to the date of the trial. The exact or approximate amount can be proved and, if proved, will be awarded as** *special damages.* **In this category falls income or earning lost between the time of injury and the time of trial. But in the case of future financial loss whether it is future loss of earnings or expenses to be incurred in the future, assessment is not easy. This prospective loss cannot be claimed as special damages because it has not been sustained at the date of the trial. It is therefore awarded as** *general damages.* **The plaintiff no doubt would be entitled in theory to the exact amount of his prospective loss if it could be proved to its present value at the date of trial. But in practice since future loss cannot usually**

be proved, the court has to make a broad estimate taking into account all the proved facts and the probabilities of a particular case.

49. Meanwhile, not only is it trite law that special damages must be specifically pleaded and strictly proved, in **Attorney General vs Lutaaya, Civil Appeal No. 16 of 2007** (Supreme Court) it was held that an award of special damages must be restricted to what was specifically prayed for in the plaint. It is against the above principles that I would interrogate the present contestations in respect of the award of special and general damages. On its part, the trial court rendered itself as follows:

> *The plaintiff is entitled to recover its value of Ug. Shs: 12,000,000/=, general damages for the inconvenience, pain and suffering occasioned to her. She is also entitled to special damages for the lost income because the car was used for special hire and as a source of income. However while she and PW4 calculate the income at Ug. Shs: 50,000/= per day six days a week, I consider that the car was couldn't have been bringing full daily income all six days of every week and through the years. Some days would be unprofitable and it would have worn off and the days of earning income would have reduced through the years. Taking these factors into account, in my discretion, I reduce the special damages claimed from Ug. Shs: 157,800,000/= to Ug. Shs. 120,000,000/= for loss of income.*

50. I find no documentary proof of the value of the Respondent's car as would justify the Ushs. 12,000,000/= awarded by the trial court, or of the Ushs. 120,000,000/= awarded as special damages. I am aware of the decision in **GAPCO (U) Ltd vs. Transporters Ltd (2009) HCB 6** (Court of Appeal) that special damages need not always be proved by documentary evidence, certain circumstances[5] rendering it impracticable to secure receipts and thus necessitating recourse to the direct oral evidence on record. However, I would not consider proof of the value of a car to fall within the category of circumstances where documentary evidence would not be readily available. Such valuation would be easily ascertainable by recourse to the appropriate professional valuation expertise, the valuation report of which

[5] In that case, bereavement was considered one such circumstance.

would be fairly conclusive on the matter. In any event, the Respondent having deferred to oral evidence, that evidence was fraught with contradictions that rendered it inconsistent and inconclusive for the strict proof of special damages. Whereas the Respondent attested to the vehicle having been bought by her husband for Ushs. 12,000,000/= in 2006, her husband (testifying as PW2) contradicted her evidence when he initially attested to having bought the car for Ushs. 1,000,000/= before admitting that he had no evidence of having purchased it at Ushs. 11,000,000/=. These contradictions were never clarified in PW2's re-examination.

51. There is similarly no proof of the lost income that formed the basis for the award of Ushs 120,000,000/= as special damages. Although the Respondent attested to having had a book where she recorded the car's daily earnings, that book was not adduced in evidence. PW2, her driver, testified that the car fetched the Respondent Ushs. 50,000/= per day six days a week as a matter of course but his evidence would appear to contradict the Respondent's testimony on the car's daily earnings. I am hard-pressed to appreciate why she would have deemed it necessary to record its daily earnings if they were guaranteed to be Ushs. 300,000/= a week as a matter of course, as alleged by PW4. Such evidence would not, in my view, be satisfactory for the strict proof of the claim for special damages. I would defer to the Respondent's testimony that no receipts were issued to their passengers to find that the claim for lost income remained unproven. At any rate, the Respondent having prayed for special damages in the sum of Ushs. 59,750,000/=, there was no justification for the award of Ushs. 120,000,000/= by the trial court. *See* ***Attorney General vs Lutaaya*** *(supra).*

52. In terms of general damages, I draw inspiration from the objective of damages highlighted earlier herein, to wit, to restore a party that has suffered injury or loss to the same position that s/he would have been but for the wrong for which recompense is being considered. They are such as the law will presume to be the direct and natural consequence of an act complained of. *See* ***Stroms v Hutchinson 1905 AC 515***. In the present case, the Respondent suffered actual loss of earnings envisaged earnings as at the date of trial (for which she rightly sought recompense as special damages); as well as prospective loss from future

earnings anticipated from her car. In **Robert Coussens v Attorney General** (supra), prospective loss was held to be compensatable as general damages estimated on the basis of actual income at the time of the injury. It was held:

> **An estimate of prospective loss must be based in the first instance, on a foundation of solid facts; otherwise it is not an estimate, but a guess. It is therefore important that evidence should be given to the court of as many solid facts as possible. One of the solid facts that must be proved to enable the court to assess prospective loss of earnings is the actual income which the plaintiff was earning at the time of his injury.**

53. Having found under my consideration of special damages that the actual income earned from the Respondent's car was not proved, it follows that there was no solid basis for the measure of general damages awarded by the trial court. Although prospective loss might arguably have been a natural and probable consequence of the car's conversion given its part-time utilization for car-hire services; its actual income – from which an estimation of general damages could have been premised, as espoused in the **Robert Coussens** case – was never proven by the Respondent. Consequently, it is not readily ascertainable on what basis the trial court assessed and awarded the sum of Ushs. 150,000,000/= as general damages. As can be deduced from its decision as reproduced above, there was no basis whatsoever for that measure of general damages. In the case of **Uganda Breweries Ltd v Uganda Railways Corporation, Civil Appeal No. 6 of 2001**, the Supreme Court deemed it necessary to interfere with an award of damages that it adjudged to have been improperly assessed and made on the wrong principles. I would respectfully defer to the same approach and decline to uphold the award of general damages in issue presently for having been improperly assessed.

54. In the instant case, to compound matters, the amount awarded would appear to have been excessive in the circumstances of the case. In my estimation, it is implausible that a car manufactured in 1988, even if purportedly purchased at Ushs. 12,000,000/= in 2006 (as alleged but not proven), would warrant an award of Ushs. 150,000,000/= for its conversion in 2010. With respect, therefore, I am disinclined to abide the trial court's awards of special and general damages in this case and would resolve *Ground 2* in the affirmative. In the same vein, having

absolved the Appellant of personal liability for fraud, I find no legal basis for the trial court's order for him to personally pay Ushs. 50,000,000/= of the total decretal amount. *Ground 3* of the Appeal is accordingly allowed.

55. Be that as it may, given the circumstances of the case, where a legal infraction had been established but the real damage arising therefrom was not quite demonstrated, the trial court could have considered the award of nominal damages. Such damages are an apposite remedy where due cognizance is made of a legal injury or loss that necessitates recompense but the plaintiff is unable to prove or the court has negated any real damage arising therefrom. Hence in **The Mediana (1900) AC 113**, nominal damages were defined as follows:

> **'Nominal damages' is a technical phrase, which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right, which, though it gives you no right to any real damages at all, yet it gives you a right to the verdict or judgment because your legal right has been infringed. But the term 'nominal damages' does not mean small damages.**

56. The material on record in this Appeal is that the Appellant reneged on his supervisory duty at CPS, which resulted in the illegal disposal of the Respondent's vehicle as unclaimed property. I would therefore award nominal damages against him in the sum of Ushs. 10,000,000/= for the legal infraction occasioned to the Respondent on account of his conduct.

57. Turning to *Ground 4*, I carefully considered the totality of the material on record and find it insufficient to draw an inference of bias as against the trial judge. As the court that observed the demeanor of the witnesses, she was entitled to make observations as to their credibility. Such observations would indeed guide an appellate court's re-evaluation of the evidence on record though it would ultimately be free to draw its own conclusions on the cogency of the evidence, as has been done in the present case. I would not deduce any emotionality from this renown practice, neither has any been otherwise established by the Appellant.

58. Whereas the Appellant alluded to an unreasoned judgment as proof of bias, it seems to me that the trial court did in fact give reasons for the conclusions arrived at. To that end, finding no satisfactory explanation as to *'why or how the plaintiff's car illegally got listed on the auctioneers list that led to its illegal sale when it was not authorized by court in its order of 17th December 2009'*, she drew the inference that the Appellant was complicit in its sale. The absence of satisfactory explanation was the reason for its decision on that matter. Following from that conclusion on the car's conversion, the learned trial judge did elaborate in considerable detail the basis for her award of special damages. The Appellant misgivings with her decision would not necessarily render it unreasoned. Finding no other demonstration of bias or emotionality, I would resolve *Ground 4* in the negative.

59. On the question of costs raised in *Ground 5*, it is well established law that costs shall follow the event unless a court for good reason decides otherwise. The reasons advanced in **M/s Tatu Naiga & Co Emprorium v Verjee Brothers Limited** (supra) as justifying departure from that general rule entail such conduct by the successful party **'that has led to litigation which, but for his own conduct, might have been averted**.' I find no evidence of such conduct on record in relation to the Respondent. Accordingly, having been the successful party before the trial court, she was rightly awarded the costs of that litigation. I would therefore disallow *Ground 5* of this Appeal.

E. **Conclusion**

60. The Appellant seeks to have the trial court's judgment set aside with costs in this Court and the lower court. Having succeeded in three of the five grounds thereof, the Appeal substantially succeeds and the trial court's judgment and orders are hereby set aside. In terms of costs, finding no reason to decide otherwise, the Appellant (as the partially successful party herein) would be entitled to part of the costs of the Appeal. However, having found that the suit vehicle was indeed illegally disposed of by the Police under the Appellant's supervisory watch, I would only award half of the costs to the Appellant.

61. The upshot of my judgment is that the Appeal substantially succeeds with the following orders:

I. The Appellant shall pay Ushs. 10,000,000/= to the Respondent as nominal damages.

II. 50% of the costs in this Court and the court below are awarded to the Appellant.

It is so ordered.

Dated and delivered at Kampala this ..... 16th day of ..... Dec ....., 2021.

Hon. Lady Justice Monica K. Mugenyi
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 111 OF 2020

ANATOLI MULETERWA ========== APPELLANT

VERSUS

ADRINE KEMIREMBE ========== RESPONDENT

(An Appeal from the decision of the High Court of Uganda at Kampala before Mugambe, J. in Civil Suit No. 200 of 2010)

CORAM: HON. MR. JUSTICE GEOFFREY KIRYABWIRE, J.A.

HON. LADY JUSTICE MONICA MUGENYI, J.A.

HON. MR. JUSTICE REMMY KASULE, Ag. J.A.

JUDGMENT OF HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

I have had the opportunity of reading the draft Judgment of the Hon. Lady Justice Monica Mugenyi, J.A.

I agree with her Judgment and I have nothing to add. Since the Hon. Mr. Justice Remmy Kasule, Ag. J.A. also agrees, we hereby order that:-

1. The Appeal is allowed.
2. The Appellant shall pay Ug shs 10,000,000/= to the Respondent as nominal damages.
3. 50% of the costs in this Court and the Court below are awarded to the Appellant.

It is so ordered.

Dated at Kampala this 16th day of Dec 2021.

.....

HON. MR. JUSTICE GEOFFREY KIRYABWIRE
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 111 OF 2020

(Appeal from the Judgment of the High Court of Uganda at Kampala (Mugambe, J) in Civil Suit No. 813 of 2007)

Anatoli Muleterwa::Appellant

Versus

Adrine Kemirembe:::Respondent

Coram: Hon. Mr. Justice Geoffrey Kiryabwire, JA

Hon. Lady Justice Monica Mugenyi, JA

Hon. Mr. Justice Remmy Kasule, Ag JA

Judgment of Remmy Kasule, Ag.JA

I have had the benefit of reading in draft the Judgment of Hon. Lady Justice Monica.K. Mugenyi, JA, and I concur with her decision that this appeal succeeds with the orders she has made therein.

I have nothing useful to add.

Dated at Kampala this...16th... day of...Dec.....2021.

....

Remmy Kasule

Ag. Justice of Appeal