

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

HCCS NO. 498 OF 2002

ABBY ZIWA::: PLAINTIFF

VERSUS

SEWANKAMBO DICKSON ::: DEFENDANT

BEFORE: THE HON. LADY JUSTICE M.S ARACH — AMOKO

JUDGMENT:

The Defendant entered into an agreement dated 18th September 2001, with the Plaintiff for the hire of the Plaintiff's Coaster Reg. No. UAB 550 D at a daily rate of Shs.70,000/-. The Plaintiff stated in the plaint filed in this Court on the 6/9/2002 that they agreed at first that the Defendant was to use the vehicle for 5 weeks, but later on, the term was verbally extended and the Defendant went with the vehicle to West Nile till February 2002.

The Plaintiff further stated that when the Defendant took the said vehicle, he made a deposit of only Shs.140,000- and thereafter used the vehicle for 4 $\frac{1}{2}$ months without further payment. The Plaintiff also stated that the Defendant took the vehicle to Arua and abandoned it there in February 2002. When he learnt about it, he went to Arua and found that the vehicle had broken down and could not be repaired. He had to hire a breakdown to tow the vehicle back to Kampala on the 3rd February 2002.

The Plaintiff contends that the Defendant committed a breach of contract by refusing to pay the hiring and towing charges despite several demands and brought this action to recover: -

- a. Shs.9,310,000- being hiring charges for 4 $\frac{1}{2}$ months.
- b. Shs.500,000- towing charges.
- c. Interest at 20% from date of the agreement till payment in full.
- d. Costs.
- e. Any other relief.

The Defendant admitted the agreement but denied the rest of the allegations in the plaint. He averred that he only hired the vehicle on a daily basis as per the contents of the agreement but never breached any term of the said agreement and on the 27th October 2001, he cleared all the Plaintiff's debt as per the agreement attached as Annexure 'B' to the defence. Wherefore he prayed that the Plaintiff's suit be dismissed with costs.

In a brief reply to the written statement of defence filed on 22/11/2002 the Plaintiff maintained his claim and denied ever receiving any money as alleged in the said agreement of 27/10/2001 and stated that the said agreement was a concoction, a fabrication and an act of fraud on the part of the Defendant and that he never signed or executed it and put the Defendant to strict proof thereof. The Plaintiff particularized the Defendants fraud as:

- a. Claiming to that he paid all the hiring charges to the Plaintiff whereas not.
- b. Falsifying the acknowledgment memorandum dated 27/10/2001.
- c. Forgery of the Plaintiff's signature.
- d. Purporting that the Plaintiff signed an acknowledgment memorandum dated 27/10/2001, whereas not.

The Plaintiff also averred that he wrote a letter demanding his payment in November, 2001, but the Defendant never replied. Wherefore the Plaintiff prayed the Court to reject the Defence with costs.

Efforts at settlement failed and the matter was finally heard by this Court starting from 6/9/2002.

The agreed facts were:

1. The agreement dated 18th September 2001.
2. The Defendant was to use the vehicle for 5 weeks.
3. The Defendant paid Shs. 140,000- for the first two days.

The areas of disagreement and the agreed issues were:

1. Whether the Defendant kept the vehicle for 133 days without payment.

2. Whether the Defendant abandoned the vehicle in Arua and the Plaintiff had to tow it back to Kampala.
3. If so, whether the Plaintiff is entitled to the relief sought.

Three documents were exhibited by consent of the parties, namely,

1. The Agreement dated 18/9/2001 — Exhibit P1.
2. Letter dated 2/11/2001 by Bamwite & Co. — Exhibit P2.
3. Receipt for towing charges — Exhibit P3.

The Plaintiff was represented by Mr. Edward Barnwite while Mr. Sekaana Musa represented the Defendant. He took over from Mr. Paul Tusubira after Mr. Tusubira abandoned the Defendant. The Plaintiff told Court that on the 17/9/2001, one Kiguli, a broker, told him that a big man called Dick Sewankambo wanted to hire his vehicle for three months at a rate of Shs.70,000- per day. On the 18/9/2001 Kiguli took him and his conductor to Dick's office located at "Happyland" at Kibuye at 10 a.m. They agreed on Shs.70,000- per day. Dick wanted to hire the vehicle for 3 months. He paid Shs. 140,000- for two days deposit. Dick wrote the agreement and they both signed it (Exhibit P1). After that, he handed the vehicle to Dick. Dick never paid him any more money. He was forced to go to his lawyers. The lawyers gave him a demand note which was copied to the police and the LC1 Chairman, Kibuye Happy land dated 2/11/2001 (Exhibit P2), demanding Shs.1,540,000- at that time. Dick never replied the letter. He went with the vehicle to various places. The police advised him that it was a Court matter. In January 2002, he received information that the vehicle had been abandoned in Arua. When he told Dick, Dick told him to forget and wait for Sarah Birungi to return it. 3id February, the conductor (PW3) reported that the vehicle had had an engine knock. He had to get a breakdown from PW2 to tow it back to Kampala at Shs.500,000- (Exhibit P3). He denied that he executed the agreement dated 27/10/2001 and that he first saw it in Court. The Defendant had used his vehicle for over 5 weeks and must pay.

The Plaintiff called two other witnesses apart from himself, to prove his claim. They were:-
Abdu Mukalazi an employee of Abdu& Sons, a break down service operator (PW2). His evidence is that he towed the Plaintiff's said vehicle on the Plaintiff's request in March or April

2002, from Arua Town for a total of Shs.500,000-. The Plaintiff paid and he issued the Plaintiff a receipt (Exhibit P3).

PW3 — Kyambadde Abby. He testified that the Plaintiff employed him to look after the vehicle. He was in charge of the vehicle when the Defendant hired it on the 18/9/2001 to take a musician called Sarah Birungi for a music tour. They went to all sorts of places including Busoga, Busia, Malaba, Tororo and stopped in Arua. The vehicle developed a fault in the engine in February 2002 in Arua Town. They parked the vehicle at the petrol station in Arua and contacted the Plaintiff in Kampala. The Defendant never handed the vehicle back to the Plaintiff. Under cross examination PW3 told Court that he returned to Kampala by bus after the vehicle had broken down. He reported to the Plaintiff who hired a break down which they took to Arua and they towed the vehicle back to a garage in Bwaise in Kampala.

The Defendant on his part maintained that he signed the agreement on 18/9/2001 to transport musicians for 5 weeks at Shs.70,000- per day. That he paid Shs. 140,000- for the first two days. Thereafter he sent Mugerwa Joachim (DW2), who was supposed to collect money from the musicians and to on his behalf, and to pay daily with effect from 20/9/2001. Joachim did very well. He paid for 3 days that is, Shs.210,000-. They made another agreement to that effect. He is the one who wrote the agreement. He gave it to Nsubuga (DW4) who photocopied. The Plaintiff took the original. During cross examination the Defendant conceded that the word “Tusubira 5 weeks” meant approximately five weeks. That it could mean 3, 4, 6 or more weeks. He contended however that in that case they would have to sign another agreement. He also contended that he did not use the vehicle for over five weeks, but conceded that he did not return it to the Plaintiff. He also admitted that he received the demand letter dated 2/11/2001 and that he did not reply to it. He told Court that the five weeks were supposed to end on 24/11/2001. He insisted that he paid Shs.2,450,000- through his agent Joachim Mugerwa (DW2). That had Mugerwa told him that he paid the money.

He conceded that there were no documents to show that the money was paid. He thought the agreement was ‘finished’. He was therefore surprised to see Court papers. The Plaintiff accused him to Katwe Police for forgery but he was not prosecuted. During cross examination, the

Defendant admitted that he did not return the vehicle to the Plaintiff. He denied that he used the vehicle for 5 weeks. He admitted that he received the letter of 2nd November 2001 from Bamwite & Co. Advocates and that he did not reply it.

The Defendant also called other witnesses in his defence. DW2 was Joachim Mugerwa. He told Court that he was the cashier who was in charge of collecting the money from the musicians during the tour. He also told Court that he was aware of the agreement for the hire of the said vehicle for 5 weeks w.e.f September 2001 at Shs.70,000- per day. That the vehicle was to go to Busoga area. According to him, he was instructed to collect money from the gate collecting from Sarah Birungi's performance and to pay for the vehicle and pass on the balance to the Defendant. He paid for all occasions except for 3 days. The Plaintiff was included in the group because he had to collect his money daily. He paid for 30 days to the Plaintiff. When the 5 weeks ended, he came back with the Plaintiff and they left the vehicle behind. He stopped in Busia, after paying the Plaintiff all the money, except for 3 days when they did not perform. His boss paid for the last 3 days on the 27/10/2001. The Plaintiff was paid Shs.210,000-. He witnessed the agreement. During cross examination DW3 stated that he paid a total of Shs.2.lm. He never signed anywhere since the Plaintiff was present in person. He was not aware whether Busia falls under Busoga. This witness was nervous and incoherent most of the time while testifying before Court.

DW3 was Patrick Sendagala. He told Court that the Defendant called him in October 2001 and he witnessed the payment of Shs.210,000- to the Plaintiff for the last three days.

DW4 was Godfrey Nsubuga, a musician with a group called Matendo. He testified that he came to the Defendant's office and found the Plaintiff demanding money for 3 days. The Plaintiff was paid Shs.210,000-. He actually saw the Plaintiff receiving this money and he signed the agreement. He was sent to photocopy the agreement after which the Plaintiff took the original.

During cross examination, DW4 denied that he was hired to tell the story. He stated that he was not in Sarah Birungi's group but in a group called Matendo. When Mr. Bamwite put him to task about his name, he stated that his name had changed from Joseph to Godfrey when he changed from being a Protestant to a Catholic. He was not aware which days the three days covered. He

denied that they forged the agreement with one Mugisha in Tusubira's chambers. This witness avoided eye contact throughout his testimony.

The 1st issue is, whether the Defendant used the vehicle for 133 days without payment. This is a question of fact, and not of law. The Plaintiff testified that he handed over the vehicle to the Defendant on the 18/9/2001 after signing the agreement (Exhibit Pt). The Defendant also admitted this. That the Defendant thereafter went with the vehicle to various places. That he reported the matter to Katwe Police Station on 2/11/2001 but the police advised him that it was a civil matter since they had made an agreement. That in January 2002, someone told him that the vehicle was seen in Arua. 3rd February 2002, the conductor told him that the vehicle had knocked an engine. He had to look for a breakdown and tow it from Arua. According to the Plaintiff, therefore, the Defendant kept the vehicle from 18/9/2001 till 3rd February 2002, a total of 135 days. This evidence was corroborated. PW2 who towed the vehicle from Arua and the conductor PW3 who reported the breakdown and accompanied PW2 to and from Arua. During cross examination, the Defendant also admitted that he did not return the vehicle to the Plaintiff. I must say I found the Defendant very evasive and he kept on insisting that he paid according to the agreement. He was not a very reliable witness. I therefore accept the Plaintiff's testimony that the Defendant kept the vehicle for more than 133 days. The question is whether he did so without paying. Evidence was led on both sides that the Defendant paid Shs. 140,000- for the first two days, as a deposit.

According to the Plaintiff however, that is all the Defendant paid. By 2/11/2001, he was demanding Shs.1,540,000- from the Defendant. His lawyers wrote to the Defendant a demand letter dated 2/11/2001. The Plaintiff never replied the said letter. When he asked Dickson for the money, he told him to forget about it because he wouldn't pay. That he should take it as someone who had lost a person. He told him that he should wait for Sarah Birungi to bring back the vehicle. He used the vehicle for over 5 weeks and he is demanding a total of Shs.9.8m including Shs.500,000- for hiring charges. I agree with Plaintiff's counsel that there is nothing on record to show that the Defendant paid any more money as he claims. He claimed that after paying the Shs. 140,000- for the first two days, he sent Mugerwa Joachim (DW2) "*who was supposed to*

pay everyday starting from 20/9/2001 because Joachim was the cashier who collected the money from the musicians.”

Mugerwa Joachim (DW2) stated that he paid money for 30 days to Abby Ziwa (the Plaintiff). Then he contradicted himself when he stated that:

“I stopped in Bus/a after paying all his money except for 3 days when we never performed on 27/10/2001 — he was paid Shs.210, 000-”

During cross examination DW2 contradicted himself further when he stated that he paid a total of Shs.2.lm to the Plaintiff. He was a nervous, incoherent witness. Most of his testimony was contradictory and untruthful. I have therefore rejected it. All in all I accept the Plaintiff's testimony that he was never fully paid for the days the vehicle was kept. I answer the 2nd issue in the affirmative.

The third issue is, whether the Plaintiff is entitled to the relief sought. The Plaintiff prayed for Shs.9,310,000- as hearing charges. This is the amount of money for the 133 days at 70% per day. The Plaintiff has proved that the Defendant kept the vehicle for over 133 days. I accordingly award this sum to him.

The Plaintiff also prayed for Shs.500,000- as towing charges. On the basis of the evidence of PW2 and Exhibit P3, that is the receipt from Abdu & Sons Breakdown Service, I award this also to the Plaintiff.

In the result, I enter Judgment for the Plaintiff in the following terms.

1. Shs.9,310,000-
2. Shs.500,000-
3. Interest on 1 and 2 at 18% p. from date of filing till payment in full.
4. Costs.

M.S. Arach — Amoko

JUDGE

1/12/2004

Judgment delivered in Court in the presence of:

1. Mr. Ambroze Tebyasa holding brief for Mr. Bamwite for Plaintiff.

2. Plaintiff.

3. Okuni — Court clerk.

Absent: Defendant and counsel

Matter was cause listed.

M.S. Arach — Amoko

JUDGE

1/12/2004