

THE REPUBLIC OF UGANDA
THE HIGH COURT OF UGANDA
(COMMERCIAL DIVISION)

HCT - 00 - CC - CA - 10 - 2011

DAIRY DEVELOPMENT AUTHORITY APPELLANT

VERSUS

DAVID NGARAMBE RESPONDENT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

J U D G M E N T

(Adjusted under slip Rule Section 99 Civil Procedure Act)

This is an appeal from the judgment of Her Worship Esta Nambayo Chief Magistrate, Mengo of the 6th June, 2010 which was made in favour of the Respondent.

The brief facts are that on the night of 20th December 2008, officers of the Appellant Authority together with the Police intercepted and stopped a track carrying milk for sale to Kampala at Lubaya along the Masaka – Kampala Road.

In an attempt to park the said truck was reversed into ditch and eventually overturned. In the process the milk tank/cooler being carried on the truck was damaged and the milk there in was spilled. The truck was also damaged.

The Respondent sued the Appellant for negligence on the grounds that accident and the resultant loss was occasioned by the officers of the Appellant. The Chief Magistrate gave judgment in favour of the Respondent and ordered that the Appellant pay the Respondent Shs. 26,225,000/= as special damages; Shs. 10,000,000/= as general damages and interest on special damages at 25% per annum from the 20th December 2008 until payment in full and costs of the suit.

The Appellant now appeals this judgment to this court on the following grounds;

- 1- The learned Chief Magistrate erred in law and fact when she found that the Appellant was liable in negligence for the loss suffered by the Respondent.**
- 2- The learned Chief Magistrate erred in law and fact when she assessed and awarded special damages basing on erroneous principles and considerations.**
- 3- The learned Chief Magistrate erred in law and fact when she awarded an outrageously excessive sum as special damages of Shs. 26,225,000/= which had not been specially proved by the Respondent.**

4- The learned Chief Magistrate erred in law and fact when she awarded the Respondent general damages in the outrageously excessive sum of Shs. 10,000,000/=.

5- The learned Chief Magistrate erred in law and fact when she awarded interest on special damages at the rate of 25% per annum from the date of the cause of action till payment in full.

The Appellant was represented by Mr. Francis Buwule while the Respondent was represented by Mr. Peter Katutsi. I shall address the grounds in the following order-

Ground No. 1 - The learned Chief Magistrate erred in law and fact when she found that the Appellant was liable in negligence for the loss suffered by the Respondent.

It is the case of the Appellant that its officers were not negligent when they stopped the truck carrying the Respondent milk and the Respondent failed to adduce evidence to support their particulars of negligence in the plaint that they

- i) (stopped) the Plaintiff's vehicle without any justifiable cause
- ii) (failed) to exercise care and due diligence while commandeering the Plaintiff's vehicle.

It is also the case for the Appellants that the Respondents failed to show that the Appellants owed them a duty of care which they broke leading to the Respondent's loss; these being the tests that the Respondent had to prove for negligence.

Counsel for the Appellant submitted that the evidence showed that driver of the truck when stopped parked in the middle of the road and ignored advice when the Appellant's agents as to where to park instead reversing into a ditch. He further submitted that if a duty of care existed it was discharged by the Appellant's agents giving advice to the driver of the truck who instead ignored it leading to the accident. Furthermore, that the Appellant's agents did not direct the said driver in how to reverse his truck.

Counsel for the Appellant submitted that Para 4(c) of the plaint stated

“... upon the Plaintiff's driver failing to pay the levy, the Defendant's said agents impounded the Plaintiff's truck and its cargo and while trying to commandeer to the Police Station drove it into a ditch thereby over turning it.”

This is to show that the Respondent's driver had control of the vehicle at the time and not agents of the Appellant. It is the case for the Appellants that they were justified to stop the truck as they were enforcing the payment of a milk levy under the law and that the truck was properly stopped by a Policeman. Counsel for the

Appellant also submitted that the Honourable Chief Magistrate also found that the collection of the milk levy was legal.

It is also the case for the Appellant that this operation to enforce the milk levy had to take place at night because that is milk was transported on that road.

It is the case for the Respondent that the Appellant failed to prove that it had statutory powers to carry out the operation to impound anyone's property to recover its dues.

Counsel for the Respondent submitted that such power by a Government officer to interfere with the liberty or property of an individual must be given by statute or common law. In this regard, he relied on the case of **Uganda Revenue Authority V Remegious Patrick Paul** CA 08 of 2005.

It is also the case of the Respondent that the Appellant knowing that the Respondent was carrying perishable goods had a duty to provide safe parking and safety for the Respondent's property.

Counsel for the Respondent submitted by using police to stop the truck the Appellants took over control of it and had a duty to ensure its safety. Counsel for the Respondent submitted that the Appellant's chief agent (DW2 Baker Semusambira) testified that they would hold such vehicles until their owners paid the levy or agreed/cooperated with them as to how to settle the dues. He further

submitted that the overturning of the truck could not have been the willful act or omission of the Respondent but was occasioned by the late night operation by the Appellant.

Counsel for the Respondent further submitted that though the milk levy may have been legal the method employed by the Appellant to collect it was illegal and they ought to have foreseen the likelihood of loss or damage to the Respondent.

I have perused the record of appeal and the submissions of both counsel for which I am grateful.

This is a first appeal from the decision of the Chief Magistrate. The duty of a first appellate court was outlined by **Hon. Justice A. Karokora** (JSC as he then was) in the case of **Sanyu Lwanga Musoke V Sam Galiwango** (sc) Civil Appeal No. 48 of 1995 when he held

“... it is settled law that a first appellate court is under a duty to subject the entire evidence on the record to an exhaustive scrutiny and to re-evaluate and make its own conclusion while bearing in mind the fact that the court never observed the witnesses under cross examination so as to test their veracity ...”

From the record there is conflicting testimony as to how the accident came about leading to the loss. What is clear is that at some point in the night after being

stopped at Lukaya the driver of the truck Salongo Sikizibwe Edward (PW2) reversed the truck and it ended up in a ditch. Whether this truck was reversed at the sole decision of the driver or the guidance of the agents of the Appellants leading to the accident so as to apportion blame in decision making may never be known. Equally, there conflicting testimony as to whether the milk was lost following the truck over turning after an attempt to tow it out of the ditch failed or the lid of the tank containing the milk was opened by driver and the milk let out.

Whatever the true sequence of events the Honourable Chief Magistrate made the finding that there were better legal procedures to recover such dues like taking the matter up in court. She further found that since the Appellant was stopping vehicles at night it should have provided proper parking space to avoid such accidents. The Chief Magistrate noted that milk is a very sensitive product and that impounding a milk truck was very risky and could lead to loss.

It is the case for the Appellant that the driver of the truck and the Plaintiff were not cooperative with the agents and this led to the loss that ensued. It would appear from the testimony of the Police officer No. 28493 Cpl. Onyango Charles that his duty was to stop the vehicles with milk and then move aside and allow the agents of the Appellant to continue with their operation. Mr. Baker Semusambira (PW2) an accounts officer with the Plaintiff authority who was involved in the night operation at Lukaya, testified that where the milk transporter do not cooperate with them over the payment of the milk levy “... *we keep the vehicle until we cooperate* ...” this is what happened.

To my mind this means that at the time of the accident the truck was under the control of the Appellants agents. That is sufficient to create a duty of care over the truck they impounded until the dispute over the dues was resolved.

I agree with the Chief Magistrate that the enforcement of milk due could have been done differently. Like counsel for the Respondent submitted, the Dairy Industry Act (cap 85) does not provide for this type of impounding of vehicles even when such levy is unpaid. This operation to my mind was rather disruptive and high handed. The Appellant Authority knew the Respondent and could have sued the Respondent to recover the milk levy instead of this operation. Section 21 of The Dairy Industry Act (cap 85) also provides for criminal sanctions against anyone who violates the provisions of the Act. The fact that this accident occurred while the vehicle was under the control of the Appellant's agents means that the Appellant failed in its duty of care leading to the damage to the truck, milk tanker and loss of milk.

The Chief Magistrate therefore properly evaluated the evidence on record and found the Appellant liable in negligence.

Ground 2 and 3 relate to award of special damages and shall be handled together.

It is the case of the Appellant that the Chief Magistrate erred in law and fact when she assessed and awarded special damages on erroneous principles and

considerations. It is also the case of the Appellant that she also awarded an outrageously excessive sum of Sha.26,225,000/= as special damages which had not been strictly proved by the Respondent.

Counsel for Appellant submitted that special damages have to be specifically pleaded and strictly proved. He relied on the case of **Paul Mugalu V Anjeri Nabukenya** C.A No. 19 of 2003 for that proposition.

Counsel for the Appellant submitted that the Respondent testified that cost of milk in Rushere where it was got was Shs. 600 while in Kampala it was Shs. 800 per litre. The Respondent however, did not show what value of Shs. 6,000,000/= for the loss of 5,000 litres of milk was arrived at.

Counsel for the Respondent contested the value the milk tanker at Shs. 19,000,000/= because its value had not been depreciated and there was no professional assessment report to prove that the tanker was a complete writer off.

He also contested the sum of Shs. 875,000/= as repairs to the truck on which the milk tanker was on because the Respondent testified that this money was paid by the owner of the truck and not him. He also prayed court to reject the sum of Shs. 35,000/= as the driver's pay as not proved.

On the other hand it is the case for the Respondent discharged the burden of proof with regard to special damages.

Counsel or the Respondent submitted that court should take judicial notice that rural milk producers do not issue receipts for their sales nor do break down operators up-country. He submitted that where special damages are not strictly proved the court may award general damages in lieu. In this regard he referred to the case of **Benedito Musisi V Attorney General** HCCS 708 of 1992 for this proposition.

I have perused the record of appeal and considered the submissions of both counsel on these grounds.

The principle of law in awarding special damages is well settled. Such a claim in special damages must be specifically pleaded and strictly proved – see the judgment of **Berko J** (as he then was) in the case of **Benedito Musisi** (supra). That case referred a decision of **Lord Goddard CJ** in **Borham-Carter V Hyde Park Hotel** [1948] 64 TLR where he stated

“... [the] Plaintiff must understand that if they bring action for damages it is for them to prove their damage; it is not enough to write down the particulars and so to speak, throw them at the head of the court saying “This is what I have lost; I ask you to give me these damages”, they have to prove it ...”

I fully agree with that position because many times that is what happens in court in that a list of losses is thrown at court with the expectation that is enough to award special damages. It is not.

Counsel for the Respondent submitted that receipts in our local environment may be hard to come by to prove payments. That may be so. Indeed **Hon. Justice Masika** (CJ as he then was) in the case of **Kyambadde V Mpigi District Administration** [1983] HCB 44 held that special damages must be strictly proved but they need not be supported by documentary evidence in all cases.

In the court below the Chief Magistrate had this to say about special damages

“... in the circumstances of this case and for the reasons I have given above, I therefore enter judgment for the Plaintiff (the current Respondent) in the following terms;

- 1) The Defendant (current Appellant) pay special damages to the Plaintiff (current Respondents) amounting to Shs. 26,225,000/=.*
- 2) General damages of Shs. 10,000,000/=.*
- 3) Interest on item (1) at the rate of 25% per annum from the date of cause of action until payment in full*
- 4) Costs of the suit ...”*

Nowhere else in her judgment does the Chief Magistrate refer to special damages. To my mind she surprisingly did not apply the required principles and

considerations or evaluate the evidence with regard to special damages. Having correctly found the Appellant liable in negligence, the Chief Magistrate simply awarded the special damages as listed and prayed for in Para 6 of the plaint. This according to the case of **Borham-Carter** cited in **Benedito Musisi** (supra) was an error.

That of course does not mean that the Respondent is not entitled to special damages. It is now open to this court as a first appellate court to subject the evidence adduced at trial on record, subject it to exhaustive scrutiny and re-evaluation and reach its own conclusion – see the decision of **Hon. Justice Karokora (JSC) Sanyu Lwanga Musoke** (supra).

A review of paragraph 6 of the plaint shows that the Plaintiff made the following claims in special damages

1) Loss of 5,000 litres of milk.....	6,000,000
2) Loss of milk tank/cooler.....	19,000,000
3) Cost of repair of truck.....	875,000
4) Driver's pay for day and fuel.....	350,000

	26,225,000=
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Under the head of loss of 5,000 litres of milk a review of the evidence is that the truck had on it a Tank/container of milk which was full and that after the accident, the said milk was lost by spillage (how this occurred is in contest). The Respondent claims Shs.6,000,000 in special damage which works out to Shs,1,200/= per litre. In his testimony the Respondent stated that the milk split was 5,300 litres which he had bought at Shs.600 per litre from Rushere.

He further testified that the cost of milk at Kampala at the time was Shs. 800/=. No documentary evidence was provided in this regard. There is a discrepancy on record as to whether the milk tank had 5,000 or 5,300 litres of milk. Order 6 rule 7 of the Civil Procedure Rules do not allow without amendment the reliance on facts inconsistent with pleadings in this case the plaintiff. I therefore find that the claim for lost milk can only be for 5,000 as in the plaintiff and not 5,300 litres. On the strength of the authority of the case of **Kyambadde** (supra), court is willing to take the price of milk at Kampala at the time of loss to be Shs. 800 as testified by the Respondent without documentary proof as indeed a lot of this trade in Uganda goes unrecorded.

Based on the above evaluation of evidence on record, overturn the award of special damages for lost milk of Shs. 6,000,000/= in the court below and instead grant a revised amount of Shs. 4,000,000/= as duly proved.

The Respondent in the court below also prayed for and was granted general damages of Shs. 19,000,000/= for the loss of a milk Tank/cooler. The evidence on

record shows that when the truck over turned, the milk tank was damaged. Counsel for the Appellant submitted that there is no evidence that the said damage amounted to a write off or that provision was made for depreciation.

I find that the Appellant should have provided expert evidence to counter this claim but did not. I therefore find that the evidence is sufficient to sustain a claim in special damages for the milk Tank/cooler. A review of the evidence on record of the Respondent shows that he testified that he bought the tank at Shs. 19,000,000/= (he was shows exhibits E.P2 and E.P3). There was a typo on the record showing Shs. 10,000,000 which is an error. I now correct under the slip rule S.99 of the Civil Procedure Act to Shs. 19,000,000/=

Based on the above evaluation of evidence on record, I uphold the lower court award of Shs. 19,000,000/=as duly proved.

The Respondent in the court below prayed for Shs. 875,000/= for repair of truck. However, in his evidence in chief the Respondent in the court below testified that the owner of truck tried to repair it after the accident but later sold it as spares. In this regard, I am therefore inclined to agree with the submissions of counsel for the Appellant that the Respondent in the court below could not claim special damages in expenses not incurred by him. Based on the above evaluation of the evidence on record, I over turn the award of Shs. 875,000/= as special damages for repair of the truck as not proved.

Finally the Respondent in the court below prayed for and was granted Shs. 350,000/= as special damages for the driver's pay and fuel. This to my mind given the events of the fateful night was a reasonable and foreseeable claim. No documentation was presented for this claim but court will allow it since such expenses are rarely documented in this country. However, I need to point out that during his testimony in the court below, the Respondent stated that

“... Transport was 500,000/= including fuel and the cost of the driver ...”

This higher figure of Shs. 500,000/= is a departure from the pleadings in the plaint. That being the case, I shall uphold the grant of Shs.350,000/= by the Chief Magistrate under this head.

All in all, I grant the Respondent on appeal the total amount of Shs. 23,350,000/= proved special damages.

Ground No. 4: The learned Chief Magistrate erred in law and fact when she award the Respondent general damages in the outrageously excessive sum of Shs. 10,000,000/=.

It is the case for the Appellant that the Chief Magistrate awarded Shs. 10,000,000/= as general damages without a basis. Counsel for the Appellant submitted that damages are compensatory in nature and should not be used for unjust enrichment. In reply it is the case for the Respondent that the trial court was very lenient in this award. Counsel for the Respondent submitted that the Appellant was negligent and high handed and caused inconvenience, anguish and stress to the Respondent.

On the issue of evaluating general damages on appeal, it was held in the case of **Joseph Muwanga V Sterling Civil Engineering (U) Ltd** Supreme Court Civil Appeal No. 20 of 1993 that

“... in principle an appellate court would normally not interfere with the findings of the lower court on the issue of damages except where the court has not properly appraised the evidence in assessing the damages and so made a wholly erroneous estimate of the damages resulting in too small or too large a sum. See Davies and Another V Powell [1942] 1 All ER 657 at 666 and Flint V Lowel [1935] 1 K.B 354 at 360. The appellate court should not reverse the findings of the trial Judge on quantum even if that court would have awarded a higher sum. This principle has been accepted in our jurisdiction in Kungo V

Njoroge [1952] 20 EACA 60; Metha V Patel [1954] 22 EACA 164 and Singh V Singh [1955] 22 EACA 125 at 129 ...”

As seen in the last issue the Chief Magistrate did not give the basis for the award of general damages. That could have been an oversight. That in any case does not mean that the Respondent was not entitled to general damages in the court below. The Appellant on appeal to this court only notes that the award was excessive but does not submit on what would have been appropriate in the circumstances.

I agree with counsel for the Respondent that the actions of the Appellant were negligent and high handed for those reasons I shall not interfere with the award of Shs. 10,000,000/= as general damages and hence it stands.

Ground No. 5: The learned Chief Magistrate erred in law and fact when she awarded the Respondent interest on special damages at the rate of 25% per annum from the date of cause of action till payment in full.

Counsel for the Appellant did not submit on this head so I deem it that the ground was abandoned and I accordingly do not interfere with that award. As a consequential order however, I note that the learned Chief Magistrate did not make an award for interest on general damages which I believe was an oversight.

Both counsels for the parties did not raise this but it is a matter for rectification. I accordingly award the Respondent in the court below interest at 8% per annum on general damages from date of the judgment in the lower court until payment in full.

The final result of this appeal is that the Appellant is liable in negligence and as a result the Respondent is awarded on appeal the sum of Shs. 23,350,000/= as special damages with interest at 25% per annum from the date of the cause of action until payment in full. The Respondent is further awarded general damages of Shs. 10,000,000/= with interest at 8% per annum from the date of the judgment in the court below until payment in full.

The appeal is therefore partial successful and I award the Appellant one third of the costs at appeal. The award of costs in the lower court remains the same on the adjusted figures.

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Justice Geoffrey Kiryabwire

JUDGE

Date: **21/01/13**

21/01/13

Judgment read and signed in open court in the presence of;

- P. Katutsi for the Respondent

In Court

- Respondent
- Rose Emeru – Court Clerk+
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Geoffrey Kiryabwire

JUDGE

Date: 21/01/13

