THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 35 OF 2003

(FROM ORIGINAL MENGO C. S. NO. 762 of 1999)

SALONGO KIBUDDE ::APPELLANT

VERSUS

MRS. JOSEPHINE MUBIRU ::::::::::::::::::::::::::::RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

JUDGMENT

The above named appellant being aggrieved by and dissatisfied with the judgment, decree and orders of Her Worship Atukwase Justine, Magistrate Grade I, delivered on 20/05/2003 at Mengo Chief Magistrate's court appealed to the High Court against the whole of that judgment and decree on the following grounds:

1. The learned trial Magistrate erred in law and fact when she found that the appellant owned (sic) Shs.1,509,100/= to the respondent without evidence to prove existence of a contract between the appellant and the respondent.

2. The learned trial Magistrate erred in law and fact when she found as a fact that the appellant used the respondent's vehicle as a special hire when it was unlicenced and could not lawfully be driven on the road.

3. The learned trial Magistrate erred in law and fact when she rejected the defence evidence of non-use of the vehicle, which was contradicted.

4. The learned trial Magistrate failed to properly evaluate the evidence on record on both sides thus coming to a wrong decision.

The grounds of appeal were formulated by the appellant personally. On getting a lawyer, they were not reviewed. The four grounds can, in my view, be conveniently summarized as follows: -

1. Whether the learned trial Magistrate subjected the evidence before her to adequate scrutiny.

2. Whether the learned trial Magistrate erred in law when she made the impugned orders.

The above broad grounds, in my view, do encompass all the grievances the appellant has against the decision of the lower court.

From the evidence, the plaintiff/respondent is the owner of the motor vehicle Registration No. UBD 996 a Toyota Corona, having bought it from one Nyanzi Umaru. After acquiring the same, she lent it out to the defendant/appellant for operation of special hire services at the rate of Shs.20,000/= per day. The defendant/appellant stayed with it for a period of one and half months without any payments being made to the plaintiff/respondent. Hence the suit.

The learned trial Magistrate was invited to determine:

1. Whether there was a valid contract between the plaintiff and the defendant.
2. What were the terms of the contract.
3. Whether any of the parties breached the contract.
4. Remedies.

She determined the first issue in the affirmative. As regards the second one, she found that the defendant was to use the vehicle for hire services at the rate of Shs.20,000/= per day. Since throughout the contract period the defendant never made any remittance of

funds to the plaintiff, the learned trial Magistrate determined the suit in the plaintiff's favour. Hence the appeal.

This is a first appeal. It is the duty of the first appellate court to review the record of the evidence for itself in order to determine whether the conclusion reached upon the evidence by the trial court should stand. It is trite that if the conclusion of the trial court has been arrived at on conflicting testimony after seeing and hearing the witnesses, the appellate court in arriving at a decision would bear in mind that it has not enjoyed this opportunity and the view of the trial court as to where credibility lies is entitled to great weight.

See: Peters vs Sunday Post Limited [1958] EA 424.

In law a fact is said to be proved when court is satisfied as to its truth. The evidence by which that result is achieved is called the proof. The general rule is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. When that party adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof: that is, his allegation is presumed to be true, unless his opponent adduces evidence to rebut the presumption. The standard of proof is on the balance of probabilities.

Applying the above principle to the instant case, the plaintiff/respondent led evidence to show that she was the owner of the vehicle in question. She also led evidence to show that after acquiring the vehicle, she lent it out to the defendant/appellant for operation of special hire services. The transaction was not reduced to writing. It is trite that a contract is a legally binding agreement. The agreement arises as a result of offer and acceptance, but a number of other requirements must be satisfied for an agreement to be legally binding.

In general, no particular formality is required for the creation of a valid contract. It may be oral, written, partly oral and partly written, or even implied from conduct.

In the instant case, the defendant/appellant did not deny the fact of taking the vehicle from the plaintiff/respondent on hire terms.

Looking at the defendant/appellant's written submissions of 11th December, 2002, the existence of the contract and the terms as testified to by the plaintiff/respondent were not denied. The very first paragraph of counsel's submissions runs thus:

> "***The defendant admits the existence of a contract between himself and the plaintiff whereby the defendant ……..agreed to drive the plaintiff's motor-vehicle registration No. UBD 996 for her as a special Taxi which had recently been purchased by the plaintiff on 9/07/1999. The plaintiff having actually taken possession of the vehicle decided to use same as a private special taxi and invited the defendant to drive the same for the purpose of raising some extra income. It was agreed term by both parties that Shs.20,000/= would be given to the plaintiff at the end of each working day. The contractual relationship was to continue as long as the defendant continued using the plaintiff's vehicle as a private hire taxi commonly known in this country as SPECIAL HIRE. If that was not possible (payment) o daily basis, then to defendant was supposed to pay Shs.140,000/= per week. Those were the agreed arrangements and in actual fact the terms of the contract (The mutual understanding by both parties)."***

With the evidence given by the plaintiff/respondent, the appellant/defendant and the admission by the appellant's counsel as set out above, it is clear to me that the learned trial Magistrate cannot be faulted for making a finding that there was a valid contract between the respondent and the appellant. The parties agreed that in consideration of the respondent allowing the appellant to use her vehicle, the appellant was to pay a sum of Shs.140,000/= per week, Shs.20,000/= per day, for use thereof. The appellant took

delivery of the vehicle and for a period of one and half months, the respondent had no access to it. The appellant, however, neither paid for its use as agreed nor returned the same to the respondent voluntarily despite several demands which included radio announcements for its return.

I now turn to the appellant's defence.

It is that after taking possession of the vehicle, he noticed that the road licence was due to expire. It is the appellant's case, therefore, that for the entire period of 45 days (one month and half), he never made use of it on account of the expired licence.

On the basis of this evidence, the learned trial Magistrate found that at the time of taking a way the vehicle, it had a road licence and during the appellant's disappearance with the vehicle, the licence expired. From the evidence on record, I am unable to fault her conclusion on the matter. The respondent/plaintiff had no access to the vehicle for the entire 45 days. She had to resort to radio announcements to recover it. It is evident that she was only able to recover it after going very early in the morning to the appellant's home, and after appellant driving it back to town with the respondent and on the way, at a Petrol Station at Bwaise, the respondent insisting that the appellant hands her back the days. Court was satisfied that this is how she recovered the vehicle from the appellant. There is no reason for me to think otherwise.

Learned Counsel for the respondent has submitted that even if the appellant's story were true that the licence expired soon after he gained possession of the vehicle, he (the appellant) cannot be absolved from responsibility because as a driver, he was supposed to take a vehicle when it had a licence. That if the road licence was due to expire, he was supposed to bring this fact to the owner's attention immediately but not to disappear with the vehicle until it was impounded from him by the respondent. He is fortified in his argument by Section 114 of the Evidence Act.

Under this law, where one person has by his or her declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that behalf, neither he/she nor his/her representative shall be allowed, in any suit or proceeding between himself/herself and that person or his/her representative, to deny the truth of that thing.

The respondent has in other words invoked the doctrine of equitable estopped. The long and short of this doctrine is that a person who stands by and keeps silence when he observes another person acting under a misapprehension or mistake, which by speaking out he could have prevented by showing the true state of affairs, can be estopped from later alleging the true state of affairs.

In the instant case, the respondent bought the vehicle in question to do business with it. She in turn entrusted it into the care and custody of the appellant, who himself took it away as it was, to do special hire business with it. At the time, the vehicle had a valid licence. He did not return it to the respondent with a view to having the licence renewed, or to pay the weekly user fee of Shs.140,000/=. He instead disappeared with it until the respondent employed coercive means to recover it from him. In these circumstances, I would agree with the submission of learned counsel for the respondent that the appellant cannot now turn around and say that he had not used the vehicle for all the period of his disappearance from the respondent. The appellant's assertion does not make any business sense and it simply lacked logic. The learned trial Magistrate was entitled to reject it. Accepting, as I must, learned Counsel's submission that the appellant is bound by the doctrine of estoppel, I am unable to fault the learned trial Magistrate's conclusion on this point. She subjected the evidence before her to adequate scrutiny.

I now turn to the issue of damages.

The respondent in her plaint prayed for special damages of Shs.1,509,000/= for the period the vehicle was under the use and custody of the appellant. She also prayed for general damages for loss of earnings and inconvenience, interest and costs of the suit. By simple

calculation, Shs.20,000/= per day for 45 days gives a figure of Shs.900,000/=. Learned counsel for the respondent has conceded that between 9th July, 1999 and when the vehicle was finally impounded, the respondent's entitlement was Shs.900,000/= and not Shs.1,500,000/=. In view of this concession the award made by the learned trial Magistrate cannot be allowed to stand.

I find cause to interfere with it. Given that the respondent's claim of Shs.9,000/= (Shillings nine thousand only) being the cost of radio announcements was not challenged, I would substitute the order for payment of Shs.1,509,000/= as special damages with an order for payment of Shs.909,000/= by the appellant to the respondent. I do so.

The learned trial Magistrate made an award of Shs.50,000/= being general damages. It has been contended on behalf of the respondent that after all the trouble she went through to recover her motor vehicle from the appellant, she was entitled to more than the nominal damages of Shs.50,000/= she got. Counsel has suggested a figure of Shs.400,000/=.

General damages are in law intended as compensation for loss occasioned to the plaintiff by the defendant and not as punishment to him. A person who sues for breach of contract is entitled to recover the amount of loss which he sustained due to the breach and the defendant is liable to make good such loss. In view of the order for payment to the plaintiff/respondent the contractual sum of Shs.900,000/= and an additional Shs.9,000/= being the cost of radio announcements, I am unable to fault the trial Magistrate's award of Shs.50,000/= as nominal damages for the inconvenience caused by the appellant to the respondent. I am therefore unable to interfere with the said award.

The respondent shall be paid interest on the decretal sum of Shs.959,000/= at the rate of 6% per annum (as per the order of the trial court) from the date of judgment (20/05/2003) up to today (03/04/2009), and at the commercial rate of 25% per annum from today till payment in full.

As regards costs, the usual result in litigation is that the loser pays the winner's costs. There is no reason for me to interfere with the decision of the lower court on the issue of costs. In the result, I have found no cause to interfere with the judgment and orders of the lower court save on the question of special damages. On the whole, this appeal lacks merit. I dismiss it subject to the above variation. In view of the appellant's partial success on the issue of special damages, the respondent shall be paid two-thirds of the costs of the appeal.

Orders accordingly.

Yorokamu Bamwine
JUDGE
03/04/2009

03/04/209:
Mr. Charles Mbogo for respondent
Respondent absent
Appellant present in person.

Counsel:
Counsel for appellant is absent. We are ready to receive the Judgment.

Court:
Judgment delivered.

Yorokamu Bamwine
JUDGE
03/04/2009