

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION) CIVIL SUIT NO. 428 OF 2005

BERNARD NSUBUGA KIZITO :::::::::::::::::::::

PLAINTIFF

VERSUS

SALONGO KATO MUHAMED :::::::::::::::::::::

DEFENDANT

BEFORE: HON. JUSTICE REMMY K. KASULE

JUDGMENT

Plaintiff instituted this suit against the defendant for the recovery of US\$8300 as well as general damages.

At the hearing three issues were framed:-

1. Whether there was a contract between the parties.
2. Whether there was breach of contract by the defendant.
3. What are the remedies available to the parties?

In order to prove his case, plaintiff testified in person, and called two other witnesses: PW2 Lwanga Julius and PW3 Hussein Balikoowa. Defendant, who gave evidence on affirmation, denied being liable to the plaintiff. He called no witness.

The first and second issues are interrelated and thus court will resolve them together. The two issues are whether there was a contract between the parties; and whether that contract was breached by the defendant.

The evidence of plaintiff is that in April, 2004, PW2, Julius Lwanga, young brother of plaintiff, told plaintiff by telephone that the defendant had offered, on being paid the

requisite sum of money, to secure a visa from the American Embassy in Uganda that would enable PW2 to travel to the USA and join the plaintiff.

The plaintiff had left Uganda in 1987 for USA, and by 2003, he had acquired a green card and was now a permanent resident of USA, where he worked as a nurse. He was desirous of having his young brother, PW2, Julius Lwanga, join him in USA.

PW2, Julius Lwanga, passed over the telephone number of the defendant to the plaintiff and the two – plaintiff and defendant began communicating with each other directly by telephone.

As a result of the telephone discussions with each other, defendant agreed to secure a Visa to USA for PW2, Julius Lwanga. The plaintiff agreed to pay to the defendant the agreed upon sum of US\$2500 for the Visa, air ticket and for the other services of the defendant.

The defendant presented himself to the plaintiff, as one who was an employee of the President's Office. By virtue of being such an employee, defendant convinced plaintiff that he was in a position to secure the Visa, as well as, the air ticket, for PW2, Julius Lwanga, to travel to USA. Defendant further informed the plaintiff that, at this material time, plans were being made for the Head of State, the President of Uganda, to travel to the USA in the near future. If the plaintiff paid the requisite money quickly; then it would be possible for defendant to process the Visa and secure the air ticket for PW2. The said PW2 would then be able to travel to USA together with those constituting the advance party who were soon due to fly to USA to prepare for the visit of the President of Uganda.

Convinced, the plaintiff sent to and instructed her late sister, one Christine Semafumu, to pay US\$2000 to the defendant. This was done. Defendant, through telephone, confirmed to plaintiff that he had received the money.

Having received the money, defendant told the plaintiff that there was an opportunity to get two (2) more Visas and air tickets, for two (2) more people, each person paying US\$3000. Plaintiff, on receipt of this news, collected US\$1900 from Ms. Edith Muwanga, also residing in USA, who wanted a Visa for her daughter, who was in Uganda, but wanted to travel to USA. Plaintiff sent the US\$1900 to one Muwanga and instructed the defendant by phone to collect the said amount from the said Mr. Muwanga. The defendant collected the money and confirmed to plaintiff that he had so collected the same. Muwanga himself also confirmed to plaintiff having passed over the money to the defendant.

Defendant, having received the money, started to give plaintiff, one excuse after another, as to why the visas and travel tickets could not be availed so as to enable PW2, Julius Lwanga, and the other person travel to USA. Plaintiff requested his late sister Christine Ssemafumu and one Joseph Mukasa, to contact the defendant with a view to securing the visas and air tickets from the defendant. The two got in touch with the defendant, but they failed to secure the visas and air tickets from the defendant.

Defendant then directly communicated with the plaintiff, to the effect that, it had become necessary that PW2, Julius Lwanga and the other traveler pass through Nairobi-Kenya, on their way to USA. A sum of US\$770 was needed. Defendant demanded the same from the plaintiff. Plaintiff sent the said amount to defendant direct by way of money-gram on 28.05.04. The defendant received the money on reference Number 79875161. The receipt was tendered in evidence as exhibit P1. Plaintiff had, earlier on, paid an additional US \$500 to defendant through Western Union for further quickening up of the travel of PW2 and the other person to USA.

The plaintiff waited in vain for PW2 and the other person to travel to USA through Nairobi-Kenya. However, to the plaintiff's surprise, he learnt that there was no travelling through Nairobi-Kenya.

Instead defendant demanded of the plaintiff for another US\$300, this time stating that, everything had been completed for the two to travel. Plaintiff, through her late sister, Christine Ssemafumu, paid this US\$300 to the defendant.

On receipt of the money, defendant communicated to plaintiff, that he-plaintiff, should physically come to Uganda to collect PW2, Julius Lwanga and the other person, and travel with them to the USA. Defendant assured the plaintiff that all travel documents had been secured.

In December, 2004, the plaintiff came to Uganda to collect the two persons. He personally met the defendant face to face. Defendant confirmed to have received all the money sent to him by plaintiff.

Defendant assured plaintiff that the visas and air tickets were ready, but the same were with some other person. Defendant told plaintiff that he, defendant, would take the plaintiff to that other person at 5.30p.m., of that day, to collect the travel documents. At 5.30p.m, plaintiff reported to defendant's office at Luwum Street, Kampala, as agreed. The defendant was no where to be seen. Defendant disappeared from plaintiff until plaintiff could wait no longer and he returned to USA without the visas and air tickets he had paid for. He thus never traveled back to USA with PW2 and the other person.

Plaintiff referred the matter to Uganda Police. Later, he decided to sue the defendant.

PW2: Julius Lwanga, confirmed the plaintiff's evidence as to how he, PW2, connected the plaintiff with the defendant whom he knew very well. PW2 also confirmed having witnessed the payments that were directly made to the defendant as he, PW2, was physically around. Defendant continued to deceive him, (PW2) that he had secured the visa for him to travel to USA. The deception of defendant was so convincing that, at one time he, PW2, made a farewell party at his parents home to bid farewell to every one, as defendant had assured him, he was definitely traveling. Defendant attended this party, but he never came with the travel documents as he had promised PW2.

PW3, Hussein Balikoowa, a driver of the late Christine Ssemafumu, sister of plaintiff, also confirmed that, on a number of occasions, he was present and witnesses the payment of money sent by plaintiff to defendant for the purpose of securing a visa and air tickets.

On his part, the defendant denied, on affirmation that he has ever dealt with the plaintiff to secure visas and air tickets for PW2, and another person, to travel to USA. Defendant further asserted that he only knew PW2, Julius Lwanga, as a labourer, whom defendant used to employ at defendant's home.

According to defendant, PW2, Julius Lwanga, had just come up with a scheme of obtaining a visa so as to get money from the plaintiff purportedly paying for a visa, when in actual fact, Julius Lwanga, used the money for personal matters, not to do with paying for a visa.

Defendant admitted that he had been arrested by police and criminally prosecuted at Buganda Road Court, for obtaining money from the plaintiff, under false pretences, amongst other charges. He had been acquitted of the charges by court.

This court has seriously evaluated the evidence of the plaintiff and his witnesses as well as that of the defendant.

Defendant offered no explanation, as to why the plaintiff, whom the defendant claimed to have seen for the first time, in court, and in this case, should have chosen the defendant and the office of the defendant at Luwum street, Kampala City, as the person and place, of the one who called the plaintiff to physically come to Kampala, Uganda, to collect the visas and air tickets. There was also no explanation from the defendant to the assertion of the plaintiff that he actually met the Defendant in Kampala City, Luwum Street, in December, 2004.

Defendant did not deny that he had an office, on Luwum Street, in-front of California Bar and Restaurant, Kampala City. He did not also deny that in December, 2004, he was present in Kampala City. No evidence was adduced to controvert the plaintiff's assertion that in December, 2004, he traveled to Kampala, Uganda, from USA.

Court observed the demeanour of the plaintiff in the witness box. He spoke calmly and clearly and was never broken down or discredited in cross-examination. He gave straight forward answers to the questions put to him.

On the other hand, defendant, vehemently denied in his evidence that the name "**Ssalongo**" was his. Yet the plaint, and even his own pleading, the written statement of defence, has the names "**Ssalongo Kato Muhamed**" as the defendant. Paragraph 2 of the plaint also so describes the defendant to the suit as "**SALONGO KATO MUHAMED**" being the defendant who is a male adult believed to be of sound mind.

This description of the defendant is admitted by paragraph 2 of the written statement of defence, that admits the contents of paragraphs 1 and 2 of the plaint as being correct. Defendant is bound by his own pleadings. If the name "**Ssalongo**" was never his, there is no way he would have failed to instruct his lawyers to so point out. Court concludes therefore that, at the time of giving his testimony to court, in denying all his full names, defendant was deliberately lying so as to avoid liability to the plaintiff.

Further, defendant's admission that the mobile telephone number 077-42-03-06 appearing on exhibit P2(a), the Western Union receipt, was his, lends credibility to the plaintiff's case, that he was dealing with the defendant by communicating with him, by use of the said telephone number when he sent him the US\$500 as per the said exhibit P2(a). The defendant's evidence that he did not know why the number of his mobile phone was on this said exhibit, is thus most suspect.

This court, also finds it incredible, that the plaintiff, his brother Julius Lwanga, PW2, and PW3, Hussein Balikoowa, a mere driver of the late sister of the plaintiff; Christine

Semafumu, thus having no direct stake in the case, should all gang up against the defendant by testifying as they did against him. Defendant offered no reasonable explanation to court as to why this was so.

Defendant asserted, rightly according to the evidence on record that he was criminally prosecuted at Buganda Road Court and was acquitted of the charges of fraudulently obtaining money from the plaintiff. This court however, was not availed the record of court proceedings of the criminal case at Buganda Road Court against the defendant. The reason for conclusion of that case against the defendant is thus not known to this court. This civil case against the defendant has to be decided on the basis of the evidence adduced in the case before this court. Therefore the mere fact that the defendant was criminally tried at Buganda Road Court and let free by that court is not conclusive, per se, of exonerating the defendant of liability in this case.

Having considered the whole evidence adduced in totality, this court, on a balance of probabilities, prefers to accept the evidence of the plaintiff and that of his witnesses, as truthful, and rejects that of the defendant as not truthful.

Court therefore answers the first and second issues in the affirmative.

The third issue is what remedies are available.

The plaintiff in his evidence, supported in material respects, is that he paid to the defendant first US\$200 through his late sister Christine Semafumu. This was followed by US\$500 through PW2: Julius Lwanga. Plaintiff sent US\$1,900 through one Muwanga. This sum of US\$1900 is recoverable from the defendant by plaintiff because plaintiff is the one who sent it to defendant, even though it was money for a visa for a daughter of Muwanga. It is the plaintiff who directly dealt with the defendant and so he is entitled to recover the said sum of US\$ 1900 from the defendant. Plaintiff also testified that he sent to defendant an additional US\$770, then US\$300 and finally US\$500. Thus the total sum

sent to the defendant is: US\$(2000 + 500 + 1900 + 300 + 500) = 5970. The plaintiff is awarded this sum of US\$5970 against the defendant.

Plaintiff prayed for general damages also. The evidence, which court accepts, is that the plaintiff was deceived by the defendant who gave one reason or another, whenever the plaintiff demanded to be informed of the position of the visa and the air tickets he had paid for. This deception went as far as making the defendant travel to Uganda to personally meet the defendant, who had, this time, assured the plaintiff that all travel documents were ready. All that remained was for the plaintiff travel to Uganda and physically fly back to the USA with the two youngsters. Plaintiff had also finally to refer the deception of the defendant to police. All this must have caused loss, anxiety, pain and suffering to the plaintiff.

It is unexplained why the plaintiff did not claim some of the liquidated loss such as travel and hotel expenses by way of special damages. Be that as it may, this court, is satisfied that for the anxiety, suffering and inconvenience cause to plaintiff by the defendant's deceitful conduct, plaintiff is entitled to be awarded general damages. Court awards shs.5,000,000/= general damages to the plaintiff.

The sums awarded to the plaintiff shall carry interest at the rate of 18% p.a, when converted into Uganda currency at the current obtaining rate of exchange of the US\$ to the Uganda shilling as at the time of final payment. The rate of interest shall run from 01.04.04, the commencement date of the deceitful transactions, in respect of the sum of US\$5970 till payment in full, while in respect of the general damages, of shs.5,000,000/= the rate of interest is to run from the date of judgment till payment in full.

Judgment is therefore entered for the plaintiff against the defendant for:-

- i. US \$5970 sum of money paid to defendant by plaintiff or its equivalent in Uganda shillings at the current obtaining rate of exchange of the US \$ to the Uganda shilling as at the date of final payment.
- ii. Ug. Shs. 5,000,000/- general damages

- iii. Interest on the sum in (i) and (ii) above, when converted in Uganda currency, at the rate of 18% p.a. running from 01.04.04 in respect of the sum in (i) above, till payment in full, and as from the date of judgment in respect of the sum in (ii) above, till payment in full.

The plaintiff is also awarded the costs of the suit against the defendant.

Remmy K. Kasule

Judge

28.08.2009