THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CIVIL APPEAL NO. 034 OF 2001

CENTURY BOTTLING CO. LTD.:::::::::::::::::::::::::::: APPELLANT

VERSUS

MALEKA LILLIAN ::: RESPONDENT

[Appeal from the Judgment of Her Worship Agnes Nkonge (GI) dated 21st November 2001 in Jinja C.M. Court Civil Suit No. 52 of 2000]

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

JUDGMENT

This is an appeal against the judgment and decree of Her Worship Agnes Nkonge (GI) in which she gave judgment in favour of the respondent for the sum of shs 1,379,231/= and the costs of the suit.

The brief facts from which the appeal arose are that the respondent was employed by the appellant as a cashier. She worked for the appellant company from an unspecified date in 1997 to 12/06/2000 when she was retrenched. The respondent claimed that when she was retrenched, the appellant calculated her dues and found them to be shs 1,379,231/=. Further, that the appellant had since the date of retrenchment failed or refused to pay her the said amount. She thus brought the suit in the lower court for recovery of the same.

In her defence, the appellant claimed that the respondent was not entitled to the sum claimed because after she was retrenched reconciliation of accounts at her station showed that shs 4,400,000/= which had been in her custody was found to be missing. The appellant company also claimed that following this discovery, disciplinary proceedings were held in which it was found that the respondent was partly responsible for the loss. The appellant further claimed that since

the respondent failed to account for the lost money the company withheld part of her terminal benefits but paid her the balance of shs. 29,000/= only, which the respondent refused to take.

The trial court framed two issues for determination as follows:

1. Whether the plaintiff was entitled to payment.
2. Whether the plaintiff was entitled to the remedies sought.

In their written submissions before the trial court, the advocates for both the plaintiff and the defendant argued both issues together. The plaintiff/respondent’s counsel argued that the defendant did not deny that shs. 1,379,231/= was due to the plaintiff as her terminal benefits. He further argued that the defendant failed to prove that the plaintiff was responsible for the loss of shs 4.4m and this was contrary to the provisions of sections 100 and 102 of the Evidence Act. That as a result the plaintiff was entitled to the amount claimed and the costs of the suit. Counsel for the defendant/appellant argued that the defendant had produced two credible witnesses and proved that the plaintiff was responsible for the loss of shs 4.4m. That it was the company’s policy to withhold any monies due to an employee where he/she owed the company money. That as a result, the company was entitled to deduct shs 1.2m from the plaintiff’s terminal benefits to recoup its loss and the plaintiff was thus not entitled to the amount claimed.

The trial magistrate found that the plaintiff had proved that the defendant owed her shs 1,379,231/= as terminal benefits. That the defendant had failed to prove that the plaintiff was responsible for the loss of shs 4.4m and as a result, the plaintiff was entitled to the amount claimed and the costs of the suit. The defendant appealed this decision on the following grounds:

1. The learned trial magistrate erred in law and fact in finding that the appellant failed to discharge the burden of proving that the respondent was not entitled to the suit sum.

2. The learned trial magistrate erred in law and fact in finding that the respondent was entitled to the reliefs claimed.

The appellant proposed that this court set aside the judgment and decree of the lower court, dismiss the respondent’s suit and allow this appeal with costs.

The parties' advocates each filed written submissions in the appeal. The appellant's counsel filed his submissions on 11/02/2009 while the respondent's counsel filed his on 26/02/2009; he also relied on the submissions he filed in the court below. The appellant's advocates did not file a rejoinder. Both counsel argued the two grounds stated in the memorandum of appeal separately and in the order framed therein. The two grounds will be addressed in like manner by this court.

GROUND 1

With regard to first ground counsel for the appellant asserted that the trial magistrate erred in law and fact when she found that the appellant failed to discharge the burden of proving that the respondent was not entitled to the sum claimed due to several reasons. The first was that by the evidence of Nkoko Robert (DW1) the appellant proved that the respondent contributed to the appellant's loss in the sum of shs 1,200,000/=. That DW1's testimony also showed that disciplinary proceedings were held in which it was established that the respondent caused the loss complained of, and that the respondent attended the said hearing. Further that DW1's testimony established that it was the policy of the appellant company that before terminal benefits could be paid to an employee he/she had to clear all monies owed by him/her to the appellant. That the appellant company had duly reconciled the books left by the respondent and found shs 4,400,000/= missing and the disciplinary hearing arrived at the decision that the loss should be apportioned between the respondent and two others with the respondent paying shs 1,200,000/=. That this had to be deducted from her terminal benefits which was done. Further that DW1's testimony was corroborated by that of DW2, the Financial Controller of the appellant company.

Counsel for the appellant contended that s.101 of the Evidence Act placed the duty on the respondent to prove that the facts that she alleged existed. That the appellant company had established that there was ground for appellant's withholding of the amount claimed by the respondent from her. That the trial magistrate therefore erred in law and fact when she placed the burden of proof on the appellant company who had defended the suit and proved that the appellant company was entitled to withhold shs 1,200,000/= from the respondent because she caused the appellant financial loss. As a result, on the balance of probabilities the appellant had proved its case against the respondent. Counsel for the appellant further submitted that after the appellant adduced evidence the burden rested on the respondent to prove that she was not liable

for the loss occasioned to the appellant. That as a result the trial magistrate erred when she found for the respondent on the belief that the appellant failed to discharge a burden that did not rest on her. The appellant's counsel relied on Cross on Evidence, 3rd Edition, at page 78.

In reply, Mr. Robert Okalang contended that the appellant totally failed to prove that the alleged loss of money was occasioned by the respondent in order to disentitle her to payment of the amount claimed. He submitted that s. 100 of the Evidence Act put the burden of proving the loss on the appellant. Further that by virtue of s.102 of the Evidence Act the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. It was Mr. Okalang's submission that while the respondent proved that she was entitled to shs 1,379,231/= as her terminal benefits from the appellant, the appellant failed to prove that the respondent was responsible for loss of shs 1.2m out of shs 4.4m. Mr. Okalang was of the view that in order to prove this loss the appellant should have called one Sajja Paul (also referred to in the lower court proceedings as Nsajja or Isaja) and Mr. Mwogeza to testify about the un-receipted money but the appellant did not do so. That the testimony of the appellant's witnesses showed that the books of account recovered from the respondent's office did not show that the respondent lost any money.

It was also Mr. Okalang's contention that the appellant failed to prove that there were disciplinary proceedings against the respondent because no documentary evidence about the alleged proceedings was produced in court. That "DE1," a memorandum from DW2 to the salaries clerk of the appellant company did not prove that there were disciplinary proceedings against the respondent. Further that there was no proof whatsoever that the respondent was summoned to attend the alleged proceedings. Mr. Okalang further contended that DE1 only proved that the respondent was not a party to the alleged disciplinary proceedings because they took place after she had left her employment with the appellant. That as a result, ground 1 of the appeal should fail.

In the lower court Mr. Okalang had raised the same arguments. He also adverted to a further sum of shs. 267,078/= being payment for overtime assignments carried out by the respondent that were not claimed in the respondent's pleadings.

While addressing the respondent's entitlement to the amount claimed, after extensively reviewing the evidence on both sides and the submissions of both counsel the trial magistrate held thus:

> *"On the above evidence s.100 and 102 of the Evidence (Act) is clear on this point, he who asserts prove, (sic) a fact which has not been done by the defendant.*
>
> *It is my view that the defendant have (sic) failed to discharge the legal burden of establishing that the plaintiff caused loss to the company and that the defendant was entitled to deduct from her terminal benefits. No evidence was adduced to prove that there was loss of 4,400,000/= to the company. The case of SEBULIBA VRS. COOPERATIVE BANK [1982] HCB 129 refers.*
>
> *In my view upon taking evidence as a whole I find the plaintiff has proved her case on a balance of probabilities and found (sic) that she is entitled to the suit sum. And judgment is hereby entered in her favour.*
>
> *In view of the aforesaid holding I find that the plaintiff is entitled to the suit sum of shs 1,379,231/= and costs of the suit. The additional sum claimed by the plaintiff and her counsel are hereby dismissed. Judgment is entered in the decretal sum of shs 1,379,231/= and costs."*

The evidence on the respondent's side was very clear. She testified that she was employed by the appellant and retrenched on the 12/6/2000. That by the retrenchment letter she was informed that her terminal benefits would be shs 1,379,231/=. The letter which was attached to the plaint as Annexure A was not admitted in evidence. However, the appellant's witnesses did not deny that it existed and they named the same amount claimed as due to the respondent as well as shs. 267,078/= being payment for overtime.

Regarding the loss of shs 4.4 million the respondent narrated the daily procedures in her duties as well as the role of DW1 as follows:

> *"I would issue a receipt and the salesmen would acknowledge the actual amount I have given them. After receiving cash I write cash received journal with all the receipts in their sending (sic) order which I give to the depot controller to take to the bank. I was directly answerable to the depot controller. Every month there was stock taking at the depot (checking stock and physical cash counting and irregularities). Every morning money is checked by the depot controller. Every Monday receipts were checked to ascertain the amounts banked that week. There had never been any complaints (sic) in the course of my employment I would collect millions and millions of shillings. I have never received any communication officially to show that I have misplaced money. I handed over my office documents to a depot controller (sic) he did not complain of any misappropriation. The allegation that I lost 4.4m/= by defendant is not true (sic) I have never received any letter to (sic) that respect under paragraph 4 of the written statement of defence. …"*

The respondent's testimony was not shaken in cross-examination. She stated as follows:

> *"I issue receipts. It would be hard for me to know if a person has paid/received money in my absence. If money is received and receipt is not given that money would not appear in the reconciliation receipts (sic) two of us used to do the reconciliation. Nkoko Robert was the reconciliation controller, reconciliation was done daily. The system could not detect un receipted money. …*
>
> *The amount of money would not be reflected in the un receipted book and reconciliation. Un receipted money would not appear in the books and reconciliation, it would also not appear on the bank statement. The system would not fail because of the above. I would be surprised if this money appears in reconciliation."*

When she was re-examined the respondent clarified that she was not in charge of un receipted money and she had never received any such money. Further that there were no credit facilities and she would not know if any one received money in her absence. Also that she could not know if money was paid to other people in her absence.

On the other hand Nkoko Robert (DW1) confirmed that the respondent was supposed to report to him as Depot Controller and he was supposed to reconcile the books. What was striking about his testimony was the process in which he found the money that was alleged to have been lost as follows:

> *"In the course of that, I found that 4,400,000/= un receipted (sic) I communicated to head office (Finance Manager (Kizito) and personnel and Sales Manager.* ***I made inquiries from plaintiff about whereabouts of the money. She was not available. I also asked Sajja Paul the stock controller, he said he had given the money to sales supervisor (Mwogeza) the 4.4m/=. I contacted Mwogeza who denied having received 4.4m/=. I therefore contacted the area sales supervisor to come and explain. I later gave them the communication regarding the loss of the money. …The 4.4m/= was part of the unreceipted money. The aspect of unreceipted money comes up from customers****, as a company procedure (sic) had to receipt this money. The actual money was not receipted (sic) up to the tune (sic) of retrenchment the money was lying in the safe (un receipted) yet that was contrary to company's policies. Therefore the 4.4m/= was company money. That is all."* **{Emphasis added}**

It would appear from DW1's testimony that the money was found in the safe in the absence of the respondent by one Sajja Paul who gave it to Mwogeza. And that when DW1 found this out he communicated to the two about the un receipted money, still in the absence of the respondent. But what gives the appellant away is the testimony of DW1 on cross-examination where he stated thus:

> *"I did not see the money in the safe. The casher opened the safe that morning (sic) when she was given her retrenchment letter she gave me the keys to the safe. She never gave me the company books, she did not show me where they were. I have never written to her to come and hand over (sic) I realized that the books she did not have (sic) over were necessary.* ***I got the loss from customers (the unreceipted money) and from the delivery and Tax income books, I got this from the stock controller, who keeps them.*** *At the end of the day (sic) was the*

person who received that money. I could tell by looking at the books. It was the cashier who was supposed to receive the money. In other words from the procedure and the book one could tell that it was the cashier who received the money. ***The books could not show any of her signatures (that she received the money). The books I have so far recovered do not reflect that the plaintiff has lost any money or caused loss. … I agree with you that I have never seen the 4.4m/= and that there was no record to show that she received the money.*** *That is all."* **{Emphasis supplied}**

When DW1 was re-examined he stated:

I got information from customers that there was a loss. I interviewed them. Money was received but not receipted. *All this was during the time when the plaintiff was the cashier. The date of the retrenchment was 12/6/2000. When the letter was given to her we had not found the short fall of the money…"* **{Emphasis supplied}**

It would appear from this testimony that in her absence, i.e. after she had left the employment of the company, customers reported that they paid money to the respondent. The delivery books showed that the customers received goods without receipts to show that they had paid for the goods. The stock controller was the person who had this information and apparently he was responsible for ensuring that the stock was controlled against payments. There was therefore no evidence to show that the payments alleged to have been made by the customers were made to the respondent and DW1 admitted this.

One also wonders whether the customers where the best persons to establish that they had paid for the goods, especially when they had no receipts to show that they had paid. It appears to me that there was a racket between the customers and the stock controller to get goods without official payments to the cashier, and the loss was at the point of delivery of the goods. It was not established that the respondent was involved in the scam because the money alleged to have been un-receipted was not proved to have been found with her; Sajja and Mwogeza who were alleged to have seen the money were not called as witnesses to prove this fact. By this testimony alone, I find that the appellant failed to link the loss of shs 4.4 million to the respondent.

In the circumstances, I find that the trial magistrate was correct when she arrived at the finding and ruled that the appellant had failed to prove that the respondent was not entitled to the amount claimed because appellant failed to prove that she contributed to the loss. Ground 1 of the appeal therefore fails.

GROUND 2

The two grounds of this appeal were intertwined and it was difficult to draw a line where ground one ended and ground two began. All the same, I will deal with the second ground because the parties desired a specific answer to the question whether the trial magistrate came to a correct finding about the remedies that the respondent was entitled to.

With respect to this ground, counsel for the appellant submitted that a hearing was held in which it was established that the respondent was a party to the loss of shs 4.4m. That as a result, according to the company's standing policy, the company was entitled to withhold shs 1.2m/= from her terminal benefits. It was submitted for the appellant that the testimonies of DW1 and DW2 showed that there were disciplinary proceedings in which it was found that the respondent was guilty of causing the loss. It was further submitted that the burden placed on the appellant to prove the loss had been discharged by these testimonies.

Counsel for the appellant also submitted that it was fair for the appellant to withhold shs 1.2m from the respondent's terminal benefits because it was the appellant company's policy to do so. It was also contended that the respondent had failed to explain how the monies in issue got lost yet she admitted in cross-examination that the monies could have been received and no receipts issued. Counsel for the appellant further contended that the finding of the tribunal that investigated the loss were proper and the appellant was right when she withheld shs 1.2m from the respondent and offered the respondent a cheque for the balance of shs 29,000/=, though she rejected it.

Turing to the claim for overtime which came up in the testimony of DW1, the appellant's counsel submitted that by the time the calculation of the respondent's dues was done, she had not submitted her overtime cards. That to award the respondent the amounts claimed in the plaint without considering and deducting the monies she had lost would be to unjustly enrich her.

Further that the respondent's refusal to collect the balance due to her after deducting the monies lost showed that she had accepted the findings of the investigation that she contributed to loss of company money. That the appellant was always ready and willing to pay the respondent the balance of shs 29,900/= after recouping the loss she had caused to the company. In conclusion it was submitted that the respondent was not entitled to the amount claimed and that her suit should be dismissed with costs to the appellant.

For the respondent, Mr. Okalang reiterated that the appellant had failed to prove that the respondent caused loss to the appellant company. Further that the appellant had failed to prove that disciplinary proceedings were held in which the respondent was found guilty of causing loss. He thus submitted that the trial magistrate was right when she found that the appellant had failed to prove the loss and that the respondent was entitled to the sum claimed and costs of the suit. In addition, Mr. Okalang prayed that this court invoke its inherent powers provided for in s. 98 and s. 80 (1) (a) and (2) of the CPA (i.e. determine the case finally and exercise the same powers as a court of first instance would) because of the following reasons.

The respondent sued the appellant way back in 2000 for shs 1,379,231/=. Judgment was entered on 13/11/2001 for the same. The appellant obtained stay of execution and filed this appeal and as a result the respondent has still not received payment of the amount claimed. Further that the appellant filed her appeal on 28/12/2001 but she never bothered to fix the same for hearing. The respondent was always interested in having the matter disposed of and thus constantly fixed the appeal for hearing. That as a result, it was now 8 years since the suit was instituted and the respondent has been denied use of her terminal benefits for that long. That this was unjust and court should redress the injustice by granting interest on the amount claimed at any rate that court deems fit, from the date of filing suit till payment in full. Mr. Okalang cited s. 26 (2) of the CPA which provides for payment of interest on decrees for money, and Halsbury's Laws of England 4th Edition, Vol. 32 at para. 53, where interest was defined as compensation. Since the appellant filed no rejoinder, I did not have the benefit of her advocates' submissions on this point.

I have already agreed with the findings of the trial magistrate that on the basis of the testimony of DW1 and DW2 the appellant failed to link the loss of shs 4.4m to the respondent. What remains to be established is whether the appellant proved that there were disciplinary proceedings against

the respondent wherein it was found that she participated in causing loss to the appellant. It also has to be established whether the appellant proved that there was company policy which required that monies owed to the company by retrenched staff be deducted from their terminal benefits before they are paid, and if so whether such policy was lawful. If these three questions are answered in the positive, the appellant would have proved that the respondent was not entitled to the sum claimed.

With regard to the proceedings to investigate the loss of shs 4.4 m, the respondent testified in-chief as follows:

> *"The allegations (sic) that I lost shs 4.4m/= by the defendant is not true (sic) I have never received any letter to (sic) that respect under paragraph 4 of the written statement of defence. I have also never been informed if (sic) the alleged loss if (sic) 1.2m/=, no letter either. I am not aware of that amount of money. I have never been summoned to any disciplinary hearing, I have never received any letter at all either."*

In cross-examination, the respondent's testimony was not shaken. She maintained that she was not summoned to any proceedings that inquired into how the money went missing. That she was later informed *"verbally"* of the proceedings when she went to collect her terminal benefits.

For the appellant DW1 testified in the following manner:

> *"I was later summoned to Kampala by the Area Supervisor to attend a disciplinary hearing on the loss of that money. I was served with a Disciplinary sheet. While there I gave the (Finance Manager) J. Sebuyira a statement. Plaintiff was also called to give a statement, she came. I was present when she came. She is aware of the disciplinary meeting because there is document evidence (sic) I saw her before the finance manager. We went through the hearing (sic) I was present and so was the plaintiff. It was presided over by the finance manager. I was given an opportunity to explain and so was the plaintiff (sic) a decision thereafter was given in writing. …"*

Although DW1 testified that there was documentary evidence to show that proceedings against the respondent were held, none was produced in court yet documentary evidence would have been the best evidence to prove serious proceeding such as those alleged by the appellant's witnesses. In spite of DW1's evidence earlier on that the respondent had been difficult to find when he was making his inquiry about the loss at Jinja, there was no documentary evidence to prove that the respondent was indeed summoned to proceedings to investigate her involvement in the alleged loss of shs 4.4m. This is in spite of the fact that DW2 testified that in such proceedings,

> *"… The party is given a document to notify him/her of the intending (impending) inquiry. The plaintiff got a copy of Exh. DE1. The Human Resource Department gave her the letter (a copy) I am not aware whether the plaintiff received the copy of the summary letter. …"*

In the face of this testimony, I was led to believe that the only document that the respondent got to see about the proceedings was Exh DE1. I was therefore left in doubt about the respondent's attendance at the disciplinary proceedings.

Regarding the findings of the proceedings Jeffy Sebunya Mukasa (DW2) testified thus:

> *"We proceeded to do an investigation. The findings were that:*
>
> - *There was a break down in the systems.*
> - *There was a conspiracy between 3 people: (1) Depot cashier Nkoko Robert guilty of gross negligence, (2) cashier-Lillian, (3) Stock controller (Mr. Nsajja Paul) and the money got lost between the three of them.*
>
> *… The investigations were mainly concerned with Mr. Nkoko (Depot controller). It concerned Nsajja. I also added the plaintiff. Right person to ensure that the hearing was proper and fair. …"*

When he was cross-examined, DW2 stated that there was no document to imply that the respondent received shs 4.4 million. By the testimony of DW2, I find that the company's systems were proved to have been at fault. The respondent could not be held accountable for the

company's own laxity. DW2 also made it clear that the person who was pinned down for the loss was Nkoko Robert, the Depot Controller. The investigations that were carried out were also about Nkoko, the plaintiff only being a person who was supposed to ensure that justice was seen to have been done. Exh DE1 bore this out because in it, it was stated as follows:

> *"Reference is made* ***to the disciplinary inquiry against the Jinja Depot Controller Nkoko Robert who was being charged with Gross Negligence*** *of duty on 3rd July 2000.*
>
> *After a carefully (sic) consideration of all the facts presented by both sides in the inquiry,* ***the depot Controller (Nkoko Robert) was found guilty of Gross negligence in which company funds to the tune of 4,400,000/= got lost*** *between him, the former deport cashier (Maleka Lillian) and the former Stock Controller (Isaja Paul)."* **{Emphasis added}**

Exh D1 proved three facts. The alleged proceedings were not in respect of the respondent but against DW1. They were held on the 3/07/2000 after the respondent had been retrenched. She could not be the subject of investigations when she was no longer an employee of the company. She was never charged with any offence but was jointly found to be guilty of an unspecified offence together with Nkoko who was charged with gross negligence. She was then wrongfully sentenced to payment of shs 1.2 m, part of the amount lost due to the gross negligence of Nkoko Robert.

I now turn to the alleged policy of the company to deduct monies at source from retrenched employees. In that regard DW1 testified thus:

> *"One is supposed to pay salary benefits on retrenchment if there are any dues to the company, in other words, it is deducted from the salary benefits. This is the company policy. The money was eventually recovered from her terminal benefits."*

Subsequently, DW2 testified in re-examination as follows:

> *"We have policies of the company. And its (sic) particular policy applies to whoever has been laid off. Exh. DE1 exists. Inquiry took place. The defendant had a right therefore to hold her terminal benefits. That is all."*

Still the record of the proceedings was not produced; neither was the policy of the company produced. I found it strange that a company with the wide distributorship and commercial reputation ascribed to the appellant did not have written policies or rules that it could show to court in its evidence. I am left with no alternative but to hold that the existence of the policy to withhold the respondent's terminal benefits was not proved to the trial court.

Had the policy been proved, would a deduction in the manner that was explained by the appellant's witnesses have been lawful? The law in operation at the time when the respondent was retrenched was still the Employment Decree because the Employment Act (2000) came into force on the 1st October 2003 by virtue of S.I. 69 of 2003. Section 31 of Employment Decree provided as follows:

> **"31. Deductions.**
> Except where otherwise expressly permitted by this Act or any other written law, or by any collective agreement, or by an award made by the Industrial Court or any other court or by an arbitration tribunal, no employer may make any deduction from an employee's wages, or make any agreement or contract with any employee for such deduction to be made, or for any payment to the employer by any employee."

Section 32 of the Decree then provided for authorized deductions which included payments to registered trade unions of which the employee was a member, payments to provident and pension funds or other schemes approved by the minister. The employer was also authorised to deduct from the employee's wages any amount authorised in writing by the Commissioner (Labour) for payment to the revenue authority. Otherwise, the employer could only deduct installments due in respect of advances of wages made to the employee by the employer.

According to Annexure "A" to the plaint the respondent was entitled to the money that she claimed as payment in lieu of notice, leave pay and transport allowance. This would fall within

the ambit of "wages" as defined by s.66 of the Employment Decree. It was not shown that there was an award made by the Industrial Court or any other court against the respondent. The proceedings referred to by the appellant against her were not proved either. Neither was it established that the deduction was in respect of any other authorized by the Decree. Clearly the deduction from the respondent's benefits offended the provisions of ss. 31 and 32 of the Employment Decree. According to s.62 (2) of the same Decree, a person who contravened s.31 (among others) committed an offence and was liable on conviction to a fine not exceeding shs. 1,500/= or to imprisonment for a term not exceeding three months. Section 45 of the Employment Act (2006) retained the rule that the employee's wages are sacrosanct. An employer shall not deduct any dues therefrom except as is permitted by the Act or any other law; the remuneration earned by the employee is to be paid directly to him/her. Permitted deductions are then provided for by s.46 of the Act.

I therefore find that the learned trial magistrate correctly found that the respondent was entitled to the remedies claimed. She also correctly found that the respondent was not entitled to the additional claim of shs 267,780/= because it was not pleaded; neither was it proved by the respondent. Ground 2 therefore also fails.

As to whether the respondent should be awarded interest on her claim as was advanced by Mr. Okalang, s. 26 (2) of the CPA provides thus:

> "(2) Where and insofar as a decree is for the payment of money, the court may, in the decree, ***order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree,*** in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit." **{Emphasis added}**

Chitaley & Rao in their Commentary on the Indian Code of Civil Procedure (1908) Vol. 1 (Ed. 7) at page 584-585 had this to say about s.34 (1) of the Indian Code which is the equivalent of s.26 (2) of the CPA:

> *"The award of interest under this section after the date of suit is entirely in the discretion of the court. The discretion is not excluded either by the fact that there is an agreement to pay a certain rate of interest till realization, or by there being no contract to pay any interest, or by the fact that the plaint does not claim interest or by any rule of* damdupat. *Interest under this section from the date of suit till decree and thereafter till payment may be awarded though the plaintiff may not be entitled to any interest prior to the suit. It is not necessary for the award of interest in the decree that the judgment should have made any reference to it. To hold otherwise would render the words "in the decree" a mere suplusage, for it does not require a rule of procedure to enable a court to embody in its decree a relief granted by the judgment.*
>
> *The discretion under this section must, however, be exercised on sound judicial principles and, when so exercised, it will not be interfered with on appeal. Ordinarily pendente lite or future interest should not be refused except for sufficient reason such as the wrongful conduct of the party, or the award of such a high rate of interest up to the date of suit.*
>
> *Where the lower court has not considered the question of interest at all the Appellate Court may grant it."*

It is my view that this interpretation applies to s.26 (2) of the CPA because the Indian Code of Civil Procedure and our Civil Procedure Act are statutes *in pari materia.* S. 26 (2) of the CPA is an exact replica of the s. 34 (1) of the 1908 Indian Code of Civil Procedure. The two are therefore to be construed together.

In Bank of Baroda v. Wilson Buyonja Kamugunda SCCA No. 10 of 2004 it was held that where there is no agreement between the parties as to the interest or rate payable, the award of interest by court is discretionary. That discretion must be exercised judiciously. The Supreme Court of Uganda had earlier considered the principles that courts should consider before awarding interest in the case of **Sietco v. Noble Builders, SCCA No. 31 of 1995.** The general principle for the award of interest was stated to be premised on the fact that the defendant has taken and used the plaintiff's money

and benefited. Consequently the defendant ought to compensate the plaintiff for the money. **(**See also **Premchand Shenoi & Shivam M. K. P. v. Maximov Oleg Detrovich, SCCA 9/2003.)**

In **Bank of Baroda v. Wilson Buyonja Kamugunda (supra)** the court laid out three instances in which interest can be granted under the provisions of s. 26 (2) CPA to be (i) on the principle sum prior to institution of a suit, (ii) on the principal sum at a given rate from the date of filing suit, and (iii) on the aggregate sum reflected in the decree till payment or earlier. The court ruled that in awarding interest and the rate of interest, the court is guided by the circumstances of the particular case. In that case, the court awarded interest on all three heads at the rates of 10%, 8% and 6 %, respectively, bringing down the interest rate of 26% which had been awarded by the Court of Appeal. The Supreme Court brought the interest rate down because the Court of Appeal had not given reasons for awarding interest at the rate of 26% when counsel for the plaintiff had submitted that a rate of 21% would be appropriate in the circumstances.

On the basis of the above authorities I am fortified in my decision that the position expounded by Chitaley and Rao (cited above) applies to the courts in Uganda. I am also convinced that under the provisions of s. 80 (2) this court can consider arguments for interest and award the same because as a first appellate court, this court has the duty to re-evaluate all the evidence adduced in the lower court and come to its own findings and decision. But it is important that I first lay down the reasons for awarding interest in this matter as well as for the rate thereof.

It has become clear that the appellant in this suit not only held onto the respondent's money for a period of 8 years from 12/6/2000 to date, but she also did so unlawfully by purporting to make a deduction that was prohibited by law. The appellant is a manufacturing and trading company and is presumed to have used this money in its business while she (the appellant) continued to deprive the respondent of it. It is also evident from the record that the appellant was not vigilant in having this appeal fixed for hearing and it is the respondent who made efforts to have it set down for hearing. In addition, the amount in dispute, i.e. shs 1,379,231/= was not worth all the litigation that is apparent on the record of this court and the court below.

In the first place, the respondent had obtained judgment against the appellant for the amount claimed in default of leave to appear and defend. The appellant had it set aside and was granted leave to appear and defend the suit. Even then, the appellant lost the suit. After judgment was

delivered on 23/11/2001, the respondent made an attempt to execute the decree by attachment of the appellant's property but this was stayed because the appellant filed this appeal. The record shows that during the proceedings in the lower court, and immediately thereafter the appellant filed a total of seven or eight applications against the respondent. The amount of resistance and litigation that the appellant engaged in was not worth the paltry claim made by the respondent. The unfortunate result is that over the years the amount claimed by the respondent has been seriously depreciated all because appellant and her advocates adapted a cavalier attitude towards the suit. They chose to engage in lengthy and onerous litigation much to the detriment of the respondent. Instead of advising their client to settle the claim which was obviously lawfully due to the respondent, the appellant's advocates 'played every trick in the book' to delay payment.

In the circumstances I am of the view that a rate of interest of 15% per annum on the amount claimed from the date of filing suit to the date of delivery of this judgment, and 10% from the date of judgment till payment in full would be appropriate to compensate the respondent for her loss of use of her terminal benefits.

In the end result this appeal fails. The judgment and orders of the trial court are upheld. The appellant shall pay the respondent the sum of shs 1,379,231/= with interest thereon at the rate of 15% per annum from the date of filing suit till delivery of this judgment, and 10% per annum from the date of judgment till payment in full. The appellant shall also pay the respondent's costs for this appeal as well as in the court below.

Irene Mulyagonja Kakooza
JUDGE
25/08/2009