

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGADNA
HOLDEN AT GULU
HCT – 02 – CV – CS – 0057 – 2007**

PULE OPIO alias MAGENDO::::::::::::::::::::::::::::::::::::PLAINTIFF

VERSUS

THE ATTORNEY GENERAL::::::::::::::::::::::::::::::::::::DEFENDANT

BEFORE HON. JUSTICE REMMY K. KASULE

JUDGMENT

The plaintiff, sued the defendant claiming special, general and exemplary damages arising from alleged trespass, assault, malicious damage to property and loss of money.

The cause of action is stated to have arisen on 29.03.07 at about 11.00 a.m., at Kayago Landing site, Amolatar District.

The plaintiff claimed that on that day, time and place, the Resident District Commissioner, Ongora Atwai, together with armed people invaded the plaintiff's bar, premises and committed the alleged torts; while in the course and within the people of their employment.

The defendant denied the plaintiff's claims.

The issues framed for determination by Court were:-

1. Whether there was any trespass on the business premises of the plaintiff by servants/agents of the defendant on 29.03.07 at Kayago Landing site, Amolatar District.
2. Whether there was destruction and/or taking of any properties of the plaintiff.
3. Whether the plaintiff was assaulted.
4. Whether the defendant is vicariously liable to the plaintiff.
5. The remedies available.

As to the first issue, plaintiff, at the material time, a farmer, business person, LCIII Chairman, and District Chairman of the National Resistance Movement political party, testified that he owned and operated a beer-bar, on his private land, at Kayago Landing Site, Namasale Sub – County, Amolatar District.

On 29.03.07 at 11.00 a.m. he was called from where he was, at the landing site, by his employee, one Omony, a DJ at the bar, to come to the bar premises because the same had been invaded by the RDC and soldiers.

The plaintiff came on a bicycle, but was not allowed to reach the bar immediately as one of the soldiers held him at gun point and refused him to enter the bar. This went on for 10 minutes.

On being let to talk to the RDC, plaintiff inquired as to why his bar had been invaded. The RDC answered him that the bar premises had been invaded because it was disturbing the police at Kayago landing site. The bar was not wanted where it was by the authorities.

The soldiers were being instructed by the RDC all the time. About eight (8) of the soldiers were in UPDF uniform, while the rest were in civilian clothes. They were moving in a blue pick-up with civilian registration numbers.

The RDC instructed the soldiers to go back to the pick up and they left.

Plaintiff then entered the bar and found the pool-table, some crates of beer and soda destroyed or missing. Cash money of shs 1,500,000/= a collection of the previous one week, had also been taken.

A report was made by him to the LCI Chairman of the area, then to the police post, Kayago landing site, where two of his employees who had been arrested had been taken.

The police post personnel at Kayago landing site advised the plaintiff to report the matter to the District Police Commander at Amolatar, as the police post could not summon the RDC for questioning given his status.

The plaintiff did not report the incident to the District Police Commander, because of fear. He instead instructed his lawyer to take up the matter.

PW2 Oroma Simon, stated he was an employee of plaintiff at the bar. On 29.03.07 at 10.30 a.m. the RDC came with eight (8) soldiers and one policeman. The soldiers entered the bar where customers were drinking and others were playing pool table. The soldiers destroyed by breaking

crates of beer and soda and confiscated equipment. He was arrested and taken at Kayago landing site Police post where he was kept up to 6.00 p.m. when he was released.

He saw only the pool table being taken from the bar to the police post.

In defence DW1 Leo Yeko Ongora Atwai, the RDC, admitted being at Kayago landing site on 29.03.07. According to him he arrived at the place at about 9.30 a.m. in the company of the District Intelligence Officer (DISO), one Fred Ojwuka, the O.C. Prison, one Odongo Moses and two UPDF personal escorts by the names of Owani and Okato. As RDC he was going to attend a security meeting in Nakasongola District, of Civic Leaders and security bodies of the Districts bordering with each other in the area; which included his Amolatar District.

On seeing two (2) young men playing pool table and a number of children of school going age being at a make shift shade of papyrus walls, he, as RDC, took it as his responsibility, to find out why this was so. He called in police from the police post at Kayago landing site. The police arrested the two young men who had been playing pool table and took them into police custody. The pool table sticks used for playing were taken by police as an exhibit. He then, together with his entourage, boarded a boat to go to Nakasongola District for the security meeting.

On his i.e. RDC, (DW1) arrival at Kayago landing site, the plaintiff was not present. Plaintiff only appeared as the RDC and his entourage, were boarding a boat to Nakasongola. The plaintiff helped them to board the boat, but remained behind at Kayago landing site to handle the issue of the arrested two boys.

DW2, D/ASP Enyang Fred of Amolatar Police station, testified that on 29.03.2007 at Kayago Landing site, he, too was going to attend the security meeting in Nakasongola District. He confirmed finding 2 male suspects being escorted to Kayago landing site police post by a Police Sergeant. He learnt that the two had been arrested and were being detained on the instructions of the RDC, DW1. He saw the balls and sticks being used to play pool table being taken by police.

The witness instructed the Sergeant to detain the two boys and on his return from Rwampara-Nakasongola, after a meeting with DW1, the RDC, and the District Police Commander, it was decided to release the two male suspects, on police bond. This is because there was no Magistrate in the area, at this time, to preside over Court before which the two suspects would be produced.

According to DW2 he saw no invasion or destruction of the premises and properties of the plaintiff at the alleged time.

The last defence witness James Omony, a businessman owning disco machines at Kayago landing site, stated that On 29.03.07 between 9.00 a.m.- 10.00 a.m. he saw RDC's vehicle go to police. He saw people who were playing pool table at plaintiff's bar run away. The police came and arrested two people who were playing pool table. Police did nothing else. His disco machines were not taken away by police, though a deck fell down and got broken.

The tort of trespass is committed when one enters some one's premises or land without the permission of the lawful owner. Trespass may be by force and or use of arms, that is forcible entry, or is may be by entering the premises without first seeking permission to enter from the lawful authority. Trespass may also be committed by the act of wrongfully taking a chattel.

Court on appreciating the evidence adduced by PW1, PW2, DW1, DW2 and DW3, finds that it has been established, on a balance of probabilities that on 29.03.07 in the morning hours, of 9.00 a.m. to 11.00 a.m., DW1, at Kayago landing site, ordered for the arrest of two males, who were found playing pool table at the plaintiff's bar premises, and some articles of playing pool were taken by police purportedly as exhibits.

The arresting and the taking of the articles was on the instructions of the RDC, DW1.

DW1 offered no explanation, as to why, before ordering for the arrest and confiscation of the pool table articles, he did not first seek to find out from the owner and proprietor of the bar premises as to whether or not the premises were lawfully licensed to have a pool table and serve customers at that material time. No explanation was also offered to court as to why DW1 did not just call in police which was nearby, to investigate the state of affairs, including questioning the owner, of the premises, before ordering for the arrest and confiscation of the pool table equipment.

Court therefore finds that by directly ordering for the arrest of the two (2) employees of the plaintiff and the confiscation of the pool table equipment from the premises of the plaintiff, without having sought any explanation from the owner, DW1 and the police contingent that was

within committed trespass to the prejudice of the plaintiff as regards his business premises and merchandise thereon.

The first issue is therefore answered in the affirmative.

The second issue is whether there was destruction and/or taking of any properties of the plaintiff. The evidence on record from both the plaintiff's side and that of the defendant is that the playing sticks and balls on the pool table were taken by police and have never been returned to the plaintiff.

The plaintiff and his witness, PW2, Oroma Simon, were emphatic in their evidence that the whole pool table was taken and has never been returned. The plaintiff put the value of the table at shs. 1,000,000/=

Court received no explanation from any defence witness as to why, as an exhibit in the case, only the playing sticks and balls, should have been taken and the rest of the table, the most prominent part, of the exhibit left behind. On a balance of probabilities, therefore this court holds that the whole pool table was taken away from the plaintiff's premises, purportedly as a possible exhibit in the case.

No evidence was adduced by defence to rebut the plaintiff's assertion that the cost of the table, balls and sticks was shs 1,000,000/=

There was also no evidence from the defence to explain the whereabouts of the pool table, balls and sticks since the date of the incident 29.03.07 to date; a period of now almost two (2) years. Court infers from this lack of explanation that the pool table, balls and sticks are untraceable and therefore plaintiff is entitled to their monetary value.

As to the fridge, valued at shs. 3,500,000/= the evidence adduced by the plaintiff and his witness is contradictory; while the defence evidence is total denial of any destruction of this fridge, PW1, the plaintiff did not state that he saw the fridge being destroyed. He did not explain how the fridge was destroyed. He did not claim he saw the same being taken away by police or any one else.

According to PW2, a witness of the plaintiff, the police only took away from the bar the pool table and nothing else. Indeed this witness states nothing about the fridge in his evidence.

On the basis of the evidence adduced, Court holds that plaintiff failed to prove that a fridge valued at shs. 3,500,000/= had been destroyed.

As to the lost cash of shs 1,500,000/= plaintiff produced no records whatsoever, by way of accounts, or at all, to show that the previous week to the 29.03.07, the business had earned shs 1,500,000/=. There was no satisfactory explanation why the plaintiff had not banked the said money on his bank account, which he admitted, he maintained.

The plaintiff did not explain to court who of his employees by names as a Bar attendant, was keeping this money or in what place in the bar was the money being kept. He did not explain from where or from whom the money was missing.

Plaintiff called no witness to explain how the money shs 1,500,000/= went missing.

Plaintiff's witness, PW2 said nothing in his examination in Chief about this sum of money. In cross examination by defence counsel this witness simply stated without elaborating:-

“ The money was destroyed because we did not get it”

The defence witnesses were emphatic that no money was lost.

Court comes to the conclusion, given the evidence adduced before it, that the plaintiff has failed to prove that he lost cash shs. 1,500.000/= on 29.03.2007 at his business premises at the hands of the defendants servants/agents.

As to the claim of ten (10) crates of bottles of Soda broken and three(3) crates of beer, court has already found as an established fact that DW1 called police and ordered them to arrest two young men who were playing pool table in the bar premises of the plaintiff. There were other people inside and about the vicinity of the business premises.

The evidence of DW1 is that he shouted calling the police officer-in-charge of the police post to come and arrest those playing pool table. DW1 also admitted that he had, at the time, two (2) armed escorts.

According to PW2, DW1 and DW2 when the police came to arrest those playing pool table the rest of the people started running away, destroying properties in the process. DW3, James Omony who was at the scene, for example testified:-

“ On 29.03.2007, while other people were running away, my equipment was not taken away, though a deck fell down and got broken”

Court, on evaluating the evidence of the plaintiff's side and that of the defence, on this point, finds that because of the manner, DW1, handled the whole situation that resulted, in the arrest of the two table pool players, coupled with the presence of armed escorts and police rushing in to effect the arrest, those inside and within the vicinity of the bar were thrown into panick and fear that forced them to flee any how. In the process bottles of beer and soda were broken, or were taken away, without being paid for. Court therefore holds the claim of 10 crates of bottles of soda being broken and 3 crates of beer as established by plaintiff against the defendant

The third issue is whether plaintiff was assaulted.

Plaintiff's testimony that, on being called by DW3, he came to find out what was happening at his business premises, but was held at gun point by an armed escort for about 10 minutes, is not supported by the evidence of PW2, his witness; who too was at the scene. PW2's evidence is totally silent about plaintiff being held at gun point by an armed escort.

DW1, DW2 and DW3, who in fact called the plaintiff from where he was, to come and see what was happening at the business premises, all deny that the plaintiff was ever assaulted.

There was no medical evidence at all, or any other witness, to support the plaintiff's version.

Court had also the opportunity to observe the demeanour and personality of the plaintiff while giving testimony in court. Court saw him as one with very strong character, both in body and mind, and not such a one who can be held at gun point for ten (10) minutes, without a fight.

On the evidence court holds that, it has not been established, that the plaintiff was assaulted.

The fourth issue is whether the defendant is vicariously liable to the plaintiff.

The law is that a master is liable for the acts of its servants committed within the scope of the servants' employment, notwithstanding that, such acts are negligent, deliberate, wanton or even when they may be done contrary to the master's express orders, provided such acts or omissions are merely the wrong method of carrying out the duties of such servant: see: **MUWONGE VS. A.G. (1967) EA 17; KAFUMBE MUKASA VS A.G. (1984) HCB, 33.** and also **H.C.C.S. NO. 380/95 HELLEN APIO VS IMPRESTIRLING**, unreported.

The evidence adduced in the case is that the acts complained of were carried out by DW1 in his capacity as Resident District Commissioner, Amolatar District, and also by members of the Uganda Police Force. The defendant is thus vicariously liable.

As to the remedies available, the plaintiff has proved, and court has so held, that he is entitled to shs 1,000,000/= value of the pool table, balls and pool sticks,
Shs 125,000/= value of the 10 crates of soda, and Shs 105,000/= value of 3 crates of beer.

As to general damages, plaintiff has proved that he is entitled to damages for trespass to his premise. The circumstances of the trespass have already been set out and considered. In the considered view of court, a sum of shs 500,000/= is adequate damages for the trespass suffered by the plaintiff in respect of his premises.

As to loss of income from the business premises, plaintiff adduced no evidence as to whether or not he stopped operating the bar business by reason of what happened and if so for how long.

With respect to the pool table, plaintiff adduced no evidence as to whether, in order to minimize loss, he acquired another pool table, and if so, when.

Court therefore has no basis to award any damages for the loss of income in respect of the sale of beers and sodas as there is no evidence that their sale stopped.

As to income from the pool table the evidence of plaintiff is that he was making an income of shs 70,000/= daily out of the pool table. This must have been gross. The net income is thus less.

As already pointed out, the plaintiff was under a duty to minimize his loss, possibly by acquiring another pool table.

Doing the best in the circumstances, court awards shs 3,000,000/= as loss of income out of use of the pool table.

As to exemplary damages, court on the facts of this case, finds that this is not such a case for the award of exemplary damages. None are thus awarded.

Accordingly judgment is entered for the plaintiff against the defendant for:-

- a. shs 1,000,000/= value of the pool table, balls and pool sticks.
- b. Shs. 125,000/= value of ten(10) crates of soda destroyed or not paid for,
- c. Shs 105,000/= value of three (3) crates of beer destroyed or not paid for.
- d. Shs 500,000/= general damages for trespass.
- e. Shs 3,000,000/= lost income by reason of non use of the pool table.

The sums awarded shall carry interest at 20% p.a. from the 30.03.2007 till payment in full, except the general damages in (d) above, whose interest is to run from the date of Judgment.

The plaintiff is awarded the costs of the suit.

Remmy K. Kasule
Judge
27th March, 2009