THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MUKONO

CIVIL APPEAL NO 99 OF 2018

(ARISING FROM MUKONO CIVIL SUIT NO. 44 OF 2014 OF THE CHIEF MAGISTRATE'S COURT OF MUKONO AT MUKONO)

TOTAL UGANDA LIMITED ..... APPELLANT

VERSUS

OPIO CHARLES ..... RESPONDENT

BEFORE HON. LADY JUSTICE FLORENCE NAKACHWA

JUDGMENT

Background

1. This appeal arises from the judgment and orders of His Worship Robert Mukanza, the trial Principal Magistrate Grade 1 of Mukono Chief Magistrates Court delivered on 25th September, 2017. The Respondents / Plaintiff filed Civil Suit No. 44 of 2014 against the Appellant / Defendant for recovery of UGX. 4,700,000/= being costs of repair of the motor vehicle, cost of towing and storage of the motor vehicle, compensation and damages for the inconveniences suffered as a result of the wrong fuel put in the motor vehicle and costs of the suit.

2. The Defendant filed a written statement of defence contending that there is no proof that the Plaintiff refueled wrong fuel from the Defendant's petrol station and that even if that was so, the pump

attendants are not under the direction or control of the Defendant since they are employed by a licensed dealer which was contracted by the Defendant. Judgment was entered by the trial court in favour of the Plaintiff who was awarded special damages of UGX. 755,000/=; general damages of UGX. 3,000,000/= and costs of the suit.

3. The Appellant being dissatisfied with the judgment and the above orders of the trial court appealed to this honourable court on the following grounds:

i. **The learned Magistrate erred in law and fact when he failed to properly evaluate the evidence before the court thereby coming to a wrong conclusion that the Appellant was liable to pay the Respondent special and general damages.**

ii. **The learned Magistrate erred in law and fact when he failed to evaluate the evidence before him and awarded special and general damages that had not been proved.**

iii. **The learned Magistrate erred in law and fact when he held that the Respondent was entitled to special and general damages.**

4. Both parties filed their written submissions. During the hearing of this appeal, the Appellant was represented by Counsel Paul Ekochu from M/s GP Advocates. The Respondent was represented by Counsel Mugerwa Herbert from M/s Kusingura Tinyebwa & Co. Advocates who held brief for Counsel Kenneth Kajeke.

5. The Appellant submitted that the learned trial Magistrate erred in law and fact when he held that the Respondent was liable for the negligent acts of its agents, and therefore liable to pay the Respondent special and general damages. That the trial Magistrate relied on the Respondent's oral evidence that his vehicle was wrongly fueled by a pump attendant at Namanve fuel station which belonged to the Appellant. It was argued that the letter relied upon by the trial court neither has bearing on the ownership of the station nor does it make any admissions of liability. That it was necessary that the Respondent prove before court that he had a car or that a car existed; it was fueled at that impugned station; and the Appellant was responsible for the damage caused, if at all.

6. The Appellant's counsel argued that there is no proof that the Respondent had a car that was damaged. He further argued that in cross examination, the Respondent clearly stated that he had no documentary proof that he had a car. That there is no corroborative evidence whatsoever that he has or had a car at the material time. The Appellant's counsel contended that the Respondent did not show to court any evidence that he had fueled his car or any car at the said petrol station. That it is open knowledge that fuel stations give receipts when fuel is taken and that even if it is argued that many a time most motorists do not take receipts, it was incumbent upon the Respondent to show by some corroborative evidence that he fueled his car or any car at all at the said station, which he did not prove.

7. The Appellant's counsel submitted that at the trial, the Appellant adduced evidence that a wrong party was sued because the pump attendant at the fuel station is employed and managed by the dealer who operates the fuel station. That it was incumbent upon the Respondent, who had been informed before the action, to have conducted necessary due diligence to ascertain the right party to sue. That he chose not to do so even in the face of clear information he was given and that the learned trial Magistrate totally disregarded or deliberately ignored the Appellant's evidence. Counsel further argued that the fact that the dealer at the station is an agent of the Appellant does not make his employees agents of the Appellant. That it is trite law that a delegate cannot delegate. Counsel cited the case of **Auto Garage v. Motokov (1971) EA 514**.

8. Learned counsel concluded that the Respondent failed to show that he had a right that was violated by the Appellant and that no evidence exists to support the Respondent's claim. That the learned trial Magistrate failed to properly evaluate the evidence on court record to establish any of the claims before he wrongly placed liability on the Appellant. That had he done so, he would have found that there was no evidence on record proffered by the Respondent to show that any of his rights were violated as alleged and that the Appellant was liable for the acts of the unnamed pump attendant. Counsel prayed that this ground be found in the affirmative.

9. Counsel submitted for the Appellant on the 2nd ground that it was incumbent on the Respondent to prove his claim with supporting

evidence and that on cross examination, the Respondent clearly stated that he has no receipts for the payments he made. That receipts are proof of payment and not invoices.

10. The Appellant's counsel submitted that the Respondent did not adduce any evidence to prove the damage to his car and that during cross examination the Respondent admitted that he is not a mechanic and only relied on statements made by a person not in court which is clearly hearsay evidence. That the learned trial Magistrate ought to have found that the special damages were not proved by the Respondent as required by the law.

11. As regards general damages, the Appellant's counsel argued that the Respondent complained to the Appellant eight (8) months after the alleged event and that this was inordinate delay. In addition, the Appellant's counsel averred that there was no proof of damage to the vehicle. That court was not led on evidence to show whether indeed wrong fuel was put in a car that caused it to have a mechanical failure. Counsel prayed that the 2nd ground of the appeal be answered in the affirmative.

12. It was further contended for the Appellant on ground 3 that since the Respondent has neither proved his claim nor proved any liability upon the Appellant, he should not be awarded reliefs as sought. That the Respondent has failed to prove that the car he claimed was damaged actually existed.

13. Furthermore, The Appellant's counsel submitted that in respect of the UGX. 755,000/- claimed as repair costs, the Respondent adduced a photocopy of an invoice from Ssalongos's Motor Garage Nakawa dated 29th September, 2012. That when asked on cross examination for the original, the Respondent said he did not have one and that no other evidence was given to court for the claimed damages. That no proof of payment was ever adduced and that it would have been arguable if receipts had been given as evidence. That the mechanic who is alleged to have done the repairs was never called as a witness to give authenticity to the invoice. That it is trite that special damages are restrictive; they do not deal with estimates but rather with exact financial losses.

14. The Appellant's counsel submitted that at the trial, the Respondent failed to meet the bare minimum of proof of special damages and simply lumped all damages together in a bid to escape the strict requirement. That the Respondent should have clearly informed court and adduced evidence of the cost of damages that is to say, repairs, towing, among others and that he was not therefore entitled to any award of special damages. That on the issue of general damages no loss or inconvenience was shown or proved to the court hence the Respondent was not entitled to any award of general damages.

15. The Respondent's counsel contended that the learned trial Magistrate properly applied the law to the facts and arrived at a right decision. That it is clear from the facts that the Respondent packed at the Appellant's

petrol station at Namanve for fueling motor vehicle Registration No. UAK 412H Ipsum.

16. The Respondent's counsel submitted that the Respondent's oral evidence was consistent as opposed to that of the Appellant's bare denial and that it is trite law that oral evidence is admissible before courts of law. That the Appellant's argument otherwise is an attempt to mislead court. That the Appellant's pump attendant put wrong fuel contrary to what the Respondent had ordered. That there are many fueling stations on the road and its was not a coincidence that the Appellant was brought to court but for the occurrence.

17. The Respondent submitted that this court disregards the Appellant's argument that the petrol station is operated by a dealer as there was no evidence to prove that the petrol station was operated by a dealer. Counsel added that the station bears the Appellant's brand name 'TOTAL" and the employees of the petrol station put on attire which has the said brand name. Counsel prayed that the 1st ground of the appeal fails.

18. The Respondent's counsel submitted on ground 3 of the appeal that the trial Magistrate was alive to the fact that the Respondent is entitled to damages especially when the Appellant did not bring any evidence to disprove the fact that the Appellant did not suffer loss. That the law on damages has been settled as compensation which flows from loss occasioned due to conduct of the defendant. In this case, the Respondent suffered loss of use of his vehicle and that the court

correctly assessed the award. Counsel prayed that this appeal is dismissed with costs to the Respondent.

Court's consideration

19. The duty of the first appellate court is to re-evaluate and re- appraise the evidence on record and come to its own conclusion. In the case of **Sanyu Lwanga Musoke v. Sam Galiwango, SCCA No. 48/1995,** Justice A. Karokora held that:

> *"...it is settled law that a first Appellate Court is under the 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..."*

20. This court will in its analysis join all the 3 grounds since the Appellant's grievance is on award of special and general damages. The grounds can be summarized into two issues. These are:

(1) Whether the trial Magistrate properly evaluated the evidence.

(2) Whether the respondent / plaintiff was entitled to the special and general damages.

21. Section 59 of the Evidence Act, Cap. 6 provides for circumstances under which oral evidence may be admitted in court. It provides as follows:

> *"Oral evidence must, in all cases whatever, be direct; that is to say—*

(a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he or she saw it;

(b) if it refers to a fact which could be heard, it must be the evidence of a witness who says he or she heard it;

(c) if it refers to a fact which could be perceived by any other sense, or in any other manner, it must be the evidence of a witness who says he or she perceived it by that sense or in that manner;

(d) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds,

except that—

(e) the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which those opinions are held, may be proved by the production of those treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable; and

(f) if oral evidence refers to the existence or condition of any material thing other than a document, the court may, if it thinks fit, require the production of that material thing for its inspection."

22. In the instant case, it is my finding that, the testimony of P.W.1 upon whose evidence the Respondent relied to prove the fact of the incident that happened was direct evidence and rightly admitted by the trial court as required by the law. Obviously, the trial court couldn't order for the

production of the motor vehicle for inspection since the same had already been repaired and was not in the same condition as at the time of the alleged incident. In my judgment, the learned trial Magistrate rightly admitted the oral evidence of the Respondent who was personally involved in the process of refueling and repairing of the motor vehicle.

23. In **Halsbury's Laws of England**, **Fourth Edition Volume 1(2) (1990)** paragraph 113 on page 79 it is stated thus:

> *"The rights of an agent against his principal flow from the principles that an agent, as the representative of his principal and acting wholly on his behalf, is entitled to be indemnified for such liabilities incurred and losses suffered as were in contemplation when the agency was undertaken, or as were stipulated by the contract of agency, and that, where he is an agent for reward, his principal must not wrongfully hinder his opportunity of earning the reward. In the light of these main principles the agent's rights are to be discovered by reference to the terms, express or implied, of the contract between him and his principal."*

24. The primary duty of an agent is to carry out, generally in person, the business he or she has undertaken, or to inform his or her principal promptly if it is impossible to do so. The principal makes use of the agent to enter into a legal relationship with third parties. The most important feature of legal agency is that the agent by his act of agency affects the principal's legal position towards third parties.

25. In **Twongyeire Peter v. Muhumuza Peter, HCCA No. 33 of 77**, Justice Wangutusi David defined agency as follows:

> *"The relationship which exists when one person acts on behalf of another and has power to affect the principal's legal position in regard to a 3rd party. An agent must satisfy the principal by making contract on his behalf and by dealing with the principal's property".*

26. A principal-agent relationship may arise by consent or operation of law or by the doctrine of apparent authority. Apparent authority is that authority which appears to the public to exist by observing the behavior of the principal and the agent, for instance, where the principle accepts and ratifies the activities of the agent. This conduct between the principal and agent may be by word of mouth, conduct or in writing.

27. In the Tanzanian case of **Dalgety & Co Ltd v. R.E.D. Cluer [1961] E.A. 178 at page 181**, Sir Ralph Windham, CJ held thus:

> *"....when one contracts with a third party for an undisclosed principal one contracts with that party as an apparent principal and renders oneself primarily liable to him as principal, while at the same time, as between oneself and the undisclosed principal, whom one is screening from the third party, one enters that contract as agent of the undisclosed principal and can indemnify oneself and recover from the latter any sum that one has lawfully and reasonably spent in connection with the contract while acting within the scope of that agency."*

28. In this appeal, the Appellant's counsel submitted that a wrong party was sued by the Respondent because the pump attendant at the Appellant's fuel station was employed and managed by the dealer who operates the fuel station. The Appellant argued that it is the dealer who is an agent of the Appellant not the pump attendant.

29. In my judgment, this argument is an attempt of escaping liability as there was no public notice whether in writing or by implication that the pump attendant was not an agent or employee of the Appellant. Moreover, according to the Respondent's contention, the said pump attendant was putting on an attire branded on with the Appellant's name, "Total". Basing on the authorities cited in this judgment, I hold that the Appellant cannot escape liability where it was not apparent to third parties that the fuel station was being run by a dealer and where it was clear from the name at the fuel station that it was the Appellant owning the fuel station. Any losses incurred by the Appellant may be recovered from the dealer as the direct employer of the pump attendant who put wrong fuel in the Respondent's vehicle, depending on the agency contract between the Appellant and the dealer or by implication.

30. If the Appellant was well aware that the dealer it contracted was liable for the acts of the pump attendant, then it could have joined the dealer in Civil Suit No. 44 of 2014, in a third party proceeding to indemnify it from liability claimed by the Respondent but that was not done. The Appellant chose to totally deny any liability of even refueling the Respondent's motor vehicle. The Respondent who testified as P.W.1 clearly stated in his testimony that upon being told by two mechanics

that the engine of his vehicle got a knock and that he was given wrong fuel, he went back to the petrol station and met the station manager who gave their mechanic called Babu who went and drained petrol out of the the tank and replaced it with diesel. The Respondent testified that when Babu opened up the bonnet, he told the Respondent that the turning belt had broken, so he asked for money to buy a turning belt from Kireka, and the Respondent gave UGX. 100,000/= plus boda-boda fare. That when he came back to the scene with the said mechanics, in the process of fixing the turning belt, they realized that other parts of the car had been damaged which made the Appellant's mechanic to abandon the Respondent with the vehicle.

31. The above evidence cannot constitute a concoction where the mobile telephone number of the Appellant's mechanic was even stated by P.W.1 in his testimony to wit 0752 116439. According to the Respondent's undisputed evidence, the following day, together with his mechanic, they passed by the Appellant's fuel station in order to go along with them to assess damages together.

32. The Respondent stated that when he went back to the fuel station to serve the Appellant's station manager with the bill for the repair of the motor vehicle, he was referred to the Appellant's headquarters using a telephone number. When he communicated on that telephone number, he was told that he was not going to be compensated. He then approached the Appellant's legal department wherefrom he was advised to put his complaint in writing but when he wrote, nothing was

done prompting him to serve the Appellant with a notice of intention to sue. He subsequently filed a civil suit against the Appellant.

33. The Respondent's evidence was tangible and the trial court rightly relied upon it. According to paragraph 4 of the plaint it is stated that

> *"(b) That while at the fuel station, he asked the attendant to give him Ugshs. 60,000/= (sixty thousand only) of diesel.*
>
> *(c) That unknown to him, the pump attendant utterly and negligently put in petrol instead of diesel and that as he drove off, he realized that the car was not moving normally until it eventually stopped near Mukono Town from where he called the mechanic to examine the car."*

The pleading clearly brought out the tort of negligence on the part of the fuel attendant for which the employer is vicariously liable. Furthermore, the fact that the Appellant had offered to compensate the Respondent with UGX. 2,000,000/= during their attempt to amicably settle the matter is an indication that it had admitted liability had the Respondent not declined to take the said offer. The Appellant is therefore estopped from denying liability to the Respondent since the negligent action of its pump attendant led to the damage of the Respondent's vehicle. Whether there was a dealer managing the fuel station or not is immaterial as already held above.

34. Regarding admissibility of documentary evidence, section 60 of the Evidence Act, Cap 6 provides that

"The contents of documents may be proved either by primary or by secondary evidence."

Section 61 of the Evidence Act states that primary evidence means the document itself produced for inspection of the court. Section 62 of the Evidence Act defines secondary evidence to include certified copies, copies made from or compared with the original, copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy and copies compared with those copies.

35. Where a party wishes to object to the admissibility of a document for reason of it being secondary evidence, the objection has to be raised before the trial court otherwise it would be unfair on the opposite party if the objection is entertained by the appellate court, when it wasn't objected to at the trial. This position is made clear by section 166 of the Evidence Act, Cap 6 which provides that:

"The improper admission or rejection of evidence shall not be ground of itself for a new trial, or reversal of any decision in any case, if it shall appear to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision."

36. In the instant case, the Appellant only cross examined the Respondent on whether the invoice adduced before the trial court was a certified copy, which was responded to in the negative but the Appellant never

objected to its admissibility. This made the document to be relied upon by the trial court during evaluation of the evidence on court record.

37. Even where the copy of the invoice was already admitted in the absence of the Appellant, its counsel could have prayed for it to be expunged from court's record during examination, but he did not. Notwithstanding the foregoing, whether it was the original, certified copy or a copy of the invoice which was adduced and admitted during trial, it would not change the court's decision as it still remains as the document consisting of costs of repair of the Respondent's motor vehicle.

38. The Appellant's counsel argued that the learned trial court erred in law and fact in awarding special and general damages. It is important to note that damages are, in their fundamental character, compensatory, not punishment. Whether the matter complained of is a breach of contract or tort, the primary function of damages is to place the plaintiff in as good a position as if the matter complained of had not occurred, so far as money can do it. This primary notion is limited by various considerations, but the central idea is compensation. Accordingly, damages are usually measured by the material loss suffered by the plaintiff. As a general rule, the plaintiff must not receive more, nor should he or she receive less than the appropriate measure of damages commensurate with his or her material loss.

39. It is trite law that in all cases where special damages are claimed, they must be pleaded with sufficient specificity and strictly proved. They are

exceptional in their character, therefore, they must be claimed specially and proved strictly. In **Jivanji v. Sanyo Co. Ltd [2003] EA 84,** court held that;

> *"It's trite law that special damages must be pleaded and then strictly proved in order for a plaintiff to succeed on a claim for specific damages."*

40. The Respondent in the instant case led evidence before the trial court to show that he incurred expenses on repair of the damaged motor vehicle which resulted from wrongful refueling of the said vehicle by the Appellant's pump attendant. As to whether the Respondent paid for the expenses of the repair stated in the invoice or not, it remains costs of repair of the Respondent's damaged vehicle which should have been or should be met by the Appellant. I hold that the trial court rightly concluded that the Appellant was liable to pay special damages to the Respondent which he specifically pleaded in paragraph 4 (h) of the plaint and indeed proved it through exhibit P1.

41. General damages are such as the law will presume to be the direct, natural or probable consequence of the act complained of. It is trite law that general damages are awarded at the discretion of court. A successful party may be awarded general damages for any discomfort suffered as a result of the wrongful action of the losing party. Therefore, it is the duty of the aggrieved party to show court that he or she has been greatly inconvenienced or suffered injuries as a result of the Defendant's actions.

3,000,000/= which I consider to be just and appropriate considering the circumstances of the case and the special damages of 755,000/=.

45. Pursuant to the foregoing analysis, this court finds no merit in this appeal and it is hereby dismissed with costs to the Respondent in the lower court and this court.

I so order accordingly.

This judgment is delivered this 31st day of Oct. 2023 by

FLORENCE NAKACHWA

JUDGE.

In the presence of:

(1) Counsel Tonny Tumukunde holding brief for Counsel Paul Ekochu from M/s GP Advocates, for the Appellant;

(2) Mr. Opio Charles, the Respondent;

(3) Ms. Pauline Nakavuma, the Court Clerk.

42. In **Luzinda v. Ssekamatte & 3 Others, (Civil suit -2017/366 [2020] UGHCCD 20 (13 March 2020),** Justice Musa Ssekaana held that:

> *"As far as damages are concerned, it is trite law that general damages are awarded in the discretion of court. Damages are awarded to compensate the aggrieved, fairly for the inconveniences accrued as a result of the actions of the Defendant. It is the duty of the claimant to plead and prove that there were damages, losses or injuries suffered as a result of the Defendant's actions".*

43. The Respondent testified before court how he was inconvenienced right from the time his vehicle stopped working as he was approaching Mukono while on his way from Bweyogerere to Busia. He had to engage a number of mechanics to work on his vehicle, towed it from the scene to a neighboring homestead, wherefrom he paid someone to ensure its safety. On several occasions, the Respondent engaged the Appellant's top management including the station manager, those at the Appellant's headquarters and the Appellant's legal department to ensure that the issue is amicably settled before he resorted to court. It was the Respondent's evidence that in all these endeavors, he was tossed here and there by the Appellant prompting him to issue a notice of intention to sue and he subsequently filed Civil Suit No. 44 of 2014.

44. I find that the Respondent has discharged his duty to prove damages and inconveniences caused as a result of the Appellant's actions. Therefore, the trial court rightly awarded general damages of UGX.