IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 97 OF 2016 (FORMERLY NAKAWA HCCA 10 OF 2015)

(ARISING FROM ENTEBBE CIVIL SUIT NO. 170 OF 2015)

JOEL OCAN LAKUMA…….APPELLANT

V

DEZIDERIO NSUBUGA……RESPONDENT

BEFORE HON. LADY JUSTICE H. WOLAYO

JUDGMENT

Through his advocates Arinaitwe Law Advocates, the appellant appealed the judgment of HW Joyce Kavuma Chief magistrate dated 8th January 2015 on three grounds of appeal that I will revert to later in the judgment.

The respondent was represented by Muslim Centre for Justice and law.

Both counsel filed written submissions that I have carefully considered.

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence adduced in the lower court and arrive at its own conclusions on issues of fact and law.

The respondent sued the appellant in tort for negligent driving and causing damage to the respondent's motor vehicle UAL 843 W along Entebbe road . The respondent prayed for special and general damages for the damage and loss occasioned.

The appellant admitted liability for the accident but that he had fully compensated the respondent which compensation was rejected.

In the trial court, it was not disputed that on 2.10.2010, the respondent's vehicle No. UAL 843 W was involved in an accident for which the appellant accepted liability . In an agreement dated 5.10.2010 Pexh. 1 , the appellant agreed to meet cost of repairs certified by the Police Inspector of Vehicles .

The respondent took the car to the garage of the appellant's choice located at Makerere for the repairs where he was told the vehicle needed an overhaul .

The respondent admitted he never collected the repaired car from Entebbe police station because the repairs did not meet the required standard.

His witness PW2Paul Eng. Odongo, an automotive and power engineer from Kyambogo University inspected the repaired vehicle on 20.12.2010 and he determined the vehicle sustained 'diamond ' damage which technically meant , such a vehicle cannot be legally on the road.

PW3 Okurut Joseph Inspector of Vehicles with Uganda Police checked the vehicle after the accident and found that it was not in a dangerous mechanical condition although oil was leaking.

DW2 Eng.Luyima Peter for the appellant confirmed he received a vehicle from the appellant for repairs at his garage . Luyima, an engineer, found no damage to the body of the vehicle and that diamond damage referred to by PW2 Odongo was to the chassis. He confirmed some repairs e.g. replacement of driver's door, side lamp and complete body work.

Three issues were framed for determination by the trial magistrate.

a) Whether the plaintiff's car was repaired to the recommended road worthy condition

b) Whether the car was delivered or handed to the plaintiff as agreed

c) Remedies.

On the basis of the MOU dated 5.10.2010, the trial magistrate was justified to frame the issue as she did.

In the course of the trial, it was conceded by both parties that the two entered a memorandum of understanding dated 5th October 2010 and marked Pexh. 1 in which the appellant admitted liability for the accident and undertook to pay the cost of repair of motor vehicle UAL 843 W and to compensate the respondent 50,000/ per day for the period the car will be at the police custody and garage.

The appellant did not cost the repairs he did on the vehicle . His expert witness who carried out the repairs DW 2 Eng. Luyima was non-committal on the actual cost of repairs and testified that he was to replace driver's door, door glasses, side lamp, and do complete body work and fence . It was Eng. Luyima's testimony that he did his part and received no complaint.

It was not disputed that the appellant delivered a repaired car to Entebbe police station after the repairs which the respondent never collected.

The respondent rejected the repaired car and called PW2 Eng. Odongo who carried out a post repair examination of the vehicle and captured his findings in Pexh.3 , a report dated 20.12.2010. In this report, Eng. Odongo found that the car had not been repaired to meet road worthiness and that it had not been brought back to the pre-collision value. He therefore recommended the appellant pays the respondent its pre-collision value that he placed at 25,579,195/ while the appellant retains the repaired vehicle with a value of 3,000,000/. In other words, Eng. Odongo recommended a sum of 22,579,195/ be paid to the appellant as pre- collision value.

Counsel for the appellant cross examined Odongo on his qualifications as an expert in automotives and Eng. Odongo stood the test because he proved that he holds a Bachelor of Engineering Automotive and power engineering from Kyambogo University among other qualifications.

In his submissions, I note that counsel for the appellant attacked the competencies of PW2 but I find these attacks are not supported by evidence. The cross examination showed the engineer had the competencies and authority to assess condition of motor vehicles as well as their value.

In the absence of credible contrary evidence, the trial magistrate was justified when she found that the appellant did not meet his part of the MOU when the vehicle was not repaired to the level of road worthiness. The appellant was estopped from denying the agreement to repair the vehicle to a road worthy state and the trial magistrate was justified in finding for the respondent. **Cross and Tapper on Evidence 8th edition, Butterworths publishers(1995) : page 102** states that two people may agree that a certain state of affairs exist and when this is done, they are estopped from denying the existence of those facts.

I now turn to the grounds of appeal.

Ground one

The learned trial magistrate erred in law and in fact by not evaluating the evidence and thereby occasioned a miscarriage of justice.

I have re-evaluated the evidence adduced in the lower court and found that the trial magistrate properly evaluated the evidence and arrived at a correct conclusion.

Ground two

The learned trial magistrate erred in fact and in law by awarding damages of 25m as replacement value whereas the motor vehicle was lost at the hands and negligence of the respondent.

The appellant had a duty to repair the vehicle to a roadworthy condition while respondent was entitled to reject a vehicle that was not road worthy. The respondent exercised his right to reject the vehicle that was not road worthy and thereby suffered a loss.

It is settled principle of law that special damages must be specifically pleaded and proved.

The respondent claimed among other heads of special damages, a sum of 25,329,000/ as cost for recovery of the damaged motor vehicle which the trial court awarded.

Counsel for the appellant argued that the respondent ought to have collected the vehicle after repairs . Counsel was raising the principle of mitigation that the respondent had a duty to mitigate his loss. I find that mitigation of the loss suffered by the respondent in terms of a damaged vehicle was not possible if the vehicle was not road worthy after repairs.

From my re-evaluation of the evidence, I found that the pre-collision value of the vehicle was 25,579,195/ and the value of the repaired vehicle was 3,000,000/ .

This means the special damages the appellant was entitled to was 22,579,195/ .

Although the respondent pleaded 25,329,000/, and the proved value of the pre-collision value of the car was 25,579,195/ , the negligible difference of 250,195/ between the pleading the actual value cannot be a basis for denying the respondent an award of special damages. I therefore

substitute 25,329,000/ with an award of 22,579,195/ after deducting the value of the repaired vehicle.

With respect to general damages , the respondent was offered a bank draft worth 1,250,000/ for the days the vehicle was in the garage . He rejected this sum. Under the common law duty to mitigate loss, the respondent ought to have accepted this money and then claimed for more if he was dissatisfied.

In **African Highland Produce Ltd v Kisorio [2001] 1 EA 1**, the plaintiff hired a land cruiser after his car was damaged in an accident in which the defendant was liable . The plaintiff claimed special damages for hiring a vehicle for 21 days. The Court of Appeal of Kenya held that the plaintiff had a duty to take all reasonable steps to mitigate the loss he sustained including retrieving the car from the garage within 21 days which he did not.

The trial magistrate therefore erred in not taking into consideration the 1,250,000/ rejected by the respondent when awarding general damages.

I will therefore exercise my discretion and deduct 1,250,000/ from 2,000,000/ awarded. The result is an award of 750,000/ general damages.

Ground three

The learned trial magistrate erred in ignoring the appellant's defence and relied on extraneous matters.

There is no merit in this ground because the trial magistrate relied on oral testimonies of witnesses and documentary evidence to arrive at a decision.

In the result, the appeal is dismissed .

The judgment of the lower court is varied as follows:

1. The respondent is awarded special damages of 22, 579,195/ and 750,000/ general damages.
2. Costs of the appeal and the lower court to the respondent.

DATED AT KAMPALA THIS 14TH DAY OF OCTOBER 2016.

HON. LADY JUSTICE H. WOLAYO

14.10. 2016

Tonny Arinaitwe for the appellant

Appellant absent. Reported sick

Respondent present

Court clerk. Margret

Judgment read out .

H. Wolayo J