

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL SUIT No. 0069 OF 2004

OKETHA DAFALA VALENTE PLAINTIFF

VERSUS

THE ATTORNEY GENERAL OF UGANDA DEFENDANT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The plaintiff sued the defendant for general and special damages for trespass to goods. It was the plaintiffs' case that on 30th November 2001, the police at Nebbi Police Station wrongfully impounded his motor vehicle registration No. UDK 669, a Toyota Dyna truck, which they eventually released on 4th March 2004. As a result of that wrongful act, he suffered loss of income of shs. 81,000,000/= which he claims as special damages in addition to general damages, interest and costs. In the written statement of defence, the defendant denied that any of the persons who impounded the vehicle were acting in the course of their employment as agents of the defendant. The defendant prayed that the suit be dismissed with costs as it was misconceived.

In his testimony, the plaintiff explained that he bought the truck in question on 16th May 2001 at the price of shs. 5,000,000/= The agreement of purchase was tendered in evidence as exhibit P. Ex. 1. He used the vehicle in the transport business and from time to time it would be hired for transporting goods and passengers. It was generating a daily net income of shs. 100,000/=. On 30th November 2001 at around 6.00 pm, policemen from Nebbi Police Station impounded it on allegations that it was a suspected stolen vehicle. When he went to the police the following day to follow up the issue, he too was arrested and later released on police bond. On 2nd December 2001 when he returned to the police station, he found the engine was missing from the truck. His inquiries as to the whereabouts of the engine were fruitless. After several complaints at the Police Regional Office in Arua and the Police Headquarters in Kampala, the vehicle and the engine

were released to him separately in March 2004. Many parts were missing from the engine and therefore he did not re-install it in the truck. He sold off what remained of the truck at shs. 1,500,000/= and what remained of the engine at shs. 1,000,000/=

The defendant did not adduce any evidence in defence of the suit. In his final written final submissions, counsel for the plaintiff Mr. Donge Opar argued that the vehicle was impounded wrongfully since the defendant did not advance any justification for that act. The defendant is liable for the wrongful act since the policemen who impounded and vandalised the vehicle were servants of the defendants who at all material time were acting in the course of their duty and scope of employment as such. He prayed for an award of shs. 80,000,000/= as exemplary damages and shs. 50,000,000/= as general damages, interest at 26% per annum and costs.

This being a civil suit, the burden of proof lies with the plaintiff. To decide in his favour, the court had to be satisfied that the plaintiff has furnished evidence whose level of probity is such that a reasonable man, even in a case such as this where the defendant has not adduced any evidence, might hold that the more probable conclusion is that for which the plaintiff contends, since the standard of proof is on the balance of probabilities / preponderance of evidence (see *Lancaster v. Blackwell Colliery Co. Ltd* 1918 WC Rep 345 and *Sebuliba v. Cooperative Bank Ltd* [1982] HCB 130).

First issue: Whether the plaintiff's motor vehicle Registration No. 669 UDK was unlawfully confiscated and detained by policemen at Nebbi Police Station.

Under section 7 of *The Criminal Procedure Code* At and sections 26 and 29 of *The Police Act*, a police officer may seize any vehicle he or she has reasonable grounds to suspect that property or anything stolen or unlawfully obtained may be found or is used in conveying in any manner anything stolen or unlawfully obtained. This power for impounding vehicles is of an exceptional nature and it ought to be exercised fairly, sparingly and only when fully justified by the exigencies of an uncommon situation. According to section 103 of *The Evidence Act*, the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular

person. In *Jovelyn Barugahare v. Attorney General S.C. C.A. No 28 of 1993*, it was decided that he who asserts must affirm. The onus is on a party to prove a positive assertion and not a negative assertion. It therefore means that, the burden of proof lies upon him or her who asserts the affirmative of an issue, and not upon him or her who denies, since from the nature of things he who denies a fact can hardly produce any proof.

The affirmative of this issue is that the impounding of the vehicle was justified and therefore not wrongful. The burden was on the defendant to prove on the balance of probabilities that at the time the plaintiff's vehicle was impounded, there were reasonable grounds to suspect that property or anything stolen or unlawfully obtained may be found on the truck or that it was being used in conveying in any manner anything stolen or unlawfully obtained or that the vehicle itself was stolen. Not only did the defendant fail to plead any facts of this nature in the written statement of defence but also did not offer any explanation for that action.

Trespass to goods consists in the unlawful disturbance of the possession of the goods by seizure, removal, or by a direct act causing damage to the goods. To constitute conversion there must be a positive wrongful act of dealing with the goods in a manner inconsistent with the owner's rights, and an intention in so doing to deny the owner's rights, or to assert a right inconsistent with them. The facts of this case constitute both trespass and conversion. In the instant case, there is absolutely no explanation of any sort as to why the plaintiff's truck was impounded and the engine removed. The first issue is therefore answered in the affirmative.

Second issue: Whether the defendant is liable for the acts of the said policemen.

According to the *East African Cases on the Law of Tort* by E. Veitch (1972 Edition) at page 78, an employer is in general liable for the acts of his employees or agents while in the course of the employers business or within the scope of employment. This liability arises whether the acts are for the benefit of the employer or for the benefit of the agent. In deciding whether the employer is vicariously liable or not, the questions to be determined are: whether or not the employee or agent was acting within the scope of his employment; whether or not the employee or agent was going about the business of his employer at the time the damage was done to the plaintiff. When

the employee or agent goes out to perform his or her purely private business, the employer will not be liable for any tort committed while the agent or employee was a frolic of his or her own.

In the instant case, the testimony of the plaintiff is uncontroverted to the effect that when he went to Nebbi Police Station, he found his truck parked at the Station. To corroborate his testimony, he tendered in evidence the police bond form that was issued to him that day and it was marked exhibit P. Ex. 2. It is dated 1st December 2001 indicating that he was accused of "stealing a motor vehicle." The following day he found the engine had been removed. He thereafter engaged various police administration offices in Arua and Kampala until he secured the release of the truck and the engine in March 2004. I have not found any evidence to suggest that the police officers involved were on a frolic of their own. According to section 3 (1) (a) of *The Government Proceedings Act*, Government is subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject in respect of torts committed by its servants or agents, where such conduct would have given rise to a cause of action in tort against that servant or agent or his or her or estate.

An act may be done in the course of employment so as to make his master liable even though it is done contrary to the orders of the master, and even if the servant is acting deliberately, wantonly, negligently, or criminally, or for his own behalf, nevertheless if what he did is merely a manner of carrying out what he was employed to carry out, then his master is liable (see *Muwonge v. Attorney General* [1967] EA 17). On basis of the evidence availed to court, I find that the plaintiff has proved on the balance of probabilities that the various police officers involved in impounding and retaining the truck did so in the scope of their duty and course of their employment for which the Attorney General is vicariously liable. The second issue too is therefore answered in the affirmative.

Third issue: What remedies are available to the parties.

By his plaint, the plaintiff sought the following reliefs; general damages, exemplary damages, special damages, interest and costs of the suit. As regards special damages, not only must they be specifically pleaded but they must also be strictly proved (see *Borham-Carter v. Hyde Park*

Hotel [1948] 64 TLR; Masaka Municipal Council v. Semogerere [1998-2000] HCB 23 and Musoke David v. Departed Asians Property Custodian Board [1990-1994] E.A. 219). The plaintiff pleaded that he would earn a daily income of shs. 100,000/= hence a total of shs. 79,100,000/= for the 791 for which the vehicle was impounded.

Apart from the assertion in his testimony that he was earning that amount daily, there is nothing to substantiate that claim, although strict proof does not necessarily always require documentary evidence (see *Kyambadde v. Mpigi District Administration, [1983] HCB 44; Haji Asuman Mutekanga v. Equator Growers (U) Ltd, S.C. Civil Appeal No.7 of 1995 and Gapco (U) Ltd v. A.S. Transporters (U) Ltd C. A. Civil Appeal No. 18 of 2004).*

In the instant case there is a total lack of contemporaneous records of the income generated over the period before the vehicle was impounded, records of running or operational expenses incurred, receipts for licences paid for, etc. by which the averment on the daily net income can be verified. As was noted by Platt., J.S.C, in *Kibimba Rice Co Ltd v. Umar Salim S. C. Civil Appeal No. 7 of 1988*, "it is not true to say that daily income can never be proved. Accounts of receipts against outgoings can be proved to arrive at a net figure. If no accounts were kept, then a claim in general damages should be considered." Although pleaded, the evidence adduced by the plaintiff does not meet the requirement of strict proof. That claim for special damages is consequently rejected.

As regards the claim for general damages, without proof of actual loss or damage, courts usually award nominal damages. Damages are said to be "at large", that is to say the Court, taking all the relevant circumstances into account, will reach an intuitive assessment of the loss which it considers the plaintiff has sustained. The award of general damages is in the discretion of court in respect of what the law presumes to be the natural and probable consequence of the defendant's act or omission (see *James Fredrick Nsubuga v. Attorney General, H.C. Civil Suit No. 13 of 1993 and Erukana Kuwe v. Isaac Patrick Matovu and another, H.C. Civil Suit No. 177 of 2003).*

In *Alaka and Company Advocates v. Metropolitan Properties Ltd*, H. C. Civil Suit No. 621 of 2007, a law firm sued its landlord for the wrongful impounding of its business assets in a misconceived distress for rent, as a result of the plaintiff's failure to give the defendant a three months' notice before terminating their tenancy with the defendant. The property impounded included chairs, desks, law books, computers, important documents such as court files, wills and even their professional attire, which property was retained as security for the payment of a sum of Shs. 6,729,000/= in lieu of the notice to terminate the tenancy. As general damages for the ninety days for which the items were wrongfully impounded, by a judgment delivered on 24th April 2012 the court awarded the plaintiff shs. 60,000,000/= as general damages to atone for such a prolonged disruption, professional embarrassment, humiliation and general inconveniences.

In *Power and City Contractors Ltd v. LTL Projects (PVT) Ltd*, H.C. Civil Suit No. 24 of 2012, in a judgment delivered on 11th September 2015, the court awarded shs. 80,000,000/= as general damages for the wrongful seizure and detention of a Pajero Station Wagon, a self loader lorry, a Tipper and a compressor belonging to the plaintiff. The defendant had directed the police to detain the plaintiff's property resulting in a six months' long, wrongful detention of the chattels.

The Court is alive to the requirement that in assessment of the quantum of damages, it should be mainly guided by the value of the subject matter, the economic inconvenience that the plaintiff may have been put through and the nature and extent of the injury suffered (See *Uganda Commercial bank v. Kigozi* [2002] 1 EA 305). Furthermore that a plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been if she or he had not suffered the wrong (See *Hadley v. Baxendale* (1894) 9 Exch 341; *Charles Acire v. M. Engola*, H. C. Civil Suit No. 143 of 1993 and *Kibimba Rice Ltd v. Umar Salim*, S. C. Civil Appeal No. 17 of 1992). General damages are the direct natural or probable consequence of the wrongful act complained of and include damages for pain, suffering, inconvenience and anticipated future loss (see *Storms v. Hutchinson* [1905] AC 515; *Kabona Brothers Agencies v. Uganda Metal Products & Enamelling Co Ltd* [1981-1982] HCB 74 and *Kiwanuka Godfrey T/a Tasumi Auto Spares and Class mart v. Arua District Local Government* H. C. Civil Suit No. 186 of 2006). All this is subject to the duty to mitigate. At common law, the plaintiff had a duty to

take all reasonable steps to mitigate the loss sustained (see *African Highland Produce Ltd v. Kisorio* [2001] 1 EA 1). Here the plaintiff attempted to mitigate his loss by selling off what remained of the truck at shs. 1,500,000/= and what remained of the engine at shs. 1,000,000/=.

Taking into account the evidence adduced on the matter as to the magnitude of the loss suffered (income from the truck for its lifespan), making a fair estimate of the replacement value of the truck (whose purchase price was shs. 5,000,000/=), its life span as a used truck (estimated at a maximum of five years), the applicable principles of law, guided comparatively by awards in previous decisions that bear some similarity with the instant case, and the general fall in the value of money over the years, while having regard to the imponderables relating to management of vehicles in the business of public transport of goods and passengers, I am of the view that Shs.25,000,000/= (twenty five million shillings) as general damages would be sufficient to atone for the loss and injury occasioned to the Plaintiff by the defendant over that period of time and capable of putting the plaintiff in the position he would have been if he had not suffered the wrong. I accordingly award that sum to the Plaintiff.

With regard to the claim for exemplary damages, also referred to as punitive damages, this represents a sum of money of a penal nature in addition to the compensatory damages given for pecuniary loss and mental suffering. They are deterrent in nature and aimed at curbing the repeat of the offending act. They are given entirely without reference to any proved actual loss suffered by the plaintiff (see *WSO Davies v. Mohanlal Karamshi Shah* [1957] 1 EA 352). If the trespass is accompanied by aggravating circumstances, the plaintiff may be awarded exemplary damages. Apart from cases in which exemplary damages are expressly authorised by statute, Exemplary damages should only be awarded in two categories of cases; - cases in which the wrong complained of was an oppressive, arbitrary or unconstitutional action by a servant of the government, or cases in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation made to the defendant (see *Kanji Naran Patel v. Noor Essa and another* [1965] 1 EA 484). This is an instance showing how power conferred on an organ of state to act in the interests of the general public can sometimes be improperly exercised. The defendant's servants engaged in oppressive and arbitrary acts that justify an award of shs. 5,000,000/= as exemplary damages.

An award of interest is discretionary. The basis of an award of interest traditionally is that the defendant has kept the plaintiff out of his money, and the defendant has had the use of it himself so he ought to compensate the plaintiff accordingly (see *Harbutt's Placticine Ltd v. Wayne tank and Pump Co Ltd* [1970] QB 447). In determining a just and reasonable rate of interest, courts take into account the ever rising inflation and drastic depreciation of the currency. A Plaintiff is entitled to such rate of interest that takes into account the prevailing economic value of money, but at the same time one which would insulate him or her against any further economic vagaries and the inflation and depreciation of the currency in the event that the money awarded is not promptly paid when it falls due (see *Mohanlal Kakubhai Radia v. Warid Telecom Ltd*, H. C. Civil Suit No. 234 of 2011 and *Kinyera v. The Management Committee of Laroo Boarding Primary School* H. C. Civil Suit No. 099 of 2013). Interest on special damages is awarded from date of filing the suit until payment, while interest on general damages is awarded from date of Judgment until payment (see *Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd* No.2 [1970] EA 469). Counsel for the plaintiff sought a rate of 26% per annum. I have not found any justification for that rate. Instead I consider a rate of 8% per annum appropriate and it is accordingly awarded.

According to section 27 (2) of *The Civil Procedure Act*, costs of any action, cause or matter follow the event unless Court for good cause orders otherwise. The Plaintiff being the successful party in this case is therefore entitled to costs of the suit and they are allowed.

For that reason Judgment is entered for the plaintiff against the defendant in the following terms;

- a) General damages of Shs. 25,000,000/=.
- b) Exemplary damages of Shs. 5,000,000/=
- c) Interest on the awards in (a) and (b) above at the rate of 8% p.a. from the date of judgment until payment in full.
- d) The costs of the suit.

Dated at Arua this 12th day of October 2017

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Stephen Mubiru
Judge
12th October, 2017.