

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MPIGI

CIVIL APPEAL NO. 24 OF 2017

(Arising from civil suit No. 008 of 2013)

CHRISTOPHER BAMWEYANA :::::::::::::::::::: APPELLANT

VERSUS

HERMAN BYANGUYE::::::::::::::::::RESPONDENT

BEFORE: HON. JUSTICE WILSON MASALU MUSENE

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JUDGMENT

The appellant, Christopher Bamweyana, appealed to this Court against the judgment and orders of the Chief Magistrate’s court dated 23/09/2016 in a claim of UGX 9,411,500/=. The Respondent is Herman Byanguye, represented by M/s Maiteki & Co. Advocates, while the appellant was represented by M/S Mujuzi, Alinaitwe and Byamukama Advocates.

The brief background facts are

The appellant and Respondent entered into a business relationship where the Respondent supplied the Appellant with coffee beans at the cost of UG shs 10,885,200/= and he paid the Respondent Ug shs 1,473,700/= on an understanding to pay the balance at a later date. The appellant contends that he paid to the Respondent the balance of Ug shs 9,411,500/= while the Respondent denied having been paid the same by the Appellant.

The Respondent therefore instituted civil suit No.008 of 2013 against the Appellant for breach of contract and the Chief Magistrate, Mpigi Chief Magistrates Court found that the appellant

breached the contract and did not pay to the Respondent the balance of the money he ought to have paid and made judgment infavour of the Respondent and made orders that the Appellant pays UGshs 9,411,500/= in special damages, Ugshs 5,000,000/= in general damages, and awarded costs to the Respondent and hence this appeal.

The grounds of appeal were:-

- 1) The trial Chief Magistrate erred in law and in fact when she failed to properly evaluate the evidence as a whole hereby coming to a wrong conclusion that the appellant did not pay the Respondent's balance of Ugshs 9,411,500/=.
- 10 2) The learned Trial Chief Magistrate erred in law and in fact when she declined to rely on the handwriting experts report basing on wrong reasons hence coming to a wrong conclusion.
- 3) The learned trial Chief Magistrate erred in law and in fact when she awarded excessive general damages to the Respondent.

As far as the first ground of appeal is concerned , counsel for the Appellant submitted that

The appellant called three witnesses who testified having paid the respondent the balance of UG shs 9,411,500/=. DW3 stated in his evidence that he found the plaintiff at the office of the cashier while delivering the payment list and physically witnesses him receiving UG shs 9,411,500/= which was in the denominations of ten thousand shillings and five thousand shillings. DW3 confirmed this in his cross examination that he delivered payment lists, that he also witnessed payment and he confirmed that the money was in notes of Ug shs 10,000/= and 5000 and coins during re-examination and further that he saw the Respondent signing the payment vouchers. The cashier handed over the money and the Respondent put the money in his shorts. This was confirmed by the evidence given by DW1 and DW2 however, the trial Magistrate in her judgment held that the DW2 and DW3 did not pay the plaintiff.

Counsel also invited this court to consider the evidence of DW2, and DW1, the Appellant.

Counsel for the appellant further submitted that although the Respondent/Plaintiff denied ever signing the voucher, that a handwriting expert report was produced which indicated that the respondent had signed the voucher.

Counsel referred to the evidence of DW4, Sebuwufu Eria, who on page 16 of the proceedings gave an opinion that both sample signatures and documents 2 and 3 and the queried signatures on document No. 1 is of the same person, the Respondent/Plaintiff.

10 Counsel for the Appellant also criticized the decision of the Lower court that the Defendant(Appellant's) witnesses did not have employment letters from Appellant, without bearing in mind that the business of the Appellant was a rural business which did not require appointment letters.

Counsel for the Appellant concluded that the Plaintiff who was the sole witness claimed that he was not paid his balance and he never called any witness to collaborate his claims or even prove that he ever demanded for his money and was not paid. He added the learned Trial magistrate did not evaluate this evidence against that of the Defendant/appellant but only believe the Respondent. Had the learned trial magistrate properly evaluated the evidence of the respondent and against that of DW1, DW2, DW3 and DW4, she would have come to a different conclusion that the Respondent was paid his balance.

20 Counsel for the Respondent on the other hand submitted that the trial magistrate properly evaluated the evidence and found that there were entries which showed that the Respondent was to be paid UGX 9.4 million as balance. He added that the trial magistrate properly evaluated document 3708 dated 11.7.2012 and the entries therein and found that a balance of UGX 9.4 million was still owing to the plaintiff for 24 bag of coffee.

Counsel for the Respondent added that the trial magistrate studied voucher which was tendered in Court as exhibit D3. It was a voucher number 489 and a duplicate copy dated 15/7/2012. He added the Magistrate properly found out that the Plaintiff's name entered against the item coffee and figure Ug shs 9.4 million under the column for amount paid of Ug shs 9.4 million

with name of payee as Byanguye Herman and signature but the same did not show that the Respondent (Plaintiff) received the money owing after all another voucher 490 for a one mama on the same date also indicated the Respondent's (plaintiff) signature to have signed for one mama who was receiving Ug shs 174,000/=. Counsel added with the above unclear entries in two different vouchers to have been signed by the respondent (Plaintiff) on the same date, were appellant's (Defendant's) creatures not the Respondent and the Trial Magistrate cannot be faulted for her decision.

It was further submitted that whereas the appellant claimed that DW2 and DW3 witnessed he payment but in his examination in chief, the Respondent had said that the appellant didn't have DW2 and DW3 as their employees, that to the best of his knowledge DW2 and DW3 were DW1's sons, that although there is no law stopping sons from working for their father but in our case DW2 and DW3 on cross examination had no proof of being DW1 company workers, there was no identification, no appointment letters, this leads to the conclusions that DW2 and DW3 did not participate in paying the Plaintiff, no wonder DW1 himself didn't tell court as the fact that he saw the Respondent being paid.

I have considered the submissions on both sides as far as the evaluation of evidence by the lower court is concerned. I have also read the judgment of the lower Court and evidence of witnesses on record. First of all, it is settled law that it is the duty of the first Appellate Court to re evaluate the evidence on record and come up with its own findings and conclusions, but without totally disregarding the Judgment appealed against. See **Kifamuntu Henry vs Uganda SCCA NO. 10 of 1998**.

Secondly, under Section 101 (1) of the Evidence Act, whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.

Then under Section 101 (2) of the same Act, when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. In the present case, since it was the Respondent who was Plaintiff, the burden to prove that he was not paid the balance of UGX 9.4 million by the appellant lay on him.

At the scheduling conference in the lower court, there were two issues:-

- a) Whether the Defendant (now Appellant) was liable for the sum of UGX 9,414,500/=.
- b) The remedies available to the parties.

In the lower court, the Plaintiff (now Respondent) was the sole witness and the appellant now produced four witnesses. The plaintiff (now Respondent's) testimony was that he knows the Defendant as a business person dealing in coffee in Gomba district. That on 11/07/2012 he supplied Defendant with dried coffee beans at a cost of 10,885,200/= (Ten million eight hundred eighty five thousand and two hundred shillings). That he was issued with a receipt. The same receipt Bulando Tamuzade and sons Serial Number 3708 called cash sale date
10 1/07/2012 for money issued by Defendant to Plaintiff to acknowledge payment of 1,473,700/= out of 10,885,200/= for 24 bags of coffee was admitted in court as PI having been agreed by both parties. That the receipt cash sale was an acknowledgement that plaintiff had received 1,473,500/= and that 9,411,500 was still owing facts both parties accepted as an agreed one. That the Defendant had never paid the same balance despite the numerous demands, hence this suit.

During cross examination by Counsel for Defendant Plaintiff told court that Defendant only paid 1,473,700/=. That the figure of 10,885,200/= was reached at by both of them (Plaintiff and Defendant), having agreed to deduct off transport and milling costs. PWI added that he had been dealing with Defendant in the same business for quiet some time. That Kaijja Alex (DW3
20) was to Defendant's son so was Mukoko Geoffrey (DW2) and that he (Plaintiff) would find them at their father's home . He added that he had never seen the two Defendant's sons (DW2 and DW3) at the coffee factory as workers. That he used to deal with the Defendant personally. That on 15/7/2012, the Plaintiff was at his home he never went to defendant factory. He (Plaintiff) denied the document that was shown to him saying that he signed having received the money owing balance.

The Defendant (Appellant) on the other hand's case in the Lower Court was that on 10/2/2012, he personally paid plaintiff (Respondent) an advance payment of UGX 1,473,700/= to facilitate him deliver the coffee at appellant's factory. He added when the coffee valued at UGX

11,142,700/= was delivered, the advance payment of 1,473,700/= was entered in his creditors advance book (DI).

The appellant's further testimony was that on 15.7.2012, he gave the list of creditors to Kajja (DW3) who delivered it to the cashier, DW2, Mukoko Geoffrey and the cashier paid the Respondent now his balance of UC 9,411,500/= using a payment voucher. The Appellant's case was supported by DW2, Mukoko Godfrey who confirmed that when DW3, Kajja Alex took to him the list of creditor's of the appellant (Defendant's) company, he paid the Respondent (Plaintiff) **UGX 9,411,500/=** through a payment voucher No. 489. DW2 added that the Plaintiff (Respondent) acknowledged receipt of the money and signed, and thereafter took the original voucher. During cross-examination in the lower Court, DW2 confirmed that **he was the cashier of the Defendant/Appellant's company and that he always paid customers as per the list written by the Director (DW1).**

DW3, Kajja Alex confirmed that he had worked for three years in the Appellant's company of Bulondo Tamwazadde and sons as office messenger. DW3 added that he delivered the payment list to the cashier and witnessed the cashier, DW2 pay the money to the Plaintiff now respondent.

Before I consider the testimony of DW4, up to this stage, I wish to note that whereas it was the duty of the Plaintiff/Respondent to prove in the lower court that he was not paid the balance of UGX 9,411, 500/=, the appellant who testified as DW1 confirmed payment. He was supported by DW2, the cashier and DW3, the office messenger of Appellant's company. DW2 also testified that the Plaintiff/Respondent signed the payment voucher No. 489, and he took the original copy of the voucher No. 489.

So whereas the law does not state or provide for a particular number of witnesses to prove a fact, the finding and holding of this court is that the appellant, whose case of payment was supported by two witnesses, DW2 and DW3 was more believable than that of the Respondent which was not supported by anybody. Secondly, the payment voucher No. 489 signed by the

Respondent after being prepared by the cashier (DW2) was exhibited in court in duplicate, the Respondent having taken the original . Although the Respondent turned round to deny having signed the voucher, DW4, S.P. Sebunya, a handwriting expert and a document examiner at Police Forensic laboratory Naguru, testified that he received a **reference by a record officer under Lab No. FS/D124/2016, the** request to ascertain whether the signature of Herman Byanguye on document is as of the same person who executed the signature of Herman Byanguye on Document No. 2 and document no. 3 . DW4 made a report using scientific methods such as sketching Characters, visual observations and video spectral operator (comparison machine).

- 10 DW4 came up with the findings that there was a close relationship between the sample signatures and the questioned one, and that they were similar in shape, in relative sizes and proportions of letters. The conclusion of DW4 was as follows on page 16 of the proceedings, **“based on the above’ observations, in my opinion, there is strong evidence to show that both sample signatures and documents 2 and 3 and queried signatures on document 1 is one and same of person.....”**

A copy of the original report together with the documents examined were tendered in court as defence exhibits (Ex D.3) and Counsel Maiteki for the Plaintiff (now Respondent) had no objection at all. That is on page 16 of the record of proceedings.

- 20 In my view, DW4, Sebuwufu Eria, the document examiner , holding a master of Science in document analysis from university of Central Lamcher, among other qualifications, properly supported the appellant’s case that the respondent signed voucher No. 489, which was acknowledgement of receipt of the balance of UGX 9,411,500/=. Although the trial Magistrate on page 7 of her Judgment stated that voucher No. 489 was a duplicate copy, DW2 confirmed that the original was taken by the Plaintiff/Respondent. The other finding of the trial chief magistrate that the cashier, DW2 and office messenger DW3 did not have employment letters from the appellant did not affect their evidence on record that they paid the Respondent the balance of UGX 9,411,500/= on voucher No. 489 which position was confirmed by the expert, DW4. DW2 , Mukoko Geoffrey confirmed during cross examination that he was employed as

a cashier since 2010 by his father (DW1) in a family business. DW2 concluded that when business is good, he could handle UGX 50,000,000/= and about 30 people at a time. This Court cannot doubt his credibility simply because he was a son of the Director of the company.

In the circumstances, I reject the submissions of counsel for the Respondent that there were contradictions and inconsistencies in the testimonies of the Defendant/Appellant and his witnesses.

Instead, I find and hold that the trial Magistrate erred in believing the testimony of the Respondent without evaluating it against that of the appellant and his witnesses.

- 10 The conclusion of this Court is that the trial Chief Magistrate failed to properly evaluate the evidence of DW1, DW2 and DW3 and came to the wrong conclusion that the appellant did not pay the Respondent the balance of UGX 9,411,500/=.

I therefore find ground No. 1 of appeal in the positive.

Ground No. 2

The learned Trial Chief Magistrate erred in law and in fact when she declined to rely on the handwriting experts report basing on wrong reasons hence coming to a wrong conclusion.

- 20 Counsel for the Appellant submitted that DW4 stated in examination in chief that according to his observations, there is a close relationship between the sample signatures and questioned one. And stated further that several letters like “B” and “H” , j,n,g are similar in character combination. And he concluded that in his opinion, there is strong evidence to show that both sample signature and documents 2 and 3 and queried signatures on document 1 is one and same person.

He quoted the text book of **Cross & Tapper on evidence, Butter worth 1995 8th Edition, page 557** where it is stated that generally, an expert evidence carries more weight than an ordinary witness and that the real value of his evidence lies in the logical inference which he draws from what he himself observed and not merely what he summarizes or has been told by others.

In reply, counsel for the Respondent submitted that the witness DW4 was at the instance of the appellant whose service was paid for the appellant, he told court that he received the request from Lukwago & Co. Advocates, who were the lawyers for the appellant at the trial Court. In his testimony, DW4 in his findings opined that there was a closeness to show that the author of sample signatures on documents 2 and 3 and the questionable signature on document 1 is one and the same.

Counsel also added that since DW4 in cross examinations stated that a person can write like another with a pictorial view showing similarity, then it was possible that the Respondent's signature was forged or copied on the payment voucher.

Further submissions were that the DWEXI (Laboratory report) and the testimony of DW4 did not help in resolving the issue as to whether the appellant paid the balance claimed by the Respondent.

That document 1, stated to be the payment voucher was a copy and not the original.

20 With due respect to learned counsel for the Respondent, and even the trial Magistrate about the copy of the voucher other than the original, the evidence of DW1 and DW2 was clear that the Respondent took the original voucher after signing for the balance claimed. So what remained was the copy which was submitted to the expert. Secondly, the opinion of the expert as seen from page 2 of the report findings was based on the **forward angle of slant shape, relative sizes and proportions of letters B,H.... character combinations, handwriting skill, letter positions, and relative spacing between characters.**

The principles of dealing with a handwriting expert were laid down in the case of **Kimani vs Republic (2000) E.A 417**, where it was stated as follows: “*it is now trite law that while*

the courts must give proper respect to the opinion of expert, such opinions are not as it were, binding on the courts.....such evidence must be considered along with all other available evidence and if a proper and cogent basis for rejecting the expert opinion would be perfectly entitled to do so.....”

In the present case, and as already noted, there was no cogent reason given by the trial Magistrate in rejecting the expert evidence of DW4, who was a highly trained officer. **Section 43 of the evidence Act provides that when Court has to form an opinion as to the identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in questions as to the identity of handwriting or finger impressions are relevant**
10 **facts.**

I therefore find and hold that in the circumstances of this case, the opinion of the expert, DW4 was of much relevance and his report corroborated the evidence of DW1, DW2 and DW3.

I therefore allow ground 2 of the appeal.

Ground 3

The learned trial Chief Magistrate erred in law and in fact when she awarded excessive general damages to the Respondent.

Counsel for the Appellant submitted that general damages are awarded at the discretion of court however in this case, it is our humble submission that the general damages awarded at the
20 Court rate from the date of judgment was excessive. In **William Alfred Kitembo & anor vs Kiiza Rwakakaikara ivan HCT-00-CC-CA-7-2013**) Hon Justice Hellen Obura as she then was at page 5-7 of the judgment observed that there are certain circumstances under which the Appellate Court can interfere with the exercise of discretion on award of general damages. She referred to the case of **Mbogo & anor vs shah (1968) E.A 93** where sir **Charles Newbold P. held that the Court of appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that:**

- a) *The Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or that this amounted to a miscarriage of justice.*
- b) *That the trial Judge acted upon a wrong principle of law.*
- c) *The amount awarded is so high or so low as to make in an entirely erroneous estimate of damages to which the plaintiff was entitled.*

Counsel concluded that considering the amount claimed for breach of contract was UGX 9,411,500/=, then the award of UGX 5,000,000/= was excessive.

10 Counsel for the Respondent on the other hand submitted that in considering claims for general damages, Courts should usually take into account the fact that they are deemed as compensatory and not punitive, for damages are pecuniary recompense given by the process of law to a person for the actionable wrong that another has done to him as it was defined in Halsbury Laws of England volume 12 4th Edition at paragraph 1202. This definition was further expounded by Lord **Greene Mr.** in the case of hall **Brothers Ss Co Ltd vs Young (1939) 1 KB 754 at 756 (CA)** for he had this to say:

“damages, to an English lawyer, imports this idea that sums payable by way of damages are sums which fall to be paid by reason of some breach of duty or obligation whether that duty or obligation is imposed by contract , by the general law, or legislation.”

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Having found grounds No. 1 and 2 in the positive, then it is not necessary to go into the detailed submissions of both sides on ground No. 3. Having held that the respondent had been paid the balance of UGX 9,411,500/=, then there was no breach of contract on the part of the Appellant. General damages were therefore un called for and so ground no. 3 of appeal also succeeds.

In conclusion therefore I find and hold that if the trial chief Magistrate had thoroughly examined the record, the evidence and evaluated the appellant’s evidence against that of the respondent, and the report of the handwriting expert, she would have come to a different conclusion that the Respondent had been fully paid his balance. On page 6 of her judgment, the trial chief magistrate stated that she only took the evidence of DW4 and the other witnesses were handled

by her predecessors who had different handwriting and so she had a challenge of understanding the evidence of those previous witnesses.

Be that as it may, this Court has found and held under ground 1 of appeal that the evidence of DW1, DW2 and DW3 was coherent and collaborated the fact that the Respondent had been paid and had acknowledged receipt of the money on a voucher.

The appeal is accordingly hereby allowed and the orders of the trial Magistrate are set aside.

I also award costs to the Appellant.

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W. Masalu Musene

Judge

12/09/2017.