

The duty of a first appellate court is to re-evaluate the evidence and reach its own conclusions as per *FLORA MBABU AND ANOR VS. SERAPIO MUKINE (1979) HCB* and *PANDYA V. R (1957) EA 336*.

The caution is that court did not have chance to observe the witnesses.

I have re-evaluated the evidence, and reviewed the pleadings and submissions, and do find as follows:

Grounds 1, 2 and 3

Appellant's Counsel argued these grounds together. These grounds complain that;

- The learned trial Magistrate failed to evaluate the evidence.
- The learned trial Magistrate erred to find that there was a valid contract of sale between the parties.
- The learned trial Magistrate erred in fact and law when he held that appellant breached the sale agreement.

The appellant's argument is that, the evidence is not enough to support the above findings. The respondent argues that the learned trial Magistrate was right.

From evidence on the file I find that the plaintiff led evidence of 4 witnesses alongside a number of documentary exhibits. He was able to demonstrate that there was a contractual obligation regarding the transactions that were conducted between PW.1 (**Balidawa**) and DW1(**Mutwalibi Kadyesi**) . I notice that the defendants in their defence through DW1- DW4 and their exhibits, as on record were all accorded a hearing and their evidence considered. It is therefore not true to argue as per appellant's counsel in submissions that the learned trial Magistrate failed to properly evaluate this evidence.

Appellant referred this court to page 4 of the learned trial Magistrate's Judgment, but did not elaborate, why he faults the assessment of the evidence there at, save the argument that it was wrong to base on the said evidence to find that a valid contract existed and was breached.

I agree with the learned trial Magistrate's assessment of the evidence, as correctly re-emphasized in submissions by the respondent's counsel. The learned trial Magistrate indeed at page 3-4 of his Judgment evaluated the evidence and made valid observations and conclusions. In summary the evidence of PW1, PW2, PW3 and PW.4, supported by that of DW.1 and DW.2, DW.3 and DW.4 Shows that there was an oral agreement of purchase concluded between DW1 and PW1. The evidence also shows that by overt actions, the terms of this contract were implied and agreed on as per the details on record in the evidence of (PW1, PW2, PW3 and PW4 and the exhibits). Further evidence is found in the testimonies of (DW1, DW2, DW3 and DW4) alongside the defence exhibits.

The conclusion by the learned trial Magistrate that "on the evidence adduced by the parties it is clear that there has never been any formal agreement executed between **Balidawa** and **Mutwalibi** concerning the suit motor vehicle but there is established a contract of sale of the suit motor vehicle between **Balidawa** and **Kadyesi**. A contract was established once the initial agreed consideration price was partly paid by Shs. 7, 500,000/=.

Evidence is on record showing how other activities were done by PW1 on permission of DW1 and his agents, to enable PW1 finalize the loan process, so as to pay up the balance. Evidence was later shown that DW1 participated in causing the respondent to incur costs at various stages of processing the loan, personally talked with PW1 and personally promised to bring the log book to the Bank, but then failed so to do. DW.1 even talked to PW1. The conclusion by learned trial Magistrate on page 4 of his Judgment basing on that evidence that;

"On the evidence I find that there was a contract of sale of the suit Motor vehicle between Kadyesi Mutwalibi and Balidawa Daudi" is a proper finding reached after a balanced evaluation of all evidence.

I therefore find no merit in the agreements by appellant under Grounds 1,2 and 3. The said grounds are not proved and do fail.

Grounds 4 and 5

On special damages

The appellant under ground 4, complains that the award of Shs. 5.000.000/= (five millions) on a claim for transport , accommodation and meals was without proof and contravened section 50 of the Sale of Goods Act. He argued that these expenses ought to have been disallowed.

In defence the respondent's Counsel argued that it is true that in law special damages must be specifically proved and pleaded.

Counsel went ahead to show that the said amounts were specifically pleaded in the amended plaint, and were proved in court by oral evidence.

In the case of **UCB V KIGOZI (2002) EA 305**, it was held that

“Where special damages had been claimed by the plaintiff a trial court was entitled to award a lesser figure than that pleaded if it was satisfied that the lesser amount had been proved.”

Also it was held in **GAPCO U LTD V AS TRANSPORTERS LTD [2009] HCB 6**

“that special damages may not only be proved by documentary evidence but also cogent verbal evidence.”

The positions of the law above give legal backing to the findings of the learned trial Magistrate that based on PW1's oral evidence he had indeed incurred the expenses pleaded. Court believed him, and reduced the amounts. I therefore agree with the defence/ respondent's Counsel that the grant of special damages was not in error.

On General Damages

Appellant complains that the award of Shs 10.000.00/= as general damages was arbitrarily set.

The respondent, argues it was fair. General damages are the direct natural or probable consequence of the act complained of (**Storms V Hutchinson (1905) AC 515**). An award of general damages includes damages for pain, suffering, inconvenience and anticipated future loss as stated in **Kiwanuka Godfrey T/A Tasumi Auto Spares and Class mart V Arua District Local Government HCCS No. 186 of 2006** (unreported).

From that position of the law and arguments as reviewed by defence/ respondent Counsel, I find no merit in the criticism by appellant of the award of Shs. 10,000,000/= as general damages given the evidence adduced before court. The learned trial Magistrate did not act in error. I therefore find that Grounds 4 and 5 of this appeal are not proved and do fail.

Ground 6: Interest

Appellant's Counsel argued that though court has discretion under section 26 (2) of CPA to order payment of interest, that discretion has to be judiciously exercised. It has to be judiciously exercised. It has to be reasonable, and given a time from which it runs till payment in full.

Interest on costs should be at the court rate of 6% with a specific order to that effect. He argued that court did not give reasons for the award of interest at 35% pa. This was contrary to the law under Section 27(3) CPA.

In response defence/respondent's Counsel contended that interest is a discretionary remedy under Section 26 and 27 CPA. The learned trial Magistrate therefore exercised it judiciously.

I have examined the judgment of the learned trial Magistrate, and the lower court proceedings and pleadings as a whole.

The law governing award of interest is settled and is as here below;

Section 26(2) CPA provides that;

“Where in so far as a decree is for the payment of money, the court may in the decree order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree.”

In ***Harbutt's Placticine Ltd V Wayne tank and Pump Co Ltd [1970] QB 447 Lord Denning*** found that:

“An award of interest is discretionary. It seems to me that the basis of an award of interest is that the defendant had kept the plaintiff out of his

money, and the defendant has had the use of it himself so he ought to compensate plaintiff accordingly.”

The court in awarding interest has to listen to evidence so that it determines what interest to award between court rate and commercial rate as held in ***Mohammed Saru V Jinja Central Division HCCS 223/2009*** (unreported).

The law also provides that 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. This position was articulated in ***Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Ltd No.2 [1970] EA 469***.

Also in ***National Medical Stores V Penguins Ltd HCCA 29/ 2010*** (Unreported).

Basing on the law as articulated above, it is clear that the learned trial Magistrate did not have specific evidence before him on which to exercise the discretion to award interest at the rate of 35%. Also the learned trial Magistrate did not properly address his mind to the fact that the law specifically provides for time frames within which such an award of interest runs specifically for special damages and general damages.

To that extent, the appellant has proved that the learned trial Magistrate did not exercise the discretion judiciously. He had no basis for setting the rate at 35% which is neither a commercial rate or court rate. I will therefore set aside that rate, having in mind the fact that court rate is fixed at 6%, and replaces the award with the court rate of 6%.

I will also amend the orders so as to reflect the law by ordering that the interest on the special damages shall be awarded from the date of filing of the suit until payment. The interest on general damages is awarded from date of Judgment until payment.

The costs having been granted to the plaintiff will also attract the rate of interest at court rate of 6% from date of judgment to payment.

This ground succeeds as above.

Ground 7: Miscarriage of Justice

The arguments under grounds 1, 2, 3, 4, 5 having failed and ground 6 having been found as I have, the sum total of all findings above do not merit a finding to support the notion under ground 7 that substantial miscarriage of justice was occasioned to the appellant. No such evidence exists on record. This ground is not proved and it fails.

All in all, save for the alterations on interest under ground 6, I do not find merit in all the rest of this appeal. It is dismissed with costs to the respondent. I so order

Henry I. Kawesa

JUDGE

10.02.2017