



personnel who failed to do. The plaintiff advised the defendant not to bring any other technicians as he was contacting specialists from the company which sold the machine to him.

However, the defendant went ahead and acquired an unqualified technician to try and repair it who failed. Upon making an assessment report, it was found out that the machine had been damaged and would require more money to repair as some parts had been tempered with and others removed.

The defendant filed his written statement of defence wherein he denied all allegations and stated that the suit did not disclose a cause of action against him.

The plaintiff during scheduling raised three issues for determination which were;

1. Whether the plaintiff rented out his ultra sound scan machine to the defendant.
2. Whether the defendant is liable for the damages occasioned onto the plaintiff's ultra sound scan machine.
3. What remedies are available to the parties.

The learned trial magistrate delivered judgement against the plaintiff on the 5<sup>th</sup> February, 2021 that he had not adduced evidence showing that the defendant had breached his duty of care towards the machine and thus his claim of negligence failing. She therefore dismissed the suit with costs to the defendant.

The appellant being dissatisfied with the judgement of Her Worship Sanyu Mukasa filed this appeal.

In his memorandum of appeal, the appellant raised two grounds of appeal against the decision of the trial court which are;

- i) The trial learned trail magistrate erred in law and fact when she failed to properly evaluate the evidence on record and arrived at an erroneous decision thereby occasioning a miscarriage of justice.**

- ii) **The learned trial magistrate erred in law and fact when she held that the appellant failed to prove that he rented out his ultra sound scans logiq 400 pro series with three functional probes to the respondent thereby arriving at an erroneous decision.**

At the hearing of this appeal, the appellant was represented by Ms. Lydia Ntono while the respondent was represented by Matovu, Lukwago & Co. Advocates.

The parties were ordered to file written submissions which I have had the occasion of reading and considered in the determination thereof.

### **Duty of the first appellate court**

Before addressing the grounds of appeal, I have to address my mind to the role of the first appellate court. The duty of the first appellate court is re-evaluate the evidence adduced before the trial court as a whole by giving it fresh and exhaustive scrutiny and then draw its own conclusion of the facts and determine whether on the evidence the decision of the trial court should stand. *See; Pandya -vs- R (1957) EA 336, Seller & Anor -vs- Associated Motor Board Co. Ltd & Ors (1968) EA 123.*

It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.

This court therefore is enjoined to weigh the conflicting evidence and draw its own inferences and conclusions in order to come to its own decision on issues of fact as well as of law and; remembering to make due allowance for the fact that it has neither seen nor heard the witnesses. The appellate Court is confined to the evidence on record.

However, the appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or

if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular, this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanor of a witness is inconsistent with the evidence in the case generally.

I will keep in mind the issues raised at trial and evidence adduced by both parties in order to resolve the grounds presented in the memorandum

### **Determination of the Issues**

**The learned trial magistrate erred in law and fact when she failed to properly evaluate the evidence on record and arrived at an erroneous decision occasioning a miscarriage of justice.**

Counsel for the appellant submitted that the appellant and the respondent delivered the machine to the latter's clinic in Kawempe upon which it was checked and found to be in good working condition and left in his possession. This was the testimony of the appellant during the cross examination.

Counsel further submitted that the respondent defaulted in paying the monthly rent and when contacted by the appellant, he informed him that the machine was damaged and not working. The appellant averred that the respondent informed him that upon the failed attempts to repair the machine, it was left with the "HV Abnormal" error fault on the screen and he advised the respondent that no further unqualified technicians should be procured to repair the machine.

The appellant in his witness statement averred that to the contrary, the respondent acquired another unqualified technician by the name Peter Kamoga to try and repair the damaged machine in vain. Counsel stated that testimony was not challenged and had the trial magistrate evaluated this evidence, she would not have arrived at a wrong decision.

Counsel submitted that the respondent deliberately ignored the appellant's advice of using qualified technicians from Phillips pharmaceuticals which acts only worsened the state of machines and thus a clear indication that the machine was damaged while in the custody of the respondent and the same was not challenged during cross examination.

The appellant further averred that the email was informing the technician of how the machine which was in the respondent's possession had been damaged and not while in his possession. He further stated that the respondent's abandoned the damaged machine at the plaintiff's clinic without a formal hand over and thus running away from the damage or liability he had occasioned on the machine.

The appellant further averred that he had tested the machine himself before delivery and use and the respondent personally powered it and he said that it was in good condition before signing the agreement. He failed to pay the money in seven days as per the agreement. Counsel submitted that the damage occasioned to the machine by the respondent and his agents amounted to breach of contract under clause 3 (3) and (11) of the agreement.

Counsel relied on the case of J.B United Civil Engineering & Building Contractors Ltd vs Lira Municipal Council HCT\_02-CV-CS-0035-2007 where court noted that a breach of contract occurs when a party to the contract fails to fulfil the obligations imposed by the terms of the contract. Counsel therefore prayed that this court finds that the respondent liable for damages occasioned onto the plaintiff's ultra sound scan machine amounting to breach of the tenancy agreement.

Counsel further stated that the trial magistrate never put into consideration the glaring contradictions and inconsistencies in the respondent's testimonies thus arriving at a wrong decision. He relied on the case of Museveni Y.K and Electoral Commission [2001-2005] 3 HCB 4 on inconsistencies in the testimony of a witness.

Counsel therefore submitted that there existed a contract between the appellant and the respondent as per agreement adduced in evidence at trial and then damaged the same or caused it to be damaged. He therefore invited this court to find that the trial magistrate arrived at an erroneous decision and allow this appeal.

In reply, counsel for the respondent submitted that this ground is a general adoption to have something to argue. Counsel noted that the ground is confusing, baseless, misconceived and prayed that this court strikes it off the record.

### **Analysis**

It is pertinent to note that **Order 43, Rule 1 (2) of the Civil Procedure Rules** which governs Appeals to the High Court provides as follows;

*“The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and the grounds shall be numbered consecutively”*

The Court of Appeal in the case of **National Insurance Corporation vs. Pelican Air services, Civil Appeal No. 15 of 2003** held that a ground which offended the rules of court in as far as how grounds of appeal shall be framed should be struck off.

In the instant case, the appellant raised this ground that *“the learned trial magistrate erred in law and fact when she failed to properly evaluate the evidence on record and arrived at an erroneous decision thereby occasioning a miscarriage of justice.* A look at the framing of this ground clearly shows that the appellant did not precisely set out the exact ground of objection for which they were faulting the trial magistrate for the appeal before this court.

For a ground of appeal which alleges an error or misdirection in law to be a valid ground of appeal it must comply with the following conditions:

- a) Quote a passage in the judgment where the misdirection or error in law is alleged to have occurred;
- b) Specify the nature of the error in law or misdirection; and
- c) Give full substantial particulars of the alleged error or misdirection.

The ground of appeal must state clearly the complaint against the judgment so that the adverse party or the court is not thrown in a state of confusion in trying to decipher the content or nature of the ground. Therefore, it must be specific and general in terms.

As can be seen, this ground does not indicate in which way the trial magistrate went wrong. This ground of appeal clearly violates the provisions of Order 43, Rule 1(2) of the Civil Procedure Rules.

A ground of appeal must challenge a holding, a ratio decidendi, and must specify points which were wrongly decided. Failure to comply with the rule renders the ground of appeal incompetent and liable to be struck off. (see: **Sietco vs. Noble Builders (U) Ltd, Civil Appeal No. 31 of 1995 (unreported)**)

A ground of appeal is the allegation of error of law or fact made by an appellant as the defect in the judgment appealed against and on which it is relied upon to set it aside. A ground of appeal must be properly located in the judgment/ruling under consideration and must be strong and valid point of complaint against it, for the appellate court to assume jurisdiction to consider any issue therefrom. It must therefore contain accurate particulars and these particulars give an insight into the nature of the ground of appeal.

The very essence of grounds of appeal is to give reasonable and adequate notice of what grouse, attack or complaints are against the decision appealed from. Any vagueness of a ground of appeal may arise where it is couched in a manner which does not provide explicit standard for its being understood, or what is stated is so uncertain that it is not susceptible of being understood. The present ground of appeal lacks particulars and is therefore too vague.

I therefore similarly strike off this ground of appeal as incompetent.

**The learned trial magistrate erred in law and fact when she held that the appellant had failed to prove that he rented out his ultra sound scans “Logiq 400 pro series” with three functional probes to the respondent thereby arriving at an erroneous decision.**

The appellant’s counsel submitted that during cross examination, the appellant stated that both parties delivered the machine to the defendant who checked it and paid 30,000/= to the appellant for fuel. He stated that the machine was powered by the respondent and was active before signing of agreement. However, the respondent communicated to him that the machine was not working two weeks after signing the agreement. He stated that at the time of signing the agreement, the respondent signed freely without coercion.

The defendant was having in his custody the scan machine which was in good condition and had it been the reverse, he would have communicated to the appellant of the same which is a clear indication that indeed the appellant rented to him the machine in good condition.

Counsel further submitted that it defeats logic that the respondent who has a diploma in radiography could sign a tenancy agreement for an ultra-scan machine without checking the machine to ascertain its functionality and why he would enter into an agreement with uncertainties as regards the functionality of the ultra-scan machine.

He therefore prayed that the court finds this ground and arguments valid and grants the reliefs sought.

For the respondent, counsel submitted that the trial court held that the appellant did not adduce any evidence showing that the respondent breached such duty of care towards the machine and all this was from a presumption of an existing rental agreement.



Counsel further submitted that the appellant did not adduce any evidence like a report to prove the same. He further noted that none of the forwarded patients that the appellant claims were worked on using the machine were ever presented before in court to give evidence. He also stated that to prove that the machine was spoilt in the possession of the respondent, the appellant tendered emails in court but these only proved that the appellant knew of the faults of the said machine before dumping it on the respondent.

### Analysis.

An appeal is an invitation to a higher court to review the decision of a lower court to find out whether, on proper consideration of the facts placed before it and the applicable law; the court arrived at a correct decision. Therefore, an appeal is generally regarded as a continuation of an original suit rather than an inception of a new cause of action.

In evaluating any piece of evidence placed before the trial court by parties, the trial court is duty bound to consider the totality of the evidence led by each of the parties. It should then place it on an imaginary scale of justice to see which of the two sides weighs more credibility than the other. This evaluation of evidence entails the assessment of the same so as to give value or quality to it. Evaluation of evidence by trial court should necessarily involve a reasoned belief of the evidence of the other or a reasoned preference of one version to the other. *See Adesina v Ojo (2012) 10 NWLR p. 552 (CA)*

This court has examined the evidence adduced by the parties and their submissions. It is important to note that the burden of proof in civil matters is heavy on the plaintiff to prove his allegations on the balance of probabilities. (see: **Section 101,102,103 Evidence Act**)

**Section 101 of the Evidence Act** is very clear on where the burden of proof lies; this being the person that desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts. He who asserts as to the existence of certain facts must prove. (See: **Jovelyn Bangahare-**

**vs- Attorney General S.CCA No. 28 of 1993)** The appellant therefore has the onus of proving on the balance of probabilities that the respondent breached the duty of care over the machine while in its possession.

The appellant's claim as against the respondent lies in negligence. As such, it is important to understand what this entails. Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate conduct of human affairs, would do or doing something which a prudent and reasonable man would not do. It is the breach of legal duty to take care by the respondent/ defendant which results in undesired damage to the appellant/ plaintiff. Its ingredients thus entail; i) a legal duty on the part of the respondent towards the appellant to exercise care in such conduct as falls within the scope of the duty, ii) breach of that duty; and iii) consequential damage to the appellant (See: **Blyth vs Virmingham Water Works** 1856 11 Ex. Ch. 781, **Donoghue vs Stevenson** [1932] AC 562)

It is trite that the appellant always bears the onus of proving negligence on the part of the respondent on a balance of probabilities. In determining whether the appellant has succeeded in discharging this onus, the court has to view evidence which was led during the trial in its entirety.

The appellant testified that the respondent was satisfied with everything in the agreement before it was signed and only proposed that witnesses be there. He further testified during his cross examination that he delivered the machine to the respondent without rent and that the latter was in breach of clause 8 and he was to pay a surcharge of 15%. The appellant also testified that the machine was not functional when it was dropped by the respondent. He further stated that he did not know a one Peter Kamoga but only saw him once at the garage when he mentioned that he could repair the machine.

The appellant testified that he had no expertise in checking the machine but the respondent did and he checked and tested it before signing the agreement. He stated that the respondent paid money within three days of the agreement. He

stated that the machine was examined in two places while at Kawempe and further at his clinic.

The question in this suit is whether a reasonable person in the position of the respondent would in the circumstances of this case have seen a possibility that the machine prior to its use was faulty and would have taken reasonable steps to guard against having it repaired. The applicable test is how a reasonable person would have acted under the same specific conditions prevailing at the time of the incident. The law is that whenever one person is by circumstances placed in such a position with regard to another that every one ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his conduct with regards the circumstances, he would cause danger of injury to the person or property of the other, a duty arises to sue ordinary care and skill to avoid such danger.

In the instant case, the appellant testified that he informed by the respondent that the machine was faulty and not working. He further noted that the respondent used unqualified personnel tried to repair it but failed and further damaged it.

However, the appellants evidence and testimony was rebutted by the respondent DWI, who testified that he signed an agreement with the appellant. During his cross examination, the respondent stated that he signed the agreement to rent the machine without looking at it. He further testified that he agreed to keep it functional and clean. He alleged that the machine was faulty and he could not maintain it because it's functionality was not in existence.

In these circumstances, I note that the credibility of a witness is bound up the consideration of the probabilities and where the balance of probabilities favours the appellant, then the court will accept his version of facts as being true. However, where the probabilities are evenly balanced as in the circumstances, that they do not favour the appellant any more than they do the respondent, the plaintiff can only satisfy the court his evidence is true and the defendant's false.

The appellant testified that the respondent hired unqualified personnel by the name; Peter Kamoga to make repairs on the machine and this was the reason for its damage. He further stated that this was noted by the biomedical engineer from Phillips pharmaceuticals. However, none of these were presented as witnesses before the trial court to assert the appellant's evidence. Furthermore, the appellant did not provide any proof to show that the machine was in a good mechanical state before it was rented out to the respondent.

In evaluating evidence, the court is bound to put the entire evidence on the imaginary scale of justice to determine in whose favour the balance tilts. The appellant testified that upon finding that the machine was faulty, the respondent notified him of the same. This, I find is within expectations of a reasonable person in the circumstances such as this and for which I find that the respondent acted with a duty of care to the appellant.

It is not sufficient for an appellant to allege that the trial court did not evaluate properly the evidence before it. The appellant must go further by pointing out the error he complains about and, in addition, he has to convince the appellate court that if the corrections of the error are made, the decision of the court will not stand which the appellant in this case has failed to show.

On the basis of the evidence availed to this court, I find that the appellant has failed to prove on the balance of probabilities that respondent was negligent with the appellant's ultra sound scan "Logiq 400 pro series" machine.

This ground of appeal therefore fails.

The appeal is therefore dismissed with costs to the respondent.

**SSEKAANA MUSA**

**JUDGE**

**31<sup>st</sup> May 2023**