THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI, C.J., ODER, TSEKOOKO, KAROKORA, AND MULENGA, JJ.S.C.)

CIVIL APPEAL NO 4 OF 2000

B E T W E E N

CHRISTINE BITARABEHO: :::::::::::: APPELLANT

AND

EDWARD KAKONGE: :::::: :::::: RESPONDENT

(An appeal from the decision of the Court of Appeal at Kampala (Okello, Berko, Mpagi-Bahigene, JJ.A.) dated 25th June 1999 in Civil Appeal No 4 of 1999).

JUDGMENT OF ODER, JSC.

This is a second appeal. It is brought against the decision of the Court of Appeal upholding the judgment of the High Court which allowed the respondent's suit against the appellant.

The background to the appeal may be summarised as follows:

The respondent, Dr Edward Kakonge, and his wife imported into Uganda a Mitsubishi Pajero motor vehicle registration No. UPX 135 from Japan in 1990. The motor vehicle is hereinafter referred to as the suit vehicle. The suit vehicle was registered in the respondent's names. The wife of the respondent Dr.

Zalah Kakonge (PW3) endorsed the registration book as the co-owner in order to protect her interest in the suit vehicle. As the respondent was a staff of Makerere University, the suit vehicle was imported tax free. It was valued between shs.25, and 35 million.

The respondent and his wife agreed to sell the suit vehicle. Kampala City Council, to whom the respondent first wanted to sell it declined to buy it, because both sides could not agree on the

purchase price. It was in the course of negotiations with the City Council that the respondent told the husband of the appellant, Paul Bitarabeho, who was a friend of the respondent, that he had a brand new Pajero he wanted to sell. The appellant's husband showed interest in the suit vehicle and agreed to buy it.

They agreed on the purchase price of Shs. 25 million. It was also agreed that Bitarabeho would make a down payment of Shs. 16 million as a deposit, then pay Shs. 7 million as taxes by the end of 1990. That would leave a balance of Shs. 2 million, which could be paid to the respondent at any time thereafter.

The appellant's husband agreed to purchase the suit vehicle on the understanding that he would be able to persuade his wife, the appellant, to agree for him to sell his own old Pajero motor vehicle (referred to hereinafter as *"the old Pajero")*. The respondent gave Bitarabeho a letter authorizing him to drive the suit vehicle. He drove it away. He returned the following day to inform the respondent that he had failed to persuade the appellant to agree to the selling of their 2**nd** hand Pajero; as a result he could not raise money to purchase the suit vehicle and for taxes.

When Paul Bitarabeho failed to raise money for the purchase price, he agreed to rent the suit vehicle from the respondent. He and the respondent entered into a rental written agreement (Exhibit P.3), which was for a period of less than one year. The rental rate was Shs. 50,000= per day. Paul Bitarabeho paid Shs. 11 million in advance. That would cover the period from 05-03-1990 to October, 1990.

Bitarabeho subsequently died. At the time of his death, the rental advance payment of Shs. 11 million had been exhausted.

After Paul Bitarabeho's death, the appellant started to use the suit vehicle without the authority and consent of the respondent. When the latter demanded return of the suit vehicle to him the appellant refused to do so. She had also refused to pay any more rental charges. Consequently, the respondent sued the appellant in the High Court, for certain remedies, to which I shall return later in this judgment.

The appellant's case was that her husband, Paul Bitarabeho, had purchased the suit vehicle out-right from the respondent at a price of Shs. 16 million; of which Shs. 11 million was paid by cheque, and

Shs. 5 million by cash; that the respondent acknowledged receipt of the Shs. 11 million by an agreement, (Exhibit P.4); that thereafter the respondent himself handed over the key and the registration book of the suit vehicle to her husband. She claimed that the delay in transferring the suit vehicle into the names of her late husband was because it was tax free.

The learned trial judge resolved in favour of the respondent the two issues which had been framed at the commencement of the trial. They were:

i) *Whether or not the suit vehicle belonged to the plaintiff; and*

ii) *Whether the plaintiff had any claim at all over the suit vehicle.*

After the trial of the suit, the learned trial judge entered judgment in favour of the respondent. The appellant appealed to the Court of Appeal, which dismissed his appeal Hence this appeal.

At the hearing of the appeal, the appellant was represented by Mr. Kenneth Kakuru; and the respondent by Mr. Muhwezi. When the hearing of the appeal commenced, Mr. Muhwezi sought and obtained leave of the court to address the Court not-withstanding his having filed under rule 93(1) and 2(b) of the Rules of this Court what was called: *"The Respondent's statement in opposition to the Appeal."* Thereafter, Mr. Muhwezi made a preliminary objection against the validity of the record of appeal on the grounds, first, that subsequent to the record of appeal having been filed, new pages were inserted into the record replacing certain pages in the original record which had contained defects. The corrected pages were not filed as a supplementary record, but were merely placed in the record of appeal. The second ground of objection was that, contrary to the directive contained in the Registrar's letter of 31-10-2001, addressed to both the advocates for the appellant and for the respondent, the appellant's advocates submitted the corrected pages of the record later than the date of January 2002, by which, according to the Registrar's letter, the corrected pages should have been submitted to the Registry.

Mr. Kakuru, the appellant's learned counsel opposed the preliminary objection. He submitted that rule 85(4) of the Rules of the Court, allows lodgement of a supplementary record to cure defects in the original record of appeal. There is no time limit in which to do so. Counsel contended that defects in a record can also be corrected by amendment. The learned counsel contended that in the instant case, the nature of the defects in the record was that certain pages were faint. The defects were corrected and were included in the record of appeal which were, thereafter, served on the respondent's counsel. He prayed that the Court should overrule the objection.

The Registrar's letter of 31-10-2001, written to the advocates for the appellant and the respondent, pointed out two types of defects in the record of appeal which had been lodged at the Registry of the Court. The first was that there were some gaps in the numbering of pages of the record. The second was that copies of the documentary exhibits admitted in evidence at the trial were not available in the record of appeal. Due to the defects the Registrar pointed out it was impossible for the court to proceed with the hearing of the appeal, which had been cause-listed for 01-11-2001. Consequently, the Registrar directed the parties to have the record corrected by January, 2002, before the appeal could be listed again for hearing.

The corrections indicated by the Registrar as necessary could be introduced in the record by a supplementary record under rule 85(3) and (4) of the Court's Rules. These rules provide as follows:

"(3) The appellant may, at any time, lodge in the Registry a supplementary record of appeal, and shall as soon as practicable after that serve copies of it on every respondent who has complied with the requirements of rule 75.

(4) A supplementary record may be lodged to cure defects in the original record of appeal due to want of compliance with rule 82."

In the instant case, the appellant's advocates complied with the provisions of these rules except that the new pages and the copies of exhibits inserted in the record of appeal were not labeled *"supplementary record."* For these reasons the Court over-ruled the respondent's preliminary objections, and ordered the hearing of the appeal to proceed.

However, before that could happen Mr. Muhwezi, the respondent's learned counsel, applied to the Court for, and was granted leave, to file a written supplementary statement in opposition to the appeal. In contrast, the appellant's learned counsel, Mr. Kakuru, made oral submissions without filing a written submission. This, he was entitled to do.

The memorandum of appeal contains five grounds of appeal. The appellant's learned counsel first argued ground three, followed by grounds one and two, which he argued together. He then argued grounds four and five, also together. I shall consider the grounds of appeal in the same order. Ground three of the appeal is that the learned Justices of Appeal erred in law and in fact when they refused to adjudicate on the issue whether the appellant was properly sued or not. If they had done so, they would have found for the appellant Under this ground, Mr. Kakuru submitted that the plaint did not indicate whether the respondent's suit was based on contract or on tort, which ought to have been done. This was important because remedies sought by the suit depended on the cause of action. The issue which came out at the trial of the suit was ownership of the suit vehicle. The appellant's case as pleaded in the written statement of defence was that the suit vehicle had been sold to the appellant's husband, Paul Bitarabeho, who paid the purchase price in full. The issue at the trial having been whether or not the suit vehicle belonged to the respondent or not, it was necessary to look at the sale agreement between the

respondent and the appellant's husband, and to interpret that contract for purposes of deciding whether or not the appellant was the right party to have been sued.

This was a point of law which, the learned counsel said, he raised for the first time in the Court of Appeal, but had not been raised at the trial. The Court of Appeal rejected to consider this point, wrongly, the learned counsel contended. The learned counsel relied on what Kanyeihamba, JSC, said in *Paul Ssemwogerere and Z. Olum -vs- Attorney General, Constitutional Appeal No. 1 of 2000 (SCU)* (unreported) on page 5 of his judgment to the effect that points of law can be raised for the first time on an appeal. In the instant case, the learned counsel contended that the Court of Appeal should have considered whether the appellant was a proper party to the suit or not by looking at the evidence relevant to that issue. Had it done so, it would have found that the appellant was a wrong party to the suit. The learned Counsel however conceded that as Berko JA said in his lead judgment, with which the other members of the Court agreed, the Court of Appeal had a discretion whether or not to consider this point of law, but it declined to do so. This was an improper exercise of its discretion, learned counsel contended. In the event, the Court of Appeal erred in fact and in law in not adjudicating on the issue of whether or not the appellant was the correct defendant in the suit.

In his written submission in opposition to this ground of appeal, the respondent's learned counsel referred to the arguments of the appellant's learned counsel before the Court of Appeal on ground one before that court, to which the present ground three is similar. Learned counsel also referred to his own submission before the Court of Appeal on the same issue.

The learned counsel reiterated that the appellant did not plead in her written statement of defence that she was a wrong party. The issue of the appellant's locus standi was never raised in the trial court. To raise it on first appeal for the first time, as the appellant did, required fresh evidence under order 29(b) of the Court of Appeal Rules. The appellant's learned counsel did not apply to adduce fresh evidence. As a result, he should not now be heard to complain against the Court of Appeal under ground three of this appeal. In any case, the issue of locus standi was ably addressed in the lead judgment of Berko, JA, and resolved in favour of the respondent. The learned counsel supported the Court of Appeal's finding on the complaint now made in ground three. He urged us to uphold that finding.

The appellant's ground one of her appeal to the Court of Appeal was in the following words:

"(1) That the learned trial judge erred in law and fact in not addressing the issue of locus standi of the defendant and in not finding that the plaintiff had brought the suit against the wrong party."

The issue raised in that ground of appeal never figured in the trial court. It was raised for the first time in the Court of Appeal. To my mind, it was not purely an issue of law. It was an issue of mixed law and fact which required the appellant to apply to the Court of Appeal to adduce additional evidence, but she did not. The decided cases to which Berko, JA, referred were, therefore, relevant. They are: *In Tasmania (1890) 15, A.C. 223,* at 225; *In Exparte Flinth (1882) 19.ch.D 419 at 429;* and *North Staffordshire Railway Co. -vs- Edge (1920) A.C.254 at 270.* One common issue considered in all the three cases is whether, on appeal, a party can be permitted to raise a matter which it did not raise in the trial court. What Lord Buckmaster said in *North Staffordshire Railway Co. -vs- Edge* (supra) at page 270, comes out with a very clear answer to that issue, which I find is of great persuasive value, and is applicable to the instant case. He said:

"Upon the question as to whether appellants should be permitted to raise here a contention not raised in the court of first instance I find myself most closely in accordance with the views just stated by Lord Atkinson. Such a matter is not to be determined by mere consideration of the convenience of this House, but by considering whether it is possible to be assured that full justice can be done to the parties by permitting new points of controversy to be discussed. If there be further matters of fact that could possibly and properly influence the judgment to be formed, and one party has omitted to take steps to place such matters before the court because the defined issues did not render it material, leave to raise a new issue dependent on such facts at a late stage ought to be refused, and this is settled practice."

After referring to the authorities to which I have just referred, Berko, JA. Said:

"It is not possible to consider this point in isolation without reference to the pleadings and the argument of defendant's counsel in the court below. There is no doubt that it was not within the pleadings. It was not made an issue at the trial. The plaintiffs case proceeded before the trial fudge upon the footing that the late Bitarabeho hired his vehicle and made a down payment of Shs. 11 million; that the late Bitarabeho died before he made another down payment and that the defendant took possession of the vehicle after the death of her husband and has refused to hand it over to him. It is clear from paragraph 3 of the plaint that the claim is against the defendant in her individual capacity and not in her capacity as the administrator of her late husband's estate. Neither is it against the estate of her late husband. The submission of counsel for the defendant in the lower court did not remotely allude to the fact that she was a wrong party to the suit.

A new point raised for the first time in a court of last resort ought not to be entertained unless the court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea. In the present case, I am far from satisfied that this court has before it all the facts bearing on the question of law now raised for the first time, which might have been elicited in the lower court had the matter been there in issue. Had the matter been properly pleaded the possibility of the defendant being the administrator or not of her husband's estate would have been investigated. If she was an administrator of the estate of her late husband, the inventory of the estate filed in court would have been scrutinized. Further this court would have had the benefit of a considered finding of facts by the learned trial judge.

For all these reasons I am of the opinion that the point now sought to be argued by Mr. Kakuru is not one which is open to him to argue. There is no merit in ground one and it is dismissed."

In my opinion, the conclusion of Berko, JA, on this point in the passage of his judgment I have just referred to cannot be faulted. The instant case is distinguishable from cases such as *Constitutional Appeal No. 1 of 2000* (supra) and *Ngakwila -vs- Lalami (1972) E.A. 182,* on which the appellant's counsel relied for his submission. In the instant case it was necessary to adduce evidence bearing on the point of law raised in the Court of Appeal. It was necessary to adduce evidence relating, for instance, to whether the appellant was the

administrator of the estate of her late husband; whether the suit vehicle was actually sold to the late Paul Bitarabeho and, therefore, it formed part of his estate after his death. Such evidence was neither adduced at the trial of the suit, nor by means of additional evidence with leave of court at the hearing of the first appeal; nor had the relevant facts been pleaded in the written statement of defence. In the circumstances, ground three of the appeal should fail.

The appellant's learned counsel next argued grounds one and two together, and then grounds four and five, also together. The first two of the grounds are that:

1. *The learned Justices of Appeal erred in law and in fact by failing to properly evaluate the evidence in the case, as a result reached a wrong decision.*

2. *The learned Justices of Appeal erred in law and in fact when reaching their decision they erroneously found that there was no contract of sale concluded between the late Paul Bitarabeho and the respondent.*

I shall also consider grounds one and two together since they both relate to the issue of whether or not there was a contract of sale between the appellant's late husband, Paul Bitarabeho, and the respondent.

Mr. Kakuru's submission relevant to grounds one and two of the appeal was very brief. The learned counsel said that the basis of the complaints in these grounds is that the respondent sold the suit vehicle to the appellant's late husband. There was clearly a contract of sale which was not terminated. The respondent as the seller should, therefore, have claimed the balance of the purchase price.

The respondent's written submissions in opposition to these grounds are to the effect that, first, the learned Justices of Appeal properly evaluated the evidence on record, considered the pleadings and made the right decision that the respondent was entitled to claim the suit vehicle from the appellant. The appellant cannot on second appeal adduce any better or fresh evidence to make good the weakness in the appellant's case both in the trial court and in the Court of Appeal. Second, that the learned Justices of Appeal properly and ably addressed the question of contract between the respondent and the late Paul Bitarabeho and came to the right holding that exhbit P.3 was a contract of hire between them. The learned counsel contended that the evidence of the appellant that the late Paul Bitarabeho

had purchased the suit vehicle from the respondent was purely hearsay, since the appellant was neither a party to the transaction nor was present when negotiations took place.

In his oral submission, which he made with leave of the Court, Mr. Muhwezi added that the appellant was not competent to represent her husband's estate. Further, she did not deny being the right party in her w.s.d. she also failed to prove that shs. 5 million was paid to the respondent in addition to the shs. 11 million. She further alleged that annexture *"D"* to the plaint was fictitious. Annexture *"D"* is a copy of the paying-in slip by which a cheque of shs. 11 million was paid respondent's bank account at U.C.B. Nkrumah Road Branch. In the circumstances, learned counsel concluded that the trial court and the Court of Appeal rightly rejected the appellant's evidence at the trial.

The complaints in grounds one and two of the memorandum of appeal before us are similar to those made against the decision of the learned trial judge in grounds two and three of the appellant's memorandum of appeal to the Court of Appeal.

In my opinion, there is no merit in grounds one and two of the appeal before us. Berko, JA, properly evaluated the relevant evidence and concluded, rightly in my view, that there was only a contract of hire of the suit vehicle between the respondent and the late Paul Bitarabeho. Although he did not make a specific finding that there was no contract of sale, such a finding, in my view, was implied in the finding he made.

This is what the learned Justice of Appeal said in his re-evaluation of the relevant evidence, and the finding thereon:

"The evidence on the point is really one sided. As Mr. Kakuru rightly conceded, the defendant was not present when the negotiations between the plaintiff and her late husband took place. Most of her evidence on the matter was hear-say and was correctly rejected by the trial judge. Be that as it may, the evidence on record clearly shows that Paulo Bitarabeho was interested in the purchase of the vehicle if he could persuade his wife, the defendant, to sell their old pajero. That would have enabled him to raise the purchase price. That did not materialize because the defendant refused to consent. As a result, Paulo Bitarabeho was unable to raise the purchase price. As he had been using the vehicle for sometime, he agreed to hire it. In my view, Exhibit p.3 was a contract of

hire. I am unable to agree with Mr. Kakuru that Exhibit p.3 was a mere authority to Paulo Bitarabeho to use the vehicle before he could pay the tax on it. The language of the document is unambiguous and does not admit of the strained interpretation Mr. Kakuru is putting on it."

This is consistent with the finding of the learned trial judge to the effect that while exhibit p.3 was a genuine agreement of hire between the respondent and the appellant's late husband, exhibit p.4 was not a contract of sale between the two men. It was a maneuver on the part of the appellant to have the suit vehicle transferred in her names. The learned trial judge further said:

"It would appear that to me that she was not well informed by her husband about his dealings with Kakonge in connection with the purchase and or rental charge of the said vehicle. DW1 knew little about what transpired between her late husband and the plaintiff or if she knew what was going on, she merely wanted to take away the vehicle without any colour of right whatsoever.

And to crown it all in her application for letters of administration the suit vehicle did form part of the estate of the late Bitarabeho. This strengthens my belief that DW1 knew that the vehicle was never sold to her husband: I do not believe her when she testified that she could not transfer the vehicle in her names because she was told to wait when taxes would diminish. That is not supported by the evidence on record."

I agree with the concurrent findings of the lower two courts and my view is that grounds one and two of the appeal should fail.

I shall next consider the last two grounds of appeal together since they criticize the Court of Appeal's award of damages to the respondent. They are:

"4. *The learned Justices of Appeal erred in law and in fact whey they failed to find that the appellant could not be sued in contract thereby reaching a wrong conclusion as to award of damages.*

5. The learned Justices of Appeal erred in law and in fact by upholding the trial judge's award of special damages."

On the complaints in these grounds, the appellant's learned counsel submitted that having found that the respondent's suit was based on tort the learned trial judge should not have awarded, and the Court of Appeal should not have upheld the award of, special damages as if the cause of action was a breach of contract. The award of damages should have been one of general damages in detinue.

In opposition the respondent's written submission is to the effect that ground four of the appeal should be struck out for being incompetent because the learned trial judge did not award damages based on a breach of contract by the appellant, nor did the Court of Appeal uphold the award of damages on that basis. On the contrary, the trial court awarded damages of Shs. 50,000= per day because the appellant wrongly detained the suit vehicle which the late Bitarabeho had hired from the respondent. The learned trial judge and the Court of Appeal considered the respondent's evidence of special damages and were satisfied in favour of the respondent. Authorities were cited and there was proof that the respondent lost Shs. 50,000= per day when the appellant wrongfully retained the suit vehicle which the respondent had hired to the late Paul Bitarabeho.

With respect, I find no merit in the respondent's submission that ground 4 is incompetent and should be struck out.

It is common ground in the instant case that the respondent's suit was founded on the tort of detinue which is the wrongful retention of the possession of a chattel. The basis of the tort was that the suit vehicle was hired by the respondent to the appellant's late husband when he was still alive. After his death the appellant retained the suit vehicle and refused to return it to the respondent despite his demands for its return to him.

The appellant refused to return the suit vehicle on the allegations that it had been bought outright by her late husband and that it formed part of the estate of the deceased husband. She also refused to pay any rental charges of Shs. 50,000= per day, the advance deposit for rental payments made by the deceased having been exhausted by 31-10-1990. In the circumstances, the respondent prayed for the following remedies in his suit:

1. *Declaration that the suit vehicle is the property of the plaintiff.*

2. *The defendant surrenders the suit vehicle to the plaintiff immediately on delivery of the judgment.*

3. *The defendant pays to the plaintiff special damages of Shs. 50,000= per day from 31-10-1990 to the date of judgment and interest from the date of judgment until payment in full.*

4. *General damages for the defendant's unlawful action, inconvenience and damage caused to the plaintiff and the suit vehicle.*

5. *Costs of the suit.*

The learned trial judge granted all the remedies prayed for by the respondent which I have reproduced above. In his award of damages, the learned trial judge said:

"(c) The plaintiff had lost daily income at the rate of Shs. 50,000= as per exhibit p.3 and paragraph 5 of the plaint. This was immediately on the demise of the late Bitarabeho on 29-10-90. The plaintiff is awarded special damages of Shs. 50,000= per day which has been specifically pleaded and proved (KCC -vs- Nakamya) from 31-10-90 to 31-10-94, for four years only because of the imponderable break down of the vehicle and etcetera. In making this award, the court is of the view that the vehicle was brand new when the late Bitarabeho started using it. He was with the vehicle for only 7 months when he passed away. Thereafter, it was retained by the defendant. The plaintiff would be entitled for the rents not from 31-10-90, up to-date. That would rather be on the high scale. The court considered the imponderables and judiciously permitted rental charges for 4 years as explained above.

(d) The plaintiff had demanded general damages of ten million shillings as per submission of Mr. Muhwezi for the unlawful detention of the said vehicle. The inconvenience and embarrassment on the part of the plaintiff for the most (sic.) use of the vehicle for these seven years. However, this figure is rather on the high scale, general damages of about Shillings 4 million would properly compensate the plaintiff.

(e) The plaintiff would be awarded interest at court rates on the decretal sum from the date of delivery of this judgment till payment in full."

The Court of Appeal did not disturb the award of special and general damages made by the learned trial judge, although it criticized the latter for awarding special damages from 31-10 -90 to 31-10-94 in view of the fact that the appellant detained the suit vehicle beyond that period. In his lead judgment Berko, JA, said:

"The judge awarded special damages of Shs. 50,000= per day from 31-10-90 to 31-10-94. I do not know why he made the award up to 31-10-94 when the vehicle is still with the defendant. The rule is that, in detinue, the value of the goods claimed ought to be assessed at the date of judgment or verdict and not the date of the defendant's refusal to return them: Rosenthal -vs-Alderton (1946) KB 374. Where the defendant has detained and used a chattel of the plaintiff which the plaintiff, as part of his business, hires out to users, the measure of damages will include a reasonable sum for hire of that chattel during the period of detention which may be up to the date of judgment, or up to the time when the goods were returned, and not only up to the date of demand for its return: Strand Electric and Engineering Co. Ltd. -vs- Bristord Entertainments Ltd. (1952) 2 QB 246.

In the present case, the defendant detained the vehicle until judgment. It has not been returned in pursuance of the judgment.

In these circumstances, the hiring charges runs up to the date when it is returned. There has, however, been no cross-appeal. Therefore, I will not say anything more about the award."

The Court of Appeal, nevertheless, upheld the decision and orders of the trial court and dismissed the appellant's appeal in that court.

I agree with Berko, JA, that in an action founded on detinue, the value of the goods detained is assessed at the date of the judgment in favour of the plaintiff and not at the date of the defendant's refusal to return the goods. This is so because the plaintiff in

detinue does not abandon his property in the goods. Cause of action arises from the defendant's refusal to return the goods on demand. The essence of detinue is that the plaintiff maintains and asserts his property in the goods up to the date of judgment. This is what the respondent did in the instant case. Further, where the defendant detains the goods which the plaintiff normally lets on hire, the measure of damages will include a reasonable sum for hiring charges during the period of detention. See *Windfield on Tort 6th Edition, page 414.* It follows, in my view, that in the instant case, the respondent is entitled to general damages for depreciation of the suit vehicle during the period it was detained by the appellant. He is also entitled to some reasonable charges for hire for the same period.

Grounds four and five of the appeal should, therefore, succeed. The appeal should partially succeed.

The respondent's unchallenged evidence at the trial of the suit was that the value of the suit vehicle in 1990 was between 25 and 30 million shillings. This was at about the time when the respondent hired the suit vehicle to the late Bitarabeho. In his judgment, delivered on 25-09-1997, about seven years later, the learned trial judge did not assess the value of the suit vehicle at that time, but he referred to the same value given by the respondent in his testimony. In my opinion that is the value I have to bear in mind in assessing the damages to be awarded to the respondent. Another factor to take into account is the fact that the appellant had retained the suit vehicle for about seven years until it was returned to the appellant on 29-09-1997 by M/s. Kitavujja General Agencies Auctioneers and Court Bailiffs as a result of an execution order by the High Court The third and fourth factors to take into consideration are that the suit vehicle was on hire to the appellant's late husband before his death at the rate of Shs.

50,000= per day, and that thereafter she refused to pay any hire charges throughout the period of her retention of the suit vehicle. All these factors, in my view, form the basis of assessing the general damages to which the respondent is entitled. I would assess the general damages together with some reasonable hire charges at Shs. 50m/= .

In the result, I would set aside the orders of the Courts below, except the order for surrender of the suit vehicle to the respondent, and substitute them with orders that:

a) *The respondent be and is hereby awarded Shs. 50,000,000= as general damages which the appellant should pay to him with interest at the court rate from the date of judgment of the trial court till payment in full;*

b) *The respondent should have four fifths of the cost of this appeal and of the costs in the courts below.*

JUDGEMENT OF ODOKI, CJ.

I agree with the judgment of Oder JSC which I have had the advantage of reading in draft. I concur in the orders he has proposed. I only wish to add a few comments.

The point whether the respondent was the wrong party to the suit ought to have been raised at the trial. I agree that it was not purely a question of law which could have been raised on appeal. It was a question of both mixed law and fact as evidence was needed to be adduced to establish the capacity in which the appellant was being sued. The Court of Appeal was therefore justified in refusing to entertain the point at that stage.

As regards the concurrent findings of the two lower courts that there was no contract of sale between the respondent and the appellant's husband, a true construction of the agreement in Exh. P.3 and the subsequent conduct of the parties justified the conclusion of the two courts that the contract was one for the hire of the vehicle. Exhibit P.3 dated 2nd April 1990 stated as follows:

"We the undersigned have authorized Mr. Paulo Bitabareho of Modern Times and Carpet Centre Kampala to rent out vehicle UPX 135 Mitsubishi Pajero Engine Number 4D 55 Oct. 0073 Chassis No. CLO 49VLJ 400 01 AT (50,000/=) fifty thousand shillings per day. He paid deposit of Eleven million shillings 11,000,000/=. Subsequent rental payment will be made six monthly.

Dr. Edward B. Kakonge Associate Professor, Z. Kakonge
Dr Mrs Zallah J. B. Kakonge

Witnessed by Paul Bitabereho Christine Mary Kakonge Mutebi Moses."

The award of special damages for breach of contract was therefore wrong since the action was based on the tort of detinue. The Court of Appeal erred in not setting aside the award of special damages. The proper award should have been for general damages for wrongful retention of the vehicle. I agree with Oder JSC that a sum of Shs. 50 million as general damages would be adequate compensation to the respondent.

As the other members of the Court also agree, this appeal partially succeeds with orders as proposed by Oder JSC.

JUDGMENT OF TSEKOOKO, JSC.

I have had the benefit of reading in draft the judgment prepared by my learned brother, the Hon. Mr. Justice Oder, JSC and I agree with his conclusions and the orders he has proposed.

JUDGMENT OF KAROKORA, JSC.

I have read in draft the judgment prepared by my learned brother, Oder, JSC and I do agree with the facts as set out in his judgment and the conclusion he has reached. I only wish to add that considering the evidence as a whole, I think that this was a case where the respondent on the facts, claimed the return of his motor vehicle and damages for its detention.

In my view, the respondent's suit for the return of the motor vehicle and damages for its wrongful detention was rightly filed in view of the decisions in *Hymas V Ogden [1905] 1KB 246* and *General & Finance Facilities Ltd V Cooks Cars (Romford) Ltd 1963 2 ALL ER 314*

However, I think that the claim for special damages at the rate of shs.50,000/= per day calculated from 31/10/90 to 31/10/94 as ordered by the

lower courts would unjustifiably enrich the respondent, when the appellant is at the same time being ordered to return the vehicle to the respondent. Therefore in the interest of justice, an award of general damages for the wrongful detention of the vehicle as proposed by Oder JSC is appropriate.

In the result, this appeal partially succeeds. I accordingly adopt orders as proposed by Oder JSC.

JUDGMENT OF MULENGA, *J*SC

I had advantage of reading in draft the judgment prepared by Oder JSC. I concur and have nothing to add.

Dated at Mengo this 15th day of July 2003