IN THE COURT OF APPEAL

AT MENGO

(CORAM: WAMBUZI, P., LUBOGO, .AG J.A , ODOKI, J.A)

CIVIL APPEAL NO.6 OF 1985

BETWEEN

MANAGEMENT TRAINING & CENTRE…… APELLANT

AND

PATRICK KAKUKU IKANZA……..... RESPONDENT

(Appeal from the judgment of the High Court of Uganda at, Kampala (Kato, Ag.J.A)

dated 10th April, 1985

IN

Civil Suit No.756 Of 1982)

JUDGMENT OF WAMBUZI, P.

I agree that this appeal must be dismissed.

The case for the appellant was that the respondent was sent by the appellant to Nairobi to purchase certain items for the appellant including the welding machine in question. The welding machine was brought and kept in the workshop. It was later removed by the respondent, who refused to return it. The director of the appellant wrote to the respondent on 26/9/80 and 24/l1/80 demanding the return of the machine. The respondent replied by letter Exh. P.1 claiming to have pledged the machine. The respondent failed to return the machine and the appellant was seeking an order for its value.

The respondent on the other hand claimed that he went to Nairobi on a private visit to buy goods and equipment including a welding machine, for his own workshop at Iganga. The goods were delivered to him in Kampala by a transporter and he kept them in the workshop at the Centre. He removed the machine to his house to mend his fence and when asked by the director at the time, he explained that the machine was his and this explanation was accepted. However, when a new director asked him for the machine he wrote back the letter, Exh. P.1.

The learned trial judge (Kato, Ag. J.) held in effect that there was no evidence to support the appellant's claim that the machine ever belonged to the Centre and dismissed the action.

The appeal is now brought on two grounds. The first ground is that,

> "The learned trial judge was wrong in law in holding that there was no evidence, to establish that a welding machine, the subject matter of the case before him, belonged to the appellant and further erred in law in deciding that, that machine was not converted by the respondent."

Learned counsel for the appellant, Mr. Kateera, argued that the respondent did not deny the machine belonged to the Centre" in Exh. p.1, instead, he stated that he had pledged it. Learned counsel referred to Exh. P.2 and argued that this letter, also written by the respondent, is again apologetic and lists items bought in Nairobi which by inference belonged to the Centre. Learned counsel further referred to the evidence of the respondent in cross-examination when questioned as to why in his reply, Exh. P.1, he did not say that the machine was his or that the property listed in Exh. P.2 was his.

These matters appear to have been considered by the trial ju4ge who after going through the evidence said,

> "The plaintiff seems to have based too much emphasis on the defendant's own account of what happened and in par4cular his letter of 27/11/80, Exh, P.2. In that letter the defendant did not say as to who was the owner of the machine. The failure to state categorically that the machine was his is not in itself enough to secure a judgment for the plaintiff, the defendant in fact explained as to why he was not being so direct in his correspondence, he gave as a reason that he had to be rather diplomatic in his approach as he was dealing with hostile employers."

The learned trial judge criticized the handling of the matter by the appellant as an institution. He remarked about the failure by the appellant to keep any records of property belonging to the institution or any accounts relating to purchases. One might add that it is strange that the director of the appellant testified, he wrote two letters demanding the return of the machine but no copy of such letters was exhibited. We were invited by learned counsel for the appellant to make inferences of guilt from the replies by the respondent, Exhs. P.1 and P.2. In my view, the appellant's case could have been strengthened if the trial court, and indeed this court, had the benefit of reading what was said to the respondent in the alleged letters of demand to enable either court construe or make proper inferences from the replies.

I note that the respondent claims that at the time he went to Nairobi there was a different director of the appellant who upon inquiry was satisfied that the machine belonged to the respondent. I note further that, Exh. P.2 dated 4/1/80 is addressed to Mr. Mwandha as director. Mr. Owor, P.W.l, who gave evidence said he became acting director in 1980, he does not say when in that year. He does not claim to have sent or authorised the respondent to go to Nairobi when the latter went to Nairobi in 1979. Owor was not the director at that time and on his own evidence, the director at that time was James Mwanga. Unfortunately, Owor was not asked as to the source of his information regarding the purchase of the machine. The respondent claimed that he went to Nairobi on his own and on his return he was blamed for having gone there without permission. Owor admitted in cross-examination that the respondent was blamed for having gone to Nairobi without anybody's knowledge.

The learned trial judge did not make any adverse findings against the credibility of either party but after considering whatever sparse evidence there is re1ating to ownership of the machine, said,

"The defendant's claim that the machine is his might as well be true."
I cannot say that the learned trial judge came to a wrong conclusion. I find it unnecessary to consider the second ground of appeal which relates to the value of the machine. As Lubogo, Ag. J. also agrees with the judgment and orders of Odoki, J.A.
there will be orders in the terms proposed by the learned Justice of Appeal.

S. W. W.WAMBUZI PRESIDENT.

12/6/86

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JUDGMENT OF ODOKI. J.A.

This appeal arises out of a suit which the appellant sued the respondent for return of a welding machine wrongfully converted by the respondent or in the alternative, damages for wrongful conversion. The trial judge (Kato, Ag. J.) dismissed the suit with costs against the appellant who now, appeals to this court against that decision.

The appellant's Case was that some time towards the end of 1979, the appellant sent the respondent to Nairobi to purchase some items for the workshop. At that time the respondent was employed by the appellant as a Workshop Manager. The respondent was paid money in Kenya Shillings by the appellant. The money was exchanged at the rate of nine Uganda Shillings to one Kenya shilling. The respondent went to Nairobi and bought items which included a welding machine which was purchased at Kenya Shs 20,672/= and brought to the appellant's workshop. In May, 1980, the director of the appellant received information that the respondent had taken away the machine. When the director verbally asked the respondent about this information, the respondent. told him that he had taken the machine to his home for mending his fence, The director wrote to the respondent twice demanding the return of the machine and on 27/11/80, the respondent replied in writing saying that he had pledged the machine to a creditor from whom he had borrowed money. The respondent had not returned the machine since then.

On the other hand, the respondent denied that the machine belonged to the appellant He claimed that the machine belonged to him as he had purchased it with his own money. His case was that, in December l979, he made a private visit to Nairobi to buy goods and equipment for his workshop at Iganga. He obtained Kenya Shs.52,000/= from the Bank of Uganda which he exchanged with Uganda Shillings at par. Among, he items he bought was the welding machine, at a cost of K-Shs.20,672/=. He left the goods with a transporter and returned. On his return, he was asked by the management of the appellant to explain where he

had been and he did so. When the goods arrived he kept them at the appellant's workshop because it was not sate to keep them at his residence at Kyambogo. One day he took out the welding machine to use it in mending his fence. When the then director of the appellant heard of this he asked, him about it and the respondent explained to him that the machine was his and the director was satisfied. When a new director took over, he wrote to the respondent instructing him to take back the machine, but the respondent replied saying that he had pledged the machine. He explained that he wrote the letter of 27/11/80 because he wanted to, be diplomatic since he was facing a hostile attitude from the management of the appellant.

The learned trial judge Found that the appellant had failed to establish that the respondent had converted the welding machine and secondly that, at the time of the purchase, the value of the machine was U.Shs 20,670/=. Finally, he held that the appellant had failed to discharge the burden of proof to establish its case on balance of probabilities.

The appellant has preferred two grounds of appeal, which are that:

1. The learned trial judge was wrong in law in holding that there was no evidence to establish that the welding machine, the subject matter of the case before him, belonged to the appellant, and further erred in law in deciding was not converted by the respondent.

2. The learned trial judge erred in law in holding that the value of that machine was Shs.620,672/= and not Shs.193,048/=.

Mr.kateera learned counsel for the appellant submitted in respect to ground one that there was sufficient evidence to warrant a finding that the machine belonged to the appellant. Counsel relied heavily on the two letters Exh. P.1. and Exh P.2 written by the respondent to the appellant. It was his submission that the inference to be drawn from these two letters is that the machine belonged to the appellant.

The relevant parts of the two letters referred to by Mr. Kateera were as follows. In Exh P.l a

letter dated 27/11/80, addressed to the Ag. Director, the respondent wrote, inter alia,

> "A regards the machine I deserve human treatment. It is very unkind on your part to expect me to survive for 3 months in Uganda Without any cent. I have pledged the machine with a creditor for Shs.10,000/= (ten thousand) which has at least kept me going since the beginning of my leave. Until I get my salary I have no Way of repaying that creditor."

In Exh. P.2, a letter dated 4/1/80 addressed to the director of the appellant by respondent he wrote,

> "I am sorry for taking too long to reply to your letters of 26th November, 1979 and 13th December, 1979. But as I had already explained in the Management Team Meeting it was a case of human weakness where sometimes anger overrides rational thinking. The fact that the first 1etter was written when I was still in Nairobi before the date I was expected to have come back (30/11/79) angered me so much that I lost the element of rational thinking. I am very sorry for that.
>
> The items I bought in Nairobi were:
> 1.
>
> ……
> ……
> …….
>
> 19. Welding machine ……..at Shs.20,672.00
> TOTAL ……..Shs.35,690.00
> Transport & Packing **……..**240.00
> Shs.36,03.00

These items were, packed in one wooden box measuring 4'x2'x2' Gross Weight of 19.8Kg. I left the items ready packed awaiting collection by the sellers' transporters.

I have sent a te1ogm to the sellers (13/12/79) inquiring about expected date of arrival in Kampala of the box, but no reply has been received yet."

Mr. Kateera pointed out that the respondent did not claim in EXh. P.1 that the machine was his. He submitted that this was surprising as one would have expected him to assert that the machine was his and that he had bought it with his money. Further, Mr. Kateera contended that the respondent did not deny that the machine was demanded from him. As regards Exh. P11, counsel wondered why the respondent had to tell the appellant all about the goods he had bought from Nairobi and why he was apologizing for human weakness. It was his submission that the inference to be drawn from this letter is that all the goods listed were bought by the respondent for the appellant.

For the respondent, Mr. Byaruhanga submitted that the appellant was laying emphasis on the respondent's account of what happened and sought to make it its own case yet the respondent gave explanations for writing the two letters. First, he was being blamed for having gone to Nairobi without authority. Secondly, he was being challenged as to whether he was borrowing the machine or claiming it as his and thirdly, he explained what he had bought because the appellant's management was hostile to him.

Mr. Byaruhanga further submitted that in coming to his decision, the learned trial judge also relied on the following matters: that the appellant could not prove that he had sent the respondent to Nairobi since it had blamed him for going there without permission, that the appellant could not prove that he paid money to the respondent, that it did not produce any evidence to show that the machine was entered in its records as its property, and that the appellant's case was badly prepared since it was unable to produce any official records to back up its case.

This being a first appeal it is the duty of this court to submit the evidence to a fresh and exhaustive examination and evaluation and to make its own finding as well as draw its own conclusions in order to determine, whether the findings as well as draw its own conclusions in order to determine whether the findings of the trial court can be supported. In so doing it is a rule of caution that this court must make due allowance for the fact that the trial court, unlike this court has had the advantage of hearing and seeing the witnesses. (See peters v. Sunday Post (1958) EA. 424 and Salle v. Associated Motor Boat Co. (1968) EA. l3.

In Selle v. Associated Motor Boat Co. (Supra) Sir Clement de Lestang V-P said, at page 126,

> "An appeal to the court from a trial by the High Court is by way of retrial and the principles, upon which this court acts in such an appeal, are well-settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court not bound necessarily to follow the trial judge'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 the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v.
> Ali Mohamed Shan (1955) 22 E.A.C.A, 270".

It was not disputed that at the material time the respondent was employed by the appellant as a workshop manager it was also common knowledge that the respondent went to Nairobi and bought the welding machine at K-Shs.820,672/= and further it was not in dispute that the respondent removed the machine from the workshop and took it to his home and subsequently pledged it. What was disputed was that it was the appellant who sent the respondent to Nairobi to purchase the machine and that it was appellant who paid for it. In other words the real issue in dispute was whether the machine belonged to the appellant.

The only witness called for the appellant was its director, Mr.Owor. The learned trial judge found his evidence unsatisfactory. In his judgment, the trial judge said,

> "Mr. Byaruhanga, counsel for the respondent attacked the evidence of Mr. Owor on a number of grounds and one of the grounds is that there was no record to indicate that the plaintiff ever gave money to the defendant to purchase this machine, and that there was no record or inventory of any kind indicating that the machine was ever received by the centre as its property. I agree with Mr.Byaruhanga's submission. Mr. Owor himself omitted that there was no clear record as to what amount of money was given to the defendant to purchase this machine although he was certain that the defendant had been given some money to purchase the welding machine and other items. I must say with some regret that the plaintiff's case was not properly prepared, for example there is nothing to indicate that the amount of money which the defendant is alleged to have taken was issued out by the plaintiff. In an organisation of this nature there ought to have been a system under which people taking away money have to sign for it and more especially where the sum involved is so much. It strikes me as something strange that no document was, produced to indicate that the plaintiff ever gave money to the defendant at all, nor was there any evidence as to who gave him this money and exactly how much it was."

These findings and observations were not attacked by the appellant in this appeal and in my opinion they were justified on the evidence. In his evidence, in cross-examination, Mr. Owor stated that at the material time he was not the director and that
it was the former director who sent the respondent to Nairobi. Mr. Owor did not know whether the authority, given to the respondent was in writing or verbal. He did not know the exact amount of money given to the respondent, or on what date it was issued to him. He was not sure whether the local cover or foreign exchange was issued to the respondent. But he admitted that under normal circumstances, the respondent would have signed a voucher. He was not sure whether the machine was entered in the appellant's inventory book. In effect it seems that Mr.Owor came into the picture after the machine had been and it was therefore not surprising that his evidence on the events prior to the respondent going to Nairobi was

unsatisfactory.

At the trial, the other evidence, the appellant relied on was the two letters written to the appellant by the respondent. The trial judge held that the failure of the respondent to state categorically that the machine was his, was not sufficient to establish the appellant's case in this connection the trial judge stated,

> "The plaintiff seems to have based too much emphasis on the defendant's own account of what happened in particular his letter of 27/11/80, Exh. P.1. In that letter the defendant did not say as to who was the owner of the machine. His failure to state categorically that the was machine was his is not in itself enough to secure a judgment for the plaintiff, the defendant in fact explained as to why he was not being so direct in his correspondence, he gave as
> a reason that he had to be rather diplomatic in his approach as he was dealing with hostile employers. The old saying which says: i.e. incumbent probation qui decit, non qui negat, (the onus of proving a fact rests upon the man who denies it) still holds good."

The judge then reverted the again to the question of the machine not having been entered in appellant's inventory book held that absence of such evidence was a serious omission. He then concluded,

> "..... as the things stand now, it is not known whether or not this machine was ever received by Plaintiff as its property. The defendant's claim that the machine was his might as well be true. That being the position**,** it cannot be held that the defendant converted the plaintiff's machine."

Mr. Kateera, for the appellant, urged this court to find that the trial judge wrong in filing to draw an inference from the two letters (Exh.P.l and Exh. P.2) that the machine belongs to the appellant. It seems to me possible to read Exh. P.2 a report by respondent to the appellant regarding but goods he had bought for the latter in Nairobi and how these goods were to be transported and therefore an inference that the goods belonged to the appellant. It is also

possible to read Exh.P.2 as an apology for pledging the appellant's machine and a prayer for human treatment and therefore, justifying an inference that the machine belonged to the appellant. But the letters to which Exh.P.1 and Exh. P.2 were a response to were not produced in evidence although their maker testified in court. In the absence of the letters from the appellant such inferences cannot be drawn so readily, nor are they the only reasonable inferences that can be drawn. No explanation was given as to why they were not produced and it may well be assumed that if they had been produced they would have been adverse to the appellant's case.

The respondent gave an explanation why he wrote those letters which explanation the trial judge seems to have accepted since he held that the respondents claim that the machine was his might well be true. Looking at the two letters in light of the evidence as a whole. I am unable to say that the trial judge came to a wrong conclusion. It is true the respondent did not claim in the letters that the goods he had bought or the welding machine were his, but it as equally true that he did not admit that the machine belonged to the appellant. The respondent's explanation in his testimony that he wrote those letters because the management of the appellant was hostile to him was not unreasonable in the circumstances.
Moreover an inference cannot be readily drawn from proved primary facts if there are other co-existing facts which weaken or destroy that inference. Mr. Owor admitted that the management of the appellant blamed the respondent for going to Nairobi with out permission. This admitted fact destroys any inference that the appellant sent the respondent to Nairobi and supports the latter's claim that he made a private visit to Nairobi and therefore he had to explain where he had been and what he had bought. It would be mere conjecture and not reasonable inference to find from these two letters that the machine belonged to the appellant. It is true that the region of pure conjecture and that of reasonable inference are separated by an indefinite line but it is well settled that an inference has legal value while a conjecture does not. As Lord Macmillan said in Jones v. G.W. Railway Co. (1931)144 T.L.T. 194 at p.202.

> "The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible, but it is of no legal value for its essence is that it is a mere guess. An inference in a legal sense on the other hand is a deduction from the evidence and if it is a reasonable deduction it may have the validity of legal proof.

> The attribution of an occurrence to a cause is I take it always a matter of inference. The cogency of a legal inference of causation may vary in degree between practical certainty and reasonable probability. Where coincidence of cause and effect is not a matter Of actual observation there is necessarily a hiatus in the direct evidence but this may be legitimately bridged by an inference from the facts actually observed and proved."

In my opinion, therefore, the two letters did not take the appellant's case beyond the region of mere conjecture into legal inference. On the evidence as a whole I am unable to say that the learned trial judge came to a wrong conclusion when he held that the appellant had failed to establish that the machine belonged to him. Having so found he was justified in holding that the appellant had failed to prove that the respondent converted its machine for conversion is an act of deliberate dealing with a chattel in a manner inconsistent with another's right to its possession. As it is stated in Clerk & Lindsell on Torts, 13th Edition, P.1079,

> "Anyone who without authority takes possession of another man's goods with the intention of asserting some right or dominion over them is prima facie guilty of conversion."

The first ground of appeal therefore fails.
In view of my finding on the first ground of appeal, it would not be strictly necessary to deal with the second ground of appeal since the failure of the first ground is sufficient to dispose of this appeal. But for the sake of completeness. I shall consider the second ground as well.

It was argued on behalf of the appellant that the trial judge erred in holding that the rate of exchange between the Uganda Shilling and Kenya Shilling was at par at the material time. It was the appellant's contention that the trial judge ought to have found that the rate of exchange was nine Uganda shillings to one Kenya shilling and consequently held that the cost of the welding machine was U.Shs.193,048/= and not U.Shs.20,672/=. In dealing with this matter, the learned trial judge said,

> "As regards the third issue which is whether the value of the machine is as that stated in the plaint it would like to say that the two witnesses who testified here, one for the plaintiff and one for the defence were in agreement that, the cost of the machine was K-Shs.20,672/=. What they did not agree on is at what rate was this money to be converted into Uganda currency. According to Mr. Owor the rate was U.Shs.9/= to one Kenya shilling but according, to the defendant Mr. Ikanza the rate was at par. In the absence of any documentary evidence or evidence from the Bank of Uganda, I would say that the evidence as given by the defendant on this point is more reliable than that given by Mr. Owor since he seems to have been personally involved in the exchange of this money. On this issue number three I hold; that at the time of purchase, the correct amount was 20,672/= Uganda money."

It is clear from the above passage that the trial judge accepted the evidence of the respondent, as more reliable than that of the appellant on this issue. I am of the view that the trial judge was justified in preferring the evidence of the respondent to that of the appellant. The respondent had been involved in the exercise of obtaining foreign exchange whereas Mr. Owor was not. Mr. Owor admitted that he did not know in what form the respondent was given money and how much it was. Mr. Owor's evidence was therefore definitely unsatisfactory on this issue. There was no other evidence, documentary or otherwise, to support the appellant's claim that the rate of exchange at the material time was different from that claimed by the respondent. It was not disputed that the machine was bought at K-Shs.20,672/=. Since the trial judge accepted, rightly in my view, that evidence of the respondent that the rate of exchange was at par, I am unable to say that the judge erred in holding, that the value of the machine was U.Shs.6.20,672/= and not U.Shs. 193,048/=. Therefore, I find no merit in the second ground of appeal.

In conclusion, I agree that the learned judge that the appellant failed to discharge the, burden of proof which lay on it to prove the case on balance of probabilities. The appellant appears to have left the case in equilibrium and it is trite law that the court is not entitled to incline the balance in its favour. (See Jones v. G.W.Railway.Co. (Supra) A Nsubuga v.P.N. Kavuma H.C.C.S No.1236/76 (1978) H.C.B.307).

For these reasons, I would dismiss this appeal with costs.

B.J. ODOKI,
JUSTICE OF APPEAL.
12/6/86

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JUDGMENT OF LUBOGO, AG. J.A,

I have had the advantage of reading in draft, the judgment of Odoki, J.A. I agree with him. The appeal would therefore be dismissed with costs as suggested.

DAVID L. K, LUBOGO, AG.
JUSTICE OF APPEAL. 12/6/86

DATED at Mengo this 12th day of June, 1986.

Mr. Nkurunziza of M/S Mulenga & Co. Advocates for the Appellant.

Mr. Byaruhanga of M/s Byaruhanga & Co. Advocates for the Respondent -Absent.

I certify that this is a true copy of the original

MK. KALANDA

REGISTRAR COURT OF PPAL