THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: ***HON.LADY JUSTICE A.EN.MPAGI-BAHIGEINE, JA***

HON. MR JUSTICE S. G.ENGWAU, JA

HON. L4DY JUSTICE C.K.BYAMUGISHA, JA

CIVIL APPEAL NO. 18 OF 2004

BETWEEN

GAPCO (U) LIMITED :: APPELLANT

AND

A. S. TRANSPORTERS (U) LTD. :::::::::::::::::::::: RESPONDENT

(Appeal from the judgment of the High Court at Kampala

(Arach Amoko, J.) dated 16th September, 2003

in H.C.C.S.* No. *721 of 1998]

Cases cited:

1. *Pandya vs. R [1957] EA 336*
2. *Uganda Commercial Bank vs. Kigozi [2002] EA 302*

JUDGMENT OF ENGWAU, JA

The appellant is a limited liability company registered in Uganda and dealing in petroleum products. The respondent, on the other hand, is a limited liability company registered in Uganda and doing transportation business within Uganda and among the other East African States.

On the 9th May, 1993 the appellant entered into a transport agreement with Esso Standard Uganda Limited, whereby it was agreed that the respondent would be transporting Esso Standard Uganda Limited's products according to the terms and conditions spelt out in the

said agreement. The appellant is the successor of Esso Standard Uganda Limited and is bound by the said transport agreement.

At all material times, the respondent was contracted to transport fuel for the appellant to and from such places as would be notified from time to time and at any time by the appellant to the respondent following terms and conditions within the agreement. On or about 18th/19th September, 1995 the said tanker and trailer Reg. No. TZ 40854 and No. TZ 41057 respectively got an accident at Rutoto in Bushenyi District on the Mbarara-Kasese Road. It was on its way to deliver fuel products to Hima in Kasese District.

It was incumbent upon the respondent to meet risks and costs of transporting the products. The respondent was also supposed to maintain the vehicles and to pay its employees. A consignment was supposed to be accompanied by quite a number of documents including a consignment note, customs documents and supplier's documents, among others. These documents verify the goods enroutes until the goods reach their final destination.

The tanker and trailer were severely damaged in the said accident but were commercially repairable. In fact, the driver and 2 tonne-boys perished in the accident. The respondent claimed funeral expenses repair charges of the vehicle, loss of income before the tanker and trailer got back on the road, general and special damages for breach of the said contract plus costs of the suit.

The learned trial judge found partially in favour of the respondent. Her finding was that the consignment's final destination was Kampala and not Hima Cement in Kasese District: As a result, she awarded Sh.25, 000,000/= for general damages. The cross-appeal is based on the judge's refusal to award special damages in respect of repairs on the vehicle and for loss of income.

There are seven grounds of appeal as hereunder:

1. **Her Lordship erred in law and fact in holding that the appellant breached the transport agreement.**

2. **Her Lordship erred in making a finding of fact that the appellant attempted to deliver the consignment to Hima Cement instead of Kampala without notifying the respondent.**

3. **Her Lordship misdirected herself by relying heavily on exhibit P4 in determining the destination of the consignment thereby coming to wrong conclusions.**

4. **Her Lordship misdirected herself by relying heavily on the evidence of PWI.**

5. **Her Lordship misdirected herself when she failed to take into consideration the evidence of DWI and the defendant's exhibits and thereby came to wrong conclusions of fact and law.**

6. **Her Lordship erred in law in awarding general damages to the respondent.**

7. **Her Lordship erred in law in awarding excessive damages to the respondent in the circumstances of this case.**

On the other hand, the cross-appeal has the following grounds:-

1. **The trial judge erred in law and fact in refusing to award Shs.40, 640,000/= costs of restoration or repair of the vehicle.**

2. **The trial judge erred in law and fact when she ignored the evidence of PW3 which was a guide to costs of the repairs, thereby coming to wrong conclusions.**

3. **The trial judge erred in law and fact in failing to award Shs.8, 564,588/=, accident expenses.**

4. **The trial judge erred in law and fact when she refused to award Shs.79, 200,000/= lost income having und that the defendant was in breach of the transport agreement at the time of the accident.**

5. **The trial judge misdirected herself on the law governing proof of special damages thereby coming to wrong conclusions.**

Mr. Moses Segawa, learned counsel for the appellant, argued grounds 1 - 5 together and also grounds 6 - 7 together. As regards the cross- appeal, Mr. Segawa asked court to dismiss it on the grounds that it is premised on special damages which were not strictly proved and that there is no evidence regarding the cause of that accident.
Mr. Ambros Tebyasa and Mr. Kaggwa Michael appeared for the respondent. They followed the manner in which counsel for the appellant argued the appeal and I will also follow the same.

Mr. Segawa submitted that the gist of grounds 1 - 5 is premised on whether the appellant had breached the transport agreement. He pointed out that the learned trial judge resolved it positively in favour of the respondent when in fact the final destination of the said oil products was at Hima Cement Factory. According to counsel, the oil tanker crashed at Rutoto in Bushenyi District before reaching its destination. He further contended that the consignment note shows Kampala as the place for taxation and not the final destination. In his view, the consignment note, Exbt. D7 shows that the vehicle was on a routine journey. The trial judge, therefore, erred in relying on the evidence of the transporter, Ali Heist (PW1) and the consignment note, Exbt. P4, in determining the destination in disregard of the evidence of Jim Samuel Mukasa, DW1 who was the operations manager of the appellant company and Exbts Dl - D5 regarding correspondence documents between both parties. In the premises, Mr. Segawa asked court to re-appraise the evidence on record as a whole and come to its own conclusion. See: **Pandya vs. R [1957] EA 336.**

Mr. Tebyasa's response was that from the evidence on record and documents involved, transportation of oil products from Kampala to Kasese was solely the responsibility of the appellant. Learned counsel submitted that each party had an obligation under the agreement. He contended that the appellant was in breach of the agreement by not notifying the respondent of intended delivery to Hima Cement Factory in Kasese District. Counsel pointed out that notification was supposed to be in writing as per agreement but the appellant failed to do so.

According to counsel, the respondent would only be in control of vehicle while on routine journey. In the instant case, counsel submitted that the appellant diverted the vehicle to unauthorized journey. According to consignment note C38, Exbt.P4, Kampala was the final destination and not Hima in Kasese. In his view, the learned trial judge was right to rely on the evidence of PW1 and Exbt. P4 as it was the only exhibit availed to court in respect of destination of the products. Hima Cement Factory was not the final destination. According to counsel, the appellant was on a frolic of its own.

The crux of the matter in grounds 1 - 5 is premised on whether the appellant had breached the transport agreement. It is clear from the evidence on record and the documents involved that on the 9th May, 1993, the respondent entered into a transport agreement with Esso Standard Uganda Limited whereby it was agreed that the respondent would transport Esso Standard Uganda Limited products in accordance with the terms and conditions spelt out in the said agreement. That transport agreement was attached to the amended plaint as annexture "A". The appellant is the successor of Esso Standard Uganda Limited and is bound by the said transport agreement.
The respondent, using oil tanker Reg. No. TZ 40854 and trailer Reg. No. TZ 41057 respectively, loaded 36,000 Litres of oil products from Mombasa and to off load the same in Kampala depot. According to the evidence on record and documents involved, the trial judge relied rightly, in my view, on the evidence of PW1 and the Road Transit Customs Declaration (C38) tendered as Exhibit P4, which accompanied the consignment indicating the destination as Kampala. Her observation on this issue is as follows:

“The evidence of PWI on this point is not controverted by the Defendant. DWl did not indicate anywhere in his testimony that the Defendant notified the Plaintiff that the said fuel tanker was to deliver that particular consignment at Hima Cement Factory. Based on PWI’s testimony, I accordingly make a finding of fact that the Defendant attempted to deliver the consignment in question to Hima Cement Factory, instead of the destination it had notified the Plaintiff, namely Kampala, without notifying the Plaintiff and this was a breach of the agreement.”

Besides that finding, DWl further stated in his testimony thus: **“It is not true that we diverted the truck. Kampala is the final destination according to customs because we are supposed to pay taxes in Kampala, but the ultimate destination of the product is Kasese.”** In cross-examination DWl stated: **“I am not sure whether we paid taxes on it.”** DWl admitted: **“The transporter would know the destination when they are loading. I tell (sic) him the destination on phone. It is a standard practice. I don’t recall who telephoned who in this case… I don’t have any documents to show that the destination is Kasese. The documents got lost in the accident.”** Clearly, from the above excerpts, the final destination of the consignment was Kampala and not Hima Cement Factory in Kasese. DW1 admitted the respondent would know the destination when loading. The loading of the products was done in Mombasa and PW1 asserted that the destination was Kampala. It was an afterthought, in my view, when DW1 stated that Kampala was a place for paying taxes. In fact he was not sure whether they had paid taxes or had informed PW1 about the extra journey to Hima Cement Factory.

It is provided in the preamble of the agreement that the appellant would hire the services of the respondent’s vehicles for **“the purpose of operating the same for transportation of their products *to and from such place or places as would be notified from time*** to ***time*** **by the appellant to the respondent.”** DW1 was evasive for nothing when he was not sure who telephoned who. PW1 was not notified about Kasese journey. Although the respondent was supposed to provide worthy vehicle and competent drivers and employees who should obey all lawful and reasonable directions from the appellant, Kasese trip without notification was in breach of the agreement. The learned trial judge was justified to find and hold that the appellant was in breach of the transport agreement. The trial judge was entitled to exercise

her discretionary power in awarding general damages for breach of the agreement. I cannot fault her for exercising her discretionary power, especially when it was not shown that the award was inordinately high or low or manifestly illegal on principle. In the premises, grounds 1 - 5 fail.

Regarding cross-appeal, Mr. Tebyasa pointed out that ground 5 of the cross-appeal encompasses grounds 1 - 4 thereof. He further contended that if the trial judge had directed her mind well on the law governing proof of special damages, she would have found that the respondent was entitled to recover all the special damages contained in grounds 1-4.

Learned counsel rightly submitted that special damages must be specifically pleaded and strictly proved. In his view, producing receipts and invoices is not the only way of proving special damages. According to counsel, special damages can also be proved by direct evidence, for example, by the evidence of a person who paid the money or from the person who received the same. He further points out that documents like expenditure lists, accounts records or assessments by professional experts would prove special damages.

Having said all that, Mr. Tebyasa relied on Exbt. P2 and Exbt. P3 which were supported by evidence of PW1, PW2, and PW3. Exhibit P2 is an evaluation report by Aliwali Diamond Engineers for restoration or repair charges for the vehicle. It was merely an estimate of expenditures which were required to repair the said vehicle after the accident. It was estimated at Shs. 40,640,000/=. According to the trial judge that figure does not prove that the money was spent by the respondent on repairing the vehicle. The fact that the vehicle was put back on the road does not in my view, prove that the sum of Shs. 40,640,000/= was used for the repair of that vehicle. I would not hesitate to agree with the trial judge in disallowing that claim because it was not proved.

As for accident expenses, Exhibit P3, it was stated that the respondent spent Shs. 8,564,588/= on burial expenses. The direct evidence of PW1 gave a total of Shs. 3,700,000/= excluding towing the vehicle from Bushenyi to Kampala at Shs. 750,000/= and Shs. 60,000,000/= for repairs. Similarly, PW2 adduced evidence for an amount that was beyond Shs. 8,564,588/= allegedly spent for burial expenses.

Be that as it may, Mr. Tebyasa submitted that it had already been proved that 3 people died in the accident; towing the vehicle and guarding it were carried out, the trial judge should have taken judicial notice of the fact that the expenses incurred by the respondent were ordinarily the expenses people incur when a person dies. According to counsel, failure to attach receipts of expenditure would have been excusable because at the time of the bereavement it was impossible to attend to such details.

It is clear from the evidence on record that the driver and 2 tonne-boys died in the said accident. That fact was not disputed or controverted. Those dead people were the employees of the respondent. According to transport agreement, the respondent was supposed to employ a competent and an experienced driver. In his testimony, PW1 stated that the deceased driver had five years experience doing the same job. Police accident report did not put the blame for the accident on the said driver.

It was a moral obligation for the respondent to take responsibility to bury the dead employees in their respective ancestral homes. PW1 must have spent some money for that responsibility. I would tend to agree with Mr. Tebyasa that at the time of bereavement securing receipts for burial expenses would be ignored in some cases. The learned trial judge, in my view, should not have, with due respect, had an iron fist on the matter. She should have taken judicial notice of the fact that PW1 spent some money towards funeral expenses and use her discretion to award something towards that item. Doing the best I can on this item and having perused the evidence on record, I would award a sum of Shs. 3,500,000/=. This sum includes expenses for the burial of 3 deceased employees of the respondent; guarding the vehicle at the scene of accident and towing it from Bushenyi to Kampala.
Regarding lost income, the respondent had pleaded for Shs.79, 200,000/= from the time the vehicle was involved in the accident up to the time it was repaired and it came back on the road for use. However, the respondent managed to prove only Shs.12, 600,000/=. It was Tebyasa's contention that if the trial judge had properly directed her mind on the law governing proof of special damages, she would have granted that sum to the respondent. In support of his contention, Mr. Tebyasa cited the decision of this court in **Uganda Commercial Bank vs. Kigozi [2002] EA 302**. In that case the respondent had pleaded special damages of Ug. Shs. 101,000/=per day, but the trial judge found that only Ug. Shs. 85,000/= was proved. It was held, inter alia, that a court is entitled to award a lesser figure

than what was pleaded if it is satisfied that the lesser amount was proved.
In the instant case, the respondent had pleaded special damages of Ug. Shs. 79,200,000/= as loss of expected income when the vehicle involved in the accident was out of use. The respondent proved a lesser sum of Ug. Shs. 12,600,000/=. This figure came out of the evidence of PW1 who testified that the vehicle used to make two to three trips per month. Mr. Tebyasa contended that the vehicle got the accident while on a commercial journey and that was enough evidence to prove that it was earning money. Further, DW1 during examination in-chief admitted having paid the respondent Shs. 24,996,000/= transportation charges for one of the routes he had made for them.

Be that as it may, Mr. Tebyasa submitted that there was unchallenged and uncontroverted evidence of PWI to the effect that the respondent used to earn Shs. 630,000/= per trip. In his opinion, the trial court was entitled to award a lesser sum than what was pleaded. In the instant case, counsel suggested that the trial judge would have taken an average of two trips per month at 630,000 x 2 x 10 months when the vehicle was off the road. Total would be Shs. 12,600,000/= which the trial judge was entitled to award the respondent for loss of income. Following the decision in **Uganda Commercial Bank vs. Kigozi (supra**) I would award the respondent that sum.

In the result, I would dismiss the substantive appeal and allow the cross-appeal with costs here and in the High Court. I would award Shs. 3,500,000/= to the respondent towards burial expenses, guarding the vehicle at the scene of accident and towing the vehicle from Bushenyi to Kampala where it was repaired. I would also award lesser sum of 12,600,000/= towards lost expected income.

Dated at Kampala this 01st day of September 2006.

S. G. Engwau
JUSTICE OF APPEAL.

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: ***HON.LADY JUSTICE A.EN.MPAGI-BAHIGEINE, IA*** ***HON.***

MR JUSTICE S. G.ENGWAU, JA

HON. L4DY JUSTICE C.K.BYAMUGISHA, JA

CIVIL APPEAL NO.18/04

BETWEEN

GAPCO (U) LTD::APPELLANT/CROSS- RESPONDENT

AND

A.S.TRANSPORTERS (U) LTD::::::::::::::::::::RESPONDENT/CROSS- APELLANT

[Appeal from the judgement and orders the High Court of Uganda at Kampala* (Arach-Amoko J) *dated 164* September 2003 in HCCS No.721/98]

JUDGEMENT OF BYAMUGISHA, JA

I had the benefit of reading in draft the judgement prepared by Engwau JA. I agree with the reasons he has given in dismissing the appeal and the orders he has proposed in allowing the cross-appeal. I have nothing to add.

Dated at Kampala this 01st day of September 2006.

C.K.Byamugisha
Justice of Appeal

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. LADY JUSTICE A.E.N. MPAGI-BAHIGEINE, JA HON. MR. JUSTICE S.G. ENGWAU, JA
HON. LADY JUSTICE C.K. BYAMUGISHA, JA

CIVIL APPEAL NO. 18 OF 2004

BETWEEN

GAPCO **(U)** LIMITED:: APPELLANT.

AND

A.S. TRANSPORTERS (U) LTD::: **RESPONDENT.**

(Appeal from the judgement of the High Court at Kampala (Arach Amoko, J) dated 16th September, 2003 In H.CC.S No. 721 of 1998]

JUDGEMENT OF HON. JUSTICE A.E.N MPAGI-BAHIGEINE, JA

I have read in draft the judgement of my Lord Engwau JA, with which I agree and have nothing useful to add.

Since my Lord Byamugisha JA also agrees, the main appeal is hereby dismissed with costs here and below while the cross appeal succeeds with costs here and below.

Dated at Kampala this 01st day of September 2006.

A.E. N. MPAGI-BAHIGEINE

JUSTICE- OF APPEAL.