THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA - AT GULU

HIGH COURT CIVIL SUIT NO. MG. 4/92

VINCENT OKELLO……PLAINTIFF

— versus —

THE ATTORNEY GENERAL…….……..……..DEFENDANT

BEFORE:

THE HONOURABLE MR. JUSTICE G.M. OKELLO.

J U D G M E N T

Vincent Okello, the Plaintiff, brought this suit against the defendant seeking a recovery of the Plaintiff's Motor Vehicle, a Datsun Pick-up Reg. No. UWQ 990 or its current value at 5m/=. The Plaintiff alleged in paragraph 5 of his Plaint that,

> "During the year 1987 the said above Motor Vehicle Reg. No.UWQ 990 was confiscated by the then Brigade Intelligence Officer of the 157 Brigade, Captain Gayira who later gave the said Motor Vehicle to Captain Rusagara who was also an Intelligence Officer"

According to the Plaint, despite several demands and other efforts to recover the Motor Vehicle, the soldiers of the NRA have to date not returned the said Motor Vehicle to the Plaintiff. The Plaintiff alleged in paragraph 10 of his Plaint that before the said confiscation, the Plaintiff was using the said motor vehicle as a taxi. The Plaintiff contended that on the above premises he has suffered losses for which he claimed:-

(1) General Damages for

(a) Value of the said m/v at 5m/=.

(b) Loss of business profit from the time the said motor vehicle was confiscated.

(2) Exemplary Damages.

(3) Interest on 1 and 2 above.

(4) Costs of the suit.

The defendant filed a W.S.D in which it denied liability. It denied in particular that the soldiers of the NRA confiscated the Plaintiff's motor vehicle. It averred in paragraph 4 of the W.S.D that,

> "if the said vehicle was confiscated, it was done so on reasonable grounds pending investigations."

The defendant submitted to the jurisdiction of this court. Upon the above pleadings, the following issues were framed at the beginning of the hearing of the cases—

(1) Whether the Plaintiff's M/V Reg. No.UWQ 990 was seized by the N.R.A soldiers.

(2) Whether the seizure was committed by the N.R.A soldiers in the course of their employment.

(3) Whether the defendant is vicariously liable for the acts of the soldiers.

(4) What damages if any, is the Plaintiff entitled to?

Before I proceed, I would like to observe on the conduct of the Director of Civil Litigation in the Ministry of Justice in respect of this case. Affidavits of service from three different persons indicated that when Hearing Notices for the hearing of this case was served and passed to him for endorsement, the Director refused to hand back the originals of the document to the Process-server concerned. He still refused even when the Plaintiff went to great expense to send another person from Gulu to Kampala to retrieve the documents. The reason the said Director gave was reportedly that he was contemplating a settlement of the case out of Court But only to write later to say that the case would be fought in Court and sought a two months adjournment of the case to February 1996.

In my view those conducts of the said Director were deplorable**.** It is known to the Director that originals of Hearing Notices are expected to be returned to Court after service as evidence of

service. There was no legitimate reason for him to sit on those documents. He did not need them to decide on whether or not to settle the case out of Court.

Secondly, the Director sought a two months adjournment of the case moreover in writing to February 1996. It is no doubt known to the Director that currently every effort is being made to minimize delays of case disposal. In such endeavors, I expect all concerned to play positive roles. For the Director to shut his eyes to those efforts and seek a two months adjournment moreover in writing, was to me a conduct not consonant with this general call.

Thirdly, seeking adjournment by letter or by telephone is a method long rejected by courts as an unacceptable method of application for the same. This is known to the learned Director. To insist on such unacceptable method, the Director was indulging in unbefitting conduct. I only hope that the Director will take appropriate steps to bring those conducts to an end. As the reason of short notice was in the circumstances not a good enough reason for granting adjournment having regard to the time service was effected on the defendant, I rejected the request and ordered the hearing to proceed ex parte.

Turning to the merits of the case, it is pertinent to point out from the outset that the law places the burden of proof in civil oases on he who would fail if no evidence at all was given from either side (S.102 EA). In the instant case, the Plaintiff claimed that the defendant's servants had seized and detained the Plaintiff's motor vehicle and that despite several demands to return it, the defendant's said servants have not returned the Plaintiff's vehicle. The defendant denied that claim. By that denial, the defendant had turned the evidential wheel to the Plaintiff who would fail if no evidence was given from either side. To succeed, the Plaintiff had to adduce evidence to prove on the balance of probabilities that while the Plaintiff was entitled to immediate possession thereof, the defendant's servants had seized the Plaintiff's said motor vehicle, that they did so in the course of their employment and that the Plaintiff had made demands for the return of the said motor vehicle but that the defendant's servants have not returned the same. Only then can the Plaintiff hope to succeed in his claim.

Indeed the Plaintiff called the evidence of three witnesses in a bid to discharge the evidential burden placed on him by law. The evidence of PW1 was centered on the Plaintiff's acquisition of

the said motor vehicle to establish his ownership, its seizure by the defendant' s servants and the Plaintiff' s vain efforts to recover the same. His testimony also touches on what the plaintiff was doing with the vehicle before the seizure. According to the testimony of PW1, the Plaintiff purchased the motor vehicle Reg. UWQ 990 a Datsun Pick-up as a second hand from O.L. Lalobo in December 1985 at the cost of Ug.Shs.2.5m/=. He paid the full price and a Memorandum of Sale Agreement was duly executed by them and witnessed by their witnesses. PW1 pointed out however that before the transfer of the vehicle was effected, the vendor, O.L. Lalobo, had died so that it left him with the Registration book still bearing the name of O.L. Lalobo as the owner.

It was the evidence of PW1, that after purchasing the vehicle, the Plaintiff left it in the Garage for general service for one month after which he put it on the road as a taxi in February 1986. It was ferrying traders who used to go to Malaba, Mbale, Busia or Kampala for their merchandise. For the Mbale, Malaba/Busia trips he used to earn 100,000/= return journeys which he was doing twice a week. For the Kampala journeys which he also did twice a week alternately, he was earning 150,000/ return journey. PW1 further told court, that he also used the vehicle for transportation within Gulu District for which he was earning about 40,000/= daily.

The second witness was. Nasuru Kibirige (PW2) a Public Relation Officer attached to the 4th Division NRA Gulu. His evidence was concise. He told court that he was posted to Gulu in July 1990. He confirmed that from the records he found in that office, and from his own investigations, the Plaintiff's said motor vehicle was seized by soldiers of the NRA in 1987 during operation. He further confirmed that the motor vehicle has since not bean returned to the Plaintiff. He confessed that he and his Director of Public Relation in the NRA confirmed the genuineness of the Plaintiff's claim end recommended to the relevant authorities that the Plaintiff be compensated for his vehicle.

The third witness for the Plaintiff was Louis Odong (PW3) a Mechanic with the Ministry of Works Gulu. From his testimony, he joined that Ministry in 1975 and his duties included valuation of motor vehicles, He explained that he underwent Industrial training at Lugogo which equipped him with the Knowledge to do his job. According to PW3, in valuation of a motor vehicle, be had to look at the age of the vehicle concerned, spares that might have been fitted to

it, and the inflation which might cause hikes to prices of spares. In the view of PW3 the Plaintiff's motor vehicle could be valued at Ug.shs.7.5m/= now. He based his assessment on the age of the vehicle and the spares fitted to the vehicle. He also had regards to the inflation which hiked the prices of spares.

I now turn to consider in more detail the evidence, and submission of counsel vis-à-vis the issues framed at the beginning of the hearing to determine whether the Plaintiff has proved his claim on the balance of probabilities.

It would seem clear from the pleadings in this case that there was no dispute as to the Plaintiff's ownership of the vehicle in question. Under section 186 of the TRSA '70 the term "owner' with regard to registered vehicles was defined to mean,

> "the person appearing as the owner of the vehicle by the register kept by the Registrar under this Act."

The person registered as the owner of the vehicle is therefore the owner of a registered vehicle under the above section. In the instant case, there was unchallenged evidence that the Plaintiff bought the said vehicle from O.L. Lalobo and had paid the full purchase Price thereof. The vehicle and the Registration card were given to him by the Vendor. Memorandum of Sale was also executed by both of them and witnessed by their witnesses. The Memorandum of the Sale Agreement was at the trial received in evidence and was marked Exh p2 According to PW1, the Vendor had died before the transfer of the vehicle was registered.

It is clear from the above evidence that though the Plaintiff was not registered as the owner of the said motor vehicle, he has equitable claim over it. He is therefore the equitable owner of the vehicle (UWQ 990) having paid the full purchase price thereof.

As to whether that vehicle was seized by the NRA soldiers, there is over whelming evidence from PW1 that the vehicle was seized from the Plaintiff by soldiers of the NRA in July 1987. This evidence was confirmed by the testimony of It. Nasuru Kibirige (PW2), the Public Relation Officer with the 4th Division NRA. His testimony was to the effect that from the record he found in that office in 1990, end from his own investigations, the Plaintiff's said motor vehicle was

indeed seized by soldiers of the NRA in 1987 during operation and for operation. Both PW1 and PW2 confirmed that despite demands, the said motor vehicle has since not been returned to the Plaintiff. From the above evidence I have no difficulty in finding as a fact that the Plaintiff's motor vehicle Reg. No. UWQ 990 was seized by soldiers of the NRA in 1987 and has since not been returned to the Plaintiff. Issue No 1 is therefore answered in the affirmative.

On whether the seizure of the Plaintiff's said motor vehicle was committed by the soldiers of the NRA in the course of their employment, it is relevant to note that there was no averment in the Plaint that the soldier was acting in the course of their employment when they seized the Plaintiff's motor vehicle. In that respect, evidence in that regard would be a departure from the pleadings because evidence must correspond to the pleadings.

The above omission not withstanding, there is, there is ample evidence to answer that question in the affirmative. The evidence of Nasuru Kibirige (PW2) is the most emphatic. He testified that the soldier of the NRA seized the Plaintiff's said motor vehicle in 1987 during operation and for operation. That meant that the soldiers who seized the vehicle during the operation were acting in the course of their duties, Issue No.2 would therefore be answered in the affirmative.

The third issue is whether the defendant is vicariously liable for the acts of the soldiers. In this connection, it is relevant to point out that a Master is only vicariously liable for the tort committed by his Servant in the course of his employment. It is therefore necessary that that relationship of "Master and Servant" must be pleaded and established by the Plaintiff by evidence on the balance of probabilities to render a Master liable. He must also similarly establish that the tort in question was committed by the defendant's servant acting in the course of his employment. In the instant case, the 'Master and Servant' relation had not been averred in the Plaint not as I have pointed out earlier that the tort was committed in the course of the servant's employment. For ease of reference I shall reproduce the relevant portion of the Plaint here below:-

> "3. The Plaintiff's cause of action against the Defendant arose as hereunder.
>
> 4. The Plaintiff is the legal owner of a motor vehicle Reg. No.UWQ 990.

5. During the year 1987, the said above motor vehicle Reg. No. UWQ 990 was confiscated by the then Brigade Intelligence Officer of the 157 Bde, Captain Gayira who later gave the said motor vehicle to Captain Rusagara who was also an Intelligence Officer.

6. The confiscation of the said above motor vehicle by the NRA officer was reported to the office of the District Administrator Gulu. The said District Administrator then by his letter ref DA/14 dated the 8th, July 1987 addressed to Brigade I.C 157 Brigade Gulu, confirmed that the above motor vehicle belongs to the Plaintiff and that it should be returned to him. A Photostat copy of the said letter is annexed hereto and is marked "Annexture "A'

7. Since there was no response to the above quoted letter of the District Administrator, Plaintiff then reported the matter of his confiscated vehicle to the office of the Resident minister, Gulu.

8. The office of the Resident Minister, Gulu wrote to the Liaison Officer, NRA to take up the Matter with the relevant authorities of NRA. A Photostat copy of the said letter is annexed here-to end marked "Annexture B"

In this annexture B, the Reg. No. of the said motor vehicle was recorded as UWQ 99 by mistake and this mistake was rectified by the second letter dated the 29th May, 1992 from the same office. A Photostat copy of the said second letter is annexed hereto and marked "Annexture C"

9. The Public Relation Officer 4th Div. Hqs then wrote to the Director of Public Relation NRA Head Quarters supporting that the Plaintiff' s claim was genuine. Here again was an error in the Reg. No of the said above motor vehicle was written as UWQ 99. This mistake was also rectified by a letter dated the 6th June 1992, from the same office. Photostat copies of the two letters are annexed hereto and are marked 'Annexture "D & E" respectively.

10. The said above motor vehicle before it was confiscated by the said officer of the NRA was being used as a taxi by the Plaintiff.

11. The statutory Notice was served upon the Defendant.

12. The cause of action arose in Gulu District within the jurisdiction of this Honourable Court."

The above Plaint is clearly defective in that it never averred that the NRA officers were servants of the defendant nor that in confiscating the Plaintiff's motor vehicle the officers were acting in the scope of his employment.

It is instructive to note that 0.7 r (1) (a) of the Civil Procedure Rules requires that a Plaint must contain,

"*the facts constituting the cause of action and when it arose*"

That rule is mandatory. Failure of the Plaintiff in this case to aver in this Plaint that the NRA soldier who confiscated the Plaintiff's said motor vehicle was a servant and or Agent of the defendant was an error in the Plaint. It may however, be argued in favour of the Plaintiff that the Master/Servant relation between the defendant and the soldier who confiscated the Plaintiff's said motor vehicle was implicit in paragraph 5 of the Plaint where it was pleaded that,

'The said motor vehicle Reg. UWQ 990 was confiscated by the then Brigade Intelligence Officer of the 157 Brigade, Captain Gayira.'

That being so there arises a presumption that the officer was acting in the course of his employment. It then becomes the duty of the defendant to rebut that presumption. On the record there is no evidence from the defendant in that regard. On the contrary the evidence of PW2 Nasuru Kibirige, the Public Relation Officer with the NRA 4th Division Gulu indicated that the Plaintiff's said motor vehicle was confiscated during operation and for operation by soldiers of the NRA. From that evidence I have no difficulty in a finding that the Plaintiff's vehicle was seized by the defendant's servant acting in the

course of his employment. This rendered the defendant liable. Issue No.3 therefore answered affirmatively.

This now leads me to the question of Damages. In this connection, the basis of the Claim had first to be considered In this case, it is detinue. The principle governing the measure of damages in cases of detinue is that the Plaintiff may claim the recovery of the specific Property detained or its value at the time of judgment. (see Halsbury's laws of England 3rd *Edn.* Vol 38 Page 791 Paragraph 1317).

In UCB .V. Matiya Wasswa CA No.6/82, the appellant had seized the Respondent's Bus whereupon the latter sued for detinue praying for the recovery of his Bus or its value and General Damages. High Court awarded him the value of a new Bus at the time of judgment. On appeal it was held that the value of the goods in detinue should be assessed at the Market value at the time of Judgment.

In the instant case, evidence was led from Louis Odong (PW3) a Mechanic with the Ministry of Works Gulu, to show that the current value of that vehicle was 7.5m/=. At the time of seizure, the value of the vehicle was put at 3.5m/=. The witness explained that in arriving at the above figure, he took into consideration the age of the vehicle, spares fitted to it and the inflation which hiked the prices of the spares. It is however interesting to note that the witness did tell the court the type and number of spares actually fitted to this vehicle that caused the hike of its value from 3.5m/= to 7.5m/=. In the absence of any such satisfactory explanation, inflation alone would not bring the value of the vehicle from 3.5m/= to that astronomical figure of 7.5m/=. I am not satisfied with the evidence of this so—called expert witness. The value of the vehicle was grossly exaggerated. I have no doubt that some spares had been fitted to the vehicle after it was bought to make it road worthy. I do not know how much. Considering all the circumstances of the ease including inflation, I award 5m/= f or the value of the vehicle.

The Plaintiff also claimed general Damages for less of business earnings from the time of the seizure.

In Matia Wasswa -vs- UCB above the Plaintiff was awarded general Damages for loss of business earning. He had produced evidence which showed his loss of earning from the date of seizure to the date of Judgment.

In the instant case, the Plaintiff did not adduce any such evidence showing his loss of earning. But his lawyer prayed far a figure of 70m/= without any basis at all. I can't make such award. But doing the best I can considering the fact that the Plaintiff who was using his vehicle as a taxi and making some earnings therefrom had lost those earnings from the date of seizure, I would award general Damages under this heading to 3m/=.

The Plaintiff further claimed for exemplary Damages arising from the seizure. In this connection, counsel cited a number of authorities like:- Obonyo –vs- Municipal Council of Kisumu (1971) EA 91 at page 94, KCC –v- Nakaye (1972) EA 446 and Joseph Lukwago –v- Ag HCCS 1156 of 1988 (unreported). Upon those authorities counsel prayed that l5m/= be awarded under this heading.
The principles governing an award or otherwise of Exemplary Damages as could be discerned from the above cases are that Exemplary Damages may be awarded where:-

(1) The conduct of the servant of the defendant towards the Plaintiff was oppressive, arbitrary, highhanded or even un constitutional; or

(2) The conduct of the defendant' s servant was calculated by him to make profit for himself which may well exceed the compensation payable to the Plaintiff; or (3) Where it is provided for by law.

Even in those situations, court still had to consider whether the Plaintiff was the victim of the punishable behavior. Ultimately, the court has discretion in the award of exemplary damages.

In the instant case, the evidence of PW1 indicated that in July 1987, his vehicle was seized from him by soldiers of the NRA. LT. Nasuru Kibirige (PW2) confined that seizure end added that the seizure was committed during operation end for Military operation. There was no evidence of any particular highhandedness in the act by the soldiers

involved. The Plaintiff was not harassed in any way • It is common_Knowledge that during Military operations civilian vehicles are quite often commandeered for such military operation. The facts of this case clearly differ from the facts of Lukwago's case above where the soldiers who seized Lukwago's vehicle acted in a high handed manner. He acted in a humiliating manner towards Lukwago. The evidence in the instant case does not reveal such punishable conduct, by the soldier involved towards to Plaintiff. For those reasons I am of the view that this case is not suitable for an award of Exemplary Damages. It is therefore not awarded.

I would award interest of 20% on the value of the vehicle and loss of earning from date of seizure until Payment in full. I also award cost wit interest thereon at courts rate from date of Judgment till payment in full. So Judgment is entered for the Plaintiff as above.

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G.M. Okello

Judge

22/12/95