THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT GULU

CIVIL APPEAL No. 0008 OF 2015

(Arising from Kitgum Chief Magistrate's Court Civil Suit No. 0062 of 2011)

1. KITGUM DISTRICT LOCAL GOVERNMENT }
2. LAMWO DISTRICT LOCAL GOVERNMENT } …… APPELLANTS

VERSUS

AYELLA ODOCH JIMMY JOEL ……..……..…… RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The respondent sued the appellants jointly and severally for recovery of shs. 10,511,064/= unlawfully deducted from his salary over a period of five years, from November, 2016, general damages, a permanent injunction against further deductions, interest and costs. His case was that the deductions began in November, 2006 while he was employed by the first appellant as Town Treasurer and continued from July, 2009 onwards upon transfer of his employment to the second appellant as a Senior Accounts Assistant. Hence he claimed the deductions that occurred from November, 2006 to June, 2009 from the first appellant (shs. 4,851,200/=) and those that occurred from July, 2009 onwards from the second appellant (shs. 5,699,864/=), hence a total of shs. 11,196,217/= This was done against the directive of 3rd January, 2011 by the Chief Administrative Officer of the second appellant that the deductions should stop forthwith.

In their joint written statement of defence, the appellants denied the claim in toto and chose to put the respondent to strict proof of his claim, contending that the respondent was the officer in charge of salaries. The respondent was employed by the first appellant up to the year 2010 whereupon his services were transferred to the second appellant. Before is transfer, there had been an Audit query raised by the Auditor General over funds amounting to shs 52,501,000/= the respondent had not accounted for. Recovery continued until December, 2011 when the respondent absconded his duties and his name was deleted from the payroll.

In his testimony as P.W.1, the respondent, Ayella Odoch Jimmy Joel, stated that he made his claim of unlawful deductions of shs. 11,196,217/= with both appellants but they did not pay him. His full salary of shs. 424,800/= gross, was only re-instated from December, 2011 onwards. His employment was afterwards terminated by the second appellant on allegations of financial mismanagement, with effect from February, 2012 but before the deductions were refunded. The second appellant's employees resorted to intimidation intending to cause him to drop his claim and the suit. He did not call any witnesses and closed his case.

D.W.1 Otim Alexander testified that following their appearance before the Local Government Standing Committee of Parliament in November 2006 where they were directed to recover advances paid to staff, the respondent was one such members of staff from whom recovery had to be made. These were funds advanced to various officers for undertaking specified activities for which they were under a duty to account within one month. The respondent had received shs. 52,501,000/= for which he had not accounted. The first appellant them began making salary deductions for enforcement of that recovery. Before full recovery could be made, the respondent's services were transferred to the second appellant but the first appellant continued to make the deductions.

D.W.2 Onen Alfred Erikana, the Principal Township Officer of the second appellant testified that the respondent was seconded to work with the second respondent as Caretaker Treasurer. Before his transfer, he had been named in the Auditor General's report as one of the persons who had failed to account for funds. The respondent failed to appear before the District Public Accounts Committee to answer that query and his services were terminated by the Chief Administrative Officer. The deductions were not made by the second appellant but by the first appellant. D.W.3 Rhoda Oroma, the Principal Assistant Secretary of the first appellant testified that the respondent was one of the members of staff who failed to produce accountability under audit queries raised by the Auditor General. Recovery of the funds unaccounted for had to me made against his salary. Shs. 5,003,900/= was recovered from him. The respondent complained to the Inspectorate of Government regarding the deductions and by the time of transfer f his services to the second appellant, the deductions had been stopped by the Inspectorate of Government. Nevertheless, the second appellant continued with the salary deductions.

D.W.4 Okeny Harriet, the Senior Human Resource Officer of the second appellant testified that the respondent wrote a letter to the second appellant's Chief Administrative Officer arguing that the deductions from his salary ought to have stopped upon his transfer of services to the second appellant. Upon consulting the first appellant, they were given a document by which the deductions had been authorised. It was established that the second appellant had not made any deductions but rather it was the first appellant who had done so.

In his judgment, the trial Magistrate found that a sum of shs. 52,501,000/= was advanced to the respondent to undertake official activities and it was alleged that he had failed to account for it. The appellants failed to adduce evidence to explain the purpose for which that disbursement was made and any justification as to why the respondent was made personally liable for failure to account for its use. There is no evidence of any disciplinary action taken against the respondent before he decision to make the salary deductions. The salary deductions were therefore wrongful and illegal. An order was made for a refund all salary deductions with interest at court rate from the time of deduction until payment in full. The respondent in addition was awarded general damages of shs. 15,000,000/= and the costs of the suit.

The appellants were dissatisfied with the decision and appealed to this court on the following grounds, namely;

1. The learned trial Magistrate erred in law and fact when he held that both appellants were liable for the deductions and yet the deductions were only by the first appellant thereby occasioning a miscarriage of justice to the second appellant.
2. The learned trial Magistrate erred in law and fact in awarding general damages of shs. 15,000,000/= which was not proved and the same was high and excessive in the circumstances.

At the hearing of the appeal, counsel for the appellants Mr. Louis Odong of M/s. Odongo and Company Advocates informed court that he had been instructed by the first appellant to withdraw their appeal since they had paid more than half of what the respondent is entitled to under the judgment of the court below. The appeal is therefore by the second appellant only. In that regard, he submitted that the award of shs. 15,000,000/= in general damages was erroneous

in that it far exceeded the amount of special damages awarded. The respondent did not lead any evidence to justify an award of general damages. It was based on speculative assumptions made by the trial magistrate. The court should therefore have awarded only nominal damages if it was inclined to award any. Erroneously, the trial court found both appellants liable for the deductions yet the evidence was to the effect that the deductions had only been made by the first appellant. It was erroneous to award "salary to-date" when in his own admission the respondent left the second appellant's employment in December, 2013. Before that, in his own admission, his salary had been re-instated from December, 2011 until the time he absconded from duty. He prayed that the appeal by the second appellant be allowed.

In response, the respondent appearing *pro se* argued that the trial magistrate came to the right conclusion since the appellants failed to adduce evidence of any disciplinary proceedings that preceded the decision to make deductions from his salary. The respondent was denied his right to a fair hearing before such a decision could be made. He prayed that the appeal be dismissed.

It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; *[2004] KALR 236*). In a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*). The appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular this court is not bound necessarily to follow the trial magistrate’s findings of fact if it appears either that he or she 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 demeanour of a witness is inconsistent with the evidence in the case generally.

With regard to the first ground of appeal, it goes without saying that, whatever the form of error, be it an error of fact or law or mixed law and fact or discretion, each ground of appeal should be stated concisely. Counsel who frame memoranda of appeals presented to court should comply with the requirements of the rules and forms for framing memoranda of appeal (see *M/s Tatu Naiga and Company Emprorium v. Verjee Brothers Limited, S.C. Civil Appeal No. 8 of 2000*). Grounds ought to be; (a) as clear as possible, (b) as brief as possible, and (c) as persuasive as possible, without descending into narrative and argument. A ground of Appeal must only state the objection to the decree without any argument or narrative. Although there is no maximum requirement as to the length or the fullness of detail of a ground of appeal, the argumentation which is necessary for the objection to the decree should be reserved for the written or oral submissions. To include justifications, elaboration or illustrations of the objection in the ground itself risks introducing argument or narrative into the ground. In the first ground of appeal for example, the phrase " and yet the deductions were only by the first appellant," is a descent into narrative and argument that ought to be avoided.

That said, it was the testimony of D.W.1 Otim Alexander that the first appellant began making salary deductions following the meeting with the Parliamentary Accounts Committee. Before full recovery could be made, the respondent's services were transferred to the second appellant but the first appellant continued to make the deductions. D.W.2 Onen Alfred Erikana, the Principal Township Officer of the second appellant testified that The deductions were not made by the second appellant but by the first appellant. D.W.3 Rhoda Oroma, the Principal Assistant Secretary of the first appellant testified that the second appellant continued with the salary deductions after the respondent's services had been transferred to the second defendant. D.W.4 Okeny Harriet, the Senior Human Resource Officer of the second appellant testified that upon consulting the first appellant, they were given a document by which the deductions had been authorised. It was established that the second appellant had not made any deductions but rather it was the first appellant who had done so. The testimony of the four witnesses was not controverted. In light of that, the finding by the court below that the second appellant was liable to make a refund of the salary deductions is not supported by any evidence, more especially since the first appellant admitted liability to refund in full. The first ground of appeal thus succeeds.

The second ground of appeal relates to the ward of general damages. It is a general principle that with orders founded upon the exercise of a discretion, an appellate court has no right to substitute its discretion for the discretion entrusted to the court of first instance. In the absence of exclusion of relevant considerations or the admission of irrelevant considerations an appellate court should not set aside an order made in the exercise of a judicial discretion unless the failure to give adequate weight to relevant considerations really amounts to a failure to exercise the discretion actually entrusted to the court (see *Sharp v. Wakefield [1891] AC 173 at 179*). When the question is one on which reasonable minds may come to different conclusions, and it is shown that the decision of the court of first instance exercising the discretion falls within a reasonable range, and no error on his part can be shown, an appellate court may not interfere.

It is not enough that the appellate court considers that, if they had been in the position of the trial court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the trial court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some material consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution for that of the trial court, if it has the materials for doing so. It may not be apparent as how the trial court reached the result embodied in its order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred (see *House v. The King (1936) 55 CLR 499, at pp 504-505*).

In the instant case, the principle of "*restitutio in integrum*" should have been applied in assessing damages, whereby the court seeks to put the plaintiff in the position he or she would have been in had the wrong not been committed. To do that, the court must ask what would have happened in fact if the wrong had not been committed. Damages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved party. Being compensatory in nature, when a claim for general damages is included in a plaint, the plaintiff is required to provide evidence in support of the claim and to adduce evidence of facts upon which

the damages can be assessed. Before assessment of damages can be done, the plaintiff must first furnish evidence of facts that warrant the award of damages. Failure to do so is fatal to a claim for damages. However, there are exceptional situations when the law will presume damages as being necessarily entailed in the wrongful act, where a plaintiff is incapable of proving intangible harm. In such cases, general damages are such as the law will presume to be the direct natural or probable consequence of the action complained of, but even in such cases only nominal damages will be awarded.

Determining whether damages are warranted requires that the court determines the nature and extent of the harm, which unquestionably requires an assessment of the facts and a fair opportunity given to the adverse party to challenge those facts. Substantial damages will be awarded when actual damage is proved to have been caused. Where the injury or loss is of a tangible nature and a plaintiff has had a full and fair opportunity to present evidence of his or her purported injury or loss but has not, the court should not award any or make a finding based on presumed damages. Recovery of damages for intangible harm such as embarrassment, or emotional suffering, where compensation may restore the plaintiff's sense of self-value, and ease his or her sense of outrage, is based on proven facts since the assessment is guided by their tangible ramifications.

Nominal damages on the other hand are vindicatory in nature in the sense that they are not damages which aim to compensate or to deter or punish. Instead, they are damages that aim to vindicate a right that has been infringed, independently of any consequences, where in the light of all the facts no actual damage has been sustained (see *Neville v. London Express Newspaper Ltd [1919] A.C. 368*). They are awarded on the basis that although money damages may not be an equivalent to the injury experienced, they can serve as an important symbolic means of preserving the entitlement of personal security and autonomy against infringement.

In the instant case, the respondent did not adduce any facts to justify the award of general damages. The court below proceeded to award general damages for intangible harm without proven facts of their tangible ramifications. The normal measure of damages in cases of belated repayments of money due is by way of interest which the money would attract during the period

of breach, taking the rates of interest and inflation into account (see *Sowah v. Bank for Housing & Construction [1982-83] 2 GLR, 1324*). Having awarded interest on the deducted amounts, the respondent did not sustain further compensatable loss. General damages should not have been awarded and not even vindicatory damages are available in these circumstances.

In the final result, the appeal is allowed. Judgment of the court below set aside in so far as it relates to the second appellant. Award of general damages against the second appellant in the court below is set aside. The costs of the appeal are awarded to the second appellant.

Dated at Gulu this 6th day of December, 2018

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Stephen Mubiru
Judge,
6th December, 2018.