IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI - CJ, ODER - JSC, KAROKORA - JSC, MULENGA - JSC, KANYEIHAMBA - JSC)

CIVIL APPEAL NO. 6 OF 2001 B E T W E E N

UGANDA BREWERIES LIMITED: :::::: :::::: APPELLANT

AND

UGANDA RAILWAYS CORPORATION: : : : : : : : RESPONDENT

(Appeal from the judgment of the Court of Appeal of Uganda (Kato, Engwau and Kitumba, JJ,A) dated 23-10-2000, in Civil Appeal No.16 of 2000 from the decision of the High Court of Uganda at Kampala (Okumu-Wenji, J) dated 20-10-99) .

Appeals – Duty of first appellate court – Evaluation of evidence – Whether Court of Appeal subjected evidence to re-evaluation and fresh scrutiny

Damages – Quantum of damages – Whether award of Ug. Shs. 280 million on the respondent's counter claim proper – Effect of failure to cross examine respondent witness on how amount claimed as specific damages was arrived at – Whether admission by accepted by appellant

The appellant sued the respondent in the High Court, claiming special damages and costs it had incurred to repair its semi-trailer, damaged in a collision between the semi-trailer and the respondent's train locomotive at a railway level crossing. The suit was founded on alleged negligence by the respondent's locomotive driver, for which the respondent was alleged to be vicariously liable. The locomotive was also damaged in the collision, which the respondent blamed on the appellant for alleged negligence counter claimed against the appellant for the costs of repair of the locomotive. The appellant's suit was dismissed with costs, but the respondent's counter-claim succeeded. The appellant appealed to the Court of Appeal against the dismissal of its suit by the High Court. The appeal failed, and the appellant filed this appeal. The appeal was based on grounds inter alia that (i) the Court of Appeal failed to adequately evaluate and scrutinize the evidence adduced with a view to coming to their own conclusion as a first appellate Court, (ii) the Court of Appeal erred in law and fact in upholding the award of specific damages thereby failing to notice that the learned trial

judge had acted on an erroneous principle in awarding the excessive sum of Shs. 280,000,000 /= to the respondent as damages.

Held:

(i) There is no set format to which a revaluation of evidence by a first appellate court should conform. The extent and manner in which re-evaluation may be done depends on the circumstances of each case and the style used by the first appellate court. The Court of as set as the first appellate court lived up to its task out in rule 29 (1) of the Court of Appeal Rules . There was no basis for this court to interfere with the Court of Appeal's re-evaluation of the evidence.

(ii) Where a trial Court finds that one of the parties to an accident has not been guilty of any negligence which contributed to the accident the Court of Appeal as the first appellate Court should not, even if it is doubtful that it would have arrived at the same decision had it been sitting at the first instance, interfere with that finding, which is largely a question of fact and degree, unless it is satisfied that the trial judge was wrong. In this case Court found that there were no errors by the trial court requiring interference by the Court of Appeal in the trial Court's finding on negligence.

(iii) In the instant case, the question of who knocked or crushed the other was not the main issue. Both parties agreed that the locomotive knocked the trailer and the learned trial judge did not have to try that issue because it was not contentious. Thiswas the substance of the issues framed by consent at the trial of the suit.

(iv) The quantum of special damages to which the respondent was entitled to ought to have been proved by the respondent and properly assessed by the trial court. Failure by the appellant to cross-examine the respondent's witness on the matter did not necessarily mean that it accepted the quantum of special damages claimed by the respondent, namely DM400, 000 or Ug. Shs. 280 million. On the authority of *Bank* of *Uganda v F . W. Masaba* (supra), the Court would interfere with the award, because it was not properly assessed and was made on wrong principles.

Cases referred to:

A. W. Biteremo v Damascus Munganda Situma, Supreme Court Civil Appeal No.15 of 1991 (Unreported)

Abdul Hamid Saif v Alimohamed Slidem (1955) 22, EACA *270*

Board v Issa Bukenya t/a New Mars Warehouse, Supreme Court Civil Appeal No. 26 of 1992 (Unreported)

British Fame (Owners) v Macgregor (1943) 1 All E.R. 33.

Bukenya and Others v *Uganda* (1972) E.A.549.

Captain Harry Gandy v Caspair Air Charters Ltd. (1956) 23 EACA 139.

Castelino v Rodrigues (1972) E .A . 223,

Charles Bitwire v Uganda, Supreme Court Criminal. Appeal No. 23 of 1985 (Unreported)

Cognlan v Cumberland (1898) *1.Ch.704 (CA)*

Danji Ramji v Rambhai & Co. (U) Ltd (1970) EA 151

Des Raj Sharm v Regina (1953) 20 , EACA 310

Ephraim Orgoru Odongo & Another v Francis Benega Bonge, Supreme Court Civil Appeal No. 10 of 1987 (Unreported)

Esso Petroleum Co. Ltd v- South Corporation 7 (1956) A.C. 218;

Francis Sembuya v Airport Services Ltd. Supreme Court Civil Appeal No. 6 of 1999 (Unreported)

G.M. Combined (U) Ltd v A.K. Detergent & *Others* Supreme Court Civil Appeal No.7 of 1998 (Unreported)

G. *W. Katatumba* t/a *Technical Plan v Uganda Co-operative Transport Union Ltd.,* Supreme Court Civil Appeal No. 23 of 1993, (unreported);

Interfreigbt Forwarders (U) Ltd. v East African Development Bank, Supreme Court Civil Appeal No. 33 of 1993 (Unreported)

James Kabigiriiza v Sezi Busasu, HCCS No MM 32 of 1981 [1982] HCB.148

Kairu v Uganda (1978) HCB 123

Karisa v Solanki (1969) EA 320 *;*

Kibimba Rice Co. Ltd v Umar Salim Supreme Court Civil Appeal. No. 7 of 1998 (Unreported)

Kifamunte Henry v Uganda, Supreme Court Criminal Appeal No. 10 of 1997 (Unreported)

Milly Masembe v Sugar Corporation of *Uganda* & *Another* Supreme Court Civil Appeal No.1 of 2000 (Unreported)

Okano v Republic **(** 1972) EA 32

Pandya v R . (1957) EA 336

Peters v Sunday Post Ltd. (1958) EA 424

Pushpa d/o Raojibbai v Tbe Fleet Transport Co. Ltd. (1960) EA 1025.

Selle and Another v Associated Motor Boat Co. Ltd. and Others (1968) EA 123

Trevor Price & *Anor v Raymond Kelsall* (1957) EA 752

Uganda American Insurance Company Ltd v Phocas Ruganzu, Supreme Court Civil Appeal No. 10 of 1992 (Unreported)

Watt Thomas v Thomas (1947) *AC.484 (H. L.*

Zarina Akbarali Shariff & *Another v Noshir Pinoshesha Setha* (1963) EA

Legislation referred to:

1995 Constitution article 28(1)

Civil Procedures Rule Order 6, rule 6

Evidence Act Section 55

Judicature Statute 1966 sections 8, 12

Supreme Court Rules rule 29(1)

JUDGMENT OF ODER - JSC

This is a second appeal. The appellant had sued the respondent in the High Court in Kampala, claiming special damages and costs it had incurred, to repair its semitrailer, damaged in a collision between the semi-trailer and the respondent's train locomotive at a railway level crossing. The suit was founded on alleged negligence by the respondent's locomotive driver, for which the respondent was alleged to be vicariously liable. The locomotive was also damaged in the collision, which the respondent blamed on the appellant for alleged negligence by the driver of the semi-driver. *T h e* respondent counter-claimed against the appellant for costs of repair of the locomotive. The appellant's suit was dismissed with costs, but the respondent's counter - claim succeeded. The appellant appealed to the Court of Appeal against the dismissal of its suit by the High Court. That appeal also failed. Hence this appeal.

The brief facts giving rise to the appeal are that on 26-06-92, the appellant's semi - trailer was moving on Kampala - Port Bell Road and the respondent's train was coming from an industrial railway siding. At the level railway crossing (hereinafter referred to as ***"the level crossing")*** the locomotive rammed on to the semi - trailer. Consequently, extensive damage was caused to the semi trailer and the locomotive. The appellant sued the respondent in negligence. The respondent's counter - claim against the

appellant was also based on negligence. At the trial of the suit the following issues were framed:

1. Whether the accident was caused solely by the negligence of the appellant's driver;

2. Whether the accident was caused solely by the respondent's engine driver;

3. Whether the appellant suffered any loss as claimed;

4. Whether the respondent suffered any loss as claimed in the counter - claim;

5. Remedies, if any, whoever won was entitled to.

The learned trial judge answered issues 1 and 4 in favour of the respondent. He found that the accident had been caused solely by the negligence of the appellant's driver and, that the respondent had proved its counter claim. As remedies, the trial Court awarded Ug. Shs. 280 million on the respondent's counter - claim, costs of the suit, and interest at 12%. The learned trial judge found that the appellant had not proved any special or general damages, and did not award any. This was to be expected as the appellant's driver was found to be solely to blame for the accident. As I have already mentioned the appellant's appeal to the Court of Appeal against the High Court's decision dismissing the suit failed.

The appellant's Memorandum of Appeal set out the grounds of appeal as follows:

1. The learned Justices and Lady Justice of Appeal erred in law and fact in that they failed to realize that the learned trial judge had rendered the whole trial a nullity and thereby prejudiced the appellant by:

(i) entering into the arena of litigation; and/or

(ii) wrongly and without justification, taking judicial notice of allegedly unusual, reckless and arrogant manner in which trailers of the appellant are driven along Port Bell Road in Kampala and elsewhere.

The learned Justices and Lady Justice of Appeal erred in law and fact in that they failed to adequately evaluate and scrutinize the evidence adduced with a view to coming to their own conclusion as a first appellate Court; and thereby prejudiced the appellant by:

(i) Casually and wrongly disregarding the respondent's departure from its pleading as being inconsequential;

(ii) Failing to draw an adverse inference against the respondent from the latter's failure to call Ocaka as a witness;

(iii) Failed to hold that documents not exhibited in evidence were relied on in error;

(iv) Failing to hold that the appellant had, on a balance of probabilities, proved its case against the respondent.

3. The learned Justices and Lady Justice of Appeal erred in law and fact in upholding the award of specific damages.

(i) when such damages were not specifically pleaded and/or proved by the respondent;

(ii) in that they failed to adequately evaluate and scrutinize the evidence with regard to damages thereby failing to notice that the learned trial judge had acted on an erroneous principle in awarding the commercially based and/or excessive sum of Shs. 280, 000, 000= to the respondent as damages.

I wish to point out that the grounds of appeal are argumentative and offend rule 81 of the rules of this Court.

Both parties made written statements of their respective arguments of the grounds of appeal. The appellants written submissions were filed by M/s. Babigumira & Co. Advocates, and those of the respondent by M/s. Kwesiga & Co. Advocates.

Under ground 1 the appellant's learned Counsel submitted that the Court of Appeal did not itself re-evaluate the evidence of the eye - witnesses so as to come to its own conclusion. The Court of Appeal's failure in that regard was a contravention of the duty imposed on it by rule 29(1) of the Court of Appeal Rules. The learned Counsel relied on several decided cases on the point, including ***Kifamunte Henry -vs- Uganda, Criminal Appeal No. 10 of 1997 (SCU)*** (unreported) ; ***Pandya -vs- R. (1957) EA 336; Okeno -vs- Republic (1972) EA 32; Charles Bitwire -vs-Uganda, Criminal Appeal No. 23 of 1985 (SCU)*** (unreported).

It is contended for the appellant that if the learned Justices of Appeal had carried out their duty under rule 29(1) of the Court of Appeal Rules they would have rejected the learned trial judge's condemnation of alleged reckless and arrogant manner in which the appellant's drivers drive on Kampala - Port Bell Road, since there was no evidence proving such alleged manner of driving. This was not a notorious fact of which the learned trial judge was entitled to take judicial notice under section 55 of the Evidence

Act. It is further contended to the effect that the learned trial judge used his own knowledge of the appellant's driver's manner of driving, not evidence. This is inconsistent with the provisions of article 28(1) of the Constitution, which guarantees fair hearing by impartial courts established by law; and contrary to the general principle that justice should not only be done, it must also be seen to be done.

The appellant's learned Counsel then urged us to find that the Court of Appeal failed in its task. Consequently we should proceed to consider the points of law or mixed law and fact raised by the appellant in this appeal to the extent that sections 8 and 12 of the Judicature Statute 1966 and rule 29(1) of the Supreme Court Rules permit, and find that had the Court of Appeal not failed in its duty as the first appellate Court, it would not have merely referred to the trial judge's condemnation of the alleged habit of the appellant's drivers, as it did, but it would have found that what the learned trial judge did was a travesty of justice, making the whole trial a sham. The learned Counsel urged us to so find.

In opposition to the appellant's submissions under this ground, the respondent's learned Counsel contended that the learned Justices of Appeal were alive to, and complied with, their duty as a first appellate court. They properly re-evaluated, assessed and scrutinized the evidence on record. They subjected the evidence to a retrial and made their own finding and conclusion. The learned Counsel referred to the duty of a first appellate Court as explained in - ***Selle and Another -vs- Associated Motor Boat Co. Ltd. and Others (1968) EA 123;*** and by Wambuzi CJ (as he then was) in - ***Milly Masembe -vs- Sugar Corporation of Uganda & Another Civil Appeal No. 1 of 2000 (SCU)*** (unreported).

The learned Counsel then referred to certain passages of the lead judgment by Lady Justice Kitumba, JA as indicating that the learned Justices of Appeal re-evaluated the evidence in the case and reached their own conclusion.

It was further submitted for the respondent that on the issue of whose negligence caused the accident, the evidence considered by the learned trial judge included that of the appellant's driver of the semi - trailer and of the respondent's locomotive driver and documentary evidence, including exhibited photographs, (Exhibit P1). The learned trial judge correctly considered and weighed all the evidence before him and, in the exercise of his discretion, he believed the evidence adduced for the respondent and disbelieved that for the appellant, finding that the appellant's semi - trailer driver was solely to blame for the accident. The Court of Appeal having reevaluated the evidence in the case as a whole, as it did, it upheld the trial Court's finding in that regard. Consequently this Court has no basis for interference with the concurrent findings of the courts below. The learned Counsel relied on - ***Karisa -vs- Solanki (1969) EA 320;*** and ***Pushpa d/o Raojibhai -vs- The Fleet Transport Co. Ltd. (1960) EA 1025.***

In the instant case, learned Counsel contended that this Court would interfere with the finding of fact by the courts below only in exceptional circumstances. Such exceptional circumstances do not exist here.

The learned trial judge's remark which attracted so much wrath from the appellant's learned Counsel was made after the former's evaluation of the evidence of the two drivers (PW1 and DW1) regarding how the accident happened and, in fact, after he had found that the appellant's driver was solely to blame for the accident.

The learned trial judge then remarked:

> **"This** ***Court might, without its being*** **a** ***basis for this decision at all take notice of an unusually reckless and arrogant manner in which trailers of the plaintiff are driven along Port Bell Road in Kampala and elsewhere. A credible animation might depict a bottled driver behind wheels."***

The learned Justices of Appeal disapproved of the learned trial judge's remark in question. Lady Justice Kitumba, JA who wrote the lead judgment cited the passage and said:

> ***"The learned trial judge did not base his decision on that. He clearly stated that it was not the basis of his judgment. I would however, say that the above remark was uncalled for."***

I agree with what the learned Justice of Appeal said. The remark came after the learned trial judge had evaluated the relevant evidence and made the conclusion that the collision between the Semi - trailer and the locomotive had been caused solely by the semi - trailer driver's negligence. The learned trial judge himself said that the remark was not the basis of his decision. Be that as it may, it is apparent that the learned trial judge used his personal knowledge - not evidence - as the basis of his remark. Moreover, such a remark showed an element on the part of the learned trial judge against the appellant. This in my view, is deplorable, because judges should refrain from showing signs of impartiality against any party in cases before them. Provisions of article 28(1) of the Constitution should be strictly adhered to; and justice must not only be done, but it must also be seen to be done. As the learned trial judge said, the remark in question was not the basis of his decision, and the learned Justices of Appeal have accepted his view, I think that the remark in question occasioned no failure of justice to the appellant.

Regarding the complaint that the learned Justices of Appeal did not subject the evidence in the case as a whole to a re-evaluation or fresh scrutiny in order to reach their own conclusion, I do not, with respect, see any merit in that argument. I shall refer to only two passages from the lead judgment to illustrate my view. The first one reads as follows:

> ***"In his evidence in cross-examination Mohamed Ntanda (PW1) testified: - The traffic jam was caused by the driving school vehicle. It stopped suddenly. That is what I thought. According to that testimony, Mohamed Ntanda never saw the driving school vehicle stopping suddenly. The appellant's (sic) witness gave a different version of what happened. I am unable to fault the learned trial judge's finding that there was no explanation for the cause of the traffic jam. In his judgment the learned trial judge evaluated the evidence of the two eye witnesses to the accident and the photographs. He found that the account of the locomotive driver of how the accident happened was more credible than that of the trailer driver. I am prepared to hold that the trial judge came to the right conclusion."***

The second passage reads:

> ***"I agree with the Judge's finding. The accident was not caused by failure of the respondent to observe the duties to keep the railway crossing signs and the road clear. Although the learned Counsel for the appellant put a lot of emphasis on the case of James -vs- The Commissioner for Transport (supra) and the English authorities quoted therein, I find that the facts in the present case are different. There were many stationary vehicles in front of the vehicle waiting for the locomotive to cross. The trailer tried to by — pass them all and in the process was knocked by the locomotive. This cannot be attributed to the respondent's failure in its duty to install warning signals. The collision was entirely due to the negligence of the appellant's driver."***

There is no set format to which a revaluation of evidence by a first appellate court should conform. The extent and manner in which re-evaluation may be done depends on the circumstances of each case and the style used by the first appellate court. In this regard, I shall refer to what this Court said in two cases. In - ***Francis Sembuya -vs- Alport Services Ltd. Civil Appeal No. 6 of 1999 (SCU)*** (unreported), Tsekooko, JSC said at page 11:

> **"I would** ***accept Mr. Byenkya's submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first appellate Court is expected to scrutinise and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial)."***

In - ***Ephraim Orgoru Odongo & Another -vs- Francis Benega Bonge, Civil Appeal No. 10 of 1987 (SCU)*** (unreported), Odoki JSC (as he then was) said:

> ***"While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance."***

I agree with the views expressed by the learned Justices of this Court in the two cases immediately referred to above.

In the instant case, I have no doubt that the Court of Appeal, as the first appellate court lived up to its task as set out in rule 29(1) of the Court of Appeal Rules and as explained in cases such as - ***Selle and Another -vs- Associated Motor Board Co. Ltd.*** (supra). ***Pandya -vs- Republic*** (supra); ***Charles B. L. Bitwire -vs- Uganda*** (supra) and

Kifamunte Henry -vs- Uganda (supra); ***Cognlan -vs- Cumberland (1898) l.Ch.704. (CA); Watt Thomas -vs- Thomas (1947) AC. 484 (H.L.); Abdul Hamid Saif -vs- Alimohamed Slidem (1955) 22, EACA 270; Trevor Price & Anor -vs- Raymond Kelsall (1957) EA 752 and Peters -vs- Sunday Post Ltd. (1958) EA 424.*** There would therefore be no basis for this Court to interfere with the Court of Appeal's finding of fact and law that the appellant's semi - trailer was solely to blame for the accident in question. In - ***Kifamunte Henry -vs- Uganda, Criminal Appeal No. 10 of 1997 (SCU)*** (unreported) this Court said:

> **"It** ***does not seem to us that except in the clearest of cases, we are required to re-evaluate the evidence like a first appellate Court. On second appeal it is sufficient to decide whether the first appellate court on approaching its task, applied or failed to apply such principle. See D. R. Pandya -vs- R (1957) E.A. (supra), Kairu -vs- Uganda (1978) HCB 123.....***
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> ***This Court will no doubt consider the facts of the appeal to the extent of considering the relevant part of law or mixed law and fact raised in any appeal. If we re-evaluate the facts of each case whole-sale, we shall assume the duty of the first appellate court and create unnecessary uncertainty. We can interfere with theconclusions of the Court of Appeal if it appears that in consideration of the appeal, as a first appellate court, the Court of Appeal misapplied or failed to apply the principles set out in such decisions as Pandya (supra), Ruwala (supra) and Kairu (supra)."***

In my view, what the Court said in ***Kifamunte Henry -vs- Uganda*** (supra) applies to the instant case. There is no basis for this court to interfere with the Court of Appeal's re-evaluation of the evidence as it did and the conclusion it reached.

Where a trial Court finds that one of the parties to an accident has not **been guilty** of any negligence which contributed to the accident the Court of Appeal as the first appellate **Court should not,** even if it is doubtful that it **would have** arrived **at the** same decision had it been sitting at the first instance, interfere **with** that finding, which

is largely a question of fact and degree, unless it is satisfied that the trial judge was wrong. See - ***Karisa -vs- Solanki (1969) EA 320 (Court of Appeal for East Africa); Zarina Akbarali Shariff & Another*** **-vs-** ***Noshir Pinoshesha Setha (1963) EA,*** and ***British Fame (Owners) vs- MacGnegor (1943) 1 All. E.R. 33.***

The principle stated in the above cases is applicable to the instant case in which, in my view, there were no errors by the trial court requiring interference by the Court of Appeal in the learned trial Court's finding on negligence. In the circumstances, ground 1 of the appeal should fail.

In his submission under ground 2(i) the appellant's learned Counsel referred to the pleadings of the parties. In paragraph 7 of the plaint the appellant pleaded that its semi - trailer was hit by the respondent's shunter engine and the body of the semi - trailer and prime mover were extensively damaged. In its written statement of defence the respondent pleaded in paragraph 3 that it was its shunter engine which was hit and damaged by the appellant's semi - trailer; and in paragraph 7 of the counter claim, it alleged that the semi - trailer crushed into the respondent's locomotive, causing extensive damage to the latter. In the particulars of damage it was pleaded that as a result of the damage pleaded in paragraph 7, the respondent suffered a loss of DM 399, 598, 801, being costs of materials and Ug. Shs. 558,536= being labour costs respectively for repair of the locomotive. The crush was allegedly a result of the appellant's driver's negligence in the course of his employment with the appellant. In its reply to the counter - claim, the appellant admitted the occurrence of the accident but denied that it occurred in the manner alleged in the respondent's counter claim. The learned Counsel contended that the testimony of the appellant's driver, PW1 was consistent with the appellant's pleadings regarding how the accident happened.

The appellant's Counsel contended that on the other hand, the respondent's locomotive driver testified that he hit the trailer where the cab joins the trailer. This was contrary to

the respondent's pleadings in the W.S.D. and counter claim. The respondent sought to show by evidence in court that it was in fact the train, which crushed into or hit the appellant's vehicle. Yet the respondent's pleading alleging that it was the appellant's trailer which crushed into or hit the respondent's train, was not amended. The respondent's case was therefore contradictory. The trailer could not have hit or crushed into the respondent's locomotive. The story was inconsistent and should not have been believed due to the inconsistency. The evidence of DW1 that the train hit or crushed into the trailer, contrary to what was pleaded, ought to have been struck off as a departure from the pleadings. If this was done the only evidence left would have shown that the respondent's train hit the appellant's trailer, thus confirming that the locomotive driver was the negligent party. In the circumstances, the learned Counsel contended, negligence was proved on the part of the respondent's locomotive driver that he drove or managed the locomotive negligently, carelessly and recklessly and due to the respondent's failure to take reasonable steps to prevent the accident happening. For his submission the appellant's learned Counsel relied on order 6, Rule 6 of the Civil Procedures Rules; ***Pushpa Ravjibhai Patel -vs-The Sheet Transport Company Ltd. (1960) EA. 1026; Esso Petroleum Co. Ltd. -vs- South Corporation 7 (1956) A. C. 218; A. W. Biteremo -vs- Damascus Munganda Situma, Civil Appeal No. 15 of 1991 (SCU)*** (unreported) and ***James Kahigiriiza -vs- Sezi Busasu, HCCS No. MM 32 of 1981 (1982) HCB.148***

The respondent's learned Counsel submitted in opposition to the appellant's submission under ground 2(1) of the appeal. He contended that the cases of ***A. W. Biteremo -vs- Damascus Muyanda*** (supra), ***Pushpa d/o Raojibhai M. Patel vs- The Fleet Transport Co. Ltd.*** (supra) and ***Interfreight Forwarders (U) Ltd. —vs- East African Development Bank, Civil Appeal No. 33 of 1993 (SCU)*** (unreported) are distinguishable from, and do not apply to, the instant case. The learned Counsel further contended that whether a judge is entitled to decree against a party on the basis of an unpleaded cause of action as a departure from pleadings, depends on whether any prejudice is caused to the party complaining; or whether the departure was a mere irregularity. Learned Counsel relied on - ***Francis Sembuya Situma -vs- Alports Services (U) Ltd..*** (supra) ***Dhanji Ramji -vs- Rambhai & Co. (U) Ltd. (1970)***

EA 151; and ***Captain Harry Gandy -vs- Caspair Air Chalters Ltd. (1956) 23 EACA 139.***

In the instant case it is common ground that the respondent's evidence concerning the occurrence of the accident was a departure from its pleadings in the w.s.d. and the counter claim. The form of departure has already been referred to in my review of the parties submissions under ground 2(i). I need not therefore again set out the pleadings and the evidence of the respondent's locomotive driver, Katungi Emmanuel (DW1).

To my mind, the questions for decision under ground 2(i) of the appeal appears to be whether the party complaining had a fair notice of the case he had to meet; whether the departure from pleadings caused a failure of justice to the party complaining (in the instant case the appellant) ; or whether the departure was a mere irregularity, not fatal to the case of the respondent, whose evidence departed from its pleadings.

In my own judgment in the case of - ***Interfreight Forwarders (U) Ltd.*** (supra), I explained in detail the purpose which pleadings serve in litigation. It operates, inter alia, to define and delineate with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases, and upon which the court will be called upon to adjudge between them.

In - ***Captain Harry Gandy -vs- Caspair Air Charter Ltd.***

(supra), Sir Ronald Sinclair said:

> **"the** ***object of pleadings is of course, to ensure that both parties shall know what are the points in issue between them, so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent."***

I agree with that view.

That must be the reason for the legal requirement that a party should not depart from its pleadings.

In the instant case ground 4 of the Memorandum of appeal in the Court of Appeal was that the learned trial judge erred in law and fact when he allowed the respondent to depart from its pleadings. In that court the appellant's learned Counsel put forward arguments similar to those made before us in support of the similar ground of appeal. This is what Lady Justice Kitumba, J.A. said in her lead judgment:

> **"Counsel's** ***complaint in ground 4 is that the learned trial judge erred in law and fact when he allowed the respondent to depart from its pleadings. Counsel contended that the respondent's written statement of defence and counter claim differed from the evidence of its witness, DW1. The pleadings were that the trailer crushed into the locomotive whereas DW1 testified that he rammed into the trailer. In Counsel's view, it was wrong in law to allow the respondent to depart from its pleadings and prove*** **a** ***case it had not pleaded without amending the pleadings. Counsel relies on – Interfreight Forwarders(U) Ltd. -vs- East African Development Bank, Civil Appeal No. 33 of 1993 (SCU)*** (unreported). ***Learned Counsel for the respondent conceded that a party is bound by its own pleadings. He submitted that the test to be applied in the instant appeal was whether the appellant had a fair notice of what was to be proved and whether there was a denial of justice by the apparent departure from the pleadings. The court had to decide which of the two parties was negligent. The question of who knocked or crushed the other was not the main issue. Both parties agreed that the locomotive knocked the trailer and the learned Judge did not have to decide that because it was not contentious."***

The learned Justice of Appeal then reproduced the respondent's pleadings as set out in paragraph 7 of the counter claim and the testimony of Katungi (DW1), and continued:

> **"The** ***learned trial judge considered the arguments of Counsel on the issue of the respondent's departure from its pleadings and held that he did not want to go into details.***
>
> > ***'According to the train driver, he had released the brakes to the defendant's trailer moved into it. This court would not like to go into semantics and is of the view that as the trailer seemed to have been in motion as it sought to cross clear of the level train crossing a collision occurred whereby the nose of the locomotive and the moving body of the trailer were involved. This could be described as crushing for want of better language.'"***

The learned Justice of Appeal then distinguished the case of ***Inter Freight Forwarders (U) Ltd.*** (supra) from the instant one and said that it is not applicable to it. She then continued:

> **"In** ***the instant appeal, there was a collision between the respondent's locomotive and the appellant's trailer. The cause of action was negligence and the issues were framed accordingly. There was no injustice caused to the appellant. The respondent was allowed to prove a case which was clear from the pleadings, issues framed and evidence adduced. Ground 4 should fail."***

I shall not proceed to examine some of the decided cases relied on by the appellant in its submission under ground 2(i) of the appeal. In - ***Pushpa d/o Raojibhai M. Patel vs- The Fleet Transport Company Ltd.*** (supra), the appellant claimed damages for injuries suffered by her when struck by a vehicle belonging to the appellant. It was alleged in the plaint that she was struck by the trailer attached to the lorry and that the driver was negligent, inter alia, by driving a large lorry and trailer too close to the foot path at the left hand side of the road and/or permitting part of the trailer attached

to the lorry to encroach from the road way over the foot path at the left hand side of the road. The defendant denied negligence and in the alternative pleaded contributory negligence on the part of the appellant. At the trial the respondent argued that the appellant was bound by her pleadings and that having failed to prove that she had been struck by the trailer in the manner given in evidence she could not rely on evidence which indicated by inference that she might have been struck either by the trailer or the lorry. In summing up his case to the court Counsel for the appellant conceded that if the front part of the trailer did not hit the appellant then the court should find for the respondent. The trial court dismissed the action holding that how the accident happened was a matter of conjecture and accordingly the appellant had not proved that the injuries were due to negligence of the respondent's driver. On appeal the East African Court of Appeal held that ***(i)*** the trial judge was in error in not drawing the inference that there was a prima facie evidence of negligence on the part of the driver; ***(ii)*** the refusal of the trial judge to accept the evidence of one witness did not alter the incontrovertible fact that the appellant was struck by the lorry or the trailer or the accepted evidence which suggested that she might have been struck by some part of the side of one or the other; ***(iii)*** the admission by the advocate for the appellant was on a matter of law and, if incorrect, was not binding on the appellant; ***(iv)*** it is a salutary and necessary rule that a party is bound by his pleadings, but if particulars are given in undue detail and what is proved varies from them in ways which are immaterial, it remains the duty of the court to see that justice is done and leave to amend will be given at any stage; if, on the other hand, the particulars given have misled the defendant or led him to shape his case in a certain way that would be a very different matter. The appeal was allowed. An order for a retrial de novo was made, and the appellant was given leave to amend her pleadings so as to include collision with the lorry as an alternative to the trailer.

The instant case in my view is distinguishable from that of ***Pushpa d/o Rawjibhaira M. Patel*** (supra). In the latter the East African Court of Appeal appears to have allowed the appeal, ordered for a retrial de novo, and gave leave for the appellant to amend her pleadings on the basis of a combination of two factors. First the errors made by trial judge as reflected in holdings (i), (ii) and (iii). Secondly, the trial court had held that how the accident happened was a matter of conjecture and that the appellant failed to

prove that the injuries she received were due to negligence of the respondent's driver. In the instant case, although what was proved by the respondent differed in detail from its pleadings the appellant, in my view, knew the case it had to meet, namely the alleged negligence by the driver of its semi - trailer. As Kitumba J.A. said in her judgment, the question of who knocked or crushed the other was not the main issue. Both parties agreed that the locomotive knocked the trailer and the learned trial judge did not have to try that issue because it was not contentious. This, in my view, was the substance of the issues framed by consent at the trial of the suit.

Secondly, the trial court found that the respondent had proved its allegation of negligence against the appellant. In the circumstances, my view is that the Court of Appeal rightly held that no injustice was caused to the appellant by the respondent having departed from its pleading in the counter claim regarding the detail of the alleged negligence by the appellant's driver of the semi - trailer.

In ***Inter - Freight Forwarders (U) Ltd.*** (supra) the cause of action as stated in the plaint and reflected in the issues framed by the parties at the trial was negligence. But the learned trial judge erred when he found in the alternative, that the respondent was liable on a different cause of action namely, as a common carrier, which puts strict liability on the carrier for any change or loss to goods he accepts to carry. This court upheld the ground of appeal complaining against the trial judge's finding to that effect on the ground that the cause of action proved was a complete departure from what had been pleaded by the respondent. That case is therefore, distinguishable from the instant one.

In the case of ***Esso Petroleum Co. Ltd.*** (supra), an oil tanker was stranded in a river estuary and, to prevent her breaking her back, the master jettisoned 400 tons of her oil Cargo which the tide carried to a foreshore, occasioning damage. The foreshore owners brought against the ship owners an action based on trespass, nuisance and negligence, alleging that the stranding was caused by faulty navigation. The defence

denied negligence. At the hearing the ship owners' case was that the stranding was due to the tanker's frame being cracked so that the steering gear was faulty, but they adduced no evidence to show how this condition was caused. The trial judge held that they (the ship owners) were not negligent as alleged in the statement of claim and that the foreshore owners were not entitled to succeed either in nuisance, trespass or negligence. The Court of Appeal held that the doctrine of res ipsa loquitor applied, and that the onus was on the ship owners to explain why the steering went faulty. They were liable in negligence. On appeal to the House of Lords, it appeared to be a common ground that there would be a good defence in any event unless negligence was established. The House of Lords held that since every allegation in the statement of claim was rightly decided by evidence adverse to the foreshore owners, who had made no allegation of unseaworthiness, the ship owners could not be held responsible because they did not negative a possible case which was not alleged against them. That case, too, in my view is distinguishable from the instant case. The foreshore owners did not base their case on unseaworthiness of the oil tanker. So the ship owners could not be held liable on the basis of a cause of action not pleaded against the ship owners. In the instant case the respondent's case in its counter claim against the appellant was founded on negligence, which was pleaded, and which the learned trial judge found had been proved. The Court of Appeal agreed with that finding, rightly so, in my view.

The case of ***A. W. Biteremo -vs- Damascus Muyanda Situma*** (supra) was about a dispute over property of an Asian expelled from Uganda in 1972. Biteremo, the appellant, sued Situma (the respondent) in the High Court to regain possession of the premises. The respondent, in his defence, pleaded that he had never occupied the premises at all. In view of the respondent's evidence admitting that he subsequently occupied the premises with permission of the local Resistance Council or the N.R.A. this Court revaluated the evidence and reached its own conclusion, finding that he had occupied the premises illegally and allowed the appellant's appeal, reversing the trial court's decision. That case is clearly distinguishable from the instant one in that the respondent's evidence in that case was the opposite of what he had alleged in his pleadings which, in my view, is different from the instant case.

In the case of ***Francis Sembuya -vs- Allports Services (U) Ltd.*** (supra), in his lead judgment, Tsekooko - JSC, followed the decision of the East African Court of Appeal in ***Dhanji Ramiji -vs- Rambhai (1970) E.A. 515*** the facts in which and the issues for decision were similar to those in the former case.

In the latter case the respondent sued the appellant and another man as trading in the name of a firm and alleged that they were carrying on a business in partnership. The appellant's defence denied that he was a partner in the firm. The trial judge found that the appellant had been introduced to the respondent as a partner in the firm and that he had not received notice of any retirement of the appellant. The judge, therefore, held that the respondent was entitled to treat the appellant as a partner in the firm. The appellant appealed, contending that liability to be treated as a partner was not pleaded, and, as such, was inconsistent with the respondent's cause of action and that the trial judge was not entitled to give judgment on unpleaded issues. The East African Court of Appeal held inter alia, that ***(i)*** the facts relied upon to make the appellant a partner had been pleaded; ***(ii)*** nevertheless, the appellant was prepared to meet the case of apparent partnership as most of the evidence in support of it was elicited by the appellant's cross-examination and the judge was addressed on it; ***(iii)*** there was no prejudice to the appellant as the unpleaded cause of action became an issue at the trial. In his judgment Law JA, referred to ***Gandy -vs- Capanir Air Charter Ltd. (1956) 23 EACA*** and said:

> ***"The question therefore arises: was the judge entitled to decree against the appellant on the basis of apparent membership of a firm, when the only basis pleaded was actual membership? The answer to this question depends, I think, on whether any prejudice was caused to the appellant, in that judgment was given against him on an unpleaded cause of action which he had no reason to anticipate and no opportunity to prepare to meet. There are indications on record that the appellant was prepared to meet a case based on apparent membership, although the ingredients required to found such a cause of action had not been pleaded."***

In my view the facts and circumstances of those cases justified the decision of the E. A. Court of Appeal in ***Ramiji*** (supra) and of this Court in ***Francis Sembuya*** **Situma** (supra) regarding departure from pleadings.

In the instant case, I agree with the finding of the Court of Appeal as reflected in the passages of the lead judgment of Lady Justice Kitumba JA, to which I have already referred in this judgment. In the circumstances, ground 2(i) of the appeal should fail.

Under ground 2(ii) of the ground of appeal, the appellant's learned Counsel submitted that because the respondent did not explain Elly Ocaka did not testify as its witness that failure ought to have attracted our adverse inference against the respondent. For this submission, the learned Counsel relied on ***Pushpa Ravijbhai*** (supra), and ***Bukenya and Others -vs- Uganda (1972) E.A. 549.***

Under the same ground the learned Counsel also submitted that the evidence of the respondent's locomotive driver, Katungi Sammuel (DW1) having contradicted the respondent's pleadings it ought to have been struck off, leaving nothing to show that Ocaka got out of the locomotive and signaled approaching vehicles to stop.

In opposition, the respondent's learned Counsel submitted that the authorities relied on by the appellant are distinguishable and irrelevant to the complaint in ground 2(ii) of the appeal. Counsel then referred to section 132 of the Evidence Act (Cap. 43) which provides that subject to provision of any other law in force, no particular number of witnesses shall in any case be required for the proof of any act.

The Court of Appeal dealt with the complaint now raised in ground 2(ii) of the appeal as follows:

> "On ***failure to call Ocaka the trial judge found that this could not be a basis that the plaintiff had (sic) discharged its burden of proof. I agree. The respondent called DW1 the eye witness to prove their case of how the accident happened. There is no number of witnesses in law required to prove any fact unless provided so by law. See:*** *section 132 of the Evidence Act (Cap.*

*43, Laws of Uganda)**. With due respect to Counsel for the appellant** Bukenya and Others* **-vs-** *Uganda* ***(supra) is an authority on the duty of the prosecution to call all material witnesses to establish the truth even where their evidence may be inconsistent and*** *J. K. Patel -vs- Spear Motors Ltd.* ***(supra) does not lay down a rule that all material or all eye witnesses must be called otherwise an adverse inference is to be drawn."***

In my own view, the case of ***Pushpa*** (supra) is distinguishable from the instant case. That was an accident case, where the victim (the plaintiff) did not testify. An adverse inference was held against her because she did not testify as a witness as a result of which the trial judge made an adverse inference against her and dismissed the suit. She appealed. Gould J.A. of the East African Court of Appeal said at page 1033 ***"whether an adverse inference should be drawn from the fact that a particular witness has not been called is a matter which must depend upon particular circumstances of each case. In the case of a child seven years of age when the accident occurred, the decision whether or not to call her to give evidence over*** a ***year later would not be an easy one. In view of the opinion on the facts which I have expressed above this question is now hardly relevant and I will content myself with the observation that I doubt very much whether in the circumstances an adverse inference of any materiality was justified."***

On the facts and the decision of East African Court of Appeal, the case of Pushpa (supra),in fact, seems to be against the appellant on the point under consideration.

As the Court of Appeal said, the case of ***Bukenya and Others*** (supra) is also distinguishable from the instant case. In the circumstances I am in agreement with Kitumba, J.A., in the passage of her judgment to which I have referred above. Ground 2(ii) of the appeal should therefore, fail.

The appellant's complaint under ground 2(iii) of the appeal is that the same point was raised in the Court of Appeal, but that that court never considered it at all. That was an error, it is contended. The appellant's learned Counsel adopted his submission in the Court of Appeal and urged us to deal with the matter. In my view, this court has the power to consider the complaint if, indeed, it was omitted by the Court of Appeal under section 8 of the Judicature Statute, 1996.

The submission of the appellant's learned Counsel in this regard in the Court of Appeal was based on the same ground as ground 2 (iii) of this appeal. The point was argued to the effect that the Police Accident Report which was annexed to the plaint was not adduced in evidence and yet the trial judge relied on it when he said in his judgment:

> ***"The Police Accident Report was not produced in evidence though it was annexed to the plaint. The Report and the sketch map attached to it tend to reflect the evidence on the photographs as well as (sic) and particularly so the story of the accident as related by the train driver rather than the plaintiff's trailer."***

For this submission, the learned Counsel relied on ***Des Raj Sharm -vs Regina (1953) 20, EACA 310.***

Under this ground of appeal, the respondent's counter argument put forward by its learned Counsel was that the parties' respective pleadings indicated that they both admitted the authencity of the police accident report and the sketch plan. These are in paragraph 5 of the plaint and paragraph 7 of the written statement of defence. These documents were not contested. Consequently, the learned trial judge did not err to rely on them. The learned Counsel contended that this argument is supported by the principle of law embodied in section 56 of the Evidence Act (Cap. 53) that no fact need be proved in any proceedings which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they are deemed to have admitted by their pleadings. It is also submitted that, in any case, even if the evidence of the police accident report and the sketch plan were expunged from the

record, there would still remain abundant evidence on record for a finding against the appellant.

According to paragraph 5 of the amended plaint the appellant pleaded that on 26-06-92, the appellant's semi -trailer was hit by the respondent's shutter engine at the Railway Crossing on Old Portbell Road, Industrial Area. As a result, the body of the appellant's semi - trailer and prime - mover were extensively damaged.

"A *copy of the police accident report and vehicle inspection report are attached as UBL2A and UBL2B respectively."* The amended plaint was filed on 30-04-96, about three years after the written statement of defence and counter - claim had been filed.

In paragraph 7 of the respondent pleaded when locomotive and the semi w.s.d. and counter - claim, the and how the collision between its - trailer happened and continued:

"The defendant shall rely on a police accident and vehicle inspection report and sketch plan similar to those relied on by the plaintiff attached to the plaint as UBLZA and UBLZB respectively."

It is to be observed that the police accident report and sketch plan were treated together by both parties to this case.

At the commencement of the trial issues were framed in the form I have already referred to early in this judgment.

In his testimony Mohumd Ntanda (PWl) the appellant's semi -trailer driver referred to the police having visited the scene of accident although he said nothing about a police accident report or sketch plan having been made.

In re-examination, he said that he had seen police sketch plans, but that he was not used to them. Marion Kagyetibahiganya (PW2) testified that he relied on the police sketch plan for making her inspection report (Exbt. P.2).

In his *written submissions, in the* trial court, all *that the appellant's learned Counsel said about the* police *accident report was*:

> ***"The Police Accident Report which could*** **have been useful was *almost* useless.** ***Since it did not for example indicate the existence of bushes or other vehicles on the road yet both PW1 and DW1 do agree that there were at least three other vehicles at the scene of the accident."***

It must be observed here that in that submission, the appellant's learned Counsel did not submit that because the police sketch plan had not been exhibited in evidence it should be ignored. His point was that the sketch plan was useless because it did not support DWl's evidence regarding the presence of bush along the railway line. He said nothing about the police accident report.

It is, indeed, correct that the learned trial judge relied on the police accident report in finding that the accident occurred in the manner described by the respondent's DW1. I have already set out in this judgment how the learned trial judge did so.

The case of ***Situma -vs- Regina*** (supra) states the general principle of law that there is a distinction between exhibits and articles marked for identification. The term ***"exhibit"*** should be confined to articles which have been formally proved and admitted in evidence. That general principle, in my view, does not apply to the police accident report and sketch plan in the instant case because the manner in which the parties here relied on the two documents in their pleadings; referred to them in their

respective evidence and in the closing address of the appellant's learned Counsel at the trial were all on the apparent assumption that the documents in question were admitted in evidence. In my view, the parties are deemed to have accepted the police accident report and the sketch plan as evidence. The provisions of section 56 of the Evidence Act apply to the instant case. In the circumstances my view is that the learned trial judge rightly relied on the two documents in arriving at his decision to prefer the evidence of DW1 to that of PW1 regarding how the accident occurred. Ground 2 (iii) of the appeal must, therefore, fail.

Next, ground 2 (iv) of the appeal. The substance of this ground and the submissions by the learned Counsel for both sides have in my view, been covered by the submissions under grounds l(i) and (ii) and 2(i), (ii) and 2(iii). My consideration and conclusions in those grounds also dispose of ground 2 (iv) which, in my view, I need not repeat here. I see no merit in ground 2(iv). It should fail.

The complaint in ground 3 of the appeal is that the learned Justices of Appeal erred in law and fact in upholding the award of special damages, when such damages were not pleaded and or proved, and because they failed to notice that the learned trial judge had acted on erroneous principle in awarding the commercially based and/or excessive sum of Shs. 280, 000, 000= or DM400, 000 to the respondent as damages. Under this ground of appeal the appellant's learned Counsel submitted that the respondent's pleading in paragraph 8 of its w.s.d. and counter claim indicated that it was a specific claim for refund of repairs and labour already done. On the contrary, the evidence of Daudi Murungi (DW2) revealed that no such repairs had yet been done. DW2's testimony was a departure from the pleadings as he testified on mere assessment by visual inspection only. Learned Counsel submitted that this departure was not addressed by the trial judge; nor by the Court of Appeal which upheld the former's award of DM400,000 or Uganda Shs. 280 million. It was submitted that this was a serious error by the lower two courts. If the two courts had addressed the issue, the offending testimony of DW2 would have been struck off or found to be untruthful. In either case, the claim for specific damages by the respondent would have been found not pleaded and not proved. The learned Counsel also relied on the case of

Kibimba Rice Co. Ltd. -vs- Umar Salim Civil App. No. 7 of 1998 (SCU) (unreported) for the proposition that claims for repairs not carried out should not be allowed. In the instant case learned Counsel submitted that the trial court and the Court of Appeal should have rejected the claim for special damages as not having been proved.

Even if the respondent were to be awarded what was claimed, DW2's report (Exhibit Dl) presented two scenarios. The report said that the cost of spare was DM206, 912 FOB or DM213,119.36 CIF Kampala. Labour charges as pleaded by the respondent was Shs. 558,536=. The second scenario from DW2's report was that ***"total cost of repairs including labour and overheads would"*** amount to DM400,000 if the repair had been done by the respondent for a private customer. In the circumstances, the appellant's learned Counsel contended that given that the cost of necessary spares CIF Kampala was DM213,119.36 and the respondent's cost of labour component was Shs. 5 5 5 , 536- it was clearly apparent that one half of the DM40C. 000 would be profit to the respondent if the repair work was done by the respondent for a private customer. That figure, therefore, was not compensatory.

The other argument by the appellant's learned Counsel under this ground was that there was no evidence before the trial court showing the rate of exchange used to convert D.M. to Uganda Shillings. DW2 was not a competent witness to testify on the matter. For this learned Counsel relied on ***Uganda American Insurance Company Ltd. —vs- Phocas Ruganzu, Civil Appeal No. 10 of 1992 (S****CU)* (unreported), the decision of which is to the effect that rates of exchange should be ascertained either by oral evidence or a certificate from a bank official.

In his counter argument under ground 3 of the appeal, the respondent's learned Counsel submitted that the respondent, in its w.s.d. and counter claim, pleaded that it had suffered extensive damages, the particulars of which were attached as annexture D4 to the w.s.d. and counter claim as the Chief Mechanical Engineer's Report. As it was held in ***G. W. Katatumba t/a Technical Plan -vs- Uganda Co-operative Transport Union Ltd., Civil Appeal No. 23 of 1993, (SCU)*** (unreported); in ***Castelino -vs- Rodrigues (1972) E.A. 223,*** and in ***G.M. Combined (U) Ltd -vs- A.K. Detergent & Others, Civil***

Appeal No.7 of 1998 (SCU) (unreported) a document attached to the plaint forms part of it and must be read together with the plaint.

On the basis of those authorities, since the Chief Mechanical Engineer's Report was attached to and referred to in the w.s.d. and counter-claim, its contents must in law be considered to have been incorporated in the plaint. It followed, therefore, that the special damages claimed, were strictly pleaded.

As regards proof thereof, the respondent's learned Counsel contended that the special damages were proved by Daudi Murungi in his testimony as DW2. His evidence, it was contended, showed strict proof of the cost of repairs, namely cost of spares, cost of insurance, freight and labour, totaling DM400,000, equivalent to Uganda Shillings 280 million. It is contended for the respondent that DW2's testimony of how he calculated the total amount of damages sought was not challenged by the appellant; nor did the appellant controvert that evidence. Proof of the claim was a matter of fact and a requirement of law. The appellant's argument that its implied admission of DW2's evidence proving the special damages was not proof thereof was, therefore, wrong.

On the appellant's complaint that the damages claimed by the respondent did not arise from repairs which had been carried out but merely estimated cost of spare parts and labour, the respondent's learned Counsel submitted that the cases of ***Kibimba Rice Co. Ltd. -vs- Umar Salim*** (supra) and ***Board -vs- Issa Bukenya t/a New Mars Warehouse, Civil Appeal No. 26/92 (SCU)*** (unreported, did not apply to the instant case.

In the instant case evidence regarding the cost of repairs was adduced by the respondent's Acting Managing Director at the time of the trial of the suit, Daud Murungi (DW2) who was a Works Engineer at the respondent's Workshop at the time of the accident. In that capacity he inspected the accident locomotive, assessed the damage and cost of repairs. He had been doing the same job since 1972. His

assessment figures exhibit D1 were not disputed or challenged by the appellant. Nor was it contradictory to the pleadings or evidence as a whole.

With regard to the issue of foreign exchange, the respondent's learned Counsel argued that the case of ***Uganda American Insurance Co. Ltd.*** (supra) was distinguishable from the instant case in many respects. ***(i)*** in the ***Uganda. American Insurance Co. Ltd. case*** (supra) the plaintiff/respondent was an ordinary person and lacked experience in foreign exchange transactions, but in the instant case, the respondent's DW2 who gave the relevant oral evidence was its acting Managing Director. As such he was conversant and competent in day to day foreign exchange rates and transactions. He based his assessment of the costs of spare parts on prices from catalogue, and he had been involved in such assessment and purchase of spare parts since 1972. The catalogue was also produced. ***(ii)*** in the instant case, there were alternatives for payment in Uganda currency or foreign currency, namely either DM400,000 or Uganda Shs. 280,000,000= There were no such alternatives in the ***Uganda American Insurance Co. Ltd. Case*** (supra). ***(iii),*** in the instant case, the appellant's Counsel did not question the exchange rate asserted by DW2.
(iv), in ***Uganda American Insurance Co. Ltd.*** (supra), there were unclear or unanswered questions regarding whether the exchange rate was at the time of the purchase or at the time of judgment, but such questions did not arise in the instant case, because DW2 testified that the ruling rate were those at the time of the accident, 1992.

Finally, the respondent's learned Counsel submitted that onthe authority of ***Interfreight Forwarders (U) Ltd.*** (supra) courts in this Country can grant an award or relief in foreign or local currency. In the instant case, the respondent prayed for an award or relief in Uganda Shs. 280 million or DM399,598 as the total cost of spare parts and repairs of the locomotive. The learned Counsel prayed that if this court wished to interfere with the Court of -Appeal's decision regarding the currency in which the award for special damages should have been made, the currency should be DM, because that is the currency in which the spare parts for the damaged locomotive were to be purchased.

In its w.s.d. and counter claim, the respondent pleaded, inter alia:

> ***"PARTICULARS OF DAMAGE***
>
> ***As per the defendant's Chief Mechanical Engineer's Report attached here to and marked D4. As a result of*** the ***damage in paragraph 7 above, the defendant suffered a loss of Deutsch Mark 399,598.80 (three hundred ninety nine thousand five hundred ninety eight point eight zero) being cost of materials and Uganda Shillings 558,536 (five hundred fifty eight thousand five hundred thirty six) being labour cost, respectively, for the repair of the said locomotive. It is the defendant's contention that the crush, was a result of the plaintiff's driver's negligence in the course of his employment with the plaintiff."***

The respondent's prayer was in the following terms:

> ***"(i).....***
>
> ***(ii) allow the defendant's counter claim and pass judgment against the plaintiff for;***
>
> (a) ***the*** sum ***of DM399,598.80;***
>
> (b) ***the*** sum ***of Ushs. 558,536=."***

It follows clearly that the special damages prayed for were pleaded. This was consistent with decisions in ***George William Katatumba*** (supra) and ***Castelico -vs- Rodrigues*** (supra). Proof of the special damages claimed was said to have been

done by the evidence of respondent's Assistant Chief Mechanical Engineer at the time of the accident (David Murungi (DW2).

The lead judgment of Kitumba J.A., dealt with the trial judge's award of special damages this way:

> ***"Ground 3 is that the learned trial judge erred In law and in fact to award Ug. Shs. 280 million on the respondent's counter claim. There was not enough evidence to prove the same by the standard required of proof of special damages. Counsel contended that DW2 was not a competent witness to give reliable information on the exchange rate and the trial judge simply awarded Shs. 280 million without inquiring into the matter. Counsel relied on*** *Uganda American Insurance Company Ltd. -vs- Phocas Ruganzi, Supreme Court Civil Appeal No. 10 of 1992* ***(unreported). For the holding that the rate of exchange should be oral evidence or certificate from Bank Officials or other recognized experts in currency exchange. On the other hand Counsel for the respondent contended that the respondent specifically and sufficiently proved the claim. DW2 made the report, Exhibit D.l, and testified that spare parts, handling charges and labour would cost DM400,000 or Ug. Shs. 280 million. I agree with the respondent's submission that DW2 was not cross-examined on how he arrived at a figure of Ug. Shs. 280 million. In my view this was an admission on this point. Besides, DW2 was the respondent's Acting General Manager and before then he had held the position of a Mechanical Engineer. He*** must ***have been conversant with the rate of exchange of DM which was the currency used to purchase locomotive spares. This case is distinguishable from*** *Uganda American Insurance Co. Ltd. -vs- Phocas Ruganzu****(supra), where the complainant was a lay man and was not conversant with the rate of exchange of the Zimbabwean dollars to Uganda Shillings."***

The learned Justice of Appeal did not specifically deal with the appellant's complaint that the amount claimed by the respondent as special damages was not the cost of repairs of the locomotive actually carried out. But I think that by implication, she rejected that argument by upholding the trial judge's award of the damages. In my view the instant case is distinguishable from the case of ***Kibimba Rice Co. Ltd.*** (supra) in that spare parts for repairing the locomotive had to be imported from Germany the Country from which the respondent usually imported spare parts for its locomotives, and paid for in German Currency, the D.M. It follows that the actual cost of repairs would be known only after the spare parts had been imported and after the repairs carried out.

I also agree with the learned Justices of Appeal that DW2 was competent enough to convert the rate of exchange between the DM and the Uganda Shillings in view of his experience in that respect. In the circumstances it was not necessary to call evidence from a bank official regarding the rate of exchange between the D.M. and the Uganda Shillings.

The quantum of special damages to which the respondent was entitled to ought to have been proved by the respondent and properly assessed by the trial court.

I do not, however, with respect, agree with the learned Justices of Appeal that the appellant should be deemed to have admitted the quantum of special damages claimed by the respondent, namely DM400,000 or Ug. Shs. 280 million. This was the award made by the trial court and upheld by the Court of Appeal. In the circumstances of this case, I think that failure by the appellant to cross-examine DW2 on the matter, does not necessarily mean that it accepted these figures.

In my view, the award of Shs. 280 million or DM400, 000 cannot be left to stand. On the authority of ***Bank of Uganda —vs- F. W. Masaba*** (supra), this court can interfere

with the award, because it was not properly assessed and was made on wrong principles.

These are my reasons:

Special damages pleaded by the respondent was Deutsch Marks 399,598.80 as cost of materials. In his testimony, however, DW2 spoke of prices of spare parts from the catalogue and said:

> ***"I also looked out (sic) for their prices. The total prices are on the report is there. Its spares 206912 FOB (1992 prices). Handling and CIF it could be DM213,116.36. These are some spares. The labour and spares component would cost DM400,000."***

On this point DWl's Report, exhibit D.l ended by saying:

> ***"The total cost CIF Kampala is about DM213,119.36. If this work is to be done for a private customer, total cost of repairs including labour and overheads would amount to D.M.400,000."***

To my mind DW2's testimony and his Report (DW1) and the respondent's pleading raised the following questions, to which there are no answers:

(i) Why is the pleaded figure of DM399,598.80 as cost of spares different from the figure of CIF Kampala D.M.213,119.36?

(ii) Out of the total cost of repairs including labour and over heads of D.M.400,000 what is the cost of each of those items?

(iii) Is the costs of labour pleaded as Shs. 558,556 different or the same as the cost of labour included in (ii) above?

(iv) Why should the cost of repairs be the same as cost of repairs chargeable to private customer, when it was the respondent's locomotive to be repaired at its own workshop?

Be that as it may, the evidence of DW1 (Daudi Murungi), and his report (Exh.Dl) show that the catalogue price of spare parts from Germany was DM.213, 116, 36. This evidence was accepted by the trial court and the Court of Appeal. My view is that only that item of special damages was proved by the respondent. Other items of special damages claimed were not proved.

In the circumstances, I would award (DM 213, 116, 36 as special damages to the respondent.

In the result, this appeal should partially succeed, and the appellant should have 1/4 of cost and the respondent 3/4 of the costs here and in the courts below.

JUDGMENT OF KAROKORA, JSC.

I have had the advantage of reading in draft the judgment prepared by Oder, JSC and I agree with him that the appeal should fail except ground 3(ii) of the appeal, which should succeed. I also agree with the orders he has proposed.

I have go nothing useful to add.

JUDGMENT OF MULENGA JSC

I have read in draft the judgment of Oder JSC. I agree that the appeal ought to succeed only in part and I concur with the orders proposed by him.

I wish to associate myself with his disapproval and reprimand of the trial judge for remarking without any supporting evidence that he ***"might*** (sic***) ...take notice of an unusually reckless and arrogant manner in which trailers of the plaintiff are driven along Port Bell Road in Kampala and elsewhere."*** and volunteering his mental image of a ***"a bottled driver behind*** (they ***wheel."*** This, in my view, is glaring prejudice, and the learned judge's assertion that it was not a basis for his decision does not mitigate it. Whilst it may well be that the remarks were not basis for the decision, it does not

appear to be so for there appears to be no other reason for his making the remarks. In my view a judge possessed of such knowledge as the learned trial judge appears to have been, would do better for the ends of justice by excusing himself/herself from trying the case rather than risking to be, or to appear to be prejudiced.

From the evidence on the record, however, 1 think that even another judge who did not have that knowledge, would have found, as the Court of Appeal did on the first appeal, that the evidence adduced was sufficient to support the holding that the collision in the instant case was caused by the negligent driving of the appellant's driver. 1 am therefore satisfied that no miscarriage of justice was occasioned.

JUDGMENT OF ODOKI, CJ

I had the benefit of reading in draft the judgment of Oder, JSC. I agree with him that the appeal should partially succeed. I concur in the orders he has proposed.

As the other members of the court agree with the judgment of Oder, JSC and the orders he has proposed, an order is made in the terms proposed by Oder, JSC.

JUDGMENT OF KANYEIHAMBA, J.S.C.

I have had the benefit of reading the judgment in draft prepared by my learned brother Oder, J.S.C., and I agree with him that except for ground 3 (ii) which should succeed, the appeal fails. I also agree with the orders he has proposed.

Dated at Mengo, this 22nd Day of April 2002

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