REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI, CJ; ODER, TSEKOOKO, KAROKORA, AND MULENGA, JJ.S.C.)

CIVIL APPEAL NO. 6 OF 2002

BETWEEN

NURU KAAYA :: APPELLANT

AND

CRESCENT TRANSPORTATION LTD ::::::::::::::: RESPONDENT

[Appeal from the judgment of the Court of Appeal at Kampala (Mukasa-Kikonyogo, DCJ., Okello and Twinomujuni, JJ.A) dated 3rd August, 2001 in Civil Appeal 37 of 2000]

JUDGMENT OF TSEKOOKO, JSC:

This second appeal arises from the decision of the Court of Appeal which reversed a decision of the High Court by Okumu-Wengi, J.

The facts giving rise to this appeal are clear. The appellant, *Nuru Kaaya*, was the plaintiff in the High Court. The respondent, Crescent Transportation Co. Ltd., was the defendant.

The appellant imported goods from Indonesia. The goods came by sea up to Mombasa Port in Kenya. The appellant entered in an agreement with the respondent for the latter to transport those goods, valued at US$ 33,396, by road from Mombasa to Kampala. A container loaded with the appellant's goods was entrusted to the respondent in Mombasa to deliver to the appellant in Kampala. The container was indeed delivered by the respondent in Kampala where the appellant acknowledged receipt of the container by signing a delivery note. In Kampala the container's seal was broken in the presence of the officials of Uganda Revenue Authority. The appellant then discovered that there were fewer bales and fewer gunny bags than what she had imported. An inspection of the container by the Police suggested that the container had been tampered with and so the appellant assumed that the container was broken into resulting in the loss of the goods. The appellant held the respondent liable for the loss. She therefore instituted a civil suit in the High Court against the respondent claiming for special damages, general damages and costs.

In the pleadings and during the trial the contract of carriage was admitted. The contention of the respondent was that it delivered all the goods it received in Mombasa for transportation to the appellant in Kampala.

Four issues were framed for determination. The trial commenced on 20/4/2000 on which date the appellant testified as PWl. In the course of her cross-examination, it transpired that she did not have the packaging list of the goods which Mr. Tayebwa, counsel for the respondent wanted to view in order to cross-examine her on it. The hearing was adjourned to 8/5/2000. On that day a witness named Patric Mutume (PW2) testified. He was expected to produce the packaging list. He produced other documents but not the packaging list. After the testimony of Ayitegereize Joy, the plaintiff's 3**rd** witness, the appellant through her counsel, Mr Byaruhanga, sought further adjournment and applied for witness summonses for other witnesses." The matter was adjourned to 26/5/2000. On that day (26/5/2002) Ali Lugudo (PW4) a Government Chemist testified about evidence of tampering with the container. Because she was unable to get police witnesses, the appellant closed her case. The case was then adjourned, at the instance of the respondent's counsel, to 26/6/2000 for hearing the defence. On that day the relevant part of the record of the court reflects this -

"Tayebwa I have a problem. Seek court's indulgence. Wrote to my client informing them of hearing date. They instead thought the hearing is tomorrow. I pray for adjournment for court to accommodate us tomorrow."

Court:- Do you have a copy of letter you wrote to them or their reply?

Tayebwa: Unfortunately I have not come with them. No reply either.

Byaruhanga: "I do not know what to say. Had he consulted me prior I would have conceded."

Thus although the plaintiffs counsel appeared accommodative, the court was in a different mood. The record further reads as follows:-

"Court: the defendant has failed on adjourned hearing to proceed with his case. It is inconceivable that a person can read 23rd when he is informed of 22nd June. I therefore invoke Order 15 rule 4 of the Civil Procedure Rules and enter judgment for the plaintiff as prayed with costs."

As there were no submissions by either counsel on the merits of the case the learned judge must have relied on the prayer in the plaint to give judgment for the plaintiff (the present appellant.)

The respondent appealed against that judgment to the Court of Appeal and listed three grounds of appeal.

The first ground which is particularly pertinent stated that -

"The learned trial judge wrongly exercised his discretion when he refused to grant an adjournment to enable the appellant call its witness and proceeded to immediately enter judgment for the respondent for UD$ 58,396."

All the three grounds of appeal were upheld by the Court of Appeal which set aside the judgment of Okumu-Wengi, J.

The Hon. Mr. Justice Twinomujuni, JA. gave the lead judgment with which the Deputy Chief Justice and the other member of the court concurred. The learned Justice of Appeal assessed the evidence tendered by the appellant and then concluded that the appellant had failed to establish her claim. So the court dismissed the suit. The appellant has brought this appeal based on five grounds of appeal. In my view the success of this appeal depends largely on the success of the fifth ground. I find it necessary to first consider that ground which reads as follows.

> "5. The Honourable Judges of Appeal wrongly exercised their discretion when they declined to order that the matter be sent back to the High Court for a retrial after they had correctly observed that there were injudicious exercises of discretion that were fatal to the whole trial - and they led to disastrous consequences."

Mrs. Mulyagonja-Kakooza, counsel for the appellant, made two points to support her contention that the Court of Appeal should have ordered for a retrial of the case. First she contended that the court should have ordered a retrial because it found that the decision of Okumu Wengi, J., refusing the application for adjournment was an injudicious exercise of discretion. Secondly she contended that the court found that Okumu-Wengi, J., also acted

injudiciously in the manner he entered judgment for the appellant. According to learned counsel, the Court of Appeal, having concluded that both actions were fatal to the trial should have ordered for a retrial. She criticised that court for holding that there was no need for retrial. She relied *on R.M. Khemaney Vs Ll. Murlindhare* (1960) EA 268 and *Kawoya Joseph Vs Uganda S.Ct Crim. Appeal 50 of 1999* (unreported) to support her view that a retrial was the proper course. She prayed that we order for a retrial and that in the event we dismiss the appeal, we should order for each party to bear its own costs.

Mr. Tayebwa, counsel for the respondent, first argued a general point, that the grounds of appeal as formulated offend the rules of this Court in that the grounds are argumentative as well as narrative. He asked us to strike out the memorandum of appeal. He based his objections on Bank of Uganda Vs Transroad Ltd. S.Ct. Civil Appeal 3 of 1997 (unreported) and *Adonia Nakudi Vs C.K. Mukasa Ct. Appeal Civil Appeal 2 of 1986)* (1992) 5 KALR 124. Further, Mr Tayebwa, argued that all the grounds of appeal had no merit and that the appeal should be dismissed.

Concerning the merits of ground five, learned counsel contended that wrong exercise of discretion by the trial judge did not affect the appellant's case because she had closed her case. Therefore, counsel submitted, the Court of Appeal was justified in not ordering a retrial. He argued that even if a retrial was ordered, only defence could give evidence. Counsel relied on Rule 29 of the Court of Appeal Rules and S. 12 of the Judicature Statue, 1996, for the view that the Court of Appeal had power to re-evaluate the evidence on record and form its own conclusions as it did in this case. Counsel relied on *Khemaney Case* (supra) for the view that it is undesirable to order a retrial contending that in ordering a retrial, an appellate court must bear in mind the circumstances of each case.

Mr. Tayebwa must have had in mind Rule 81(1) of the Rules of this Court when he belatedly raised the objection to the formulation of the grounds of appeal which he contended were argumentative and narrative. Mrs. Mulyagonja-Kakoza, took objection to the last point contending that the respondent's counsel required leave of this court in order to raise that point of objection. She relied on Rule 97(b) in support. With respect to Mrs Mulyagonja-Kakooza, I think that the provisions of paragraph (b) of rule 97 do not apply

to the type of objection raised by Mr. Tayebwa. Paragraph (b) is concerned with objections challenging the competence of an appeal and not to technical defect in form of the memorandum of appeal. Objections to formulation of grounds of appeal may be raised at anytime up to the time of the hearing of the appeal. Of course, as a good practice, such objection must be raised early and, this should be done with advance notice to the other side, to avoid surprise and to reduce delay that may arise from possible adjournment. I do not think that raising this type of objection belatedly would normally affect hearing the appeal on merits unless the defect is sufficiently substantial to warrant that the memorandum be struck out. In my view though the grounds could have been better formulated, they are not so defective as to justify striking out the Memorandum of Appeal as a whole. I would overrule the objection.

I return to the merits of ground 5. In the Court of Appeal, Mr. Tayebwa contended in his written submissions that after the trial judge had refused the adjournment the judge should have invited the parties to address him on the merits of the suit on the basis of the evidence and the pleadings available before the judge decided the case. Counsel relied on *Shali's case* (supra) and *Famous Cycle Agensia Vs. M. R. Karia Sct. Civil Appeal 16 of 1994,* among others. Mr. Byaruhanga, for the present respondent, made oral submissions. On this particular question he argued in effect that there was no sufficient reason shown in support of the application for adjournment, and therefore, the trial judge was right in refusing the application for further adjournment. Counsel relied on *Habib Vs Rajput* (1960) EA 92.

In the lead judgment, in the Court of Appeal, Twinomujuni, JA, considered two principles governing the exercise of discretion. The first, with which I agree, is that when trial courts grant adjournments they (courts) exercise judicial discretion. The second, with which I also agree, is that an appellate court will normally not interfere with the exercise of judicial discretion by a lower court unless the lower court failed to exercise the discretion judiciously. The learned Justice of Appeal relied on *Famous Cycle Agencies* case (supra) for these statements. He considered the circumstances of the present case leading to the decision of Okumu Wengi J. The learned Justice then went on to say -

"It is generally accepted that the essence of a trial is that both parties should be heard and except where a party is deliberately dragging the proceedings in a trial, such a party should not be denied opportunity to present its case. In the circumstances of this case, I am unable to hold that the learned trial judge exercised his discretion judiciously. The refusal to grant an adjournment to the appellant was totally unjustified and occasioned a serious miscarriage of justice. This court therefore, has a duty to interfere with the trial judges exercise of discretion to correct the injustice".

I agree that the refusal to grant the adjournment was, on the facts, totally unjustified. On the facts of this case I am in full agreement with the reasoning and conclusions of the learned Justice of Appeal in so far as his discussion on the refusal to adjourn the hearing of the case is concerned.

The learned Justice of Appeal then considered the failure by the learned trial judge to allow parties to address him before entering judgment and found that such failure was a serious error which caused injustice. He then concluded -

"The result of these twin injudicious exercise of discretion was fatal to the whole trial and led to disastrous consequences."

Again on the facts I agree with these conclusions relating to the injudicious exercise of discretion by the learned judge. The facts show that the appellant was not at fault and wanted the trial to continue. It is my opinion that as the trial had aborted, the conclusions reached by the learned Justice of Appeal were sufficient to justify sending the case back to the trial judge for continuation of the hearing. Here was a typical example of a case where the principle that justice must not only be done but must be seen to be done had clearly been violated by the trial court. The issue we are concerned with is a question of fundamental principle. Public hearings of cases must be conducted according to law. It is a question of hearing both parties and such hearing requires that parties be given reasonable opportunity to present their case.

In this case the trial was aborted by the trial judge. The defendant was ready to adduce its evidence if it was given just one day. Counsel for the plaintiff was clearly not opposed to the adjournment to the next day. In such a scenario in the absence of defence evidence, I think that there was insufficient material before the Court of Appeal to enable it or indeed this court, to reach a sound conclusion. True the plaintiff had closed her case. But since

the defendant had not deliberately elected not to give evidence, the principle of fair healing enshrined in Article 28(1) of the Constitution would be breached if final judgment is given, as was given in this case, without receiving the defence evidence.

I think it was not proper that in the total absence of evidence of the respondent, who was in effect found not at fault, for the Court of Appeal to evaluate evidence of only one side. The effect of this is to condemn the other party without hearing it. Therefore ground 5 should succeed.

In my opinion these conclusions on this ground disposer of appeal.

I would allow the appeal. I would set aside the judgments of the two Courts below. Since it is the fault of the court which resulted in the appeal proceedings, I would order that each party bears its own costs here and in the Court of Appeal. I would order that the costs in the High Court do abide the conclusion of the trial. I would remit these proceeding to the trial judge with orders for him or for his successor to continue with the hearing of the case starting where he stopped, namely, hearing the defence case.

JUDGEMENT OF ODOKI, CJ.

I have had the benefit of reading in draft the judgment prepared by Tsekooko JSC and I agree with him that this appeal should be allowed and the case remitted back to the High Court for the hearing to proceed where it prematurely stopped. I concur in the orders for costs as proposed by Tsekooko JSC.

As the other members of the Court also agree with the judgement and orders proposed by Tsekooko JSC, there will be judgment and orders in the terms proposed by Tsekooko, JSC.

JUDGMENT OF MULENGA JSC

I have read in draft, the judgment prepared by my learned brother Tsekooko JSC. I concur that the appeal be allowed setting aside both judgments of the courts below and that the case be remitted to the High Court for completion of the trial by hearing the defence case.

I also agree with the orders he proposes on costs.

JUDGMENT OF KAROKORA

I have had the advantage of reading in draft, the judgment prepared by my learned brother, Tsekooko JSC, and do agree with him that the appeal should be allowed. I also agree with the orders he has proposed.

Dated at Mengo, this 12th day March 2003.