THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI, CJ, TSEKOOKO, KANYEIHAMBA, KATUREEBE AND OKELLO, JJ.SC.)

CIVIL APPEAL NO. 07 OF 2007

B E T W E E N

GAPCO (U) LTD: :::::: :::::: :::::: APPELLANT

AND

A. S. TRANSPORTERS LTD: :::::: :::::: :::::: RESPONDENT

{An Appeal from the judgment and orders of the Court of Appeal (Mpagi-Bahigeine, Engwau and Byamugisha, JJ.A), at Kampala dated 1st September 2004, in Civil Appeal No. 18 of 2004}.

Judgment of G. M. Okello, JSC:

This is an appeal from the judgment of the Court of Appeal which upheld the judgment and orders of the High Court (Arach-Amoko, J), in a suit instituted by the respondent.

On the 9th May 1993, the respondent entered into a Transport Agreement with Esso Standard (U) Ltd., the predecessor of the Appellant. Under the agreement, the respondent agreed to supply vehicle units, for transportation of the appellant's products to and from such place or places as shall be notified from time to time and at any time by the appellant to the respondent.

The terms and conditions of the Agreement included inter alia that:

(1) ***The transporter shall supply the said vehicle unit(s) with experienced and competent driver or drivers who shall be servants of the transporter but shall obey all the lawful and reasonable directions of the charterers (appellant). All the boarding, lodging, traveling and other expenses of the driver or drivers shall be paid by the transporter.***

(3) ***The transporter shall during the duration of the Agreement, keep the said vehicle unit(s) in good and serviceable order and condition and validly licensed for all the purposes for which they are being used and fully insured under a comprehensive Insurance policy or policies taken out with a company approved in writing by the chaterers.***

(5) ***(a) Every consignment of the chaterer's product shall be accompanied by a consignment note which shall state:***

(i) ***That the consignment consist of such product(s).***

(ii) ***Particulars of destination;***

(iii) ***Appropriate customs documentation.***

(b) ***The transporter shall be entirely responsible for the products in transit and the chaterers shall not be liable for losses or contamination occurring during the transit."***

On or about the 18th/19th of September 1995, the respondent's tanker and trailer registration No. TZ 40854 and TZ41057 respectively were involved in an accident at a place called Butoto in Bushenyi en-route to Hima Cement Factory in Kasese District to deliver the appellant's fuel oil. The driver and two tonne-boys died instantly in the accident. The tanker and the trailer were severely damaged. The respondent sued the appellant claiming general and special damages for breach of the agreement, interest and costs of the suit.

The respondent alleged that the appellant sent the respondent's vehicle to Hima Cement Factory in Kasese without a prior notification of the respondent as required under the agreement. The appellant filed a written statement of defence in which it denied the respondent's claims in particular that the agreement provided for notification of change of destination.

At the trial, three issues were framed for determination by the court.:

The trial judge answered the first issue above in the affirmative and the second issue in the negative. On issue No. 3, which was on remedies, she awarded the respondent shillings 25 million as general damages for breach of contract but declined to award the special damages claimed on the ground that they were not proved.

The Court of Appeal dismissed the appellant's appeal with costs in that court and in the High Court. It however allowed the respondent's cross - appeal and made the following awards:

(1) ***Shs. 3,500,00= for burial expenses and for guarding the vehicle at the scene of the accident and towing to Kampala.***

(2) ***Shs. 12,600,000= for loss of expected income.***

It is against the above decision of the Court of Appeal that the appellant brought this appeal to this Court. There are 11 grounds framed as follows:

"(1) Their Lordships of Appeal erred in law and in fact in Holding that the appellant breached the Transport Agreement.

(2) The learned Justices of Appeal erred in law when they failed to re-evaluate the evidence on record so as to come to their own findings of fact regarding the final destination of the consignment.

(3) ***The learned Justices of Appeal misdirected themselves by relying heavily on the evidence of PW1 and exhibit P4 in determining the final destination of the consignment.***

(4) ***The learned Justices of Appeal erred in law and in fact in disregarding the appellant's evidence on record before they determined the final destination of the consignment.***

(5) ***The learned Justices of Appeal erred in law and in fact in holding that the Kasese trip was without notification and authority and therefore a breach of the Transport Agreement.***

(6) ***The learned Justices of Appeal erred in law and in fact in upholding the trial judge's award of Shs. 25 million as general damages for having delivered the consignment to Kasese instead of Kampala.***

(7) ***The learned Justices of Appeal erred in law by allowing the cross - appeal and awarding Ug. Shs. 3,500,000= as special expenses and Ug. Shs. 12,600,000= as lost income.***

(8) ***The learned Justices of Appeal erred in law by failing to make a finding on the Appellant's objections to the cross - appeal.***

(9) ***The learned Justices of Appeal erred in law when they overturned by implication the trial judge's finding on issue No. 2 when it was not a ground of Appeal in the Cross - Appeal.***

(10) ***The learned Justices of Appeal erred in law in awarding remedies arising from matters which were not part of the cross - appeal.***

(11) ***The learned Justices of Appeal erred in law in holding the appellant responsible for causing the accident in the absence of a ground of appeal in the cross - appeal.***

I should like to observe that there are too many repetitions in these grounds of appeal resulting in unnecessarily many grounds. It is important to note that it is not the number of grounds one has but rather, the substance of the grounds framed that matters in an appeal.

At the hearing of this appeal, Mr. Moses Segawa appeared for the appellant while Messrs. Ambros Tibyasa and Michael Kaggwa represented the respondent.

Mr. Segawa argued these grounds in three batches, namely, grounds 1 - 5 together then ground 6 separately and grounds 7 - 11 together. Mr. Tibyasa responded in a similar order. I propose to consider the grounds in that order too.

On grounds 1 - 5, the complaint was that the learned Justices of Appeal erred in relying solely on the evidence of Ali Herst PW1 and Exh. P4 the Road Transit Customs Declaration to determine the destination of the consignment. That they did not re-evaluate the evidence on record, as they ought to do, and merely re-stated the finding of the trial judge. The appellant put 10 exhibits which were ignored by the learned Justices of Appeal. Learned counsel stated that the appellant's case is that there was no diversion of the vehicle. The vehicle was going on a routine journey of which the respondent was duly notified.

He further argued firstly, that the Road Transit Customs Declaration (Exh. P4) was not the only document that accompanied the consignment. There were other documents that were destroyed in the accident. One of the

documents so destroyed was the Transport Consignment Note, like the one at page 151 of the record of appeal, which would show the destination of the consignment.

Secondly, that the evidence of PW1 was not worthy of credit as PW1 was not a truthful witness. He was noted by the trial court to have been evasive in his evidence. Learned counsel submitted that the evidence of Jim Samuel Mukasa (DW1) shows the practice of the transport business transactions. Fuel oil had never, in twenty years, been discharged at Kampala but at Hima Cement Factory. This shows that the vehicle was on a routine journey. He invited us to rely on ***D. R. Pandya - vs - R (1957) EA 336*** on question of re-evaluation of evidence.

Mr. Tibyasa replied that there was no notification by the appellant to the respondent of the journey to Hima Cement Factory. The notification had to be by consignment note and it was the duty of the appellant to avail that piece of evidence but had not done so. According to learned counsel, the alleged business practice to deliver fuel oil to Kasese depot did not include delivery at Hima Cement Factory. He replied that DW1's evidence that Kasese Depot was closed did not answer the real issue which is failure to notify the respondent of the journey to Hima Cement Factory. In any case, DW1 even denied knowledge of who called who to give the notification of that journey. Learned counsel pointed out that Exh. P4 was produced after the accident but the other alleged documents including the consignment note were not produced. He submitted that the criticism of the learned Justices of Appeal was not justified.

The gist of the complaint in these grounds 1 - 5 is that the learned Justices of Appeal did not re-evaluate the evidence on record as a whole, as they ought to, to determine the destination of the consignment and whether notification of the destination was given to the respondent. That the learned Justices relied solely on the evidence of PW1, an untruthful witness and Exbh. P4. That they ignored the evidence of DW1 and the ten exhibits put in evidence by the appellant.

The law governing the duty of the first appellate court is very clear. It is that the court must subject the whole evidence on record to a fresh exhaustive scrutiny and to draw its own conclusions of facts giving allowance of the fact that it has not seen the witnesses testify. The following statement of the Court of Appeal of England in ***Coghland - vs - Cumberland (1889) 1ch 704,*** that embodies the above principles, was cited by the East African Court of Appeal with approval in ***Pandya - vs - R (1957) EA 336 at 337 - 8:***

> ***"- - - - Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must consider the materials before the judge with such materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it, and not shrinking from overruling it if, on full consideration the court comes to the conclusion that the judge was wrong When the question arises which witness to be believed rather than another, and that question, turns on the manner and demeanor, the Court of Appeal always is, and must be guided by the***

impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on credibility of witnesses whom the court has not seen."

In the instant case, Justice Engwau, JA, in his lead judgment with which the other two Justices of Appeal agreed said:

"According to the evidence on record and the documents involved, the trial judge relied rightly, in my view, on the evidence of PW1 and the Leod Transit Customs Declaration (C 38) tendered as Exhibit, P4 which accompanied the consignment indicating the destination as Kampala."

The above statement from the judgment shows that the learned Justice of Appeal did consider the oral and documentary evidence on record before forming the view to agree with the trial judge. He then went on to say:

"Besides that finding, DW1 further stated in his testimony thus: '*It is not true that we diverted the truck. Kampala is the final destination according to customs because we are supposed to pay taxes in Kampala, but the ultimate destination of the product is Kasese.'* ***In cross examination DW1 stated*** *'I am not sure whether we paid taxes on it.'* ***DW1 admitted,*** *'The transporter would know the destination when they are loading. I tell (sic) him the*

destination on phone. It is a standard practice. I do not recall who telephoned who in this case. I do not have any documents to show that the destination is Kasese. The documents got lost in the accident.'

Clearly from the above excerpt, the final destination of the consignment was Kampala and not Hima Cement Factory in Kasese. DW1 admitted that the respondent would know the destination when loading. The loading of the product was done in Mombasa and PW1 asserted that the destination was Kampala.

It was an afterthought, in my view, when DW1 stated that Kampala was the place for paying taxes. In fact he was not even sure whether they paid taxes or informed PW1 about the extra journey to Hima Cement Factory."

I have reproduced this portion of the judgment of Engwau, JA, to show that he did not ignore the evidence of DW1 as argued by Mr. Segawa. The appellant's attempt was to establish by the evidence of DW1 and the ten exhibits they put in evidence that by practice of the transactions, -

1) Hima Cement Factory and not Kampala was the destination for discharge of fuel oil for the last twenty years; and

2) That notification of the destination was done by telephone.

This attempt, however, failed. The learned Justices of Appeal reviewed the evidence of DW1 and, like the trial judge, found him not credible. They also considered the documentary evidence on record and, like the trial judge, found that the destination of the fuel oil consignment was Kampala and not Hima Cement Factory. Only the product delivery Acknowledgement Note of 10-10-95, (Exh. D11) shows that Fuel Oil was discharged at Hima Cement Factory on 12-11-95. That one occasion is an exception rather than an established practice.

I find that the criticism of the Justices of Appeal in this regard has no basis. The learned Justices of Appeal re-evaluated the evidence on record as it is their duty to do. I am unable to fault them in this matter. Grounds 1 - 5 would thus fail.

On ground 6, the complaint is that there was no evidence of diversion of the truck by the appellant. In any event, the respondent was going to derive financial benefit in delivering the consignment in Kasese. If there was any breach, which was denied, the damages should have been nominal. Mr. Segawa relied on ***Queen - vs - Burch Brothers (Builders) Ltd. (1966) 24 ACCER 283,*** where it was held that where a defendant's breach of contract provided the occasion for the plaintiff to injure himself but was not the immediate cause of the injuries, the defendant was not liable for the plaintiff's injuries as his injuries were not the natural and probable consequence of the breach of the contract, even if it was a foreseeable consequence of the breach.

That case, in my view, is distinguishable from the instant case. Though, like in Queen's case, the appellant's breach provided occasion for the accident, unlike in Queen's case, where the plaintiff was responsible for the immediate cause of his own injuries by using unfooted trestle, the respondent in the instant case, was not responsible for the immediate cause of the accident. In fact, the Police Accident Report (Exh. D1) does not disclose the cause of the accident which remains unknown.

Mr. Segawa criticized the learned Justices of Appeal for awarding Shs. 12,600,000= as damages for lost income and Shs. 3,500,000= for burial expenses.

In my opinion, the principle governing an award of special damages is clear. Special damages must be pleaded and proved. These were so pleaded and the Learned Justices of Appeal found evidence to prove part of the lost income and made the award. Special damages however need not always be proved by production of documentary evidence. Cogent verbal evidence can also do. See ***Kampala City Council - VS - Nakaye (1972) EA 446.*** The learned Justices of Appeal found the evidence of PW1 credible on this point and made the award.

In the circumstances, I would not fault the Justices of Appeal in the award they have made. I would, therefore disallow this ground.

On grounds 7 - 11, the complaint is that the special damages should not have been awarded as they amount to duplication of the general damages. Mr. Segawa submitted that the learned Justices of Appeal awarded the respondent Shs. 3,500,000= for burial expenses reasoning that it was moral duty to bury the dead, yet the High Court had awarded general damages for running around. He criticized the learned Justices of Appeal for taking judicial notice of funeral expenses.

Mr. Tibyasa replied that there was no duplication of the award. The general damages were awarded for breach and what followed that breach. The principle of the award is *restitutio in integrum.* He pointed out that the High Court awarded general damages for running around. He supported the awards made by the Justices of Appeal.

I have already covered this point when considering ground 6. It suffices to say that the lost income and burial expenses were awarded as special damages as they were so pleaded and were found proved. The respondent might not have proved the actual amount pleaded as lost income but the Justices of Appeal found evidence to support part of the lost income and made the award.

Burial expenses, as special damages, need not always be proved by production of documentary evidence. Cogent verbal evidence can also do as earlier pointed out in this judgment.

In the instant case, there was oral evidence of PW1 which the learned Justices of Appeal believed and on that basis found the claim for burial expenses proved. I find no fault with that. That is not the same as taking judicial notice of burial expenses. These grounds should therefore fail.

In the result, I find no merit in the appeal which I would dismiss with costs here and in the courts below.

Dated at Mengo this 20th day of January 2008.

G. M. OKELLO

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: ODOKI, C.J, TSEKOOKO, KANYEIHAMBA, KATUREEBE AND OKELLO, JJ.SC)

CIVIL APPEAL NO. 07 OF 2007

BETWEEN

GAPCO (U) LTD :: APPELLANT

AND

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

[An appeal from the decision of the Court of Appeal at Kampala (Mpagi-Bahigeine, Engwau and Byamugisha J.J.A) dated 1st September 2006 in Civil Appeal No. 18 of 2004]

JUDGMENT OF ODOKI, CJ

I have had the benefit of reading in draft the judgment of my learned brother, Okello, JSC, and I agree with him that this appeal should be dismissed for the reasons he has given. I concur in the order he has proposed as to costs.

As the other members of the Court also agree, this appeal is dismissed with costs here, and in the courts below.

Dated at Mengo this 20th day of January 2009.

B J Odoki
CHIEF JUSTICE

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: ODOKI, CJ; TSEKOOKO, KANYEIHAMBA, KATUREEBE
AND OKELLO JJSC.)

CIVIL APPEAL No. 7 OF 2007

BETWEEN

GAPCO (U) LTD. ::
APPELLANT

AND

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

[Appeal from the judgment of the Court of Appeal at Kampala (Mpagi-Bahigeine, Engwau and Byamugisha, JJA.) dated 1st September, 2006 in Civil Appeal No. 18 of 2004]

JUDGMENT OF TSEKOOKO, JSC.:

I have had the benefit of reading in draft the judgment prepared by my learned brother Okello, JSC. and I agree that this appeal has no merit and the same ought to be dismissed with costs here and in the two Courts below.

Delivered at Mengo this 20th day of January 2008.

J. W. N. TSEKOOKO
JUSTICE OF THE SUPREME COURT.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: ODOKI, C.J, TSEKOOKO, KANYEIHAMBA, KATUREEBE, OKELLO, *JJ.S.C.)*

CIVIL APPEAL NO.7 OF 2007

BETWEEN

GAPCO (U) LTD :::::::::::::::::::: APPELLANT

AND

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

(Appeal from the judgment of the Court of Appeal at Kampala (Mpagi- Bahigeine , Engwau and Byamugisha, JJ.A.) in Civil Appeal No.18. of 2004, dated 1st September, 2006)

JUDGMENT OF KANYEIHAMBA, J.S.C

I have had the benefit of reading in draft, the Judgment of my learned brother, Okello, J.S.C. and I agree with his findings and decisions. I concur that this appeal has no merit and the same ought to be dismissed with costs here and in the two Courts below.

Dated at Mengo this 20th day of January 2008

G.W.KANYEIHAMBA

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI, CJ, TSEKOOKO, KANYEIHAMBA, KATUREEBE AND OKELLO, JJ. SC).

CIVIL APPEAL NO. 07 OF 2007

B E T W E E N

GAPCO (U) LTD : : : : : : : : : : : : : : : : : : APPELLANT

AND

A. S. TRANSPORTERS LTD: : : : : : : : : : RESPONDENT

[An appeal from the judgment and orders of the Court of Appeal (Mpagi-Bahigeine, Engwau and Byamugisha, JJ.A) dated 1st September 2006, at Kampala dated 1st September 2004, in Civil Appeal No. 18 of 2004].

JUDGMENT OF KATUREEBE, JSC.

I have had the benefit of reading in draft the judgment of my brother Okello, JSC, and I agree with him that there is no merit in this appeal. Clearly the Court of Appeal correctly and appropriately addressed itself to the evidence on record and came to the right conclusions. I see no reason to interfere with the decision of that Court.

I concur that the appeal be dismissed with costs in this Court and in the Courts below.

Dated at Mengo this 20th day of January 2008.

Bart M. Katureebe

Justice of The Supreme Court