

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
(CORAM: Kakuru, Muhanguzi, Tuhaise, JJA)
CIVIL APPEAL NO.0030 OF 2010

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ENTEBBE HANDLING SERVICES:..... APPELLANT

VS

UGANDA FISH PACKERS:..... RESPONDENT

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(An appeal from the judgment and orders of the High Court of Uganda at Kampala commercial division (Hon. Justice Arach Amoko) dated 25th September 2009 in High Court Civil Suit No.495 of 2000).

JUDGMENT OF EZEKIEL MUHANGUZI, JA

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Brief back ground

This is an appeal from the judgment of the High Court of Uganda at Kampala delivered by Hon Justice Arach Amoko, J (as she then was) dated the 25th day of September 2009 in High Court Civil Suit No. 495 of 2000.

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The facts giving rise to this appeal as accepted by the trial Judge are that, the respondent sued the appellant for recovery of a sum of US \$ 48,294.26, damages for breach of contract and interest on that amount at a rate of 25% p.a. from the date of judgment until payment in full.



The respondent alleged that on or about 12 September 1998, it handed over to the Appellant, the only cargo handling agent at Entebbe airport, 36,800 Kilograms of fish for loading on the aircraft for export to various customers in Europe. There was a condition of the contractual relationship between them that the loading of the respondent's cargo on the plane was entirely the responsibility of the appellant and the respondent's only obligation was to deliver the fish at Entebbe airport.

No specific time for delivery of the fish was agreed upon, but the same was to be completed at least one hour before the actual departure of the chartered plane. The estimated time of departure of the plane was 04.00am, and before that time, the appellant had delivered all the fish to the airport in good condition by European Standards. There was no agreement executed but the Respondents paid Uganda shillings forty five thousand eight hundred and thirty shs.45, 830.00 as handling and bond fees.

The Cargo was delivered by the respondent and received by the Appellants at Entebbe airport. Upon delivery of the cargo to the respondent's customers, 9,494 kilograms were rejected for being above the accepted temperature.

The trial court gave judgment in favor of the respondent for the sums of:

1) US \$ 48,294.26 as damages representing the value of 9,494 kilograms of rejected fish;

2) US \$ 10,000 general damages;

3) Interest on (1) at 20%p.a from the date of filing the suit until payment in full;



4) Interest on (2) at court rate from the date of judgment until payment in full; and

5) Costs of the suit.

The Appellant was dissatisfied with the judgment of the trial Court and appealed to this appeal.

The Appellant filed this appeal on three grounds set out in the memorandum of Appeal as follows;

1) *The learned judge erred in law and in fact in finding that the defendant was negligent and in breach of duty of care.*

2) *The learned judge erred in law by failure to properly evaluate the evidence.*

3) *The learned judge erred in law and in fact by awarding interest at 20% which was inordinately high and excessive.*

The appellant sought the following reliefs:-

a) *The appeal be allowed*

b) *The judgment of the High Court of Uganda at Kampala be set aside.*

c) *The respondent be ordered to pay the costs of this appeal and the costs in the court below.*

Representations

The appellant was represented by learned counsel Mr. Paul Rutisya while the respondent was represented by learned counsel Mr. Bautu Robert.

Submissions by the Appellant

Counsel for the Appellant argued grounds one and two together. He submitted that, the learned trial judge erred in law and in fact in finding that the defendant was negligent and in breach of a duty of care
5 and that the learned trial judge erred in law by failing to properly evaluate the evidence on record.

Further, that it was the Appellant's duty to provide ground handling services at Entebbe airport which included receiving of the product (fish), storing it in a cold room and loading it on the aircraft. Counsel
10 invited court to look at the evidence of PW1 in cross examination where this witness stated that all the above were done. Further, that the goods had been properly kept in a cold room, that the temperature at which the fish arrived at the airport was never ascertained or determined and that this was never presented by the plaintiff at trial.

15 Counsel submitted referring to the evidence of PW1, that the inspection was carried out at the Respondent's factory and placed the fish in boxes. There was no mention of any further inspection. Further, that the next inspection was when the goods had been transported to Europe at about two days later. Counsel referred to the evidence of
20 PW2 and submitted that PW2 who was a fisheries officer admits not to have conducted a hepatic check to establish the quality of a product and that it is likely that the chilled fish was already bad.

On the issue of failure to evaluate the evidence on record Counsel submitted that the charter plane that was scheduled to come and pick
25 the cargo from Entebbe airport delayed. It arrived 4 hours and 20 minutes late and that this was not in control of the appellants. This he submitted also further contributed to the deterioration of the fish.



Counsel relied on the respondent's statement of defense that contains facts of contributory negligence which the lower court failed to put into consideration. Counsel submitted that there was the issue of manpower constraints and maintenance of the fish on tarmac. Further, that the fish was kept on tarmac by the charter plane load master who was not an agent's employee or affiliated to the Appellants.

Counsel relied on **BAT 1984 Vs Selestino Mushongore**, Supreme Court Civil Appeal No. 26 of 1994 which held that "a person is guilty of contributory negligence if he ought reasonably to have foreseen that if he did not act as a reasonable prudent man he may hurt himself and in his reckonings he must take into account the possibility of others being careless". Counsel further submitted that, the delay of the plane and having the fish on tarmac was so long by an agent who was operating the plane and that it falls within the ambit of contributory negligence. Counsel invited court to follow this decision in relation to contributory negligence.

More so on the issue of failure to evaluate the evidence, Counsel submitted that, the lower court did not take into consideration the inconsistencies in witness testimonies. Counsel argued that PW1 in cross examination testified that "he was aware of the time the plane would arrive". Further, the witness states that "he was not sure of the exact time the plane would arrive". Counsel contended that such inconsistencies brought bias on his overall truthfulness.

Furthermore, Counsel submitted that, the lower court did not consider 9,494 kilograms of fish that were rejected. Counsel argued that only 25.8% of the entire cargo was rejected out of the entire consignment. That on arrival in Amsterdam in the evening of Sunday the fish was



inspected and only 9,494 kilograms of the 34,000 kilograms were rejected because they were above the required temperature. Counsel argued further that, failure to take into consideration the fact of mitigation of damages, the rejected fish could have been sold at a lesser value. Further that court ought to have scrutinized the health certificates presented by the respondent at the trial as they were not very specific because they stated that the fish was chilled but did not state if the fish was sufficiently chilled.

Counsel submitted that the duties of the appellants were limited to the three duties that are highlighted at Entebbe airport and did not extend to storage on the six or so hour flight to Europe and anything subsequent thereafter.

On the last ground of appeal, Counsel for the appellant submitted that the learned judge erred in law and fact by awarding an exorbitant interest at 20% which was high and excessive. Counsel relied on **BM Technical services v Crescent Transporters, Supreme Court Civil Appeal No. 8 of 2002** and submitted that, the interest in that case was reduced from 22% to 10% by the Supreme Court and their Lordships noted that, "by its nature the transaction was a clearing and carriage of goods contract and not an ordinary commercial transaction". Counsel invited court to adopt the findings of the Supreme Court in lowering the interest if this court is inclined to award it. Counsel prayed to court that, the judgment of the lower court be set aside, the appeal be allowed and costs be awarded to the appellant.

Submissions by the Respondent

Counsel for respondent opposed the appeal and supported the decision of the trial Judge. In response to ground one, he submitted that the



learned trial judge did properly analyze the evidence and reached proper conclusion based on law and evidence adduced at the trial.

5 Counsel submitted that, the appellate Court must, while evaluating evidence, be mindful of the fact that it did not have the opportunity to hear and observe the demeanor of witnesses in the trial court. (*See Kifamunte Henry v Uganda, Supreme Court Criminal Appeal No. 10 of 1997, Bogere Moses & Anor v Uganda, Supreme Court Criminal Appeal No. 1 of 1997*).

10 Counsel submitted that, the appellant in this case was negligent and he invited court to look at testimony of the defense witness in cross-examination. He argued that, the defense conceded to the fact that the fish was not in the cold room from 9.00 A.m to 11.50 A.m before the same was loaded on the plane.

15 Further that, the duty of the appellant in this case was to ensure that the respondents' cargo or fish was properly looked after. The appellants failed in their duty to look after the respondent's cargo when they left the fish for a long period of time on the runway before it was loaded on the plane.

20 Counsel submitted that, the appellants testified to have had experience in handling fish since 1996. He argued that, it is prudent to know whether the appellants were careful in handling the respondent's fish having left the same on the runway from 9.00 a.m. to 11.50 a.m. Counsel relied on *Jacob Mathew V State of Punjab and Anor, Appeal (crl.) 144-145 of 2004* an Indian Supreme Court case, and submitted
25 that, the Justices of that court defined negligence to mean "a breach of duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of



human affairs would do or doing something which a prudent and reasonable man would do". Counsel argued that the appellants were negligent since they left the fish on a runway from 8.30 a.m. until 11.50a.m. .

5 Further that, a prudent man would have ensured that the fish be returned to the coolers until such time when the plane would arrive, a test that the appellants did not pass. Counsel added that it is speculative for the appellants to say that the fish could have been spoilt at the time it left the factory since there was no evidence adduced by
10 the appellant/Defendants that at the time the fish arrived at the cargo handling point the same was spoilt.

In response to the issue of contributory negligence, counsel relied on the authority of **BAT 1984 Vs Selestino Mushongore (supra)** and submitted that, it was a case of an accident as the facts restate. Further
15 that, this is a case of Bailment. He argued that, by mere application the case does not apply in the circumstances. Counsel further submitted that pleadings as claimed by the appellants ought to have been backed up by evidence of contributory negligence which evidence was never adduced in the lower court.

20 On the second ground counsel submitted that if court finds that ground one fails the issue of relief follows where evidence of negligence was put on record and that court should find that the ground on interest has no merit too.

Counsel submitted that what follows the suit is that damages must
25 follow and before damages can be recovered there must be a wrong committed, whether in torts or contract even where a loss has been incurred no damages can be awarded in the absence of a wrong.



Further, that negligence was established from the evidence adduced in court and that the trial judge was right to award damages having arrived at a just conclusion.

5 In respect of ground 3, counsel submitted that, whereas the court did not give reasons for having awarded interests at the rate of 20%, that perse, is not sufficient ground to hold that the award was not proper or justified. Counsel relied on **Section 26 of the Civil Procedure Act** which confers discretion upon the trial court to award interest and in so doing, court bases its discretion on precedents.

10 Counsel submitted that, the purpose of awarding interest at 20% was intended to address the wrongful acts of a wrong doer by whose conduct the respondent was deprived of use of its money. Counsel submitted that the principle in ***BM Technical Services v Crescent Transporters (supra)*** is distinguishable from the instant case since it
15 was a contract of carriage and addressed commercial interest visa vis interest at court rate. Further that, this is a case of bailment and not of carriage.

Counsel relied on the case of ***Wall Stainer vs Whah, (1945) Queens Bench 388*** where it was stated that *“in equity, interest is awarded
20 whenever a wrong doer deprives a company of its money which it needs for use in its business”*. Counsel argued that, the company should be compensated for the loss occasioned to it because mere replacement of the money years later is not adequate compensation especially in days of inflation. Further that, the company should be compensated by
25 award of interest and the award of 20% interest was not excessive given the circumstances.



Counsel relied on *Rwemicandara Shinon and Anor Vs Marksmovey Alokdep Rovik*, Supreme Court Civil Appeal No. 9 of 2003 where it was held that, in considering what rate of interest the respondent should have been awarded, court applied the principle in *Sietco Vs Noble Builders Uganda Ltd*, Supreme Court Civil Appeal No. 81 of 1995, which was to the effect that, it is a matter of court's discretion, to award interest. That the appellants had recovered the money for a commercial transaction hence the court rate of 6% was not appropriate but the 20% was. Counsel argued that, this equally was a commercial transaction where the appellant was entrusted with the duty of care for the Respondent's fish. Counsel asked court to escalate the interest from 20% as awarded to 35%.

Consideration by Court

I am mindful of the duty of this court as the first appellate court. I am alive to the law that requires this court to re-appraise the evidence and come up with its own inferences on all issues of law and facts. See rule 30 of the Judicature (Court of Appeal) Rules and the case of *Kifamunte Henry v Uganda*, Supreme Court Criminal Appeal No 10 of 1997.

The issues for determination in this case are;

Grounds 1 and 2

1. *Whether the appellant was negligent and in breach of his duty of care and,*
2. *Whether the learned trial judge failed to properly evaluate the evidence.*

I have perused the evidence of PW1, Katsigazi Gilbert, the export manager of the respondent on pages 29 to 33 of the record of



proceeding and that of PW2, Etyang Jimmy, senior fisheries officer from ministry of agriculture, fisheries department, on pages 34 up to page 42 of the record of proceedings. I have also perused the evidence of DW1, Tytens George, the CEO of the defendant on pages 43 up to page 50 of the record of proceedings as well as that of DW2, Saul Kamukama, fisheries officer of Rukungiri District on pages 51 up to page 55 of the record of proceedings.

After perusal of the evidence of the above four witnesses I am satisfied, find and hold that the appellant owed a duty to the respondent to ensure that the respondent's fish was handled with the utmost care to avoid exposure to high temperatures and consequent adverse effects on its quality. From the evidence, it appears that, out of the total consignment of 36,800 kilograms, only 9,494 kilograms were rejected upon arrival in Europe.

In the circumstances, since the appellant largely fulfilled the duty of loading the whole, 36,800 kilograms of fish on the plane, I find no evidence of negligence or breach of contract on the appellant/defendant's part. Ground 1 of this appeal therefore succeeds.

Nevertheless, right from the pleadings in paragraphs 4 to 7, of the plaint (pages 7-8) of the record of proceedings to the evidence of the two plaintiff's witnesses referred to above, some questions need answers. For instance, what sort of damages are claimed in paragraphs 4-7 of the record of proceedings? Those damages were not specified or classified. One can only presume that, perhaps, such damages were special damages. If they were special damages then, they should have been specified as such and particularized. It is trite



law that special damages must be specifically pleaded and proved by evidence. That was not done in this case.

5 Secondly, the sum of US\$ 48,294.26 claimed in the plaint as mere damages, apart from not being specified, was also not really proved specifically by the evidence of the only two witnesses of the respondent/ plaintiff. Though paragraph 4(c) of the plaint claimed that 9,494 kilograms of fish was rejected by the plaintiff/ respondent's customers upon delivery, no evidence was adduced at the trial of the value of that amount of fish. What was the price (value) of the fish per kilogram at Entebbe where the negligence and breach of duty was alleged to have occurred? That question remained unanswered. Therefore, I would fault the learned trial judge for failing to evaluate the evidence properly in that regard and for awarding the sum of US\$ 48,294.26 without specific proof. I would therefore disallow that claim.

15 Thirdly, no evidence appears on record about the exact point in time and place when and where the temperature of the fish reached the stage of being rejected as unacceptable. Was it at the point of delivery at the Airport? Was it at the point of loading on the plane? Was it at the point of arrival in Europe? Or was it elsewhere? Since not the whole consignment of 36,800 kilograms was rejected it is possible some intervening circumstances between Entebbe International Airport and Europe could be blamed for high temperatures and consignment rejection of that small part of the fish consignment. This fact was not proved. Had the learned trial judge properly evaluated the evidence, she would not have arrived at the conclusion that she did.



Ground 3

Having held above that there was no evidence of negligence or breach of contract by the defendant/appellant and having disallowed the claim of US\$ 48,294.26, the issue of general damages and any interest on damages would not arise. I would therefore disallow the awards of damages and any interest thereon.

In conclusion, I would allow this appeal and make the following orders:-

- 1) The judgment and decree of the High Court is hereby set aside and substituted with this judgment dismissing the respondent's entire claim.
- 2) The respondent shall pay costs at this court and at the lower court.

Dated at Kampala this day of 2018.



EZEKIEL MUHANGUZI
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO 0030 OF 2019

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VERSUS

UGANDA FISH PACKERS.....RESPONDENT

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Coram: Hon. Mr. Justice Kenneth Kakuru, JA
Hon. Mr. Justice Ezekiel Muhanguzi, JA
Hon. Lady Justice Percy Night Tuhaise, JA

Judgment of Hon. Lady Justice Percy Night Tuhaise, JA

I have had the opportunity of reading in draft the judgment of my learned brother Hon. Mr. Justice Ezekiel Muhanguzi JA.

I agree with his analysis, conclusion and orders, and the reasons he has given.

Dated at Kampala this.....7th.....day of.....Nov......2018


Percy Night Tuhaise
Justice of Appeal

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Coram Hon. Mr. Justice Kenneth Kakuru, JA
Hon. Mr. Justice Ezekiel Muhanguzi, JA
Hon. Lady Justice Percy Night Tuhaise, JA

Judgment of Hon. Mr. Justice Kenneth Kakuru, JA

I have had the benefit of reading in draft the Judgment of my learned brother Hon. Mr. Justice Ezekiel Muhanguzi.

I agree with him that this appeal ought to succeed for the reasons he has given.

I also agree with the orders he has proposed. As Hon. Lady Justice Tuhaise also agrees it is ordered.

Dated at Kampala this.....^{7th} day of^{NOV.} 2018.



Kenneth Kakuru
Justice of Appeal