IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 099 of 2018

In the matter between

AMONY MARY STELLA **APPELLANT**

And

OKOT GARIMONI MATHEW
t/a 323 ROYAL INN **RESPONDENT**

Heard: 20 March, 2020
Delivered: 22 May, 2020.

Contract Law *—Bailment — section 88 of The Contracts Act, 7 of 2010 — Bailment means the delivery of goods by one person to another for some purpose, upon a contract that the goods shall when the purpose is accomplished, be returned or disposed of according to the direction of the person who delivered them. A bailment relationship therefore exists when the property is delivered for some special purpose, such as storage, safekeeping or to perform some work or service on it. — In all contracts of bailment, possession is severed from ownership. If the Bailee has received the chattel from the Bailor then he or she must return the chattel to the Bailor only. It does not matter if there a third person who claims the chattel to be his or hers. The Bailee has accepted the chattel to be Bailor's during bailment. The Bailee has no right to not re-deliver the chattel to the Bailor on grounds that the Bailor is not the real owner. — It follows that suits for bailment are not of a purely proprietary nature but rather are recognised as sui generis, in that the sub-bailee owes the same duties as bailee to both the head bailor (the owner of the chattel) and the sub-bailor. — Anyone who takes custody of someone else's property is legally liable for loss or damage to the property due to negligence. The basic rule is that the bailee is expected to return to its owner the bailed chattel when the bailee's time for possession of them is over, and the bailee is*

presumed liable if the chattel is not returned. The bailee has a responsibility to the bailor to maintain the property in a safe condition.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant sued the respondent seeking recovery of shs. 13,222,500/= being the value of a motorcycle bailed to the respondent, shs. 12,600,000/= as special damages, general damages for breach of a contract of bailment and the costs of the suit. Her claim was that on 8th October, 2015 Gulu District Local Government assigned her as proprietor for use in the discharge of her duties as an officer of the local government in her capacity as a Community Development Officer, a white Yamaha Motorcycle registration number LG 0022 030. She entered into an arrangement with the respondent by which the respondent was to provide overnight parking and security for the motorcycle at his business premises, at a monthly fee of shs. 20,000/= On the evening of 5th November, 2015 the appellant entrusted the motorcycle to the respondent for custody until the month of June, 2016. She paid for the eight months' bailment in full in advance. When the appellant returned on 30th June, 2016 to pick the motorcycle, the respondent informed her it had been stolen from the premises. As a result, the appellant incurred transport costs for commuting daily to her place of work at Lalogi and back five times a week from July, 2016 to September, 2017 hence the suit.

[2] In his written statement of defence, the respondent refuted the appellant's claim and averred that she had no *locus standi* to sue for its loss since the motorcycle did not belong to her. He had neither written nor oral contract of bailment with the appellant and the receipts she presented are a forgery.

The appellant's evidence in the court below:

[3] P.W.1, Amony Mary Stella, the appellant, testified that the motorcycle was given to her on 8th October, 2015 by Gulu District Local Government with the support of the Japan International Cooperation Agency (JICA) for use in discharging her duties as a Community Development Officer. She signed an indemnity form with Gulu District Local Government undertaking responsibility for the replacement of the motorcycle in case of loss. She entered an arrangement with the respondent through his cashier, D.W.2 Lakot Harriet for the appellant to park her motorcycle on the respondent's premises overnight at a monthly fee of shs. 20,000/= staring 5th November, 2015. She paid for the next eight months up to 30th June, 2016. She did not sign a formal contract and would not hand over the keys after parking the motorcycle. On 29th June, 2016 when she went to pay for the month of July, the respondent's manager, Ojera Andrew Laker, told her the motorcycle had been stolen the previous night. She reported loss of the motorcycle to the police on 30th June, 2016. She is not aware that the respondent's staff oat the inn were poisoned first before the motorcycle was stolen. Although the motorcycle still had local government number plates, it was given to her on permanent terms. She signed an undertaking to pay the District Local Government in the event of loss of the motorcycle.

[4] P.W.2 No. 46753 DC Amone Victor testified that on 30th June, 2016 he received a report from the respondent's manager, Ojera Andrew Laker regarding theft of the appellant's motorcycle from their premises that occurred on the night of 28th June, 2016. The security guards ate some adulterated pork and he saw the remains. From his investigations, a guest in the inn room served adulterated pork in a black polythene bag to the security guard and the receptionist and they became unconsciousness. They were taken to hospital for treatment. By the time they regained consciousness, the guest and the motorcycle were gone.

[5] P.W.3 Gorretti Okech, the appellant's supervisor, testified that on 8th October, 2015 the appellant was given a motorcycle by Gulu District Local Government with the support of the Japan International Cooperation Agency (JICA) for use in discharging her duties as a Community Development Officer. The motorcycle was given to her on permanent basis and the appellant undertook sole responsibility in the event of its loss. The appellant did not own but was only a custodian of the motorcycle.

The respondent's evidence in the court below:

[6] D.W.1 Okot Garimoi Mathew, the respondent, testified that he is a proprietor of hotel business where guests park at owner's risk. The manager of the inn at the time was Ojera Andrew Laker and Harriet Lakot the bar attendant. Parking is allowed on the inn premises at "owner's risk" and a notice to that effect is displayed on the premises. He had never experienced any incident of loss or damage of a guest's property since he began operations in the year 2002. Towards the end of the year 2015 he had stopped his staff from allowing the appellant to park her motorcycle on the inn premises since it had damaged the door to the security guard's unit. He was later informed that the appellant began parking the motorcycle on the respondent's other space adjacent to the inn. It is his manager that informed him on 30th June, 2016 that the security guard had been poisoned and the motorcycle stolen. The security guard was admitted in hospital for two weeks. The receipt presented by the appellant is not genuine.

[7] D.W.2 Lakot Harriet testified that she is the cashier at the respondent's inn. Sometime in the year 2015 she noticed that the appellant was in the habit of parking her motorcycle at the security guard's house. She never interacted with the appellant regarding parking at the premises, the appellant never paid for parking and she never issued her with a receipt for parking. She only issues receipts to customers paying for accommodation.

Judgment of the court below:

[8] In his judgment delivered on 30th November, 2018, the trial Magistrate found that there was a contract of bailment between the appellant and the respondent. Allowing the appellant to park at his premises did not imply that the respondent undertook liability for loss of the motorcycle, even if it involved his employees being complicit in that loss. Besides the receipts issued to the appellant, there was no formal agreement by which the respondent undertook liability of the loss of the motorcycle, especially considering that it was stolen by thieves who poisoned his staff prior to the theft. The respondent did not owe the appellant any duty of care, therefore the question of negligence does not arise. Although she signed an indemnity form with the District Local Government, she had never indemnified the local government. This was district property and so she did not have a cause of action for its loss. She therefore had not suffered any loss. The suit was therefore dismissed with costs to the respondent.

The grounds of appeal:

[9] The appellant was dissatisfied with that decision and appealed to this court on the following grounds, namely;

1. The learned trial Magistrate erred in law and fact when he held that the appellant had no cause of action against the respondent.
2. The learned trial Magistrate erred in law and fact in holding that there was no written contract of bailment between the parties whereas he found that the receipts issued by the respondent to the appellant were genuine.

Arguments of Counsel for the appellant:

[10] In their submissions, counsel for the appellant, argued that the appellant entered into an agreement of bailment with the respondent. Gulu District Local

Government had given her the motorcycle for use in her work as a Community Development Officer. Being in lawful possession of the motorcycle, she had the capacity to enter into an agreement of bailment. Loss of the motorcycle while in the custody of the respondent raises a prima face case of negligence against him. The respondent failed to discharge the standard of care of a person of ordinary prudence. The respondent was vicariously liable for the negligence of his employees. A relationship of bailment may exit independent of a contract, by the mere fact of delivery of a chattel into the possession of another with the obligation to return it after the purpose of the delivery is done.

Arguments of Counsel for the respondents:

[11] Counsel for the respondent did not file submissions in response.

Duties of a first appellate court:

[12] It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; *[2004] KALR 236*). In a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*).

[13] In exercise of its appellate jurisdiction, this court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular, this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular

circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

Ground two; court's finding that there was no contract of bailment.

[14] In the second ground of appeal, it is contended that the trial Magistrate having found that the receipts issued by the respondent to the appellant were genuine, erred when he held that there was no written contract of bailment between the parties. According to section 88 of *The Contract Act*, *7 of 2010* bailment means the delivery of goods by one person to another for some purpose, upon a contract that the goods shall when the purpose is accomplished, be returned or disposed of according to the direction of the person who delivered them.

[15] The delivery of a chattel to a bailee may be made by doing anything which has the effect of putting the chattel in the possession of the intended bailee or of any person authorised to hold the chattel on behalf of the bailee (see section 90 of *The Contract Act*, *7 of 2010*). A bailment is constituted by the act of an owner or possessor of the chattel (bailor) transferring the possession of those chattel to another person (bailee) upon the understanding that the chattel shall be re-delivered as soon as the time or condition on which they were transferred has elapsed or been performed.

[16] A bailment relationship therefore exists when the property is delivered for some special purpose, such as storage, safekeeping or to perform some work or service on it. One definition holds that a bailment is "the rightful possession of goods by one who is not the owner. It is the element of lawful possession, however created, and the duty to account for the thing as the property of another, that creates the bailment, regardless of whether such possession is based upon contract in the ordinary sense or not" (see *Zuppa v. Hertz, 268 A.2d 364 (N.J. 1970*).

[17] In all contracts of bailment, possession is severed from ownership. If the Bailee has received the chattel from the Bailor then he or she must return the chattel to the Bailor only. It does not matter if there a third person who claims the chattel to be his or hers. The Bailee has accepted the chattel to be Bailor's during bailment. The Bailee has no right to not re-deliver the chattel to the Bailor on grounds that the Bailor is not the real owner. A person in possession has right to retain control of the object against any other person except the owner or person who holds title, and is therefore entitled to same legal protection whether or not it has been obtained lawfully (see *Russell v. Wilson (1923) 33 CLR 538* and *Costello v. Chief Constable of Derbyshire Constabulary [2001] 1 WLR 1437; [2001] 2 Lloyd's Rep 216; [2001] 3 All ER 150*). Against a wrongdoer, possession is title. A chattel that has been converted or damaged is deemed to be chattel of possessor and no other. Its loss or deterioration is regarded as possessor's own loss.

[18] Every bailee has true possession as distinguished from mere custody. When the bailee in the original bailment then bails the chattel to another, called the sub-bailee, this creates a sub-bailment. By voluntarily taking the chattel into its possession knowing they belong to someone other than the bailee, the sub-bailee assumes responsibility for them (see *Gilchrist Watt & Sanderson Pty Ltd v. York Products Pty Ltd [1970] 3 All ER 825 at 832; Morris v. CW Martin & Sons [1966] 1 QB 716; [1965] 3 WLR 276; [1965] 2 Lloyds Rep 63; [1965] 2 All ER 725* and *KH Enterprise (cargo owners) v. Pioneer Container (owners) [1994] 2 All ER 250 at 261, 262*).

[19] Bailment does not necessarily and always, though generally, depend upon a contractual relation. It is the element of lawful possession, however created, and duty to account for the thing as the property of another that creates the bailment, regardless of whether such possession is based upon contract in the ordinary sense or not. Therefore the law of bailment is not confined within the boundaries of the law of contract, the bailor may also claim in negligence whether or not there is a contract. The existence of a duty of care under section 92 of *The*

Contract Act, *7 of 2010* which is essential for the tort of negligence is a necessary inference from the fact that a defendant was the plaintiff's bailee in respect of the chattel whose loss or damage gives rise to the action. That notwithstanding, a suit against a bailee can often be stated, not as a suit in contract, nor in tort, but as an action on its own, *sui generis*, arising out of the possession had by the bailee of the chattel (see *R v. McDonald [1881–85] All ER Rep 1063 at 1064*).

[20] It follows that suits for bailment are not of a purely proprietary nature but rather are recognised as *sui generis,* in that the sub-bailee owes the same duties as bailee to both the head bailor (the owner of the chattel) and the sub-bailor. If not permitted to sub-bail, the bailee will be liable in negligence because the bailee will have breached the duty to retain possession of the chattel (see *Edward v. Newland and Co [1950] 2 KB 534*). In either case (with or without authority) the sub-bailee is liable to the bailee for loss. Where a bailor delivers property to a bailee and such bailee fails to redeliver the bailed property upon legal demand therefor, a cause of action, either *ex contractu* or *ex delicto*, accrues in favour, of the bailor.

[21] Ideally, the agreement or contract between the bailee and the bailor should be in writing, spelling out the duties, rights and obligations of both parties, and where exemption is sought, stating further that the bailee assumes no liability for the property in his or her care, custody or control or provides no insurance to the benefit of the property owner. Although bailment has often been said to arise only through a contract, the modern definition does not require that there be a written agreement. According to section 90 of *The Contract Act*, *7 of 2010* a contract may be oral or written or partly oral and partly written or may be implied from the conduct of the parties. Therefore in the great majority of cases of bailment there is a written contract between bailor and bailee, but a bailment can exist without a written contract.

[22] A bailment only requires that the bailor delivers physical control of the chattel to the bailee, who has an intention to possess the chattel and a duty to return it. The bailee must take physical control of the property. In addition to physical control, the bailee must have had an intent to possess the chattel; that is, to exercise control over it. For a bailment to exist, the bailee must know or have reason to know that the property exists. When property is hidden within the main object entrusted to the bailee, lack of notice can defeat the bailment in the hidden property. The existence of a contract of bailment often turns on the degree of control exercised by the prospective bailee over the property or chattel in question. In other words, the crucial point to be considered is whether the custody or possession of the vehicle is purposefully handed over to the bailee or whether the complainant is merely allowed to park his or her vehicle in a parking space or facility. While the laws of bailment apply in the former case, the latter is only a licensor-licensee relationship where laws of bailment or the *prima facie* liability rule cannot be applied.

[23] The distinction between a person who leaves his or her vehicle in a car park, and a person making delivery of a vehicle for safekeeping has been well-established in common law by the Court of Appeal in *Ashby v. Tolhurst. [1937] 2 K.B. 242*. In that case, the plaintiff parked his car in a car park owned by the defendants and received a parking ticket with an "owner's risk" clause. The car park attendant allowed another person to take away the car based upon a mistaken impression that the thief was the true owner of the car. The Court of Appeal held that no relationship of bailment was established, and the defendant was under no contractual liability to the Plaintiffs as:

> It seems to me that reading the document as a whole, including its own description of itself, namely "Car park ticket," it really means no more than this: the holder of this ticket is entitled to park his car in the Seaway Car Park, but this does not mean that the proprietors are going to be responsible for it...If that be the true view, the relationship was a relationship of licensor and licensee alone, and that relationship in itself would carry no obligations on the part of

> the licensor towards the licensee in relation to the chattel left there, no obligation to provide anybody to look after it, no liability for any negligent act of any person in the employment of the licensor who happened to be there.....The word "give" in the context quite clearly is not accurately used. The car is placed upon the ground, and if the owner came for it he would get into it and drive it away. There is no question of giving, no question of physical delivery coming into it at all. It is not like articles in a railway cloak-room which have to be handed out by the cloak-room attendant before the person claiming them can get them. This is a case where anyone can walk on to the land and get into a car, and I cannot myself read that one phrase as evidence of any such delivery as Mr. Cloutman admits is essential for the success of his case.

[24] Similarly, in *Tinsley v. Dudley, [1951] 2 K.B. 19* the Plaintiff went to a public inn and parked his motorcycle in the premises. No parking fee was charged, nor was there any attendant to look after the vehicles. Relying upon *Ashby* (supra), the Court of Appeal held that the inn would not be liable:

> But, apart altogether from that point, it seems quite plain that the decision in this Court proceeded upon the view that one who parks his car in a car park does not thereby deliver over the possession or custody of the motor car to the keeper of the park.....at any rate in the absence of some unusual or special circumstances which did not exist in that case and were not to be imported by the giving or the terms of the ticket. It seems to me clear, therefore, that there is no basis for saying that there was any delivery over to the Defendant, or to any agent of his, of the possession or custody of the motor-bicycle. There was nobody about, and it is not suggested that access to the yard was not available to any who liked to walk in.....As Romer, L.J., said in *Scarborough v. Cosgrove*, all these cases must depend upon their own facts; and it should not be assumed that in every case in which, adjoining a public house there is a place provided for the leaving or storage of motor cars by patrons of the house it will follow that the publican is under no liability. That question will depend on whether, in the particular case, a contract of bailment comes into existence or not.

[25] It the two decisions cited above, there was only an open space where licence was being granted to vehicle owners to park their vehicle on payment of certain fee without their being any obligation on the part of the defendants to look after the safety of the vehicles parked therein. However, when the vehicle is placed under the charge, custody, control and possession of the owner of the premises, a contract of bailment comes into existence.

[26] Whether the relationship between a driver who offers and a parking lot operator who accepts a motor vehicle for the purpose of parking, is that of bailor and bailee, depends upon the question whether the parking lot operator assumes control over and custody of such vehicle, or simply grants permission to park the vehicle at a designated place upon the parking lot.

[27] A receipt issued by the premises attendant in itself is not conclusive of a bailment, when the keys are retained by the vehicle owner, if circumstances warrant a finding that it is not intended to be a claim check, but is meant to be a receipt for the payment of a fee for the license to park. Where the owner of the premises exercises no control over the vehicle, letting the car owner take the keys and permitting him or her to lock the car or not as he or she desires, and where the parties contemplate that the car owner may enter the premises and remove the car at will without consulting the attendant first, generally no bailment is found to exist. Under such circumstances if attendants are present, it is usually only for the purpose of collecting fees and directing traffic.

[28] Generally, a receipt is an acknowledgment in writing that the party giving the same has received from the person therein named, the money or other thing therein specified. By itself, a receipt is not an agreement but rather a document evidencing a prior agreement. The receipt so handed over to the bailor (the appellant) is evidence of a contract, by which the bailee (the respondent) undertook to park the motorcycle and return it in a suitable condition when the

appellant so directed. It may also serve as an indicia of title since a rebuttable presumption exists that those in possession of property are rightly in possession.

[29] However, when it is understood that the bailor must produce the receipt, or must in some other manner identify herself before he or she can reclaim his or her motorcycle, a bailment usually is found to exist, even when the key is retained by the owner who locks his car or not as he sees fit (see *General Exchange Ins. Corp. v. Service Parking Grounds, 254 Mich. 1,235 N. W. 898 (1931)*; *Galowltz v. Magner, 208 App. Div. 6, 203 N. Y. S.421 (1924)* and *U Drive & Tour v. System Auto Parks, 28 Cal. App. Supp. 2d782, 71 P. 2d 354 (1937*). A contract of bailment may be implied based upon the manner of conducting the business and the circumstances of the case, taking into consideration the degree of enclosure, an undertaking to guard the vehicle against theft, the manner in which the premises are guarded, and the practice of prohibiting any one from leaving the premises with a vehicle without proper identification and proof of the right to remove the vehicle.Upon that state of facts in the instant case, the trial court was right to conclude that the respondent assumed control over and custody of the motorcycle and that the relationship between the parties was that of bailor and bailee.

[30] A bailee may attempt to limit liability as respects his or her negligence by inclusion of exclusion clauses. To be valid, a disclaimer must be brought to the attention of the bailor and must be unambiguous (see *Price & Co. v. Union Lighterage Company [1903] 1 K.B. 750*). Thus posted notices and receipts disclaiming or limiting liability must set forth clearly and legibly the legal effects intended. In the absence of anything to indicate that the bailor either expressly or impliedly assented to such printed conditions, prior to or contemporaneously with delivery of the property to the bailee, they will not bind the bailor (see *Thornton v. Shoe Lane Parking [1971] 1 All ER 686; Chapelton v. Barry Urban District Council [1940] 1 KB 532; Olley v. Marlborough Court [1949] 1KB 532* and *Curtis v. Chemical Cleaning and Dyeing Co Ltd [1951] 1 All ER 631*). The bailee must

show that the bailor in fact knew about the disclaimer. Language printed on the back side of a receipt will not do. A bailee may not as well make a disclaimer of responsibility for certain losses (e.g., fire or theft) if in fact he or she is guilty of gross negligence. Reasonable notice (not actual nature of the notice itself) is required as to the existence of the clause. The notice must be sufficiently prominent (see *McCutheon v. David MacBrayne Ltd [1964] 1 WLR 125*). The clause must not only be incorporated into the contract but must also, as a matter of construction, extend to the loss in question.

[31] There must be evidence to show that the party that is attempting to limit or exclude their liability made reasonable steps to ensure that the other party knew that the exemption clause existed and their notice was drawn to the same. In the instant case, apart from the respondent asserting that Parking is allowed on the inn premises at "owner's risk" and a notice to that effect is displayed on the premises, no evidence was led as to the sufficiency or reasonableness of the said notice. All in all, in failing to advert to the fact that it is lawful possession and the corresponding duty to account for the chattel as the property of another that creates the bailment, regardless of whether such possession is based upon contract in the ordinary sense or not, the trial court misdirected itself. This ground of appeal accordingly succeeds.

Ground one; court's finding as to appellants' *locus standi.*

[32] By the first ground of appeal, it is contended that the triad court erred when it found that the appellant not being owner of the motorcycle, had no *locus standi* to sue for its loss and the respondent had no corresponding liability in bailment. The appellant's cause of action against the respondent was founded on a breach of the contract of bailment. A contractual duty is one which is owed to a specific person in consequence of an agreement entered into with that person. The issue of title to or property in the motorcycle was not pivotal in determining whether there was a breach of contract of bailment.

[33] Under section 93 of *The Contract Act*, *7 of 2010*, a "bailor" is the person who delivers the chattel. A bailor is an individual who temporarily relinquishes possession but not ownership of a good or other property under a bailment. A bailment is usually a contractual agreement between the bailor and the bailee that specifies the terms and purpose of the change in possession. As possession is the essence of a bailment, it follows that the bailor need not be the real owner of the property or chattel transferred to the bailee. Possession is a relative concept and it is immaterial for the purposes of creation of a bailment how the bailor came into possession of the chattel (see *Armory v. Delamirie [1722] 93 E.R. 664 and Meux v. Great Eastern Ry Co [1895] 2 QB 387*).

[34] A bailor transfers possession, but not ownership, of a chattel to another party. Accordingly, as a person privy to the contract of bailment, the bailor has the *locus standi* to sue for its breach (see *Claridge v. South Staffordshire Tramway Co [1892] 1 QB 422*). More so, section 117 (2) of *The Contracts Act* confers upon the bailor the right to sue a third person for deprivation or damage. The general rule is that the bailee too can recover damages in full if the bailed property is damaged or taken by a third party, but he or she must account in turn to the bailor. As against a wrongdoer, possession is title. The chattel that has been converted or damaged is deemed to be the chattel of the possessor and of no other, and therefore its loss or deterioration is his or her loss, and to him or her, if he or she demands it, it must be recouped (see *NZ Securities & Finance Ltd v.. Wrightcars Ltd [1976] 1 NZLR 77*). A bailee thus has the requisite possessory title to sue for interference with the chattel.

[35] Anyone who takes custody of someone else's property is legally liable for loss or damage to the property due to negligence. The basic rule is that the bailee is expected to return to its owner the bailed chattel when the bailee’s time for possession of them is over, and the bailee is presumed liable if the chattel is not returned. The bailee has a responsibility to the bailor to maintain the property in a safe condition. According to sections 92 and 93 of *The Contract Act*, *7 of 2010* in

the absence of any special contract, a bailee is not responsible for the loss, destruction or deterioration of the bailed chattel, where the bailee takes such care as a person of ordinary prudence would under similar circumstances take of his or her own chattel of the same bulk, quantity and value, as the bailed chattel. The bailee needs to take the same degree of care of the chattel whether the bailment is for reward or gratuitous. At least so far as modern commercial bailments are concerned the absence of reward is likely to be largely, if not wholly, immaterial to the standard of care expected of the bailee (see *Port Swettenham Authority v. T.W. Wu & Co. [1979] A.C. 580*). The responsibility is one of "ordinary care" or the care that prudent persons would exercise in caring for their own property. The circumstances of the bailment and the nature of the property usually will be deciding factors as to the degree of care a bailee must exercise.

[36] The bailee is under a duty to anticipate the hazards to which the particular property would be exposed. Hence, a bailee is liable to a bailor for property that is lost or stolen from the bailee's premises while under the care of a bailee, even if the loss was not the bailee's fault. In a bailment case, the bailor has the burden of proving that a loss was caused by the bailee's failure to exercise due care. Because the bailee is in possession and in control of the given property, the bailor makes out a make a *prima facie* case for negligence if the property is not returned or returned in a damaged condition. Section 99 of *The Contract Act*, *7 of 2010* specifically provides that where, by the fault of a bailee, the chattel is not returned, delivered or tendered at the proper time, the bailee is responsible to the bailor for any loss, destruction or deterioration of the chattel, from that time.

[37] Under section 92 of *The Contract Act*, *7 of 2010*, the bailee has a duty to keep his or her premises in a condition of safety that would be reasonable to prevent loss, damage, or theft of the chattels of its guests. The higher the value of the chattel, its attractiveness to thieves, the likelihood of any avoidable hazard affecting the chattel and the probability of theft, the greater the obligation of the

bailee to watch out for it (see *Date & Cocke v. GW Sheldon & Co (London) Ltd (1921) 7 Ll. L.Rep. 53*). This would mean that it is not sufficient for the bailee to merely appoint an attendant or security guard who takes the responsibility of parking the vehicle and keeping the ignition keys in his custody until the vehicle owner is inside the bailee's premises. The bailee must take additional steps to guard against situations which may result in wrongful loss or damage to the vehicle. The practice of other bailees in a similar way of business and having possession of similar chattels may be relevant but is by no means determinative (see *British Road Services Ltd v. Arthur V. Crutchley & Co Ltd (No.1)[1968] 1 All E.R. 811*).

[38] The question becomes whether the bailee exercised such care. If he did, he is not liable for the loss. To avoid liability the bailee must rebut that presumption by showing affirmatively that he was not negligent. The reason for this rule is that the bailee usually has a much better opportunity to explain why the chattel was not returned or was returned damaged. To put this burden on the bailor might make it impossible for him or her to win a meritorious case. In cases of private stealth, or simple theft where no force or violence is involved, the bailee has the *prima facie* burden of explaining that the loss or disappearance of the chattel in his or her custody is not attributable to his or her neglect or want of care. This is because no one apart from the bailee is in a position to explain the fate of the chattel. The burden of proving that such loss or damage was covered by sections 92 and 93 of *The Contract Act*, *7 of 2010* will be on the bailee.

[39] The obligation imposed by section 92 of *The Contract Act*, *7 of 2010* applies to bailees as well as to their servants in the discharge of their duty. For negligent loss by the servant in the course of employment the master will be responsible (see *Elvin Powell v. Plummer Roddis (1933) 50 TLR 158; Port Swettenham and China-Pacific SA v. Food Corp of India (The Winson) [1982] A.C. 939* and *Alwaham v. Bullock, (1902) 86 L.T. 796*) and also for theft due to the bailee's own negligence. However, where loss is due theft by the servant, the master will not

be liable provided he or she used due care in selecting that servant (see *Cheshire v. Bailey [1905]1 K.B. 237* and *Mintz v. Silverton (1920) 36 TL.R. 399*).

[40] However it has been held before that where a fraudulent servant is put in a position of authority by the employer and the person defrauded is brought into contact with the servant by the act and on the representation of the employer and a fraud is committed by the servant acting within the bounds of that representation, the principal is liable for the fraud of the agent provided the agent was acting within the scope of his or her employment (see *Lloyd v. Grace, Smith & Co. [1912] A.C. 716*). At common law, cases of bailment though fall outside this general principle as to vicarious liability. It is an established principle of the common law that a bailee for reward, in the absence of personal negligence, will not be held responsible for the thefts of his or her servants. However this was changed by section 92 of *The Contract Act*, *7 of 2010*. A bailee is answerable for the manner in which the servant or agent carries out his or her duties (see *Morris v. C.W. Martin and Sons Ltd [1956] 2 ALL ER 725*).

[41] There is an inference or presumption of negligence on the part of the bailee when the chattel entrusted to him has been lost, stolen or destroyed while in his or her possession. It was therefore incumbent upon the respondent as bailee to prove that he was unable to redeliver because the motorcycle had been stolen, and that such a theft was not inconsistent with the exercise of due care on his or his servants' part. When the theft was occasioned by the bailee's negligence, the bailee is liable. Where the bailee proves loss of the property by theft, but attempts no explanation of the circumstances and offers no proof of facts from which an inference of due care may be drawn, or the explanation offered is unsatisfactory, he does not thereby rebut the presumption of negligence or want of due care arising from his failure to redeliver. The respondent as sub-bailee had not taken such care of the motorcycle as was expected of the prudent man in respect of his own chattels of the same quality and value. Therefore, the respondent is liable for the loss suffered by the appellant as bailor.

[42] This duty of safe return is one imposed by the bailee's contract, from which he cannot by his own conduct, much less by shifting the responsibility to his servant, release himself, and the liability in such a case grows out of the fact that the bailee has failed to do the thing he agreed to do. The bailee is in a position to supervise and select his employees and should do so with the degree of particularity commensurate with the great value of the chattel which the employees are to control, and with an eye to the enticing nature of the chattel and the facility with which a servant can remove it from the premises. It seems more proper that the risk should be placed upon the bailee who selects the servant and has a chance to supervise his actions than upon the bailor who has no control whatsoever over the methods of management used. The risk should properly be a risk of the bailee's business and not of the bailor.

[43] When a principal has in his charge the a chattel or belongings of another in such circumstances that he is under a duty to take all reasonable precautions to protect them from theft or depredation, then if he entrusts that duty to a servant or agent, he is answerable for the manner in which that servant or agent carries out his duty. If the servant or agent is careless so that they are stolen by a stranger, the master is liable (see *Morris v. CW Martin & Sons Ltd [1966] 1 QB 716*). An act may be done in the course of employment so as to make his master liable even though it is done contrary to the orders of the master, and even if the servant is acting deliberately, wantonly, negligently, or criminally, or for his own behalf, nevertheless if what he did is merely a manner of carrying out what he was employed to carry out, then his master is liable (see *Muwonge v. Attorney General [1967] EA 17*). It was therefore not a defence to the respondent that he had instructed his staff not to permit the appellant park her motorcycle at the inn premises.

[44] Applying the relevant principles to the present case, it is clear that the respondent did not explain that his failure to return the motorcycle to appellant was not on account of fault or negligence on his part. If the possibility of danger

emerging would have occurred to the mind of a reasonable person, there is negligence in not having taken extraordinary precautions. In the light of human experience, a security guard who accepts food items from a stranger exposes himself to the danger of poisoning and by doing so does not meet the standard of care expected of him. Thus, liability should be affixed on the respondent due to want of the requisite care towards the motorcycle bailed to it.

[45] One who has the right to permanent possession is necessarily the owner, and since one entitled to temporary possession only is under a duty, either present or future, to surrender the chattel or its proceeds on demand or to seek the owner and deliver it to him or her, he or she is a bailee. It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed (see *Sally Wertheim v. Chicoutimi Pulp Company [1911] AC 301*). In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.

[46] Where two parties have made a contract which one of them has broken, or where one is under a duty of care which he has breached, the damages which the other party ought to receive in respect of such breach of contract or breach of a duty of care, should be such as may be fairly and reasonably be considered either as arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. If the special circumstances under which the contract was actually made where communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.

[47] On the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. This is because such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants (see *Hadley v. Baxendale (1854) 156 ER 145*). If a person is in possession of a chattel, and his or her possession is interfered with, he or she may maintain a suit but only for the injury sustained by himself or herself. The right to sue is one thing; the measure of the damages recoverable in such action is another. A bailor should be allowed to recover damages beyond the extent of his or her own loss simply because he or she happened to be in possession. He or she may not recover in such action as if he or she were the owner.

[48] In sub-bailment, the bailee becomes the sub-bailor, and someone else becomes sub-bailee. Both owner and head-bailee have concurrent rights of bailor against the sub-bailee (see *Morris v. CW Martin & Sons Ltd [1966] 1 QB 716 a*t *730*). Sub-bailment with the bailor's express or implied consent creates a relationship of what may aptly be termed privity of bailment not only between the original bailor and bailee on the one hand and between the bailee and the sub-bailee on the other, but also between the original bailor and the sub-bailee (see *Cheshire v. Bailey [I905] 1 K.B. 237* and *North Central Wagon and Finance Co Ltd v. Graham [1950] 1 All ER 780*). Both bailor and bailee may be able to sue in conversion a third person who interferes with possession of the chattel. However, the bailor cannot recover double damages against both bailee and sub-bailee, so must choose one if both are available. The sub-bailee does not have to initiate subrogated proceedings in negligence.

[49] The nature of the claim being *sui generis*, enables avoidance of some of the inconveniences of the law of contract, such as privity and title, since both the owner and the head-bailee have concurrently the rights of a bailor although they cannot both, of course, recover for the same loss. Both bailor and head-bailee have possessory rights in the chattel and concurrent rights to sue a wrongdoer, even though they cannot both undertake the same cause of action. If either the bailor owner or head-bailee sues, the settlement of those proceedings precludes a claim by the other (see *O'Sullivan v. Williams [1992] RTR 402* and *Nicholls v. Bastard (1853) 150 ER 279*).

[50] Only a possessory interest is required by a plaintiff in a suit for conversion, trespass or negligence (see *HSBC Rail (UK) Ltd v. Network Rail Infrastructure Ltd [2006] 1 All ER 343*). An owner with no possessory right to chattels has no title to sue in trespass, negligence or conversion. Save for damage to the reversionary interest which he or she retains in the chattel, it is only when the owner lawfully regains actual possession of the chattel from the head-bailee, that the exclusive entitlement to sue in conversion, trespass or negligence will also revert to the owner. Unless or until the owner has recovered the right to possession of the chattel, he or she will be unable to sue the wrongdoer, hence the head-bailee has not merely a right, but a duty, to recover converted chattels or their value.

[51] By reason of the fact that a bailee is regarded as having complete title *vis-à-vis* a stranger, the bailee may sue to recover the whole value of the chattel. Whether the bailor or the bailee had the actual use of the chattel, there can be only one loss of use claim. Although the head-bailee may obtain from the sub-bailee the entire value of the lost or damaged chattel, the head-bailee may retain as against the bailor only damages resulting from the wrongful interference with her possessory interest in them. Damage caused to the proprietary interest, regardless of whether it is recovered by the head-bailee or bailor, is suffered only by the bailor and so will be recoverable by him either from the sub-bailee directly,

or from the head-bailee who has recovered the entire value of the chattel from the sub-bailee. Ultimately, whether bailor or head-bailee is the plaintiff, the entire value of the loss or damage is recoverable by either, and they have reciprocal obligations to account.

[52] The appellant stated the value of the motorcycle at the time of its loss at shs.13,222,500/= and that is the measure of the loss suffered by the appellant on account of the loss of the motorcycle. The measure of damages is the value of the property immediately prior to its loss. Estimates of value may be made, if possible, by one or more competent and disinterested persons, preferably reputable dealers or officials familiar with the type of property lost. In the instant case there is evidence of a proforma invoice that was exhibit to justify that value.

[53] Although in reality, each brand and model of a motor vehicle loses its value at a slightly different rate, the standard motor vehicle depreciation calculator assumes that after approximately 10.5 years, the motor vehicle will have zero value. Despite the fact that it can still be sold to individual buyers, its market value will be extremely low. It is widely acknowledged that after a year's use, the value of a motor vehicle on average decreases to 81% of the initial value (hence in this case shs. 10,710,225/=) There should therefore be an 8 months' depreciation deduction at the rate 16% which is shs. 1,375,265/= Hence the value of the motorcycle at time of loss was shs. 11,847,235/= Where a cost saving chattel used by the appellant in the course of her employment is damaged, destroyed or lost the appellant is entitled to the expenses reasonably incurred during the period which is reasonably required to replace the lost chattel (see *Christine Bitarabeho v. Edward Kakonge S.C. Civil Appeal No. 4 of 2000*). The cost of a substitute, reasonably hired may provide the measure of damages (see *Martindale v. Duncan [1973] 1 WLR 574*; *Moore v. DER Ltd [1971] 1 WLR 1476*; and *Giles v. Thompson [1994] 1 AC 142*).

[54] Notwithstanding that no substitute vehicle has been hired, judges have awarded compensation for loss of use of a vehicle while it is being repaired where it has been shown that inconvenience has been caused or, for example, that the owner has had to use public transport, or walk or that a family have been deprived of the advantage of a family car where otherwise they would have used the car which had been damaged (see *Lagden v. O'Connor [2004] 1 AC 1067* and *Alexander v. Rolls Royce Motor Cars Ltd [1996] RTR 95*). Being special damages, they must not only be specifically pleaded but must be strictly proved (see *Ryce Motors Ltd and another v. Muroki [1995-1998] 2 EA 363; Borham-Carter v. Hyde Park Hotel [1948] 64 TLR*; and *Masaka Municipal Council v. Semogerere [1998-2000] HCB 23*). "It is not enough to write down particulars and, so to speak, throw them at the head of the Court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it" (see *Kenya Breweries Ltd v. Kiambu General Transport Agency Ltd [2000] 2 EA 398 at 416*). The degree of certainty and particularity depends on the circumstances and the nature of the act complained of (see *Jivanji v. Sanyo Electrical Co Ltd [2003] 1 EA 98*).

[55] Furthermore, the law is that a person in the position of the appellant must take reasonable steps to mitigate her damage (see *African Highland Produce Limited v. Kisorio [2001] 1 EA 1* and *Senyonga Bernard v. Uganda Transport Corporation [1980] HCB 128*). The defendant must plead it as a fact and also bears the burden of proof of the possibility of mitigation (see *African Highland Produce Ltd v. Kisoria [2001] 1 EA 1*). So the appellant cannot claim for the cost of hiring another motorcycle if she had no reason to hire an alternative one while her own motorcycle was missing. It had to be shown that the appellant had a choice, and that she would have been able to mitigate her loss at less cost. A wrongdoer is not entitled to demand of the injured party that she incur a loss, bears a burden or makes unreasonable sacrifices in the mitigation of his damages. The question what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case, the

burden of proof being upon the defendant. In the instant case, there was necessity to hire alternative means of transport because it was not shown that the appellant's employers maintain a spare fleet of motorcycles for such emergencies. The appellant though was under a duty to minimise her loss by spending no more on the hire than she needed to do in order to obtain a substitute means of transport.

[56] Where the appellant in a case such as this had had to hire a replacement vehicle, the precise figure can be claimed as special damage and will be recovered if proved or in the alternative, damages calculated on the standing charge cost of maintaining and operating the vehicle. If the respondent can show that the cost that was incurred was more than was reasonable, if for example, a larger or more powerful motorcycle was hired although motorcycle equivalent to the lost one were reasonably available at less cost, the amount expended on hire must be reduced to the amount that would have been needed to hire the equivalent (see *Giles v. Thompson [1994] 1 AC 142*).

[57] Apart from the assertion in her testimony that she incurred transport cost, there is nothing to substantiate that claim, although strict proof does not necessarily always require documentary evidence (see *Kyambadde v. Mpigi District Administration, [1983] HCB 44; Haji Asuman Mutekanga v. Equator Growers (U) Ltd, S.C. Civil Appeal No.7 of 1995* and *Gapco (U) Ltd v. A.S. Transporters (U) Ltd C. A. Civil Appeal No. 18 of 2004*). There is a total lack of contemporaneous records of the places she visited, the tasks undertaken and the distances involved. The quality of evidence before the court does not meet the requirement of strict proof. Where a claim of special damages fails, the a claim in general damages should be considered (see *Kibimba Rice Co Ltd v. Umar Salim S. C. Civil Appeal No. 7 of 1988*).

[58] Damages are said to be "at large," that is to say the Court, taking all the relevant circumstances into account, will reach an intuitive assessment of the loss which it

considers the plaintiff has sustained. The award of general damages is in the discretion of court in respect of what the law presumes to be the natural and probable consequence of the defendant's act or omission (see James *Fredrick Nsubuga v. Attorney General, H.C. Civil Suit No. 13 of 1993* and *Erukana Kuwe v. Isaac Patrick Matovu and another, H.C. Civil Suit No. 177 of 2003*).

[59] In the assessment of the quantum of damages, court should mainly be guided by the value of the subject matter, the economic inconvenience that the plaintiff may have been put through and the nature and extent of the injury suffered (See *Uganda Commercial bank v. Kigozi [2002] 1 EA 305*). Furthermore that a plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been if she or he had not suffered the wrong (See *Hadley v. Baxendale (1894) 9 Exch 341*; *Charles Acire v. M. Engola, H. C. Civil Suit No. 143 of 1993* and *Kibimba Rice Ltd v. Umar Salim, S. C. Civil Appeal No. 17 of 1992*).

[60] General damages are the direct natural or probable consequence of the wrongful act complained of and include damages for pain, suffering, inconvenience and anticipated future loss (see *Storms v. Hutchinson [1905] AC 515; Kabona Brothers Agencies v. Uganda Metal Products & Enamelling Co Ltd [1981-1982] HCB 74* and *Kiwanuka Godfrey T/a Tasumi Auto Spares and Class mart v. Arua District Local Government H. C. Civil Suit No. 186 of 2006*). The general damages in the instant case are calculated on the standing charge cost of maintaining and operating the motorcycle which is estimated at shs. 100,000/= a month for two financial years, from July, 2016 to July, 2018 as the period reasonably required to replace the lost motorcycle. In the final result, the appeal succeeds.

Order:

[61] Accordingly the judgment of the court below is set aside. Instead, judgment entered for the appellant against the respondent in the following terms;

a) shs. 11,847,235/= as the value of the motorcycle at the time of its loss.
b) shs. 2,400,000/= as general damages.
c) Interest on the awards in (a) and (b) above at the rate of 8% p.a. from the date of judgment until payment in full.
d) The costs of the suit and of the appeal

Delivered electronically this 22nd day of May, 2020 ……Stephen Mubiru……..

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : M/s Owor-Abuga and Co. Advocates

For the respondents: ……..