

UGANDA / JUDGMENT

Comdel Forex Bureau v Attorney General (Civil Suit No. 497 of 2012) [2014] UGCommC 196 (19 May 2014)

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COURT

Commercial Court of Uganda

CASE / FILE NUMBER

Civil Suit No. 497 of 2012

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THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO 0497 OF 2012

COMDEL FOREX BUREAU:.....PLAINTIFF

VS

ATTORNEY GENERAL :.....DEFENDANT

BEFORE THE HON. MR JUSTICE HENRY PETER ADONYO

JUDGMENT

1. Facts of the Case

The plaintiffs' employee, one Sarah Njuki on the 6th of July 2010 on the instructions from her Managing Director, went to Tropical Bank Uganda Limited to collect Uganda Shillings Two Hundred Ten Million Shillings only. (Ug. Shs. 210,000,000/) from the plaintiff's safe deposit box for usage at the bureau. On her way back from the bank, she was met by one of her supervisor, a Mr. Mahad Miiro who requested her to return with him to the bank and to collect the said money in smaller change amounts. On their return to the plaintiff's trading place, Mr. Mahad Miiro carried the bag containing the changed money and while they proceeded to the plaintiff's office, a motor cyclist grabbed the bag containing the money. On noting this action, Ms. Sarah Njuki made an alarm and a chase for the thief who was later identified as Mugume Samuel ensued. The said Mugume Samuel ran and took refuge in the house belonging to one Sarah Nantege, located in Kawempe Zone Kanyanya, Kampala District. A mob gathered around Nantege's house with the intention to lynch the thief. This intensity of the situation led the chairman of the local council area called Kanyanya Komamaboga, a Mr. Mulumba Samuel to rush to the nearest police station

and report the matter. He met Sgt. Baluku Sam who was on duty whom he requested to go with him to assist to quell the mob.

Sgt Baluku stated that he was busy but gave the Local area Chairman two police officers to go and assist in controlling the mob. Upon arrival at Ms. Nantege's residence, the police officers entered into her house where the said Mugume was hiding. They spotted Mugume hiding in the house and upon seeing Mugume, the police officers asked him to give to them the stolen motorcycle which they assumed he had stolen. Mugume informed the police officers that he had not stolen any motorcycle but that he had snatched a bag which contained money. The police officers searched for the bag of money which they eventually found under the bed of Nantege's baby.

Upon discovering that the bag contained money, the police officers simply shared it among themselves but left some as exhibit. They did not return the money to the owner. Sergeant Baluku who had deployed the said police officers later went to Ms. Nantege's house and entered into it. He took hold of the bag, saw what was inside, saw the remaining money took it and pocketed. Sgt. Baluku and PC Walusa were later arrested, charged with a criminal offence, tried and convicted of the offence of abuse of office in the High Court Criminal Session Case NO 180 of 2010. The High Court also found similarly in High Court Criminal Session case No. 202 of 2010 one Mahad Miirö guilty of theft and ordered the recovery of the money from the Police force.

1. ISSUES FRAMED

Three issues were framed for trial as follows;

1. Whether the defendant's employees acted in breach of their obligation?
2. Whether the defendant is vicariously liable for the acts of its employees?
3. What are the available remedies?

4. LAWS APPLICABLE

5. The Constitution of the Republic of Uganda 1995
6. The Civil procedure Act (Cap 71)
7. The Government Proceedings Act (Cap 77
8. The Government Proceedings (Civil Procedure) Rules) Rules SI 77-1
9. The Civil Procedure Rules SI 71-1
10. The Police Act Cap 303
11. **Authorities cited**
12. Justine Ooja versus Attorney general and Four others HCCS 16 of 1996
13. Management Training and Advisory Centre versus Patrick Kakuzu Ikanza
14. Standard Chartered bank (U) Ltd. versus Emag AG – CACA No. 3 of 2003

15. Jovelyn Byaruhanga versus Attorney general SCCA No. 28 of 1993
16. Okello Donato Lacika versus Attorney General
17. Others as found in the submissions of both sides which are on record.
18. **RESOLUTION OF THE MATTER**
19. **Whether the defendant's employees acted in breach of their obligation?**

At the beginning of trial, the plaintiff presented five witnesses. The Defence accepted the evidence of four of the five plaintiff's witnesses namely Sarah Njuki, Mugume Samuel, Sarah Nantege and Mulumba Samuel.

The plaintiffs' main evidence through the testimony of Ms. Sarah Nantege was as stated above but more particularly that that upon entry together with the police into the house where Mugume had taken refuge after snatching the bag, the police officers upon discovering the bag containing the stolen money instead of handing it intact to her or taking the whole amount as exhibit shared the money amongst each other but left a little amount as exhibit. But that later their boss, Sgt . Baluku also came and pocketed what had remained in the bag.

The plaintiff further stated through the evidence of Janat Nsubuga that the police officers did not declare the amounts they had recovered at the police station. Rather, the police officers forced Mugume Samuel to record a statement to claim that he had stolen instead stolen a motorcycle.

The police officers who misappropriated the plaintiff's money, namely Sgt. Bakulu and Walusa were later tried and found guilty in the case of **Uganda versus Bakulu Samuel and Another High Court Criminal. Session Case No.180 of 2010** where Honourable Justice Catherine Bamugemereire at page 15 of her judgment had this to say, that; **"The prosecution... had to prove that the accused person did or directed to be done an arbitrary act; an arbitrary act includes acts which are indiscriminate, irrational or illogical. In this case the act of policeman on duty deciding to take money or other property, capable of being stolen can be said to be capricious, indiscriminate and even illogical and therefore an arbitrary act. I find that the police while executing their duty on the material day unlawfully and without claim of right appropriated to themselves money estimated to be Uganda Shillings 210, 000,000 which had been recovered from a suspect of theft. It beggars belief that instead of protecting public property, the policemen decided to steal money which that had found on a suspect at a riotous scene."**

The defendant's evidence concurred with that of the plaintiff. But however in disassociating itself from the acts of the police officers, Counsel for defendant the submitted the police officers were personally liable for the onerous act of theft in that since the Uganda Constitution of 1995 Article 212 provided for the functions of the police force which include the duty to protect life and property which same functions were reflected in the Police Act. Counsel for the Defendant further contended the obvious that that by virtue of provisions Police Act, the police officers were under the obligation to protect property and not to steal the same. He therefore submitted that it was for that reason that the trial judge in the criminal case found them guilty of abuse of office of

having acted to the prejudice of their employer by stealing stolen money which they had recovered amounting to Uganda Shillings Two Hundred ten Million Only (Ug. Shs. 210,000,000/=) which had been stolen by one Mugume Samuel belonging to the plaintiff which they never protected as required or declared the same. Counsel for the defence then concluded that it was for the said reason that the court ordered that the police officers were personally pay the plaintiff the money which they took from her after being found guilty of the offence of abuse of office.

This submission however is based on the facts found in the decision of the High court in **Uganda versus Mahdi Miir** High Court Criminal Case No. 202 of 2010 and I find it quite erroneous and misleading. The fact of the matter is that in that criminal case, the learned trial Judge Honourable Lady Justice Catherine Bamugemereire, upon conviction and during the process of sentencing, ordered for the recovery of the money stolen by the police officers from the Uganda Police Force which she stated was constitutionally liable for the acts of the said police officers and herein represented by the Attorney General and not the convicts themselves. The criminal trial court held that the police force was responsible for the act of its officers, a clear presumption that being police officers and represented by the defendant herein, they were the defendant's servant who acted in breach of their obligations. There can be no doubt in my mind that about this matter as it was proved beyond reasonable doubt at both the criminal trials in the cases of **Uganda versus Mahdi Miir** High Court Criminal Case No. 202 of 2010 and **Uganda versus Bakulu Samuel and Another** High Court Criminal Session Case No.180 of 2010 that this was the position.

My one and only conclusion here is that the defendant's servants were in breach of their obligation which they ought to have exercised in the public interest but failed to do so and I do find so.

1. **Whether the defendant is vicariously liable for the acts of its employees?**

Turning to the second issue of whether the defendant is vicariously liable for the acts of its servants and, in this particular respect the Police officers, the submission of the counsel for the plaintiff was that the Defendant was vicariously liable for the acts of its servants, who in this instance as police officers who were on duty purportedly executed their duties of controlling a mob in the process of arresting a thief. But, however, instead of carrying out their constitutional duties of rescuing the situation, they instead made matters worse by fraudulently converting to their own use the plaintiff's money while in line of duty. That this was so, the plaintiff's counsel submitted, was as clearly demonstrated by Mulumba Samuel who stated that he saw a mob armed of motorcyclist's riding towards the home of Ms Nantege with the intention of lynching an alleged motorcycle thief and that on realizing that the mob were out baying for the life of the alleged thief, he, Mulumba rushed to the nearest police station to seek for police's help and the police responded by deploying police officers to the charged scene. Mulumba went on to state that these same police officers instead of saving the situation, stole the money which had been grabbed from an employee of the plaintiff. This piece of evidence was uncontroverted. Indeed the defence agreed entirely with the sequence of events as stated by Mulumba.

The defence however argued that the said police officers were on their own frolic. This is however not born from the facts of this case as the sequence of events show that the said police officers were deployed upon a report that there was a mob which had wanted to lynch an alleged motorcycle thief. They were indeed on duty at the time they stole the money as while seeking out the alleged thief in the house where he had hidden, the police officers came across the bag of money which had been grabbed and instead of returning it to the owner or exhibiting it for purposes of a criminal trial against the alleged thief, merely distributed the same amongst themselves. It is clear that the said officers were not on a frolic of their own as evidence show that they were deployed and were on official duty.

It should be recalled that the evidence of these officers being on duty was clearly exhausted in the criminal case of **Uganda versus Mahdi Miir** High Court Criminal Case No. 202 of 2010. In that case, a certified copy of which was tendered in evidence, the trial court did find that the money which the plaintiff lost and which the plaintiff seeks to recover in this civil suit be recovered from the police force whose servants occasioned the loss while in line of duty. This to me is additional and sufficient proof that the loss was indeed committed by the policemen in the course of their employment. Indeed to put it in perspective, the words spoken out by the trial judge, Bamugemereire, J in that criminal case is telling. She stated as follows; *"...the stolen cash ...was misappropriated by the police officers during the arrest of one Samuel Mugume..." in the line of duty."

That the police officers stole the money while on duty talks volume of the moral bankruptcy of the said officers and their lack of sense of duty to the public whom they are employed to protect and serve with diligence. And as noted by the trial judge in that criminal case, it appears, that the police force, which is represented by the defendant in this instant matter, has no control on what its these officers do and as a result ordered it to make good the theft occasioned by the rogue officers. In my view, this was a clear manifestation that the officers were on duty and had the responsibility to take control of the situation and save it rather than aggravate. The defendant is therefore liable for their act as this e scenario is at fours with the decision in **Muwonge versus Attorney General Uganda** [1967] EA 17, where **Newbold P** held that; *"...an act may be done in the course of a servant's 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, want only, negligently or criminally, or for his own benefit, nevertheless if what he did is merely a manner of carrying out what he was employed to carry out then his master is liable."* The learned Judge in the above case further went on to state that; *"...a policeman may still be acting in the course of his duties if the manner in which he carries out his duty is a wrong one; but nevertheless he is still carrying it out"*. The holding in **Ketayomba versus Uganda Securiko Limited** [1971] HCB at 170 where it was held inter alia that *"...an employer is still liable for the tortuous acts of his servant id the servant acted dangerously, recklessly or for his own benefit as long as he was on his master's duty when he inflicted the tort"*. confirms the liability of an employer of being vicariously liable for the acts of its servants.

Relating the evidence adduced before me and the fact that there was no controversy as to how those said officers went to the scene of crime and noting that the same said officers were subsequently tried and convicted in the criminal case resulting from the facts as adduced in this matter being quite similar, I would not hesitate but to find that the plaintiff has proved on a balance of probability that the defendant vicariously liable for the act of the police officers.

1. **What are the available remedies?**

The plaintiff prayed to this Honourable Court to award it special, general and general damages for the loss occasioned. I will examine each area of claim and make appropriate decision.

1. **Special Damage**

As regards special damages, the plaintiff claimed that it lost Uganda Shillings Two Hundred and Ten Million Only (Ug. Shs.210, 000,000) as per the evidence of Ms Njuki who stated that she went to the bank to pick the said amount and her evidence was not controverted. Further, in the case of **Uganda versus Mahdi Miir H. C. Cr. Sc.202 of 2012** and **Uganda versus Baluku Samuel and Another High Court Criminal Session Case No.180 of 2010**, the court found in both cases that the defendant's employees stole money belonging to the plaintiff's funds amounting to Uganda Shillings Two Hundred and Ten Million Only (Ug. Shs. 210,000,000/=). This is the same money claimed here. The consistency of this piece of evidence coupled with the fact that no other evidence was brought to countermand this claim, I would find as a fact that the plaintiff lost Uganda Shillings Two Hundred and Ten Million Only (Ug. Shs. 210,000,000/=). I will award that amount as special damages.

1. **General Damages**

The plaintiff further asked for general damages to a tune of Uganda Shillings 150,000,000 on the basis that the money that was taken by the defendant's officers was meant to be used in the running the plaintiff's business and as such the plaintiff had suffered great economic inconvenience to its business. In resolving this matter, I would seek to rely on the holding in **Hardley versus Baxendale (1894) 9 Exch.341**, to determine whether general damages be awarded or not. In that case, it was held that the purpose of damages is to put the injured party in the position he or she would have been if the injury had not occurred.

In the instant matter, it is indeed clear that the plaintiff suffered a loss as a result of the defendant's servant's action and would be entitled to general damages. However, it is my view that a claim for general damages should not be made to make a plaintiff better off than when the loss occurred but to put back the plaintiff to the equal position the plaintiff was at the time the loss occurred. Not worse not better. The case of **Moses Ssali AKA Bebe Cool and Others versus Attorney General and Others HCCCS No. 86 of 2010** is relevant in determining the level of award. In the instant matter, the plaintiff has claimed general damages of Uganda Shillings One Hundred Fifty Million (Ug. Shs.150, 000,000/=). I find that this amount to be on the higher side and as such excessive in the circumstance taking into account that the plaintiff ought to have also used reasonable measures to ensure that the funds withdrawn from the bank were given adequate

security to avoid the circumstances under which they were grabbed. An amount of Uganda Shillings 30,000,000/= would suffice as general damages and would in my view atone for the loss and I would order so.

1. Aggravated Damages

The plaintiff also prayed for aggravated damages for the inconvenience suffered as a result of fraudulent conversion of the money lost. I take note the decision of **Isaac Nsereko versus MTN HCCS No 156 of 2012**, where the court put down reasons for such an award including mental distress, the manner of committal of the tort and so forth as to why such damages were awarded, I would go on to distinguish the situation as against the high award was against a commercial entity for profit and would consider it fallacious to do the same in the instant matter since the award would indirectly be against the ordinary tax payer represented by the defendant. While it is important that deterrence is put in place, it is my view that huge monetary deterrence orders as against the government tends to affect the ordinary citizen in that the government normally recoups such money from public funds causing other public beneficial activities to suffer as a result or even levying higher taxes to the detriment of the citizen. Having considered such scenario, I would think that an award of Uganda Shillings Twenty Million Only (Shs. 20,000,000/=) would suffice in the circumstances. This would atone the anguish of the plaintiff but also act as warning to the police force to rein in their officers to ensure that they do not turn against the very public they are employed to protect.

As the plaintiff is the successful party in this matter, I would also award to the plaintiff the costs of this suit.

1. Orders.

2. The Plaintiff is awarded Special damages of Uganda Shillings Two Hundred Ten Million Only (Ug. Shs. 210,000,000/=).
3. The Plaintiff is awarded a general damage of Uganda Shillings Thirty Million Only (Ug. Shs. 30,000,000/=).
4. The plaintiff is awarded an aggravated damage of Uganda Shillings Twenty Million Only (Ug. Shs. 20,000,000/=)
5. I award interest of 21% per annum on (a) and (b) from the date of filing this suit.
6. I also award the cost of this suit to the plaintiff.

This judgment is delivered at the High Court of Uganda at the Commercial Division at Kampala this 19th day of May 2014.

HENRY PETER ADONYO

JUDGE

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