



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 569 OF 1988

GLADYS NYAGUTHII.....PLAINTIFF

VERSUS

SPEEDWAYS INTERNATIONAL LTD.....RESPONDENT

JUDGMENT

The plaintiff in her plaint filed herein averred that by an agreement made on or about 1st April, 1987 between the plaintiff and the defendant, the plaintiff agreed to let out or hire and the defendant agreed to take the plaintiff's motor vehicle registration No KWW 874 Toyota lorry to transport goods from Nairobi to Juba Sudan in consideration of Shs 46,000/=.

That in pursuance of the said agreement the plaintiff's said motor vehicle transported the said goods to Sudan. The defendant paid to the plaintiff the sum of Shs 23,000/= leaving a balance of Shs 23,000/=.

That while on transit to Kenya the defendant requested to use the said vehicle for purposes of ferrying UNHCR relief food to Northern Uganda to which request the plaintiff agreed. That the plaintiff's vehicle stayed in Uganda at the sole use of the defendant for a period of 4 months and made 4 trips to Northern Uganda and Sudan.

That reasonable hiring of the said vehicle for a month is in the sum of Shs 45,000/ and the plaintiff claims from the defendant Ksh 180,000/= being reasonable hire charges.

In para 9 the plaintiff claims reasonable expenses of Shs 25,000/= incurred by the plaintiff when retrieving the said motor vehicle from Uganda.

That demand has been made but the defendant has refused and or neglected to repay the same.

That plaintiff therefore claims from the defendant Ksh 228,000/=

b) General damages as may be assessed by the Court, costs, interest and such further and other relief as the Court may deem fit to grant.

The defendant on the other hand put in a defence filed herein on 8/4/1988. The defendant denied hiring the plaintiff's vehicle Reg No KWW 874 on 1/4/87 and further stated that the plaintiff failed to provide particulars of the said agreement when demanded. The defendant further denied that the plaintiff's vehicle transported any goods to Sudan but in the alternative and without prejudice but if it did so then it did so in the ordinary course of business of the plaintiff as a transporter.

The defendant further denied owing the plaintiff the sum of Shs 23,000/= but in the alternative and

without prejudice to the foregoing the defendant is not bound to pay the same until the plaintiff produces duly endorsed and stamped customs and excise department documents showing that the plaintiff's said vehicle delivered the consignment the subject of export from Kenya.

He denied having requested the plaintiff to continue using the plaintiff's said motor vehicle between Kampala, Uganda and Northern Uganda or Sudan for the purpose of ferrying UNHCR relief food. And that if the plaintiff did so she did so purely for the plaintiff's own benefit and profit as a shrewd businessman and not at the request or instance of the defendant.

Further that the plaintiff was asked to supply the particulars but she failed to do so. The defendant further denied that the sum of Ksh 180,000/= is due from the defendant to the plaintiff and without prejudice to the foregoing that even if the hire charges were payable the rate of 45,000/= is unrealistic, excessive and unreasonable. He denied the claim for 25,000/= being expenses incurred by the plaintiff when retrieving the said motor vehicle from Uganda.

He denied that he is liable to the plaintiff for any damages and prayed for the dismissal of the suit with costs. The evidence briefly is as follows;

PW1 the plaintiff herein testified that on 1/4/87 she went to look for a job from the defendants. She had a lorry Reg No KWW 874. She talked with their representative in Court. DW1 and another European whose name she could not recall. The management agreed to hire her lorry as per exhibit 1 at a hire price of 46,000/= she was paid 23,000/= as the balance was to be paid upon her return. She with the driver left in a lorry along with other trucks. They had a guide to show them the route.

They were transporting certain commodities whose particulars she does not know but they had customs documents. The documents were in 3 bundles, one to be left at the Kenyan border, then another in Kampala and the third one in Sudan. They went to Sudan via Zaire as there was war. They reached Sudan through Juba and delivered the goods safely. There was no complaint from the people in Sudan. They were given some other papers to enable them bring back the vehicle to Kenya. They also had customs papers.

On 6/5/87 she arrived in Kampala where she met one Augustine Macharia DW2 who told her to leave her vehicle behind. She left it while she came to negotiate the terms she left the lorry in the hands of Macharia.

She brought the papers back and she met with DW1 and on checking she was told there was one paper which had not been rubber stamped by customs. She tried in vain to discuss the contract for her lorry which had remained in Kampala. The European referred her to DW1 who was in Kampala who wrote a letter to the European in Nairobi to the effect that she should be paid 100,000/=. The European took the letter and disappeared. She went back to Kampala and met Macharia DW2 and they discussed over the issue and he wrote a letter for her saying that she should be paid for the services of her vehicle. The defence objected to production of this letter but it was ruled admissible as Exhibit 2. She came to chase payment but later learned her lorry had been arrested in Kampala. She got annoyed and left the office before handing over the letter as she assumed it was going to assist her get her claim. She was not happy the way the defendants were dodging her and she reported the matter to police. The defendant promised to pay when at the police station but on getting to the office they refused to pay.

From here she was given a letter to the Kenyan Embassy in Kampala Exhibit 3a, b, and c. The Ambassador did the documentation for her and gave them fuel to Kenya.

She added the vehicle stayed in Kampala for 4 months and she is asking for 45,000/= per month. She went to Kampala 3 times to go and check on the lorry, she was using public means. She slept in lodgings and spent money, she used 3,000/= to get the lorry here in Kenya Exh 4.

Later on her lorry was repossessed by the financiers. She prayed for relief's sought in the plaint.

When cross-examined she confirmed that the money she has claimed is realistic. She has no experience in the transport business as that was her first time to go out of Kenya. All she knows is that they had a bundle of papers to be endorsed by customs, she did not check the contents.

She was firm the goods were duly delivered to Juba and she came back with documents. That 23,000/= payable upon her return has not been paid up to now. She added she does not know if the 23,000/= was used to get the forms stamped. The vehicle was on hire purchase and she was paying 14,330/= monthly instalments. She was making 20-30,000/= profit per month.

She denied hiding the vehicle in Kampala so that it is not repossessed. She denied hiring it out in Kampala on her own. That her driver was sick and that is why she came back with him and told them to hire another driver to drive her vehicle. She retained Exh 2 as an Exh. She was firm it was not sealed. It explains what her vehicle had done. She added that when she got her vehicle back she was assisted by the Kenyan Ambassador in Kampala. She was given 2 drums of fuel, she did not pay for them.

She stated she went by public means and in Kampala she was staying in a lodging but she does not have the receipts. That as far as the hire of her vehicle in Kampala is concerned she trusted Speed Ways person especially the European as she did not know that a white man conduct.

DW1 on behalf of the defence testified that he is the Operational Director of the Expeditors International Ltd, formerly Speed Ways. They transact transport business. He had worked for them for 9 years. He recalled on 1/4/87 he entered into a hire agreement with the plaintiff and they issued an LPO Exh 1. The hire charges came to 46,000/= for her lorry KWW 874 she was paid 23,000/= as mobilization expenses they gave her customs documents to enable her pass through the Kenyan Uganda border to Sudan. The plaintiff came back in the middle of May alone and brought the customs documents, on checking them he DW1 disclosed that she had passed through that border. He added that failure to stamp the documents is an offence. He gave her the papers to take them back for stamping. He did not see her again till the day she came with police. He was firm she was not entitled to payment till she brings these papers.

He was firm she is not entitled to any payment until she brings back the customs documents. He stated further that his office did not make any arrangements to use her vehicle in Uganda as it would be difficult for non citizens to enter into a contract of hire in Uganda.

According to him a lorry of the capacity of the plaintiff's would make about 20,000/= a month and not 45,000/= as claimed. From his experience in transport business a lorry of the plaintiff's type would make only 2-3 trips to Juba per month from Kampala.

He denied any knowledge of expenses incurred in bringing the vehicle to Kenya from Kampala. He denied phoning the plaintiff from Kampala on any one occasion.

When cross-examined he confirmed in 1987 they hired the plaintiff's truck to transport goods to Juba. He denied having any office in Uganda. He conceded they have a representative there who is there mainly for translation and clearing. He conceded they know Afri States Ltd whom they contracted to clear goods to Juba. Afri States are based in Kampala. He conceded they contracted Afri States to do the clearing and storage of relief good destined for Northern Uganda. They also had a clearing representative in Juba. He confirmed they once contracted Afri States to clear relief items to Juba. They send their person to go and supervise the stores. He is DW2. He was to supervise the loading while Afri States were responsible for hiring out the trucks. He was firm none of their trucks was used in this operation.

They had been contracted by UNHCR to deliver the relief food to Northern Uganda.

In further cross-examination he confirmed he was aware the plaintiff's truck delivered relief food to Northern Uganda. It is part of the food stuffs they had been contracted by UNHCR to deliver to Northern Uganda. He could not recall how many times the plaintiff's lorry delivered the food stuffs.

He was firm however that the hiring of the trucks was being done by Afri States and they had nothing to do with it.

He conceded Exh 2 shows that Macharia received the lorry and loaded it with the relief food. The lorry made the following trips.

Departure date	Destination	Return date
1. 15/5/87	Arua	26/5/87
2. 29/5/87	left with boxes of vegetable oil to Arua, it was loaded on 29/5/87 but left 17/6/87 and came back on 29/6/87	
3. 2/7/87	Jumbe	8/7/87
4. 16/7/87.		

He added that the procedure is that when trucks came back to Kampala they bring delivery notes to confirm that the goods had been duly delivered.

As far as he was concerned he did not come across a situation where consignment notes were not returned. He confirmed on the 1st trip of the plaintiff the consignment note was there which meant that goods had been received by the client.

He confirmed he did not pay her because he did not contract her to do the Uganda trips. He confirmed he learned the plaintiff's truck was working in Uganda and it is up to Afri States to pay her. He added, crossing the border without papers is an offence and as far as he was concerned the plaintiff was not charged in connection with those forms which were unstamped. He was firm he had never seen Exh 2 in their offices.

DW2 who works for the same company as DW1, he was employed as a warehouse supervisor. He recalled they had been contracted by UNHCR to transport to Northern Uganda. The Kenyan firm was not registered in Uganda and so they sub-contracted Afri States to do the transportation. Afri States was to employ his own people to do the transportation business while he DW2 was just to supervise the operation especially the lodging and the documents.

On 5/4/1987 he left for Kampala to go and supervise the operations. He recalled at one time the Managing Director of Afri States who is a Mr Iwanga came to him with a Kikuyu fat lady who had taken goods to Sudan and had a truck and she was desirous of doing same work in Kampala. He was asked if he knew her and he said no. He was asked if she could be contracted but he said he had no work but if they had work they could contract her on their own. She was given the contract and she was loaded with relief food consigned for Jumbe. 3 days later he saw her with the truck loaded with food stuffs waiting for fuel from Afri States.

After 10 days she came back to the ware house and she was loaded with vegetable oil. She later came back to talk to him about money on a friendly business. He DW2 conceded he wrote Exh 2 which was an operational report. He recalled that there was a report of stolen cargo from the UNHCR as per Exh D1 telex sent to their Nairobi office.

He investigated the trucks. An inquiry was made from Nairobi concerning the Nairobi truck operating in Kampala and he wrote a report in his hotel which he handed to the lady.

He gave the plaintiff the letters in official envelope on 18/7/87 to deliver them to their offices in Nairobi. That the lady had not been paid by Afri States and she sought assistance from their office to assist her get paid and he DW2 was asked if he knew anything about the case and that is why he wrote Exh D2.

He confirmed that the truck did the deliveries as most consignment notes came back. He had no idea whether 50% had been paid by Afri States or not.

When cross-examined he stated that what he wrote in Exh 2 is from the information he received. He confirmed the plaintiff's truck delivered the goods to Northern Uganda as he was receiving consignment notes. He confirmed the plaintiff was brought to himself by Mr Iwanga of Afri States who inquired whether he knew the plaintiff because he was a Kenyan.

He confirmed that Afri States were not mentioned in the contract between them Speed Ways and the UNHCR. From his experience cost of transporting goods from Kampala to Northern Uganda is about 3,000/= and a person can make an average of 15,000/= per month.

He conceded that they do subcontract them to do a job for them which they cannot do from Kampala. He was firm if they cannot make it straight from Kenya they can subcontract from Uganda.

He confirmed they have not been called upon to pay anything concerning the Uganda trips. He added that UNHCR deducted money for losses in respect of this particular lorry although he did not include that in the report.

At the close of the whole case, the plaintiff's advocate submitted as follows:-

1. There is no evidence that the Kenya Government preferred any criminal charges against the defendant company for non export of the consigned goods which proves that the customs documents were duly endorsed and the plaintiff should be paid for the balance of Kshs 23,000/=.
2. The defendant's employee DW2 admitted that the plaintiff's vehicle made 4 trips to Northern Uganda transporting relief food Exh 2 was written to enable the plaintiff to be paid.
3. The language of Exh 2 shows that it is the defendant's employee DW2 who contracted the plaintiff's lorry and not anyone else. That it is not true that Exh 2 was written in response to the telex Exh D1 as the contents are totally different.
4. The allegation by the defence that the plaintiff was contracted by Afri States while in Kampala holds no water as they did not plead this in their defence.
5. That it has been admitted by both defence witnesses that the plaintiff was never paid for the services rendered by her truck in Uganda.
6. She was unable to repay instalments as a result of which the lorry was repossessed, she lost income of 15,000/- per month and she is entitled to damages.
7. That she spent money on her trip to Uganda to look for the lorry and she should be paid 28,000/=.

The defence on the other hand also put in written submission as follows:-

1. That the balance of 23,000/- on the first trip was payable only after full performance of the contract.
2. That the defence witnesses have given credible evidence which has not been shaken at all.
3. That the plaintiff has not produced proof to show that she delivered the goods to the customer and in the absence of that an inference should be drawn that she did not deliver the goods to the customer.
4. That Exh 2 was obtained in an extremely dubious irregular manner and the same should not

have been admitted at all as it was never addressed to her nor intended for her use in the ordinary course of business. The manner in which she obtained it shows she is dishonest and that her evidence should not be believed.

5. That the plaintiff's hands are tainted with theft of evidence and this evidence should not be allowed in her favour in order to stamp out such dirty practises likely to ruin the whole concept of mutual trust and faith in commercial transactions.

6. The plaintiff did not call her driver as she knew he would contradict her.

7. The plaintiff remained in Uganda in order to keep away her vehicle from Diamond Trust who wanted to repossess it.

b To perform lucrative transportation business offered to her by Afri States Clearing and Forwarding Co Ltd. There is evidence to show that the plaintiff was often seen loading for Afri States.

c To benefit from the irregular and illegal transportation deals for purposes of making money for herself Exh D1 the telex from UNHCR confirms that the plaintiff and others looked up stories of theft in order to sell the goods entrusted to them for transportation.

8. The claim of damages based on 45,000/= per month is far fetched and are meant to enrich the plaintiff unjustly against the defendant's. He prayed for the suit to be dismissed with cost.

After assessing all the evidence on the record adduced by both sides and also the submissions of either side the question is whether the claim is proved or not and if so what amount or amounts are payable?

12 issues were framed. Issue No 1, 2 and 3 relate to the first contract whether the plaintiff was hired to take goods to Juba at a hire price of 46,000/= and if it ever transported the goods and whether the defendant paid part of that amount.

Exh 1 is clear on this. It has been supported by both the plaintiff's and defence evidence from DW1 Yusuf.

It is on record she was paid part of this money namely 23,000/=. The balance was to be paid upon return.

It is evident from the record the balance has not been paid. The reason or excuse advanced by the defence is that some customs documents were not stamped at the Malaba Kenya border. PW1 confirms that when she came back she handed over the papers and she was told some had not been stamped.

These papers were for transportation of the goods. PW1 said the goods reached their destination. DW1 Yusuf conceded there is no complaint about that consignment and have not been asked to pay anything in connection with those goods nor has anyone been prosecuted for non export of the goods.

The defence submitted that failure to produce the documents shows that she did not perform the contract and that the goods did not reach their destination. This submission is at variance with the admission of DW1 Yusuf that the goods reached their destination and they were not asked by anybody to pay anything in connection with that trip.

It has not been indicated what documents were not stamped.

From the above it is clear that since the defendant suffered no loss as a result of failure to have customs forms endorsed by plaintiff there is no justifiable reason for withholding payment of the balance of the 23,000/. I find this claim is proved and it is therefore allowed in favour of the plaintiff.

Issues No 4, 5, 6 and 7 relate to the trips within Uganda, namely whether the defendant requested to use

the plaintiff's vehicle while in Uganda, whether it made 4 trips to Northern Uganda whether 45,000/= per month is payable and lastly whether the claim of 45,000/ is reasonable or not.

The evidence on this is that of PW1 who said she was requested by DW2 to leave her vehicle for hire in Uganda and then came to Kenya to discuss the contract with the (*muzungu*) European. She did so. When she came to discuss the terms of the payment the European as well as DW1 dodged her. She was referred to Kampala for assistance. She went to Kampala to see DW1 who referred her back to Kenya with a letter she does not know the contents of that letter.

She later went back and DW2 Macharia wrote for her Exh 2 she clung to it because that was the piece of evidence that would assist her in her claim and in fact she has relied on it very likely to support her claim. The defence has attacked this evidence saying it was stolen as it was not meant for her use and the Court should not use this piece of evidence and the Court should rule that by this conduct the plaintiff is dishonest and she should not be believed. The plaintiff gave the background of the matter that the defendant started dodging her in respect of her claims and she was looking for something to support her claim and when she was given a naked letter she was able to read the contents and on finding that it supported her she decided to keep it.

I find nothing wrong with this conduct as she was entitled to keep evidence that supported her case when it comes to her claim. No adverse inference can be drawn as the paper was meant to assist her. I tend to believe her that it was not sealed. If she had opened it on her own, I am sure she would have opened the one that had been given to her by DW1 in a sealed envelope. She was firm her lorry did work and she should be paid.

DW1 in his cross-examination he conceded that from Exh 2 the plaintiff's vehicle did 4 trips in Uganda. DW2 admitted having written Exh 2 as an operation report on the vehicle and he also conceded that it did 4 trips in Uganda.

From the foregoing the Court is therefore satisfied beyond doubt that the plaintiff's vehicle made 4 trips from Kampala to Northern Uganda.

DW1 Yusuf was clear that they received all consignment notes and therefore all deliveries were made. There was no complaint at all.

The question that follows now is who contracted that vehicle. PW1 was firm it is Macharia who told her to leave the vehicle behind for hire purposes. Macharia DW2 confirms seeing the plaintiff in Uganda seeking contract to transport relief goods. DW1 was firm he did not contract her but she was contracted by Afri States. It is noted from the evidence that the issue of Afri States specified in cross-examination when DW1 & 2 stated that they as Kenyans could not do business in Uganda and so they had to sub-contract an agent in Kampala Afri States. That it is Afri States who were to look for trucks to transport relief food to Northern Uganda and they are the ones to pay the plaintiff.

The plaintiff's counsel submitted that the sub-contract to Afri States Co Ltd holds no water as the same has not been pleaded. The general principle is that a party is bound by his pleadings. If at all the defendant knew of these facts all along they could have pleaded so in their defence and they could have brought in Afri States Ltd as a third party.

In the absence of this the Court has no alternative but to hold that mention of Afri States is an after thought and the same is dismissed. This is further confirmed by Exh 2 written by DW2 which is an operation report. In it Macharia DW2 states clearly that he is the one who loaded the lorry. There is no mention of Afri States in the letter. At one time DW2 Macharia conceded that he could contract transport in Kampala to do transportation work for them. I have no doubt this is one of these occasions when DW2 contracted a truck in Kampala to do transportation business for them.

It was also conceded that Afri States were not part of the contract between them and UNHCR which shows that the defendant employees were to oversee and supervise the operations in Uganda including

hiring of trucks.

I therefore find that the evidence shows that it is the defendant's agent who contracted the plaintiff verbally followed by an acknowledgment Exh 2 which constitutes a duly executed contract binding on both parties and as such charges are payable in respect of the same.

The plaintiff has claimed 45,000/- per month for 4 months. It is true the vehicle was in Uganda for 4 months, it did 4 trips. The defence have stated the claim is unreasonable, unrealistic.

Both DW1 and 2 have experience in transport business and have an idea of what reasonable charges would be. DW1 placed the figure at 20,000/- while DW2 place it at 15,000/-.

It is observed that the charges across the borders as evidenced by Exh 1 is 46,000/- one would expect within charges to be less. The trips were from Kampala to Northern Uganda. In the absence of any guiding factor, I will go by what the witnesses said in comparison with what was payable across the border. DW1 said in normal circumstances a lorry of the plaintiff's type would make 2-3 trips monthly.

In my opinion in view of the security problem in the area of operation I am of the opinion that 2-3 trips per month are reasonable. Exh 2 shows that there was one trip in May, 2 trips in June and 2 trips in July.

In my own assesment I would say that 20,000/= per trip would be reasonable in the circumstances. The 4 trips amount to a total of Kshs 80,000/=.

I now come to issue No 8 relating to expenses incurred when retrieving the lorry from Uganda. From her own evidence she was assisted by Kenyan authorities who gave her a letter of introduction to the Kenyan Ambassador in Kampala to assist her. She used public means to Kampala and slept in lodgings. She did not produce any receipts.

Exh 3a, b and c show that they were assisted by the High Commission. They were given 2 drums of fuel which she did not pay for. The Court however believes she spent money on food, travelling and accommodation although she has no receipts.

The general rule concerning claims where no receipt is produced is that the Court has to make reasonable assessment.

See the case of *Kampala City Council vs Nakaya* [1972] EA 446. In this case she has claimed 25,000/= as being her expenses. In the circumstances I would assess a figure of 10,000/= as being reasonable charges.

This now brings me to the issue of general damages as per paragraph 11 of the plaint. She stated in her evidence that because her vehicle stayed in Uganda for 4 months she was unable to meet her instalments as the defendants failed to pay. The vehicle was later repossessed. We were not told when the vehicle was repossessed and no document has been produced to that effect in respect of that claim.

It is therefore not known whether it was repossessed immediately it came from Uganda or whether did some work before it was repossessed.

PW1 just said it was after it had come from Uganda. It is true if the plaintiff had been paid her dues she could have saved her vehicle from being repossessed.

She used to be able to make a profit of 15,000/= per month. The period of compensation was not specified and as such the Court cannot allow an indefinite period.

In my view a period of 3 months would have been sufficient to enable the plaintiff make up again in her business.

I would award her 50,000/= as being an adequate recompense for loss of profit. The defendant is liable to

pay this money because if they had paid her promptly for services either in part or in full her vehicle would not have been repossessed thus occasioning her loss of profit.

Issue 10 deals with the suit. I have considered the pleadings as well as the evidence on the record and I find that the suit is not bad in law and it discloses a reasonable cause of action against the defendant.

Issue No 11 has already been dealt with when dealing with the issue of 23,000/= in respect of the 1st contract.

In the final analysis, I find that the plaintiff has proved her case on a balance of probability and she is entitled to judgment which I enter for her on the following terms:-

1. Kshs 23,000/= balance of payment on the 1st contract.
2. Kshs 80,000/= payment for 4 trips in Uganda.
3. Kshs 10,000/= travelling, food and accommodation expenses while retrieving the lorry from Uganda.
4. General damages in the sum of Kshs 50,000/=.
5. Interest on item 1-3 at court rates from the date of filing of the suit.
6. Interest on item 4 at court rates from the date of judgment.
7. Costs of this suit.

Dated and delivered at Nairobi this 8th day of March 1992.

R.N WALEKHWA

JUDGE