



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: MADAN AG C J, KNELLER J A & PLATT Ag J A)

CIVIL APPEAL NO 21 OF 1983

BETWEEN

OMUMBO ACHOLA APPELLANT

VERSUS

PETER ONDIEKI GANGA RESPONDENT

***(Appeal from the judgment of the High Court of Kenya at Eldoret (Mr W Mbaya J)
dated February 18, 1983 In Civil Case No 217 of 1974)***

JUDGMENT OF KNELLER J A

Omumba Achola (Achola) a butcher in Kisumu asks this court to allow his appeal with costs, set aside the judgment and decree of the High Court at Eldoret dated February 18, 1983 and substitute orders dismissing with costs the prayers of (the late) Peter Ondieki Ganga (Ondieki) in the suit.

Ondieki, a Zonge Settlement Scheme farmer, died intestate at Songhor on July 14, 1983 and by an order of the High Court at Kisumu, letters of administration were granted to the Deputy Public Trustee there on August 14, 1984. And on September 27, 1985, by consent, this court made the Public Trustee a party to the appeal in place of the late Ondieki, adding an order that the costs of and incidental to the appellant's application for this to be done should abide the result of this appeal.

Mr Ubaldo Fernandes represented Achola in both courts and Mr Philip arap Tunoi appeared for Ondieki in the High Court and the public trustee before this court.

The Public Trustee asked for the appeal to be dismissed with costs. The section in the High Court concerned a 1965 red and grey Massey Ferguson tractor KLZ 215 (the tractor) first registered on January 7, 1966 and sold as second hand one by the Motor Mart in Kisumu to Ondieki for Kshs 22,000.00 (Pound 1,100). He purchased it for this sum with the help of Motor Mart and Exchange Finance Company Limited. On August 22, 1970 it was registered first in the joint names of the company and Ondieki, and then it was registered in the name of only Ondieki.

Ondieki, by his plaint of November 20, 1974, prayed for judgment against Achola for an order compelling Achola to return the tractor in good working order or refund Kshs 22,000.00 which was the value of the tractor, special damages Kshs 500.00 for transport and other disbursements incurred by Ondieki while trying to recover it, general damages for less of its use, costs and interest at court rates on all those sums.

Achola's written statement of defence concluded with a prayer for Ondieki's suit to be dismissed with costs. Ondieki based his claims on allegations in his plaint that in 1969 Achola asked him to lend him his tractor to plough his land which Ondieki agreed to do (provided it was handed back soon) because they were relatives and thus members of the same clan. Achola collected the tractor, did not return it soon but kept it instead. Ondieki demanded its return and Achola refused to do this because, he told Ondieki, it had been stolen. www.kenyalawreports.or.ke Ondieki reported this to the nearest Police Station which was Muhoroni. There he saw the tractor and heard of a report that it had been sold to a third party. Achola had, therefore, not returned it to Ondieki between October, 1969 and November, 1974. Ondieki suffered special and general damages on account of Achola's unlawful acts. The items of special damages were particularised as:

(a) value of the tractor **Kshs 22,000.00**

(b) transport expenses and other disbursements

incurred by Ondieki while trying to recover

this tractor **Kshs 500.00**

Kshs 22,500.00

Achola, in his written statement of defence of February 4, 1975 stated Ondieki had bought this tractor from Motor Mart in Kisumu on hire purchase terms in 1969 but could not pay the instalments as they became due so it was repossessed by Motor Mart. Ondieki had then asked Achola to pay the balance due for the tractor under the hire purchase agreement and then the tractor would be Achola's which Achola agreed to do. So they went to Motor Mart to explain this arrangement and Ondieki watched him pay part of that balance. Later, when Motor Mart had been paid that balance in full by Achola, it released the tractor to Achola who used it for about two years to plough his land. It broke down and Achola took it back to Motor Mart for repairs which were estimated would cost Kshs 4,000.00. Achola authorised Motor Mart to repair the tractor, sell it to someone else, deduct the cost of the repairs and refund the excess (if any) to Achola. Motor Mart repaired it for Kshs 4,000.00 sold it to Okeno Osare for Kshs 10,000.00 and paid back about Kshs 6,000.00 to Achola.

Achola denied that he was related to Ondieki or was his clansman that he ever asked Ondieki to lend him the tractor or promise to return it soon or that he ever borrowed it on any terms. So Ondieki never demanded its return and Achola did not tell him it had been stolen. Ondieki told the police at Koru in 1974 it had been stolen and he had seen it was being used for ploughing nearby so the police took it away from Achola and kept it at Koru Police Station until they returned.

Achola never sold it to Okeno Osare or anyone. Thus Ondieki was not entitled to any of the reliefs he sought.

The trial judge recorded the testimony and admitted the documents of Ondieki , who called no witness, and Achola whose witnesses were Mwerre Mogbeel Hussein, the Motor Mart's manager in Kisumu at the relevant time, and Okeno Osare a farmer and, when this tractor was the subject of these events, Provincial Commissioner of the North Eastern Province.

Then he had two different versions of the history of this tractor and they were in some ways different from those set out in the pleadings. Ondieki's was that he purchased it second hand from Motor Mart Kisumu on hire purchase terms on December 13, 1967 for Kshs 22,000.00 and insured it on January 21, 1968 which is the date he took possession of it. The financing of this purchase was provided by Motor Mart Finance Company with a loan and he paid it back with various sums and some monthly instalments of Kshs 1,035.85. He had paid Kshs 11,000.00 for it by the time it was 'released' to him.

Then there was an oral agreement between the parties that he would lend and Achola borrow the machine for three days in return for payment so that Achola could plough his six acres. Achola's driver collected it

but Ondieki never received it back three days later or any day thereafter. Nor was he paid anything for those days by Achola whose excuse for this failure was that it had been stolen in early October, 1973. This is about four years and not four days after it was hired by Achola. Ondieki told the police at Muhoroni about its alleged theft whose searches led them to discover it with Osare. He claimed he had bought it from Achola so the Muhoroni police, having kept it for a month, elected to hand it back to Osare

. He had defaulted on the payment of two instalments and the court broker repossessed the tractor but it was released to him with its log book and completed transfer form when he paid the balance and the brokers charges or fees.

Pausing there, the receipts produced in evidence by the parties at the trial reveal that Ondieki's payments to Motor Mart totalled Kshs 23,905.40 (which included the broker's charges) of which Kshs 11,000.00 were credited by Motor Mart to its account 21350 and almost equally attributed to a deposit on a 'used Massey Ferguson Tractor' and one to plain 'Motor Mart Finance' whereas his Kshs 12,905.40 was credited to account 21300 labelled either 'Motor Mart Finance on rental KCZ 215' (the number of the tractor) or 'M V 6967' or a combination of part of both (eg MV 6967 KCZ 215) and recording sums varying from Kshs 505.80 to Kshs 1,035.85 to Kshs 2,000.00 each about the middle of each month from February, 1968 to May 1969 inclusive save for the months of June, July, August, September and December 1968 and March 1969.

Mogbool Hussein explained that account 21350 is for deposits required for the purchase of anything by any customer and 21300 for the instalments towards repayment of the Motor Mart loan to buy it.

Returning now to Ondieki's evidence, it is on October 20, 1969, five months after he paid in full for it, that Ondieki hired out this tractor of his to Achola to plough his six acres at Kshs 50 an acre or Kshs 300 in all which Achola paid him so he had not given it to Achola for any reason, lest of all in paying any overdue instalments. The ploughing should have taken Achola one to three days only. When the time came for Achola to return it he did not do so and drove Ondieki away when he went to collect it. Late still he told Ondieki he would not return it for the simple reason he no longer had it and that was because it had been stolen. He asked Ondieki for its documents for the police at Koru. In 1973 the police found Osare's wife had it and Osare said Achola had sold it to him.

The loss of the tractor meant Ondieki had been unable to earn anything by hiring it out to anyone and could not pay the school fees

It cost him Kshs 500.00 in fares to recover it which he claimed as 'special damages'.

That is Ondieki's story. Achola's is a denial of it and, as foreshadowed, a completely different one. He is a businessman who owns a farm and has known Ondieki since they were children.

In 1969, Ondieki told him the court broker had seized his tractor and when he heard this they agreed that if he paid Motor Mart what Ondieki owed it for the machine then it would belong to Achola. They went to Motor Mart and on March 6, 1968 he paid Motor Mart's account 21350 and on the receipts there was a reference to Motor Mart Finance Deposit, and (in the absence of Ondieki) the manager of Motor Mart released the tractor to Achola because it was indeed now his.

Returning briefly to the details of the payments, however, it is strange that the receipts reveal that Motor Mart received from Ondieki Kshs 1,035.00 on March 11, 1968 as an instalment towards the repayment of the loan given by Motor Mart to him to buy the tractor, and yet by March 6, 1968 it had received from Achola Kshs 10,042.00 towards the balance of the same loan, and that these two sums were credited to different accounts. Besides, the year is 1968 and not 1969 as Achola would have us believe. Two other points. Ondieki gains nothing out of all this, if Achola's version is true, save perhaps a quiet mind over the future payments of instalments. And Motor Mart never passed the tractor's documents to Achola or Osare.

But, to continue with Achola's version, he used it for two years (1969 to 1971 inclusive) and then it

broke down. The Motor Mart manager's estimate for its repairs was Kshs 4,000.00 which Achola could not afford. He told them to sell it which they did for Kshs 10,000.00 to Osare, deducting Kshs 4,000.00 for the work done on it and refunding Kshs 6,000.00 to Achola. Moqbool Hussein flatly contradicted part of this. He swore Motor Mart never sold any tractor to Achola in 1969. But he remembered Achola paid Kshs 10,042.00 on behalf of Ondieki to clear what Ondieki owed in arrears on it and the receipts for them were issued in Achola's name and handed to him, the tractor's account closed and the tractor was returned to both of them. The log book remained with Ondieki.

He recalled that Achola (and his sons) brought the tractor back for repairs which Motor Mart did and Achola could not pay for them so at Achola's request they released it to Achola and Osare when Osare paid it about Kshs 10,000.00 but he did not recall sending Achola any part of that sum.

Osare, in turn, swore he bought it by agreement with Achola for Kshs 10,000.00 in cash in 1979 or 1980 from Motor Mart and he used it for about five years and then it would work no more. He was never given any log book for it.

So much for a summary of all the evidence Mr Fernandes submitted that Ondieki had not proved that he owned the tractor at any time because he had not produced its log book, the registrar of motor vehicles had not been called and the transfer form was inconclusive. He described the evidence of Moqbool Hussein a defence witness, relating to the receipts in Achola's name for his payment in 1968 on March 6 and July 7 as 'neither here nor there' and unreliable. He did not know why these payments by Achola went into the deposit account 213500 but as Ondieki was credited by Achola with nine more payments into account 21300 for the repayment for the loan to buy the tractor Motor Mart had not treated Achola as having paid off the instalments due on the repayment of the loan.

Mr Tunoi's reply was that the log book was not essential for proof of ownership and Achola's two payments were inconclusive, especially as Motor Mart's manager denied it over dealt with Achola over this tractor.

Mr Justice Mbaya outlined the evidence for each party. He wrote, among other things, that Ondieki paid the instalments for the balance of the purchase price regularly, except for a default of two months which led the court brokers to repossess the tractor on behalf of Motor Mart. Ondieki redeemed the tractor by repaying the whole outstanding balance of the purchase price. He went on to write that Ondieki produced ten receipts each for Kshs 1,035.85 so Ondieki paid in full for the tractor. Turning to Achola's version the learned judge described it as being untrue for Ondieki had all the documents of title (though his advocate had misplaced its log book) and he payments Achola had made were paid into the general deposits account 213500 which could have been for anything and not the instalments account for the tractor which was 21300. He dealt with the sale by Motor Mart to Osare by declaring it was illegal.

Then the learned judge gave judgment for Ondieki against Achola for –

- 1. the refund of Kshs 22,000.00 because that was the price Ondieki had paid for it and after Achola and Osare had used it for fifteen years it was a 'write off' ;***
- 2. Kshs 500.00 for the expenses he incurred in 'chasing' it;***
- 3. Kshs 195,000.00 general damages for loss of its use, calculated at thirteen years at the rate of Kshs 50.00 a day for 300 working days each year (and not Kshs 300.00 a day as Ondieki had claimed);***
- 4. Costs; and***
- 5. Interest***

Mr Justice Mbaya delivered that judgment in favour of Ondieki on February 18, 1983, and later some of Achola's goods were attached and sold for Kshs 150,000.00.

This concludes the history of the action up to the time of the hearing of the appeal.

Achola's memorandum of appeal of April 22, 1983 had fifteen grounds. The first two, taken together, were that Ondieki's plaintiff alleged that Ondieki lent Achola this tractor to plough his fields on the understanding that Achola would return it soon. Ondieki did not prove this was so because he called no witness to this loan and produced no letter of demand and sent none. Furthermore, Ondieki was bound by that pleading and the learned judge erred when he admitted evidence of the hiring of the tractor. But the lack of witness and a letter of demand are of no consequence. It is correct that the plaintiff and written statement of defence do not allege the tractor was hired out and that this only emerged in the evidence of Ondieki five years later. Mr Fernandes did not object to it being given or recorded on two occasions (separated by three years) during the trial that Ondieki alleged this hiring and, apart from the calculation of damages for loss of use of the tractor, it did not affect the other issues. Mr Fernandes soon appreciated this and abandoned those grounds.

It is clear from the plaintiff and especially its prayers that what Ondieki sought was the return of his tractor, or its value, which is a claim in detinue. He also claimed damages for loss of its use. He did not confine himself to a simple claim for the wrongful act, which would lie in trover or conversion. See Newbold, J A in *Cullen vs Parsram and Hansraj*, [1962] EA 159, 162 (CA-K).

Following on that, if the judgment is not in the end for the return of the tractor but its value then the court's award is for the tractor's value at the date of the judgment (February 18, 1983). *Rosenthal vs Alderton & Sons Ltd* [1946] 1 KB 374; *Cullen vs Parsram and Hansraj (ibid)*. Thus the learned judge erred, with respect, when he made an award of Kshs 22,000.00 because by February 18, 1983 the tractor was a write-off. The figure of Kshs 22,000.00 was in Ondieki's plaintiff and neither advocate drew the court's attention to the local or foreign authorities on the matter but the award has to be corrected now. And to what is the next issue. A 1965 Massey Ferguson tractor, sold by Motor Mart Kisumu in December 1967 for Kshs 22,000.00 and used on and off for ploughing land at Songhor or Koru or Kisumu by two or more local farmers until it was a wreck in 1983 could not on the balance of probabilities be worth more than Kshs 1,000.00 as scrap or a source of spares so that was what should have been awarded for detinue.

The third was that there was an error of law in the finding that Ondieki had proved the Kshs 500.00 special damages he claimed. They have to be proved if they are not agreed and they were not agreed. There was no documentary evidence to support his assertion that he had incurred that amount of expense in trying to find the tractor. Railway tickets are collected at the end of the journeys between Koru, Muhoroni and Kisumu, bus or matatu conductors issue no receipts, but without some record of the journeys and their distances, it cannot be said Kshs 500.00 is a reasonable sum or otherwise. There cannot be an award for 'special damages' here.

The fourth, fifth and sixth grounds were that there was no claim and no evidence, or insufficient evidence, to support the award of general damages of Kshs 195,000.00 for Ondieki's loss of the use of the tractor. The judge reached this figure by supposing the tractor would be hired out for 300 days for 13 years at Kshs 50.00 a day. Ondieki's testimony was that he charged at the rate of Kshs 300.00 a day for its use and it would plough 5 to 6 acres a day. The evidence for any calculation for these damages is too meagre to support any mathematical calculation. The judge rightly took Kshs 50.00 a day as the net profit. Ondieki would make on its use because the rest would be offset by the cost of its fuels and repairs. There was no evidence, however, on which the judge could find it would be hired out for 300 days a year or for how many years. Having considered the matter I find that on the balance of probabilities it would have been hired out for some days a year at Kshs 50.00 a day for some years and it is right to pluck a figure out of the air. The expenses of trying to find the tractor are included in this reckoning. It should be Kshs 9,000.00.

The fourteenth ground was that the judge did not take into account the fact Ondieki was required to mitigate his losses by buying another tractor, after, say, two years and not waiting for thirteen years for judgment to set up again in his tractor hire business. This, however, overlooks the fact that at least he filed his plaintiff only five years later, he was not to know it would take another eight years for the suit to be tried and, according to the evidence, he could not always afford to pay even a monthly instalment of Kshs

1,035.85 every month so another Kshs 22,000.00 second hand tractor was probably beyond his means. It was probably not possible for him to mitigate his damages.

Taking one thing with another, therefore, I find the learned judge's award of Kshs 195,000.00 damages was manifestly excessive and based on too large multipliers so on the evidence and my calculations I would reduce it to Kshs 9,000.00.

The seventh and thirteenth grounds attacked the High Court's finding that Ondieki owned the tractor and was based on the fact that he had not produced its log book but Mr Tunoi handed it to Mr Fernandes during the appeal saying a relative of Ondieki had fetched it to him in August 1985 so Mr Fernandes abandoned that ground too.

Then there were complaints in the eighth and ninth grounds that the learned judge did not deal with the significance of the pattern of payments by Ondieki or Achola as recorded in the receipts but again Mr Fernandes dropped those.

The tenth and eleventh would have been worthy of consideration had there been anything in the written statement of defence to make them another issue. Mr Fernandes' complaint in them was that the plaint and the evidence revealed that Ondieki wanted damages for Achola's detention and conversion of this tractor but because the cause of action arose in 1969 (it should be by November 30, 1974) so the claim was time barred by the provisions of the Limitation of Actions Act (cap 22). That's as may be; but any relevant statute of limitation must be specifically pleaded by the provisions of order VI rule 4(1) of the Civil Procedure Rules.

The fifteenth and last ground was that the trial judge erred in awarding interest on the general damages from the date of the filing of the suit to the date of judgement when it should have been only from the date of judgment (February 18, 1983) until payment in full. That is correct.

Th learned judge did not however specify the rate or from what date the interest on the special or general damages should run (and he should have done) but made an award of interest at the usual court rates which was what Ondieki claimed in his plaint. Interest on the special damages should have been awarded, however, at the old rate of 8% a year from the date of filing of the suit November 25, 1975 to March 15, 1982 when it became 12% (Practice Note 1 of 1982) to the date of judgment and at 12% until payment in full.

The result is that the appeal in my view, should be allowed in part because the judgment of Mr Justice Mbaya should be set aside and one for Ondieki against Achola in these terms be substituted for it with effect from February 18, 1983:

- A. Special Damages

- (1) Kshs 1,000.00 for the value of the tractor at the date of the judgment
- (2) Interest on that sum at 8% a year from November 25, 1974 to March 15, 1982 and 12% there after until payment in full;

B. General damages

- (1) Kshs 9,000.00
- (2) Interest on that amount at 12% a year from February 18, 1983 until payment in full.

C. Costs

- (1) Costs in the High Court

(2) Interest on those costs at 12% a year from the date of their agreement or taxation until payment in full. Note that Ondieki will have to give Achola credit for the Kshs 150,000.00 recovered by attachment.

Achola succeeded in having the awards of special and general damages and interest substantially reduced but failed to have the trial judge's findings of fact concerning his liability reversed or varied so I propose that the appropriate order for the costs of the appeal is one that will allow him only half of them.

Dated at Nakuru this 28th day of January, 1986

A A Kneller

Judge of Appeal

IN THE COURT OF APPEAL

AT NAKURU

(CORAM: MADAN AG C J, KNELLER J A & PLATT Ag J A)

CIVIL APPEAL NO 21 OF 1983

BETWEEN

OMUMBO ACHOLA APPELLANT

VERSUS

PETER ONDIEKI GANGA RESPONDENT

**(Appeal from the judgment of the High Court of Kenya at Eldoret (Mr W Mbaya J)
dated February 18, 1983 In Civil Case No 217 of 1974)**

JUDGMENT OF MADAN AG J A

I have had the advantage of reading in draft the judgment of Kneller J A I agree. As Platt, Ag J A, also agrees the orders will be as proposed by Kneller, JA.

Dated at Nakuru this 28th day of January, 1986

C B Madan

AG Chief Justice

IN THE COURT OF APPEAL

AT NAKURU

(CORAM: MADAN AG C J, KNELLER J A & PLATT AG J A)

CIVIL APPEAL NO 21 OF 1983

BETWEEN

OMUMBO ACHOLA APPELLANT

VERSUS

PETER ONDIEKI GANGA RESPONDENT

**(Appeal from the judgment of the High Court of Kenya at Eldoret (Mr W Mbaya J)
dated February 18, 1983 In Civil Case No 217 of 1974)**

JUDGMENT OF PLATT, AG J A

I agree, and I would only like to highlight two points.

The first is that where a plaintiff is under a duty to mitigate his damages, he is not obliged to do what he could not afford to do in order to reduce the damages. (See Radford vs De Froberville [1977] 1 WLR 1262 at page 1268)

In the instant case, it was difficult enough for the plaintiff Ondieki to pay instalments for the tractor he lost to Mr Ochola. He was thereafter unable to make any income out of this tractor. His capital had been lost. If in those circumstances his resources did not run to buying or hiring another tractor, no one could be blamed but the tortfeasor, Mr. Achola. He must take his victim as he finds him, for richer or for poorer.

The second is that there may be two methods of calculating loss in cases of detinue; one is to calculate the pecuniary loss when the article has been returned, and the other is to measure the inconvenience suffered when the article has never been returned, if no pecuniary loss has been proved or can be proved.

An example of the first calculation is Brandeis Goldschmidt vs Western Transport (1982) 1 ALL ER 28. But this decision takes no account of the situation where the goods have never been returned. If the standard of life of a plaintiff is such that no accounts can be expected to be kept properly due to lack of education or other reasonable causes; if on a plaintiff's level of life the careful giving and taking of receipts cannot be expected; if life is nearer to a system of barter than a cash system, such a plaintiff will hardly prove his economic loss, but nevertheless the "loss" may be severe to him. Therefore it would be right to compensate him for inconvenience in a modest sum suitable to the position of that plaintiff. Naturally if a greater sum of damages is asked for, the plaintiff must prove it.

In this case, whether one attempts to calculate the pecuniary loss or the inconvenience, the equations yield a similar result. Consequently, I agree with the figures proposed on this and the other heads of damages, and I agree with the orders proposed by Kneller, J A.

Dated at Nakuru this 28th day of January, 1986.

H G Platt AG

Judge of Appeal

I certify that this is a true copy of the original.

DEPUTY REGISTRAR