

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION AT LAUTOKA**  
**APPELLATE JURISDICTION**

**CIVIL APPEAL NO. HBA 06 OF 2020**

**IN THE MATTER** of an Appeal from the Judgment of the Nadi Magistrate's Court dated 30 January 2020 in Civil Action No. 33 of 2018.

**BETWEEN** : **SAROJINI DEVI** of Sabeto, Nadi.

**APPELLANT/PLAINTIFF**

**AND** : **SHANIL KUMAR** of Keyoliaya, Sabeto, Nadi.

**FIRST RESPONDENT/  
ORIGINAL FIRST DEFENDANT**

**AND** : **ROHITAASH RAVNEEL KUMAR** of Keyoliaya, Sabeto, Nadi.

**SECOND RESPONDENT/  
ORIGINAL SECOND DEFENDANT**

**AND** : **ROHIT RAJNESH** of Keyoliaya, Sabeto, Nadi.

**THIRD RESPONDENT/  
ORIGINAL THIRD DEFENDANT**

**Appearances** : Mr Zoyab S. Mohammed for the appellant/plaintiff  
No appearance for the respondents/defendants  
**Date of Hearing** : 09 June 2020  
**Date of Judgment** : 30 June 2020

**J U D G M E N T**

## **Introduction**

- [01] This is an appeal from a ruling of the Magistrate's Court.
- [02] The appellant appeals the ruling of 30 January 2020 delivered by the learned Magistrate ("*the Magistrate*") sitting at Nadi following a hearing in the absence of the respondents. The Magistrate dismissed the appellant's claim.
- [03] At the appeal hearing, the appellant orally argued the appeal and tendered her written submissions as well. The respondents did not participate in this appeal.

## **Background**

- [04] In April 2018, Sarojini Devi, the plaintiff/appellant ("*the appellant*" in these proceedings) filed a claim in person against Shanil Kumar, Rohitaash Ravneel Kumar and Rohit Rajnesh Bhan, the first, second and third defendants/respondents respectively (collectively "*the respondents*" in these proceedings), claiming damages.
- [05] Subsequently, the claim was amended and a formal amended statement of claim was filed on 18 September 2018.
- [06] In the amended statement of claim, the appellant alleged that the respondents failed to do work properly and all in act of joint enterprise stole parts of damaged vehicle Nissan Blue Bird registration No. U 12 and sought damages of \$19, 220.00 together with costs on indemnity basis.
- [07] None of the respondents had filed their statement of defence nor had appeared at the court to contest the claim brought against them. As such, the hearing proceeded in the absence of the respondents.
- [08] At the hearing in the absence of the respondent, the appellant gave sworn evidence and tendered some documents in evidence. Thereafter, the Magistrate delivered his ruling dismissing the appellant's claim. The appellant appeals that ruling to this court.

### Decision in the court below

[09] Having analysed the appellant's evidence in totality, the Magistrate came to the conclusion that:

*"the plaintiff failed to provide or adduce any evidence to show that they acted in concert to steal car parts. There was no eye witness or credible evidence to the alleged theft. In view of the deficiencies in the evidence of the plaintiff which were not collaborated [sic] by any sworn or documentary evidence, I make a finding of fact that the evidence adduced were unsafe, unreliable and contradictory. In evaluating the evidence in totality, I make a finding of fact that the plaintiff has failed to discharge the requisite burden of proof in this case. The plaintiff's claim is hereby struck out with no costs." [Emphasis added]*

### Magistrate's reasoning for his decision

[10] The Magistrate in his analysis evaluates the appellant's evidence and states that [at paragraphs 21 to 27]:

"...

21. *From the evidence, Plaintiff never said she saw or witnessed any or all of the 3 named Defendants stealing the items from her home. Furthermore, her belief of the involvement of the 3 named defendant is based on mere suspicion.*
22. *There police report noted that 3 defendants were interviewed but police formed the opinion there were insufficient evidence to charge them. Also police were of the view that Plaintiffs complaint was more of a civil nature and she should file civil action.*
23. *It is undisputed fact that all 3 defendants were not charged. Police did not take any further action after considering and assessing their statements in the form of interview.*
24. *Plaintiff allegation of favouritism by the police that all 3 defendants were related to a Police officer by the name of Amit is very serious and she failed to provide any proof. It is unfair to say that police tampered with the investigations for the detriment of the Plaintiff without any*

*form of evidence. In the courts view, the police record[s] was proficiently done as PEX 1 speaks for itself.*

25. *I must mention that Plaintiff is not learnt in police duties. She did not inform court of her qualifications or skills set or experiences. All we know she is a domestic worker. It follows that her evidence to pass judgment against police is irresponsible. I will not consider such allegations without proof.*
26. *The second point that will address is the fact that plaintiff's evidence was contradictory and unsafe. From the police record, the Investigating Officer was WPC 2980 Ilisapeci Rasaku and police did investigate the matter. There was no recovery and all admitted that some car parts were buried in the grave yard.*
27. *From the observation of the court, the Plaintiff took time to answer basic questions concerning her claim. Plaintiff should be acutely aware of her case but she was not. This demonstrates to court that she as unreliable and untrustworthy witness.*

*..."*

## **Grounds of appeal**

[11] The appellant appeals the Magistrate's decision on the following grounds:

1. *That the Learned Magistrate's decision was unjust in that its practical effect is unjustly to deprive the appellant of it claim.*
2. *That the Learned Magistrate erred in law and fact that the Magistrate misconstrued that the appellant gave sworn evidence on Holy Koran [Quran] in English Language, whereas the appellant/original plaintiff gave sworn evidence on Holy Ramayan, hence rending the whole evidence null and void.*
3. *That the Learned Magistrate erred in law and in fact in failing to consider independently of the plaintiff's evidence that there was sufficient prima facie evidence, and failed in his discretion to accept the affidavit in evidence in chief, as it was filed and issued by the Court Registry.*

4. *That the Learned Magistrate failing to exercise his discretion properly by ignoring the crucial ingredients of the claim and there was no statement of defence filed to which the matter had proceed through formal proof.*
5. *That there has been a substantial miscarriage of justice in that the Learned Magistrate's misconstrued the facts put by the appellant in her claim.*
6. *The Learned Magistrate erred in law and in fact by adjudging and pronouncing that the appellant's/original plaintiff's evidence was unreliable and untrustworthy, simply because the appellant/original plaintiff wrote numerous complaint against the Learned Magistrate or his deliberate delays in making his ruling in the matter.*
7. *The appellant reserved the right to add and file further grounds of appeal within fourteen (14) days from the date of the hearing of the appeal on receiving the Court Record.*
8. *That the matter be referred back for a re-hearing before a new Magistrate.*

### **The issue on appeal**

[12] The primary issue on appeal was whether or not the Magistrate had erred in law and in fact by adjudging and pronouncing that the appellant's evidence was unreliable and untrustworthy.

### **Appellant's submissions**

[13] Mr Zoyab on behalf of the appellants submits that: there has been a miscarriage of justice in that the learned Magistrate misconstrued the facts put by the appellant in her claim. The Magistrate had also erred in law and in fact by adjudging and pronouncing that the appellant's evidence was unreliable and untrustworthy simply because the appellant wrote numerous complaints against the learned Magistrate of his deliberate delays in making his ruling in the matter. He also submits that the complaint letter may have resulted in the Ruling being unfair and erroneous towards the appellant.

[14] It is further submitted that the learned Magistrate had divulged his attention to the issues of stolen parts and theft only and completely failed to ascertain and

comment in his ruling in regards to the incomplete works carried out by the respondents/defendants on the graveyard which caused damages and loss to the appellant.

## Discussion and determination

### *Ground 2*

- [15] Firstly, let me deal with the ground 2 of the appeal. Ground 2 is that: *the Learned Magistrate erred in law and fact that the Magistrate misconstrued that the appellant gave sworn evidence on Holy Koran [Quran] in English Language, whereas the appellant/original plaintiff gave sworn evidence on Holy Ramayan, hence rendering the whole evidence null and void.*
- [16] It is borne out in the copy record that the appellant gave evidence after taking oaths on the Holy Ramayan in English (see: pg. 42 of the copy record). However, the Magistrate in his ruling states that the appellant gave sworn evidence on the Holy Koran in the English language. What is important here is whether the Magistrate had considered the fact that the appellant gave sworn evidence in court. The Magistrate nowhere in his ruling says that the appellant gave unsworn evidence. It clearly points to the fact that the Magistrate had considered the appellant's evidence was sworn evidence despite the fact that he states in his ruling that the appellant gave sworn evidence on the Holy Koran instead of the Holy Ramayan. This may have occurred due to a typographical error.
- [17] There is no prejudice to the appellant by the Magistrate mentioning in his ruling that the appellant gave sworn evidence on the Holy Koran instead of the Holy Ramayan. Ground 2 has therefore no merit.

### Ground 3

- [18] Appeal ground 3 is that: *the Learned Magistrate erred in law and in fact in failing to consider independently of the plaintiff's evidence that there was sufficient prima facie evidence, and failed in his discretion to accept the affidavit in evidence in chief, as it was filed and issued by the Court Registry.*
- [19] It seems that on 16 April 2019 (the day on which the hearing was fixed in the absence of the respondents because they had failed to file either

acknowledgement or defence), the appellant had filed affidavit evidence in chief without leave of the Magistrate.

*Admission of affidavits*

- [20] The Magistrates' Courts Rules ("MCR"), O 5, R 18, dealing with admission of affidavits, states:

*"Admission of affidavits*

*18 In any suit, the court may, in its discretion, if the interests of justice appear absolutely so to require (for reasons to be recorded in the minutes of the proceedings), admit an affidavit in evidence, although it is shown that the party against whom the affidavit is offered in evidence has had no opportunity of cross-examining the person making the affidavit. [Emphasis provided]*

- [21] In terms of the above rule, the Magistrate had the discretion to admit an affidavit for reasons to be in the minutes of the proceedings, if the interest of justice appear absolutely so to require.
- [22] In the current action, the appellant filed her affidavit without the leave of the Magistrate. Under rule 18 the appellant does not have right to file an affidavit in evidence. It is the Magistrate who decides in his or her discretion whether to admit an affidavit in evidence not the parties.
- [23] The Magistrate in his ruling states that since no leave was granted [to file an affidavit in evidence], the court will not consider the same (see: para 10 of the Magistrate's ruling at pg. 8 of the copy records). The Magistrate was entitled to disregard the affidavit evidence of the appellant as it was filed without leave of the court and to call for oral evidence of the appellant. Therefore, second part of ground 3 that the Magistrate failed in his discretion to accept the affidavit in evidence in chief, as it was filed and issued by the Court Registry has no merit as well.

*Finding on credibility of witnesses*

- [24] I will consider the rest of the grounds of appeal collectively.

- [25] The appellant alleged in the amended statement of claim that: upon the verbal agreement she engaged the first respondent to construct her deceased family grave/mausoleum and paid \$500.00 in advance. The first defendant engaged the second and third respondent to do the work for the appellant. The respondents failed to complete the work and delayed. The respondents cohered and stole the parts of her damaged Nissan Blue Bird U 12. The respondents also stole and removed other items and equipment hired for the works.
- [26] She claimed \$19,220.00 against the respondents on the premises that the respondent through their actions have caused loss and damages to her by taking her vehicle parts and failed to complete the work assigned to them.
- [27] The Magistrate heard the appellant's evidence in the absence of the respondents and dismissed her claim as her evidence was not credible.
- [28] The appellant lodged a police complaint against the respondent. The police after investigation closed her complaint saying that her complaint was civil in nature. Apparently, the police could not find any evidence to substantiate her complaint.
- [29] The Magistrate succinctly summarises the appellant's evidence. In her evidence, she states: *"In the morning of 31 August 2017 the three respondents stole vehicle parts. The first respondent standing on the front of her house as acting like a watchman and second and third respondents were loading vehicle parts in the wheelbarrow. On that day, they left her home about 5.15pm. Later, she had a suspicion that something was taken from her house. At about 8pm, she opened the second flat and noticed that all parts were gone. She wants the three respondents to pay the items taken from her house. She seeks a \$30,000 damage which is inclusive of \$20,000 worth of vehicle parts (gathered from the Magistrate's ruling, pg.3 (copy record pg.9))."*
- [30] It will be noted that the appellant in her evidence states that the second and third respondents were loading the vehicle parts while the first respondent was standing like a watchman. Then she says that she had suspicion that something was taken from her house. The appellant contradicts herself because she saw the respondents were loading the vehicle parts. She did not even ask why they were loading the vehicle parts. Later she casts suspicion that they had taken something from her house. The complaint of theft appears to be an afterthought one. That may be the reason why the police determined that her complaint was civil in



nature. Further, in her evidence she asks damages in the sum of \$30,000.00 inclusive of \$20,000.00 worth of vehicle parts. She was asking \$20,000.00 for Nissan Blue Bird parts. At the hearing, counsel appearing for the appellant said the current market value of the vehicle itself would not exceed \$5,000.00.

- [31] Generally, the credibility of a witness may be inferred by the trier of fact from the witnesses' demeanour and the evidence in the case. A witness may be assessed as to credit by reference to his or her bias, previous convictions (if relevant), previous inconsistent statements, reputation for untruthfulness, or any physical or mental disability affecting the credibility or his or her evidence.
- [32] In the current case, undoubtedly, the Magistrate disbelieved the appellant's evidence. He says that: *"from the observation of the court, the Plaintiff took time to answer basic questions concerning her claim. Plaintiff should be acutely aware of her case but she was not. This demonstrates to court that she as unreliable and untrustworthy witness."*
- [33] Indeed, the Magistrate had assessed the credibility of the appellant from her demeanour and the evidence in the case. The Magistrate was entitled to do so.
- [34] In *Ali v Ali* [2009] FJCA 66; ABU0029.2006 (3 December 2009), the Fiji Court of Appeal summarizes the general principles (governing the powers of the court on hearing appeals on findings of fact by the trial judge) at paragraph 18 that:

*"[18] It is also my opinion, that the following general principles can be gleaned from the case authorities that I have considered above:*

- 1. There is no general rule that the Court of Appeal must not overturn a decision of the High Court based on the trial judge's findings of fact alone.*
- 2. Where the trial Judge has misdirected himself as to the facts, the Court of Appeal should consider the evidence given at the trial and come to its own conclusions.*
- 3. Where the trial judge's findings of fact are not dependent on the credibility or reliability of witnesses, the Court of Appeal is obliged to draw its own inferences from those facts and come to its own decision.*

4. *Where the trial judge's findings of fact are based on the credibility or reliability of the witnesses, the Court of Appeal is obliged to consider the evidence given at the trial and draw its own inferences from the facts but it must give due weight to the findings of the trial judge.*
5. *Where the trial judge's findings of fact are based solely on the credibility or reliability of the witnesses, it would be difficult for the Court of Appeal to overturn the trial Judge's findings."*

- [35] Turning to the matter at hand, in the course of the judgment in the court below, specific findings were made on the essential issue of credibility. The appellant's case as a whole was not accepted, according to the judgment, for the following reasons:
1. *The plaintiff (appellant) took time to answer basic questions concerning her claim.*
  2. *The plaintiff should be acutely aware of her case but she was not.*
  3. *This demonstrates to court that she was an unreliable and untrustworthy witness.*
- [36] The appellant had depended only upon her own evidence against that of the respondents. The court below did consider the truth of her evidence and he did not accept or believe her evidence.
- [37] It seems to me that the appellant's case was inherently improbable.
- [38] The Magistrate said that he found her (appellant) manner as she gave evidence to be unconvincing and the subject matter of her case and her story was unconvincing in particular respects. He rejected the appellant's evidence as unworthy of belief, and made definite findings of fact based on such testimony. The questions of fact depending on credibility were resolved in the mind of the Magistrate against the appellant.
- [39] Having analysed the appellant's evidence, the Magistrate had rejected her evidence as unworthy of belief. He had given sufficient reasons for doing so. He had delivered a well-reasoned judgment based upon the testimony of the appellant. Therefore, the ground of appeal that the Magistrate had also erred in law and in fact by adjudging and pronouncing that the appellant's evidence was unreliable and untrustworthy simply because the appellant wrote numerous

complaints against the Learned Magistrate of his deliberate delays in making his ruling in the matter.

[40] The Magistrate had made a definite finding of fact based solely on the credibility or reliability of the appellant's evidence; it would be difficult for the appellant to overturn the Magistrate's findings. None of the grounds of appeal has merit for the appellate court to intervene.

### Conclusion

[41] For these reasons, I would dismiss the appeal and uphold the judgment of the Magistrate dated 30 January 2020. I would make no order as to costs because the respondents did not participate in these appeal proceedings.

### Result:

1. Appeal dismissed.
2. Judgment of the Magistrate dated 30 January 2020 confirmed.
3. No order as to costs.



*M.H. Mohamed Ajmeer*  
30/6/20  
.....  
M.H. Mohamed Ajmeer  
JUDGE

At Lautoka  
30 June 2020

### Solicitor:

Zoyab Shafi Mohammed Legal, Barristers & Solicitors for the appellant