IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: MANYINDO, D.C.J., ODER, J.S.C., PLATT, J.S.C)

CIVIL APPEAL NO.24A/92

BETWEEN

ATTORNEY GENERAL : :: : : : APPELLANT

AND

ABDUL KARIM WINYI : :::::::::::::::::::::::::::::::::: : : : RESPONDENT

(Appeal from the Judgement of the
High Court at Kampala (Hon. Justice
Tsekooko) given at Kampala
on the 20th day of February, 1992
IN
H.C.C.S. NO. 850 OF 1989)

JUDGMENT OF PLATT, J.S.C:

This appeal concerns the fate of four Chimpanzees, brought from Zaire by the Respondent Mr Abdul Karim Winyi. The animals are still in the custody of the Uganda authorities, having been seized at Entebbe Airport on 6th January, 1989 as they were about to be exported to Dubai. The Respondent was at first arrested and charged with wrongful possession of the animals contrary to Sections 14, 23 and 90 of the Game (Preservation & Control) Act (Cap. 224) and was acquitted. But the present proceedings concern Sections 16 & 17 of that Act relating to improper importation and exportation of animals. When the respondent was acquitted, he went on to sue that Attorney General, on behalf of Chief Warden of the Game Department acting together with the Customs authorities. He prayed for:—

(a) the return of the four chimpanzees, or

(b) payment of the value of the four chimpanzees at the time of judgment,

(c) special damages in the form of reimbursement of the cost of air travel for Mr. Winyi and the chimpanzees,

(d) general damages,

(e) exemplary damages

The respondent was successful. The return of the Chimpanzees was not ordered. But the value was set as shs 72,000,000/=, special damages at shs. 139,700/=, general damages at shs 500,000/= and exemplary damages at shs. 1,000,000/= the respondent was awarded costs, and various orders as to interest. The Attorney General has appealed on all orders made. The issues which arise are:—

(1) Whether or not the animals could be imported through the Customs post at LIA and then allowed to travel from Arua to Entebbe as the authorities in Arua allowed the respondent to do. The learned Judge accepted that the LIA Customs post was not, at the time of importation, a place listed as an approved entry point. But he held that the officials at Arua and Entebbe had established a modus operandi of their own, which allowed importation in ways not laid down in the relevant legislation.

(2) The Attorney General contends in grounds 1 and 3 of the memorandum of appeal that whatever they were doing, they had no authority to depart from the procedures laid down in the Statute. Cap 216 and rules made there under.

(3) The learned Judge raise the issue of estoppel In so far as the learned Judge held that the acts of the Officials estopped the Government from relying upon the Statutory provisions, the Attorney General contends that in principle, there can be no estoppel against a Statute. That is the issue taken up in ground 2 of the memorandum.

(4) In reaching the conclusion that the respondent had imported the animals in conformity with the advice of the officials, the Attorney General contends that:

(a) the learned Judge should not have relied on the evidence of PW2 but on that of D.W.4; grounds 4 & 7);

(b) it was wrong to hold that LIA was a proper customs post for handling the importation and exportation of Chimpanzees

(c) it was wrong to hold that the Chimpanzees were seized because of the failure of the respondent to pay a bribe.

(5) Finally, the award of shs 72,000,000/= was wrong in principle (ground 8)

Before these issues can be considered there was a further issue taken up by Mr. Ayigihugu namely that the identification of these animals was not proved and that it was

not clear whether Cap. 226 applies to this case at all. This matter was dealt with by the learned Judge as follows:-

"Secondly, I don't know whether item No. 18 (Chimpanzee anthropopithecus) is the same chimpanzees the subject of this suit. I say so because there is Chimpanzee pan schweinfurthi listed as item 2 in Part A of the listed schedule to the same Act which appears to be different. Section 2 of the Act defined "Scheduled animals" and "Non—Scheduled animals". That definition appears to me relevant to the operation of Rule 2. In the absence of expert evidence showing that the Chimpanzees which are subject of this suit are the ones falling within Sections 16 & 17 and Rule 2 aforementioned it does not seem academic to ask whether the animals impounded and detained are those chimpanzees which in fact and in law should have been impounded and detained. In fact D.W.3 in cross examination showed that he did not know their origin. Yet he is the expert."

This argument will serve as a convenient curtain raiser to the whole debate.

Section 16 of the Game (Preservation & Control) Act Cap 226, and I shall now refer to it as "the Act," provides as follows:—

"16 (I) Except in the case mentioned in sub—section (2) of this section it shall be an offence for any person to import any scheduled animal.

(2) It shall be lawful to import, with the prior permission in writing of the Chief game warden

(a) any such animal or trophy if such animal or trophy is accompanied by a certified issued by a duly authorised Officer of the Government of the country of origin satisfying the Commissioner of Customs and the Chief Game Warden that such animal or trophy is being imported for the purpose of transit only;

(b) any such animal or trophy when the owner thereof enters or has entered Uganda as a bonafide resident;

(c) any such trophy when converted into or forming any part of any bonafide manufactured article.

17. Any animal or trophy imported under the provision of Section 16 of this Act for the purpose of transit shall be introduced at such place and under such conditions as the Minister may rule, prescribe and not else where and shall be consigned to and exported from such

place as the Minister may so prescribe and not elsewhere, and any person who acts in contravention of any such rule shall be shall be guilty of an offence."

I hope all officials who acted otherwise will note the very determined statement of the above offence in section 17. An animal may be introduced "at such place and under such conditions as the Minister may by rule prescribe and not elsewhere. Similarly the animal may be exported form a prescribed place "and not elsewhere." There can be no possible room for deviation in anyone's mind, and those officials who condoned other practices will be guilty of an offence.

The Minister made rules called The Game (Importation & Exportation For Transit Purposes) Rules (S.I. 226 — 3, L.N. 280 provide: -

"2. An animal or trophy imported under the provisions of section 16 of the Act for the purposes of transit shall be imported only through a Customs post specified in the first column of the First Schedule of these Rules; and it shall be a condition of the importation that the importer shall complete a declaration in the form contained in the Second Schedule to these Rules (hereinafter referred to as "the transit declaration").

3. An animal or trophy of the kind mentioned in rule 2 of the Rules shall be consigned to the consignee specified in transit declaration and shall be imported within the period so specified in the second column of the First Schedule to these Rules.

FIRST SCHEDULE

CUSTOMS POSTS

First Column	Second Column
Customs Post for Importation	Customs Posts for Exportation
Kampala	Kampala
Jinja	Jinja
Mbale	Mbale
Entebbe Airport	Entebbe Airport
Merama Hill	Mombasa
Kisoro	
Mpondwe	
Ishasho river	
Vurra	

Goli

Atiak

The Second Schedule is not important.

It is not obvious that LIA is not prescribed Customs Post for Importation. It may be that LIA is a new Customs Post opened up after these Rules were promulgated. That makes no difference. It remains a place elsewhere as Section 17 describes it, until it appears in the First Column. The Act (Cap.226) came into effect on 1st September, 1959. It is true that in First Schedule Part A "Animals not to be hunted or captured throughout Uganda except under special Permit."

Item No. 2 Chimpanzee Pan Schweinfurthi. It is also true that in the Eleventh Schedule "African animals not occurring in Uganda, or of which only local species and subspecies are protected, which animals and Trophies thereof are protected by International Convention"

Item No. 18 Chimpanzee — Anthropopithecus (all subspecies).

It is plain by the definition section that the species of Chimpanzee have to be observed as stated in the Schedules.

"Scheduled animal" means an animal mentioned in any of the Schedule and "non-scheduled" shall be construed accordingly." Provided that the application of any provision of this Act to any particular animal shall be limited by the qualifications expressly attaching to the name of that animal in the schedule in which it appears;"

We were able to consider the Chimpanzees in the 1959 edition of the Encyclopedia Britanica Vol. 5 p. 508 in Court. Neither Counsel had consulted it. It says the Chimpanzee is the popular name of one of the African anthropoidapes (Pan trogplodytes). It is found from French Guinea to Western Uganda and the Belgian Congo (now Zaire). A pygmy species (Pan paniscus) occurs on the South side of the Congo river, but the various forms although they show great variation, are probably only races of the common species. The nomenclature of the Chimpanzee is greatly complicated Anthropopithecus, Troglodytes and Simia are frequently used as generic names although the last has been ruled invalid in any animal.

We now turn to another authority Dorst and Dandelow in their "FIELD GUIDE TO THE LARGER MAMMALS OF AFRICA", we find the following on page 89.
P.T. Troglodytes - (from the Cameroons to Congo and Ubangi rivers.
P.T. Schweinfurthi (from Ubangi and Congo rivers to theGreat Lakes)
pygmy Chimpanzee (P Paniscus - left bank of the Congo river).

The whole situation is clear. In 1959 the generic name was Pan Anthropopithecus. It covered all sub—species as the Eleventh Schedule says. It covers all non-Uganda chimpanzees and a local sub—species are covered by the Convention on International Trade in Endangered species of Wild Fauna and Flora. Uganda had not acceded to it at the material time. Zaire had done so.
The sub—species Pan—Troglodytes is sometimes also used generically but exists from Cameroon to the Congo and Ubangi Rivers. That is outside Uganda Pan Schweinfurthi reaches and exists in Uganda. Pan Paniscus lives South of the Congo River outside Uganda.
The whole matter is still more simple in that the Chimpanzees were exported from Zaire as Pan paniscus. The learned Judge accepted all the documents from Zaire as being in good order, and indeed what was done on the Zaire side was in good order. It follows that he was dealing with chimpanzees Pan panicus from Zaire and coming under the 11th Schedule. Of course, we would agree with the learned Judge that it was distinctly peculiar for the Chief Game Warden not to know what type of Chimpanzees he was dealing in, and that anathema spread over the officials who gave evidence, as well as Counsel at the trial and on the appeal. Indeed we have explained this matter at great length, in order to illustrate how a person involved in this sort of predicament can find their way out of the fog.
The result is that there is no difficulty in finding that the Chimpanzees in this case were identified as subspecies from Zaire coming under the generic name of Pan Antrhropopithecus, a name used in 1959, (but probably replaced nowadays by Pan
Troglodytes) and thus within the description of Chimpanzees in the 11th Schedule of the Act.
Going back to the issue on this appeal, that the statutory provisions did not permit the respondent to import the Chimpanzees into Uganda, via Lia. He is resident having his home at Mengo Kampala. The Chimpanzees were in transit to Dubai. To import these animals the respondent needed the prior permission in writing of the Chief Game Warden. The respondent never got

such permission. There is no evidence that the Chief Game Warden's duty can be delegated to the Game Warden at Arua. That would not seem to be possible because Section 16(2) (a) require the Chief Game Warden and the Commissioner of Customs to be satisfied from the Certificate from the duly authorised officer of the country of origin that the animals are in transit. No delegation therefore seems possible.

Another difficulty which arose during the hearing of the appeal was the statement of the Chief Game Warden at the trial that this importation had been banned. No record of this ban can be found. The appellant does not support the statement. We take no account of it.

The whole procedure as explained by Mr. Alubino (PW2) is in substance wrong. If that procedure has been operated before, it should not have been. The procedure explained by Mr. Tindigarukayo (DW4) was substantially correct on the basis of the Law. We note the derogatory remarks of the learned Judge about this witness. This is one of those rare occasions when the written law is so clear that the witness having followed the law must be preferred to the Customs officer who explained how his colleagues did not follow the law. This is an example where the written law (or it may be a document) indicates where the truth lies, better than the Court's impression of the demeanor of the witness. The witness had some difficulty fitting in the forms required of CITES, not the proceedings under the Act.

It is further to be noted that Mr. Tindigarukayo explained that the respondent was really acting improperly. He had five Chimpanzees,and not four as his documents stated. Two died and three were in the zoo. Thus not only was the respondent technically at fault (however much he may have been misled by the officials in Arua), but he was in fact smuggling out one more Chimpanzee than he ought to have had. Of course, that ruined the analysis of the learned Judge, who thought that the respondent ought to have been compensated. That also disposes of the jibe about a bribe.

To answer the issues on this appeal as established thus far. The respondent did not import the chimpanzees properly through Lia, nor on the documentation, since he had no prior written permission of the Chief Game Warden, and also because he was exporting five Chimpanzees instead of four. It was not possible to estop the Attorney General since the Statute had been broken technically and with unlawful intent. The Appellant ought not to have had these animals at all. However he was acquitted of unlawful possession (quite how I cannot tell) and therefore the animals could not be forfeited under Section 91 of the Act. The Magistrate's Court ordered

the release of the chimpanzees. There was no appeal so the order stands. The Chief Game Warden did not surrender the animals. No contempt of Court proceedings were taken against him. At length on this suit, the respondent has decided not to call for the animals to be returned to him. In the end no harm was done by the wrongful attitude of the Chief Game warden. The latter has proved his point, that the import atio was unlawful and amounted to smuggling one animal. The respondent no longer wants them returned. Therefore we will accede to that decision and leave them where they are in Entebbe Zoo.

In these tangle circumstances does the respondent deserve any compensation?

As the respondent ought not to have these animals he cannot complain if he has lost them. He was importing and exporting one more animal than he had stated either to the authorities in Zaire or Uganda. These were however his property and should have been returned to him if not forfeited (Section 88). But he asked for their value at the date of judgment. On his own evidence, the chimpanzees had no value as they were at that time too old for this trade. Consequently the value of shs.72,000,000/= is out of the question as a matter of the value of the goods in detinue. He also claimed general damages. Such damages would have t be damages of wrongful detention (See GENERAL AND FINANCE FACILITIES LTD VS. COOKS CARS (ROMFORD) LTD (1963 W.L.R. 644 from DIPLOCK L.J. at p.650). The damages for wrongful detention might extend interlia from the inconvenience of not having the respondent's property in possession, to the loss due to a further contract if that was reasonably foreseeable and reasonable. He cannot claim for inconvenience since he ought not to have had them, and now no longer wants them. He did import them to export them to Dubai for profit. What was his profit to be? He did not explain that part of his loss. He simply claimed the value of the animals at the rate of $60,000, which he found out to be that price in Dubai through Abdul Karim. The latter (PW4) said that the Company of Al Jaber would pay $60,000 for each Chimpanzee the Chief Game warden thought that each animal could cost $5,000 to $10,000. Where are the Contract documents? Whether there was a further contract therefore is in doubt. The value given at the customs was shs 200,000/=. One can only conclude that (apart from the value which was said to be nothing at all at the time of the trial what further loss the respondent made is not possible to tell on the evidence.

We must now state that we are aware that consequential damages can be claimed in the case of a fall in the market price of the detained article. This must be pleaded and proved. It was not. At

the most it could be shs 200,000/= the value on the Customs forms. Having sated that he wanted the value at the date of judgment the respondent precluded himself from asking for consequential damages, namely damages based on the value at an earlier date than the date of Judgment. There is no ground for exemplary damages.

I would in consequence allow the appeal and set aside the judgment of the High Court. I would substitute judgment for the Attorney General by dismissing the respondent's claim. The Appellant will have the costs of this appeal and in the Court below.

Delivered at Mengo this 12th day of January, 1993.

Sgd: H.G. PLATT
JUSTICE OF THE SUPREME COURT

JUDGEMENT OF MANYINDO, DCJ:

I have read the judgment of Platt JSC in draft. I agree with it and as Oder JSC also agrees, this Appeal is allowed, the suit stands is missed. There will be an order for costs

in terms proposed by Platt JSC.

Delivered at Mengo this 12th day of January, 1993.

Sgd: S.T. MANYINDO
DEPUTY CHIEF JUSTICE

JUDGEMENT OF ODER, JSC:

I have had the benefit of reading in draft the Judgment of Platt, JSC. I agree with him that the appeal should be allowed.

DATED AT MENGO THIS 12TH DAY OF JANUARY, 1993.

SGD:

A.H.O. ODER

JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS IS A TRUE COPY OF THE ORIGINAL.

B.F.B. BABIGUMIRA