[2011] JMCA Civ 35

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES CIVIL APPEAL NO 5/08

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE HIBBERT JA (Ag.)

BETWEEN	**ANTHEA McGIBBON**	**APPELLANT**
AND	**AMBROSE BURKE**	**RESPONDENT**

Appellant in person

Leroy Equiano for the respondent

28 July and 7 October 2011

PANTON P

[1] This appeal is from a decision of Her Honour Mrs Marlene Malahoo Forte, former Resident Magistrate for the Corporate Area (Civil), delivered on 7 June 2006 in which she gave judgment with costs of $2,500.00 to the respondent.

[2] The proceedings in the Resident Magistrate's Court commenced with a plaint filed by the respondent on 1 November 2004 seeking from the appellant one month's arrears of rental and recovery of possession in respect of premises at 11 Maple Leaf Avenue, Kingston 10. Firstly, the question of the rental was recorded as settled on 3 December 2004. Secondly, on 16 March 2005, by

consent, judgment was entered for the appellant to deliver up possession of the premises on or before 30 June 2005. Prior to the entry of that judgment, a counterclaim had been filed by the appellant wherein she claimed $250,000.00 for nuisance, breach of covenant for quiet enjoyment and refund of monies paid to the respondent for cable service which was not paid for by him; and for an injunction restraining the respondent from further interfering with her quiet enjoyment of the premises. The final phase of the proceedings involved the trial of the counterclaim. The appeal stems from that trial.

[3] On 25 April 2005, a further notice of counterclaim was filed by the appellant. In that counterclaim, she sought an award of $158,128.37 for replacement of her portfolio of work which she claimed was willfully and recklessly destroyed by the respondent. She also claimed compensation for loss of employment opportunity resulting from the destruction of the portfolio. The appellant last saw the portfolio on 11 February 2004. The job offer was from Vibez Communications Group. On 12 January 2004, the appellant had attended a job interview which she said went very well.

[4] At the trial, the learned Resident Magistrate heard evidence from the appellant and her witness Mr Andrew Thompson as well as from the respondent. In her evidence, the appellant said that her real claim was for the damage done to her portfolio. She was working at the Gleaner Company as a sub-editor and photographer. The portfolio was a compilation of published and unpublished

works, representing her skill, experience and expertise in the roles of sub-editor and photographer. On 11 February 2004, the portfolio was on her verandah immediately under her window. She left for work at about 8 a.m. On her return at about 7 p.m. she noticed that the portfolio was missing. According to her, upon enquiring of the respondent, he told her he had thrown it away. She denied that she had told him to dispose of it. She said that her inability to provide the portfolio resulted in the loss of a job opportunity which would have earned her US$500.00 per week in addition to other benefits.

[5] While being cross-examined, the appellant denied that the newspapers making up the portfolio were in a carton box. She said that they were in plastic and that the respondent and herself had discussed the portfolio from time to time but he used to laugh at her pile of newspapers. She said it was not necessary for her to show her portfolio at the interview on 12 January 2004. She has since made an attempt to reproduce the portfolio, and has shown electronic versions to the potential employer but the online version does not amount to the required evidence for the State Department and the firm. Her intention, she said, was to take the newspapers abroad while travelling by aeroplane.

[6] The appellant said that her rental package included $1,000.00 for cable service. She paid for full cable service but only received basic channels sometimes, and nothing at other times. She received no cable service, she said, between April 2004 and July 2005 when she vacated the premises.

[7] Mr Andrew Thompson, an electrical contractor, gave evidence that he visited the appellant on a date when he heard a heated argument between her and the respondent in respect of the missing portfolio. He said that the respondent said that he had thrown away the portfolio as he thought it was garbage. Under cross-examination, he said that he used to ask the appellant what the papers were for. "You could see it was old newspaper", he said. The appellant, he said, had told him that the portfolio was being kept on the verandah "until she sorted out herself inside".

[8] The respondent said that the monthly rental amount included a fee for basic cable service. The cost for the cable service was $800.00, not $1,000.00. He denied charging the appellant $1,000.00, and said that the only time that there was no cable service was when the line was being worked on by the providers. The appellant, he said, had unlawfully removed the cable box and as a result he had reported this incident to the police.

[9] As far as the portfolio was concerned, the respondent said that the appellant, who had taken up residence not very long before, took a little while to unpack her household items. The process of unpacking had taken two to three weeks, and involved a fight between the appellant and her boyfriend. The fight was in respect of "what was to be packed when, where and how", said the respondent. After the unpacking had been done, and two to three weeks more had passed, the respondent said that he noticed that there were three seat

cushions and a carton on the verandah. They were unsightly. He inquired of the appellant whether they should be thrown out and, according to him, the appellant answered in the affirmative. He said he threw them out on the Tuesday because garbage is collected on Tuesdays. When the appellant returned home that afternoon, according to the respondent, she went off in a tizzy as to why the respondent had thrown out the carton with newspapers in which she had written articles.

[10] The respondent said that the very first time that he had heard about a portfolio was after he had given the appellant notice to quit and had come to the court. After the written notice was served on the appellant, she said that she would not be leaving until he had paid her $10,000.00 for the newspapers that had been thrown out. The respondent also noted that when he was served with the first counterclaim, there was no mention in it of the portfolio.

[11] The learned Resident Magistrate found that there was no doubt that the newspapers were of value to the appellant and were thrown out by the respondent. She found that they had remained on the verandah after everything else had been stored away and that it was natural for the respondent to inquire whether the articles could be thrown away. The learned magistrate accepted that the respondent did ask, and was told, that the carton could be thrown away. She noted that there had been no mention of the portfolio of newspaper when the counterclaim was first filed. This fact was seriously considered in relation to the

credibility of the appellant. In this regard, the learned Resident Magistrate accepted the evidence of the respondent that the appellant had said that she would not be vacating the premises until she had been paid for the portfolio.

[12] In arriving at her findings and conclusion, the learned Resident Magistrate took into consideration the appellant's demeanour which she said was "instructive". She stated that she simply did not believe the appellant. She did not accept that the respondent deliberately threw out the carton without having consulted and received the approval of the appellant. As far as the cable service was concerned, she accepted the evidence of the respondent. In the circumstances, on a balance of probabilities, judgment was entered in favour of the respondent.

[13] The appellant filed four grounds of appeal whereby she sought the setting aside of the decision of the court below and the entering of judgment in her favour; alternatively, she sought a new trial of the suit. The four grounds were listed by the appellant as follows:

> " (i) That the learned trial judge conducted the trial in a bias (sic) manner in not allowing the Appellant/Defendant the opportunity to present her witnesses at the trial. The Court was advised by the Appellant/Defendant that her witness was unable to attend Court and seek an adjournment for a further trial date or continuation in order to allow sufficient time for her witnesses to attendant (sic) the said hearing. That at all material times of (sic) two of the said the (sic) witnesses for and on behalf of the Appellant has always been in attendance at the trial.

(ii) That the learned trial judge erred when she did not weigh the evidence correctly, and, erred when she found that on a balance of probability that the Respondent/Claimant did not intentionally destroy the portfolio.

(iii) That the learned trial judge erred when … she did not find the Respondent/Claimant with intention to charge for cable, and likewise was not liable for not providing service.

(iv) That the learned judge failed to address her mind to the evidence that the difference in discovery of the papers was inconsistent as stated by the Defendant in cross examination

- 'The Papers were on top of the box'.
- 'When I dug up the box, I saw papers'."

[14] At the hearing before us, the appellant challenged not only the findings of the learned Resident Magistrate but also the completeness of the notes of evidence. According to her, "the notes left out evidence that would have influenced the case". The evidence that was omitted, said the appellant, was that given by her as to the reason for the isolation of the portfolio and its being confined to the verandah. Also allegedly omitted was evidence by the respondent indicating an inconsistency as regards his knowledge of the existence of the portfolio prior to its destruction.

[15] The appellant did not say exactly what the evidence omitted was, although stating that which she believed would have been the effect of it. In looking at the detailed manner in which the evidence was recorded by the

learned Resident Magistrate, we find it difficult to accept that any relevant and material evidence would have escaped her attention and notation. Hence, the challenge as to incompleteness is without foundation.

[16] As regards the failure to grant an adjournment to facilitate the attendance of other witnesses that the appellant said she had intended to call, we note that the matter had been set for trial on six previous occasions in 2005, namely 1 March, 16 March, 4 May, 13 July, 27 September and 9 November, as well as on two previous occasions in 2006, namely 21 February and 25 April. Given the nature of the case and the requirement that suits such as the instant one be tried in a summary way pursuant to **section 184 Judicature (Resident Magistrates) Act**), it was entirely open to the learned Resident Magistrate to refuse the request for a further adjournment. Litigants must play their part in speeding up the process of litigation by attending trials with their witnesses and attorneys-at-law on the dates appointed by the court for trial.

[17] The other grounds of appeal may be dealt with together as they relate to the Resident Magistrate's assessment of the evidence presented to her. In those grounds, the appellant complains of the Resident Magistrate's failure to "weigh the evidence" and to deal with inconsistencies on the part of the respondent. This failure, the appellant said, resulted in the adverse findings made against her. Mr Leroy Equiano for the respondent submitted that the Resident Magistrate made findings that were in keeping with the evidence presented, and

stressed that the Resident Magistrate saw the witnesses and was in the best position to determine the truth.

[18] We remind ourselves that the learned Resident Magistrate, having seen the witnesses give evidence under cross-examination, concluded that the appellant was not a truthful witness. In order to disturb that finding, there has to be plain evidence that the learned Resident Magistrate was in error. In ***Industrial Chemical Co. (Ja.) Limited v Ellis*** (1986) 23 J.L.R. 35, the Privy Council held that "where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself [or herself] by the judge, an appellate court should not come to a different conclusion on the printed evidence, unless satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion". This principle was reproduced from earlier cases such as ***Powell v Streatham Manor Nursing Home*** [1935] A.C. 243, ***Yuill v Yuill*** [1945] 1 All E.R. 183, ***Dunn v Dunn*** [1930] S.C. 131, ***Kinnell v Peebles*** 17 R. (Ct. of Sess.) 416 and ***Watt v Thomas*** [1947] 1 All E.R. 582. Since ***Industrial Chemical Co. v Ellis***, we have followed this principle in countless cases (such as ***Samuels v. Johnson-Henry*** (1987) 24 J.L.R. 152 and ***Moore v Rahman*** (1993) 30 J.L.R. 410). In the latter case, this court did interfere with the trial judge's finding of fact. However, in the instant case, we see no reason to interfere.

[19] The major finding of fact that excited the appellant's condemnation was the finding that she had given the respondent the go-ahead to dispose of the carton containing the newspapers. The appellant maintained that no such permission had been given to the respondent as the contents of the carton were of great value to her. We find it strange that such valuable material should have been left on the verandah for so long. Further, it is also a strange feature of the appellant's case that the newspapers, though of value to her job prospects, were never taken to the interview, nor protected after the interview had gone so well in the estimation of the appellant. This suggests that the newspapers were really not needed. In the circumstances, we understand why the learned Resident Magistrate preferred the respondent's version of events to the appellant's.

[20] The appellant has not satisfied us that there is any error in the reasoning and findings of the learned Resident Magistrate or as regards her conduct of the trial. The appeal therefore fails. The appeal is dismissed, and the appellant is ordered to pay costs $15,000.00 to the respondent.