THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

(CIVIL DIVISION)

CIVIL SUIT NO. 259 OF 2015

KENZA JOHN----------PLAINTIFF

VERSUS

1. **SWIFT COACHES CO LIMITED**
2. **DELTA INDUSTRIAL EQUIPMENT**
3. **LUJJA MUGOLOZI----------DEFENDANTS**

BEFORE HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The plaintiff boarded Swift Coaches bus belonging to the 1st defendant heading to Mbarara District around April 2015. While at Busega round about, the plaintiff stopped the bus to pick some items and the bus parked accordingly. Before the plaintiff could properly disembark from the bus, the driver started the bus again and as a result the bus tyres run over the plaintiff's left foot shattered it and caused him to suffer severe damage.

At the time of the accident, the bus was branded with the 1st defendant's image and was at that time used and is currently being used to carry out the 1st defendant's transport business.That the accident was solely caused by the negligent and careless driving of the 1st defendant's deriver for which the 1st defendant being the owner or holding out to be the owner is vicariously liable.

That as a result of the accident, the plaintiff suffered severe damages, anguish, pain, permanent incapacitation emotional physical and financial loss for which he claims special and general damages against the defendant.

The plaintiff seeks to recover special damages, of 94,117,000/= (Ninety Four Million One hundred Seventeen Thousand Shillings) from the time of the accident to date and general damages for the injury and financial loss suffered of 30,000,000/= (Thirty Million Shillings).

The 1st defendant filed a defence to this suit and contended in her defence that the plaintiff is liable for contributory negligence since he ought to have known, seen and heard that the bus engine was revving and the bus was moving and should have waited to disembark from the bus. That the claims for special damages are exaggerated and excessive and that the court recesses them.

The 1st defendant's counsel was duly served with both the hearing notices of 16th October 2018 together a proposed joint scheduling memorandum and the plaintiff's witness statements but on the slated date they never appeared and this matter proceeded ex-parte.

AGREED FACTS IN PLEADINGS

a) That there was an accident involving the plaintiff when the 1st defendant's motor vehicle run over the plaintiff's leg.
b) That the plaintiff suffered damage as a result of this accident.

AGREED ISSUES.

(1) Whether the 1st defendant is variously liable in special and general damages for the accident.?

(2) What are the remedies available to the parties?

At the trial the plaintiff led 1 witness who testified through his witness statement that was admitted as his evidence in chief and the defendant never appeared to challenge the plaintiff's evidence or their case and other evidence was by way of documentary evidence that were exhibited at trial.

ISSUE ONE

Whether the 1st defendant is variously liable in special and general damages for the accident.?

The 1st defendant's contended in paragraph 5 of the written statement of defence, the defendant contended that the plaintiff was liable for contributory negligence on a claim that the plaintiff ought to have known, seen and he should have waited to disembark from the bus.

The 1st defendant in his defence under paragraph 6 averred that the claims for special damages were exaggerated and excessive and prayed that the honourable court reassess them.

The plaintiff's counsel cited Order 13 Rule 1 of the Civil Procedure Rules SI 71-1, "*any party to a suit may give notice by his or her pleadings or otherwise in writing, that he or she admits the truth of the whole of any part of the case of the other party*".

Under rule 6 of Order 13 of the CPR, "*any party may at any stage of the suit, where an admission of facts has been made either on the pleadings or otherwise, apply to the court for such judgment or order as upon the admission he or she may be entitled to, without waiting for the determination of any other question between the parties and the court may upon such application make such orders, or give such judgment as the court may think fit*".

The plaintiff's counsel submitted that the contents in Paragraph 5 and 6 of the plaintiff's written statement of defence amount to an admission and their only point of contention is contributory negligence and excessive damages which they ought to have disproved in court but failed to appear in court to defend the contributory negligence and excessive damage.

According to the plaintiff's counsel Paragraph 5 and 6 of the written statement of defence amount to an admission and their only point of contention is contributory negligence and excessive damages which they ought to have proved in court but failed to show appearance despite having been served.

She prayed that the court be pleased to find that they are an admission and then court should proceed to determine the contributory negligence.

On the issue of contributory negligence, the plaintiff's counsel cited; Hon. Lady Justice Margaret C. Oguli Oumo in the case of ***Kasekya-Kasaija Sylvan Vs Attorney General (Civil Suit No. 1147 of 1998)*** *were she* held that "The rule in contributory negligence is that the defendant has to prove the contributory negligence…"
She further held that that "In the circumstance, the defendant did not bring any other evidence that could have showed the probable cause of the accident,"

It was the submission of the plaintiff's counsel that since the defendant did not appear in court to prove their allegation of contributory negligence against the plaintiff, their claim should be dismissed with costs to the plaintiff.

Proof of Negligence
In the case of Kasekya-Kasaija Sylvan Vs Attorney General (supra), Hon. Lady Justice Margaret C. Oguli Oumo bases on the case of *F. J Ijala v Corporation Energo Project – (1988-1990) at p. 123* as cited by counsel for the plaintiff to give her decision. In that case, Justice C. Byamugisha, as she then was held that "a motor vehicle does not normally block others without some negligence on the part of the driver. She further held that,
"in this particular case, it was incumbent upon the defendant to show either there was a probable cause on his part or the accident was due to circumstances beyond his control".

In the case of Alice Wanjiru Karangi V Mash East Services Limited T/A Mash Bus Services Limited (Civil Suit No. 283 Of 2016), Hon. Lady Justice H. Wolayo stated that "for the tort of negligence to be established, the plaintiff must show that the defendant owed her a legal duty of care and that duty was breached causing injury to the plaintiff."

It is the plaintiff's evidence in his testimony/witness statement that he boarded Swift Coaches bus belonging to the 1st defendant registered under Reg. No. UAU 331L destined to Mbarara District.

It is further his evidence under paragraph 4 of the witness statement that when the bus reached at Busega round about, the plaintiff asked the driver to stop so that he could pick some items and he accordingly parked, his turn boy got out of the vehicle and the plaintiff followed after the turn boy.

The plaintiff testified under paragraph 5 & 6 that before he could properly get off the vehicle, the driver negligently and wantonly started to drive once again without waiting for the plaintiff to fully disembark from the said vehicle. That he shouted signaling the driver to stop but he continued to drive ahead and as a result, the plaintiff fell off the bus, thereafter and the bus tyres run over his left foot shattered it and caused it to suffer severe damage.

The plaintiff's extent of damage was clearly shown in the photographs admitted as exhibits. The plaintiff further appeared in court and could only be supported by a walking stick.

It can be deduced from the above evidence, the 1st defendant's driver owed the plaintiff a duty of care and to ensure that he reaches his destination safely. Whereas he had stopped for the plaintiff to get out, the driver negligently started the vehicle once again before the plaintiff could properly disembark from it and he caused him to suffer from the accident.

It was upon the defendant to show that there was a probable cause on the part of the plaintiff or that the accident was beyond the driver's control. According to PE2 it indicated that actually the plaintiff was involved in an accident caused by the 1st defendant's bus.

Vicarious liability

Whether the defendant is vicariously liable?

Hon. Lady Justice Margaret C. Oguli Oumo held in the case of ***Kasekya-Kasaija Sylvan vs Attorney General*** (Supra) that "However, in this case, it is my view that the reckless driving of a driver who was employed to drive has a direct connection to the duties he was employed to perform unless the contrary is proved. The judge relied on the leading case of *Muwonge v Attorney General [1969] EA. P.17* quoted with approval in the Wuyuu case (supra) as submitted by counsel for the plaintiff_that "the liability of a master extends to all torts committed by his servant when purporting to act in the course of such business as he was

authorized or held out as authorized to transact an account of his master. That it would remain the position even when the servant was acting deliberately, negligently or criminally for his or own benefit. That according to the case of Ijala (supra), it was held, inter alia that "*ownership of the vehicle in question is prima facie evidence that at the material time, it was being driven by his agent and servant unless the contrary is proved*"

The plaintiff under paragraph 7 of his witness statement confirmed that at the time of the accident, the car was driven by the 3rd defendant whom he later came to learn was Lujja Mugolozi Juma and whose whereabouts are not known to the plaintiff. The plaintiff further stated under paragraph 9 of his witness statement, that at the time of boarding the bus, he knew it as the property of Swift Safari Limited because it was branded with the swift logo and is up to date being used to transact transport business under the same brand of swift hence the suit against the 1st defendant. This evidence is supported the police report marked PE2 which shows that the bus was the property of Swift.

The plaintiff's counsel contended that the bus that was involved in the accident causing injuries to the plaintiff was the property of the 1st defendant who tolerated and encouraged the use of its branding image and that the driver of the bus was an employee of the bus company. That the driver was acting in the course of his duty and therefore Swift is vicariously liable.

NEGLIGENCE

Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Before the liability of a Defendant to pay damages for the tort of negligence can be established, it must be proved that

a) **The defendant owed to the injured man a duty to exercise due care**;
b) **The Defendant failed to exercise the due care and**
c) **The defendant's failure was the cause of the injury or damage suffered by that man**

(See H.KATERALWIRE vs PAUL LWANGA [1989-90] HCB 56)

"Negligence is conduct, not state of mind- conduct which involves an unreasonably great risk of causing damage…..negligence is the omission to do something much a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something, which a prudent and reasonable man would not do". See ***Salmond and Heuston on The Law of Torts*** *(19th Edition)*

STANDARD OF CARE

The standard is reasonableness. But in considering what a reasonable man would realize or do in a particular situation, we must have regard to human nature as we know it, and if one thinks that in a particular situation the great majority would have behaved in one way, it would not be right to say that a reasonable man would or should have behaved in a different way. A reasonable man does not mean a paragon of circumspection. The duty being a general duty to use reasonable care, reasonableness is the test of the steps to be taken

FORESEEABILITY OF DANGER

It is not enough that the event should be such as can reasonably be foreseen. There must be sufficient probability to lead a reasonable man to anticipate danger or injury. The existence of some risk is an ordinary incident of life, even when all due care has been, as it must be, taken

ANTICIPATION OF GRAVITY OF INJURY

In considering whether some precaution should be taken against a foreseeable risk, there is a duty to weigh on the one hand, the magnitude of the risk, the likelihood of an accident happening, and the possible seriousness of the consequences if an accident does happen, and on the other the difficulty and expense and any other disadvantage of taking the precaution.
The gravity of possible consequences is a major factor in considering precautions. The more serious the likely damage, the greater the precaution required and this is considered in determining the level of fulfillment of the duty of care. **- Paris –v- Stepney B.C. [1951] A.C. 367.**

STANDARD OF PROOF NEGLIGENCE

If the evidence in a civil case is such that the tribunal can say: We think it more probable than not, the burden is discharged, but if the probabilities are equal, it is not. Thus the standard of proof is on a balance of probabilities.

The plaintiff has satisfied the court that the 1st defendant's driver or 3rd defendant was negligent and this court agrees with the plaintiff's counsel submissions on this issue of negligence.

Whether there was contributory negligence?

THE LAW AND THE STANDARD

"In order to establish contributory negligence the defendant has to prove that the claimants negligence was a cause of the harm which he has suffered in consequence of the defendant's negligence. The question is not who had the last opportunity of avoiding mischief but whose act caused the harm."

Halsbury's Laws of England/NEGLIGENCE (Volume 78) (2010) 5th Edition) Paragraph 76

"The existence of contributory negligence does not depend on any duty owed by the claimant to the defendant and all that is necessary to establish a plea of contributory negligence is for the defendant to prove that the claimant did not in his own interest take reasonable care of himself and contributed by this want of care to his injury."

Halsbury's Laws of England/NEGLIGENCE (Volume 78) (2010) 5th Edition) paragraph 77

"The standard of care in contributory negligence is what is reasonable in the circumstances and this usually corresponds to the standard of care in negligence.
The standard of care depends upon foreseeability. Just as negligence requires foreseeability to harm others, contributory negligence requires the foreseeability to harm oneself."

Halsbury's Laws of England/NEGLIGENCE (Volume 78) (2010) 5th Edition) Paragraph 7

The defendant never pleaded any particulars of contributory negligence in the written statement of defence and above all they never appeared in court to impute their contributory negligence on the plaintiff during his testimony.

The contributory negligence has not been proved against the plaintiff and the accident was wholly caused by the 1st defendant's employee through his negligence.

ISSUE 2

Whether the Plaintiff is entitled to the reliefs sought?

General & Special damages

According to his paper on the **Principles Governing the Award of Damages in Civil Cases,** Hon. Justice Bart M. Katureebe, JSC stated that general damages, according to Lord Macnaghten in the often-cited case of **Stroms V. Hutchinson [1905] AC 515],** are such as the law will presume to be the direct natural or probable consequence of the act complained of.

Special damages, on the other hand, are such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character, and, therefore, they must be claimed specially and proved strictly.

The plaintiff in his witness statement stated that immediately after the accident, he was admitted to Mulago Hospital more than a month before discharge and upon discharge from Mulago Hospital, he started reporting to Universal Medical Centre – Busega for physiotherapy. That although he was later discharged, he continued receiving treatment and is still undergoing treatment to the extent that an operation has been recommended after conducting an x-ray. The operation to be conducted is assessed at 2,650,000.

It was the plaintiff's evidence that before the accident, he had his permanent place of aboard at Buborogota Village in Isingiro District and after the accident, he was compelled to find convenient accommodation in Kampala Busega to enable him report to hospital on the daily basis at a rate of 200,000/= which has now accumulated to 7,800,000.

That while in hospital, his wife would travel to hospital and from home in Busega to cook and bring food and upon discharge, he continued to travel from Busega to

Mulago with special hire which is all estimated at 2, 400,000/= (Two Million Four Hundred Thousand Shillings).

That even after discharge from Mulago hospital, he continued reporting at Busega Universal clinic for special medical attention and regular reporting to Mulago hospital and the medical bill accumulated to 1, 975,000/= (One Million, Nine Hundred Seventy Five Thousand).

That he incurred daily wound dressing expenses of 6, 542,000/= (Six Million Five Hundred Forty Two Thousand).

That besides the medical fees incurred at the Busega Universal Clinic, he incurred medical expenses from Mulago hospital which were not receipted including x-ray and other prescribed medicines all valued at 3,000,000/= (Three Million Shillings)

He incurred meals for both himself and his caretaker while at the hospital in total valued at 1,000,000/= (One Million Shillings).

It was the plaintiff's evidence that before the accident, he was employed with Tomis Construction and could earn a daily allowance of 50,000/= and monthly salary of 200,000/=. In total he would earn a monthly income of 1,700,000/= (One Million Seven Hundred Thousand) shillings for both my salary and allowance and that as a result of the accident, he lost his job subjecting him to financial loss of 71, 400,000/- (Seventy One Million, Four Hundred Thousand Shillings) from the time of the accident to date. He stated that given his condition, condition it was very hard to secure another similar job.

Hon. Justice Bart M. Katureebe, JSC in his paper on the **Principles Governing the Award of Damages in Civil Cases** stated that in current usage, 'special damages' relate to past pecuniary loss calculable at the date of trial.

It was the plaintiff's submission that he has suffered special damages cumulatively calculated at UGX 94,117,000/= (Ninety Four Million One hundred Seventeen Thousand Shillings) from the date of the accident to the date of the trial.
The plaintiff set out the special damages that he had suffered as at the time of filing the suit and it is only these claims that he is entitled to recover as special

damages. It would be wrong for the plaintiff to change his case for special damages at the time of trial. Parties are bound by their pleadings.
This court shall only consider the special damages set out in the plaint;
i.e Hospital bills at Universal Medical Centre at 1,975,000/=, other medical expenses at 3,000,000/=, transport costs from Mulago Hospital to Busega using special hire for 2 years at 2,400,000/=, Meals for plaintiff and care takers at 1,000,000/=, daily dressings for injuries 6,542,000/=. The rest of the items that are included in this rubric do not qualify to be special damages since they are specifically spent by the plaintiff but are merely anticipated losses and or consequential losses which should be considered as general damages.
The plaintiff is awarded special damages of 14,917,000/=.

Assessment of General damages
Hon. Justice Bart M. Katureebe, JSC in his paper on the **Principles Governing the Award of Damages in Civil Cases** referred to the case of Hall v Ross (1813) 1 Dow 201 3 ER 672, HL and noted that "*It is an ancient rule of the common law that the difficulty of assessing damages is no reason for the court not granting them. Indeed, the difficulty of assessing damages is not a ground for giving only a nominal sum. Thus, even where it is impossible to assess the appropriate measure of damages with certainty and precision, the defendant must not be relieved of his liability to pay the plaintiff any damages at all in respect of a breach of contract or any other actionable wrong. In all such cases where ascertainment of damages is difficult, the court must attempt to ascertain damage in some way or other*"
Hon. Lady Justice Margaret C. Oguli Oumo held in the case of **Kasekya-Kasaija Sylvan vs Attorney General (supra)** General damages are damages which the law implies or presumes naturally to flow or accrue from the wrongful act and may be recovered without proof of any amount. *(See Traill v Bowker, (1947) 14 EACA 20) and Patel and Amin (1955) 11 EACA 1 post 258,* cited in East African cases on the ***Law of Tort*** by *Veitch* at page 253.

The plaintiff stated in his witness statement that as a result of his job, he incurred debts to pay his children's school fees and borrowed item's from Ayebale Silver's Shop and compensated for the loss of his employment, he would then clear his debts.
The plaintiff testified that as a result of the accident, his condition worsened and he was by his wife who traveled to arb countries and left him minor children.

It is therefore my submission that the plaintiff is awarded general damages of **UGX 30,000,000/= (Thirty Million Shillings)** for the inconveniences suffered, the physical and emotional stress resulting from his permanent incapacitation after losing his toes as well as the pain suffered.

General damages are such as the law will presume to be direct natural probable consequence of the act complained of. In quantification of damages, the court must bear in mind the fact that the plaintiff must be put in the position he would have been had he not suffered the wrong. The basic measure of damage is restitution. See ***Dr. Denis Lwamafa vs Attorney General HCCS No. 79 of 1983 [1992] 1 KALR 21***

The character of the acts themselves, which produce the damage, the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstance and nature of the acts themselves by which the damage is done. See ***Ouma vs Nairobi City Council [1976] KLR 298.***

In the present case, the plaintiff has sought general damages. Considering the circumstances of the case, the plaintiff is awarded a sum of 15,500,000/= as damages for accident occasioned and general inconvenience.

Interest

Section 26 provides for an award of interest that is just and reasonable. In the case of ***Kakubhai Mohanlal vs Warid Telecom Uganda HCCS No. 224 of 2011***, Court held that;

> " ***A just and reasonable interest rate, in my view, is one that would keep the awarded interest rate, in my view, is one that would keep the awarded amount cushioned against the ever rising inflation and drastic depreciation of the currency. A plaintiff ought to be entitled to such a rate of interest as would not neglect the prevailing economic value of money, but at the same time one which would insulate him or her against any***

economic vagaries and the inflation and depreciation of the currency in the event that the money awarded is not promptly paid when it falls due"

Special shall attract an interest of 15% from the date of the cause of action and General damages shall attract an interest of 15% from the date of judgment.

Costs

The plaintiff is awarded costs of the suit.

It is so ordered.

SSEKAANA MUSA
JUDGE
7th/12/2018