THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

CIVIL SUIT NO. 230 OF 2012

1. **KELLY JARET SILVERIA {suing for herself and on Behalf of her 3 kids; Thai, Thiery and Jermaine as A next friend}**
2. **JULIE SOLBERG**
3. **AMY HELLEN LAURA HEART**
4. **MUHAMED LUBOWA**
5. **CHILD AFRICA**

….PLAINTIFFS

VERSUS

1. **STANBIC BANK (U) LTD**
2. **HORIZON COACHES LTD**
3. **NATHAN MUWONGE**

……DEFENDANTS

BEFORE HON. JUSTICE MUSA SSEKAANA

JUDGMENT

BACKGROUND

The plaintiffs filed this suit seeking special damages, general damages for the injury occasioned by the 1st and 2nd defendants' driver, for loss of dependency on the 1st plaintiff on behalf of her children and herself and the loss of life of the 1st plaintiff's husband and costs of the suit.

On the morning of the 17th day of August 2010, while the 1st plaintiff's late husband Jermaine Nesta Silveria, the 2nd and 3rd plaintiff were being driven by the 4th plaintiff towards Kampala in the 5th plaintiff's motor vehicle Reg No. UAJ 132Y . The motorvehicle was knocked and crashed at Muhanga trading centre

along the Kabaale-Mbarara road by the first and second defendants' bus Reg No. UAL 231L. The 3rd defendant was the driver of the said bus with express and implied authority of the 1st and 2nd defendants and in the course of his employment negligently and recklessly drove the same and collided with the plaintiffs' car injuring the 2nd, 3rd and 4th plaintiffs and also killing the 1st plaintiff's husband instantly. The 4th plaintiff's car was severely damaged and written off. The plaintiffs claim that the 1st and 2nd defendants are vicariously liable due to the negligence of the 3rd defendant, the driver who was acting in the course of his employment.

The 1st defendant filed its written statement of defence denying any liability and stated that though the said vehicle Reg. No. UAL 231L was registered in its name, it was subject of finance lease agreement between the 1st and 2nd defendant. The said vehicle was under the possession, control, management and operation of the 2nd defendant who was solely and wholly responsible for it and to the complete exclusion of the first defendant.

The 2nd defendant also filed its written statement of defence where it denied all liability as it stated that the accident resulting into the death and injuries pleaded was not due to its negligence or negligence of its driver as the 3rd defendant was considerate to other road users and exercised due care and diligence. The 2nd defendant also claimed that all the claims special and general damages were exaggerated and unreasonable and that since the vehicle was comprehensively insured, the liabilities should have been addressed by the Insurance Company.

The 3rd defendant was served by way of substituted service as his whereabouts could not be established but he neither filed a written statement defence nor entered appearance when the matter came up for hearing.

The plaintiffs were represented by Mr Roscoe Yiga and Mohammed Mbabazi whereas the 1st defendant was represented by Mr. Richard Bwayo and Mr. Nangwala James and the 2nd defendant by Mr. Alfred Okello Oryem.

The parties filed a joint scheduling memorandum wherein they proposed the following issues for determination by this court.

1. ***Whether the accident alleged was caused by the sole negligence of the driver of bus Reg No. UAL 231L***
2. ***Whether or not any of the defendants is vicariously liable for the actions of the said driver***
3. ***Whether by virtue of the lease agreement between the defendants, and the fact of possession of the bus being under the 2nd defendant, the first defendant is not liable for any tort arising out of its use and to the plaintiffs***
4. ***Whether the plaintiffs are entitled to the remedies sought and if so, what quantum***

The parties were ordered to file written submissions; the plaintiffs and the 1st and 2nd defendants accordingly filed the same. The 3rd defendant did not enter appearance at the hearing and did not file any written submissions.

Both parties' submissions were considered by this court.

<u>DETERMINATION OF ISSUES</u>

Issue 1

Whether the accident alleged was caused by the sole negligence of the driver of bus Reg No. UAL 231L

Submissions

Counsel for the plaintiffs submitted that the 3rd defendant failed to drive vehicle No. UAL 231L with due care to other road users as he was over speeding and negligent.

PW1, Ms Kelly Jarret Silveria testified that her husband was killed in a car crash that was caused by the negligence of the 3rd defendant who was over speeding and driving on the wrong side of the road thus failed to swerve the bus to avoid hitting the car. PW1's evidence was further corroborated by the evidence of PW5, Mr. Abaho Willy a police officer in charge of the Kabale district who during his cross examination failed to maintain his side to which he invaded the land cruiser and resultantly caused the accident.

It was submitted for the 2nd defendant that the accident cannot be said to have been caused by the sole negligence of the bus driver the 3rd defendant but was inevitable with the road and weather conditions contributing to its occurrence.

Counsel for the 2nd defendant relied on the testimony of PW3, the driver of the Toyota Prado involved in the accident who testified that he was driving at 60 to 70 km/hr on a bad and disjointed road. That he further testified that the conditions on that day were not good for driving as it was misty.

Counsel for the 2nd defendant relied on several authorities to define negligence and relied on the evidence of PW3 where he stated that there was mist or fog around the time of the accident and that he was driving at 60 to 70 km/hr which was overspeeding. Counsel therefore submitted for the 2nd defendant that there was nothing to show that the bus driver was negligent but a magnitude of evidence that demonstrated how the accident was a result beyond human control for both drivers of the said vehicles.

Resolution

Negligence is a person's carelessness in breach of duty to others. As a tort, it is the breach of a legal duty to take care. It involves a person's breach of duty that is imposed upon him or her, to take care, resulting in damage to the complainant. Although the law imposes on all persons a general duty of reasonable care not to place others at foreseeable risk of harm through conduct, negligence is essentially a question of fact and it must depend upon the circumstances of each case. The standard of care expected is that of a reasonable person.

In this case the PW3 testified for that the 3rd defendants was driving recklessly as he was driving on the wrong side of the road at a very high speed and did not break to swerve the bus to avoid hitting the plaintiffs' car. PW5 also corroborated this evidence when he stated that he visited the scene of the accident. He stated that the point of impact was on the side of the direction travel of the land cruiser and that the driver was negligent and reckless as he failed to maintain his side to which he invaded the land cruiser on its side and caused the accident.

It was submitted for both the defendants that at the time of the accident, the weather conditions were not good as it was misty and that the road had some sharp corner and yet the driver was driving on the side of the road at a high speed and did not break to swerve the bus to avoid hitting the other car. This clearly shows the negligence of the 3rd defendant who had a duty to the other road users in this particular case being the plaintiffs and thus causing damage and injury.

The 3rd defendant did not appear in court nor did he file any defence and there was no evidence led to contradict the above testimonies as he fled the scene of crime after the accident and has not been found hence the only inference is that it's true he was indeed negligent.

Issue 1 is resolved in the affirmative.

Issue 2

Whether or not the 1st and 2nd Defendants are vicariously liable for the actions of the 3rd defendant

Submissions

Counsel for the plaintiffs submitted that it is a well-established rule that a master is liable for the acts of his servant committed within the course of his employment. He submitted that it was an undisputed fact in the Joint Scheduling Memorandum that the 1st Defendant was the registered owner of the vehicle Reg. No.UAL 231L although it was operated and maintained by the 2nd defendant. He relied on the testimony of DW1, Ms. Kyaterekera Viola who stated that at the

time of the accident, the vehicle Reg. No. UAL 231L was registered in the 1st defendant's names and was in the possession of the 2nd Defendant. Counsel further submitted that the DW2 testified to the 2nd defendant being in the physical possession of the said vehicle and confirmed that the 3rd defendant was an employee of the 2nd defendant and at time of the accident, the 3rd defendant was in the course of his employment.

He therefore invited this honorable court to find that the 1st and 2nd Defendant were vicariously liable for the negligent actions of the 3rd defendant.

Defendants' submissions

Counsel for the 1st defendant submitted that it was not vicariously liable for the actions of the driver, the 3rd defendant because it was his employer and he was not in acting in the course of any employment with the 1st defendant at the time of the accident. He contended that the driver was in the transportation business which the 1st defendant is not licensed to do. He stated that it was an agreed fact that the bus was operated and driven by the driver of the 2nd defendant which is involved in the transportation business. Counsel relied on the testimony of DW1 who testified that the driver, 3rd defendant was not an employee of the 1st defendant and was in fact not known at all. He stated that the DW2 unequivocally testified that the 3rd defendant was an employee of the 2nd defendant at the time of the accident and was acting in the course of his employment.

He therefore submitted that the 1st defendant cannot be said to be vicariously liable for the actions of the 3rd defendant who was not its employee and prayed that court so finds.

Counsel for the 2nd defendant submitted that from the evidence of DW2, it was confirmed that the driver, 3rd defendant was an employee of the 2nd defendant. He further submitted that it was not disputed that at the time of the accident, the said bus was registered in the names of the 1st defendant and that the 2nd defendant was acting in the capacity of an agent. He therefore stated that it is only imperative that the 1st defendant is liable for all the actions of the 2nd defendant including its employee and that court should find so.

Resolution

As rightly submitted by counsel, it is indeed a well-established rule that a master is liable for the acts of his servant committed within the course of his employment.

An act may be done in the course of employment so as to make his master liable even though it is done contrary to the orders of the master, and even if the servant is acting deliberately, wantonly, negligently, or criminally, or for his own behalf, nevertheless if what he did is merely a manner of carrying out what he was employed to carry out, then his master is liable **(see *Muwonge v. Attorney General [1967] EA 17*).**

DW2, the general manager for the 2nd defendant testified that the 3rd defendant was an employee of the 2nd defendant and was in the course of his employment

at the time of the accident. Neither the plaintiffs nor the 2nd defendant led any evidence to initiate that the 3rd defendant was an employee of the 1st defendant.

The 2nd defendant contended that at the time of the accident, it was acting as an agent of the 1st defendant since the said bus was registered in the names of the 1st defendant.

DW1 testified for the 1st defendant that the driver of the said bus was not its employee and was in fact not known to the bank at all.

I concur with the submissions of counsel for the 1st defendant that the 3rd defendant was not its employee as he was employed by the 2nd defendant and was in the course of employment at the time of the accident as unequivocaly admitted in its testimony by DW2. The plaintiffs did not lead evidence before this court to contradict the defendants' testimony and neither was the evidence challenged during cross examination.

As held by court in ***Muwonge v. Attorney General (supra),*** there must be a master-servant relationship for the principle of vicarious liability to be established**.** In the instant case, it was testified for the 2nd defendant that indeed the 3rd defendant was its employee and was in the course of employment at the time of the accident. I disagree with counsel for the 2nd defendant that it was an agent of the 1st defendant and thus the driver was an employee of the 1st defendant since the 1st defendant did not have any authority or knowledge of the driver or his work.

I therefore find that the 2nd defendant was vicariously liable for the actions of the driver, 3rd defendant and not the 1st defendant.

Issue 4

Whether by virtue of the lease agreement between the defendants, and the fact of possession of the bus being under the 2nd defendant, the first defendant is not liable for any tort arising out of its use and to the plaintiffs

Submissions

The plaintiffs relied on the testimony of DW 1 who testified that at the time of the accident, the motor vehicle Reg. No. UAL 231L was registered and belonged to the 1st defendant. That she further stated that the vehicle was leased out by the 1st defendant to the 2nd defendant at the time of the accident and that the 1st defendant was required to apply for a route chat from the licensing board. The plaintiffs therefore prayed that court finds the 1st defendant equally liable for the actions of the 3rd defendant as it did not show that it had no residual interest in the bus and that the bus had been insured in both the 1st and 2nd defendants' names.

Defendants' submissions

It is the 1st defendant's submission that the said bus though registered in its names did not and does not infer liability upon it on the account of the lease financing business. It was submitted that the registration only served to buttress the security interest and is part and parcel of lease financing. It was further submitted for the 1st defendant that though it was the registered owner of the impugned bus at the date of the accident, it is trite law that the fact of registration

on the log book is not conclusive proof of ownership as to automatically infer liability and that this is a rebuttable presumption under the law. The 1st defendant contended therefore that the financed asset being the bus in this case was only collateral for the loan extended thus its registration and it prayed that this court finds it not liable to the plaintiffs' claim on the account of undeniable lease agreement.

It was the 2nd defendant's submission that in deciding the real legal owner, the question was whether the 1st defendant executed a contract of sale of goods or agreement of sale as defined by the Sale of Goods and Supply of Services Act. Counsel submitted that this question helped to determine whether the 1st defendant remained with the property in the bus including risk or the property passed to the 2nd defendant including the risk. Counsel relied on the evidence of DW1 wherein she confirmed during her cross examination that the bus was registered in the 1st defendant's name at the time of the accident making it the legal owner of the same and not the 2nd defendant. He therefore prayed that court finds that both the property and risk in the bus at the time of the accident had never passed to the 2nd defendant making the 1st defendant liable for the tort.

Resolution

The courts have overtime entertained a number of cases on asset/lease financing and have laid down a number principles /precedents basing on the various laws of the land. Whereas there is no particular statutory framework for lease financing, the **Financial Institutions Act (F.I.A), 2004** under **section 3** recognizes it as one of the business of a financial institution. This therefore places the operation of asset financing in the financial institutions like commercial banks,

saving banks, credit institutions among others which have to be licensed in Uganda.

Hon. Justice Lameck Mukasa gave a definition of finance leasing in ***Nassolo Farida v DFCU Leasing Company Ltd HCCS No, 536/2006*** while quoting ***Chitty on Contracts, 27th Edition Vol.7*** as follows;

"Finance Leasing- a form of long term finance has developed known as finance leasing. In a finance lease, the lessee selects the equipment to be supplied by a manufacturer or dealer but the lessor (a finance company) provides funds, acquires title to the equipment and allows the lessee to use it for all (or most) of its expected useful life. During the lease period, the usual risks and rewards of ownership are transferred to the lessee, who bears the risk of loss, destructions and depreciation of the leased equipment (fair wear and tear only expected) and of its obsolescence or malfunctions. The lessee also bears the costs of maintenance, repairs and insurance. The regular rental payments during the rental period are calculated to enable the lessor amortize its capital outlay and to make a profit from its finance charges. At the end of the primary leasing period, there will frequently be a secondary leasing period during which the lessee may opt to continue to lease at a nominal rental or the equipment may be sold and a proportion of the sale proceeds returned to the lessee as a rebate of rentals. The lessee thus acquires any residual value in the equipment, after the lessor has recouped its investment and charges. If the lease is terminated prematurely, the lessor is entitled to recoup its capital investment (less the realizable value of the equipment at the time) and its expected finance charges (less an allowance to reflect the accelerated return of capital). The bailment which underlines finance leasing is therefore only a device to provide the finance company with a security interest (reversionary right)".

This means that much as the ownership of the leased vehicle remains with the lessor by acquisition of its title, the usual risks and rewards of ownership are transferred to the lessee who bears the risk of loss, destructions and depreciation of the leased equipment. The ownership of the leased vehicle by the lessor is meant to secure the lessor's interest to ensure that the lessor recovers its capital investment and profit thereto.

In determining leasing disputes, reference is made to the agreed terms of the contract between the parties (See. ***Gladys Nyangire Karumu & 2 Others v DFCU Leasing Company Ltd HCCS Nos. 106, 150 & 788 of 20***07). The reason for this is that the construction of commercial documents is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them (See. ***Mannai Investment Co. v Eagle Star Life Assurance [1997] A.C. 749, HL)***.

As I resolve this issue, I shall consider the key clauses in the accepted Lease letter of offer, Exhibit D1 where I have considered Clause 11 of the same that states that "for the purposes of security for the lease financing which was extended, the original log book for the impugned bus would be registered in the names of the 1st defendant.

Clause 4.1 of the Vehicle and Asset Finance Lease Agreement, Exhibit D3 stated that the lessee would carry all the risk in the goods and its use from the date of signing the agreement or from the date it takes delivery of the good whoever is earlier, until the goods are returned to the lessor.

From the reading of these clauses, it is very clear that the lessee being the 2nd defendant in this case took on all risks in the bus at the time it took over delivery of the same. It was in full control, operation and management of the said bus even when it was still registered in the names of the 1st defendant.

The registration of the bus to the 1st defendant was only security to the bank in case the 2nd defendant failed to honour its rental obligations that the bank would use to recover its monies from the asset.

Clause 6 of the Lease letter of offer, Exhibit D1 provided that the lessee was required to pre-finance the purchase of the bus up to a thirty percent of its total value. The 1st defendant's loan was only a top up. DW1 testified to court that upon the completion of the loan payment, the said ownership was transferred to the 1st defendant as the bank had lost its interest in the security of the bus.

I accordingly agree with the 1st defendant's counsel that the lease finance arrangement placed the liability with respect to usage of the bus on the lessee, 2nd defendant who was in total possession, control and operation of it at the time of the accident regardless of it being registered under the 1st defendant's name.

Counsel also submitted for 1st defendant that it was misconceived to say that since the 1st defendant was the registered owner of the bus at the time of the accident, it was liable for the actions of the 3rd defendant. I agree with counsel's position that registration on the log book is not conclusive proof of ownership. Section 30 of the Traffic and Road Safety Act, Cap 361 clearly provides an exception in cases to do with hire purchase agreement or finance lease agreement. In this case, the 1st defendant has proved that indeed while it was the

registered owner of the said bus at the time of the accident, the possession, control and management of it was vested with the 2nd defendant and all liabilities and risks arising from its use were to be for the 2nd defendant under the finance lease agreement. The ownership was vested in the 1st defendant only as security until the 2nd defendant fulfilled his loan obligation under the agreement.

I therefore find the 1st defendant not liable for the actions of the 3rd defendant by virtue of the lease agreement.

This issue is answered in the negative.

Issue 3

What remedies are available to the parties?

The plaintiffs in their pleadings prayed for: Special damages, Compensation for loss of life, General damages Costs of the suit and Interest thereof

General damages

The plaintiffs suffered multiple injuries and damages due to the negligent acts of the 3rd defendant. The 1st plaintiff lost a husband and a father to her children, the 2nd, 3rd, 4th and 5th defendant suffered personal injury and inconvenience due to the accident

As far as damages are concerned, it is trite law that general damages are awarded in the discretion of court. Damages are awarded to compensate the aggrieved, fairly for the inconveniences accrued as a result of the actions of the defendant. It is the duty of the claimant to plead and prove that there were damages losses or injuries suffered as a result of the defendant's actions.

I find that the plaintiffs have discharged his duty to prove damages and injuries as a result of the 3rd defendant's actions.

The plaintiffs are awarded a sum of **UGX 100,000,000** as general damages against the 2nd and 3rd defendant.

Special Damages

As submitted by counsel it is indeed trite that special damages must not only be specifically pleaded but they must also be strictly proved **(see *Borham-Carter v. Hyde Park Hotel [1948] 64 TLR.***

The 5th plaintiff claimed UGX. 50,000,000/= as the cost of the motor vehicle and adduced Exh. P.14 to proof this fact. It also claimed a sum of UGX. 300,000/= per day as loss of income for not using the car but hiring cars for the purpose of the NGO's work where it adduced EXH.P11 and UGX 100,000/= for the police report. The 5th plaintiff therefore sought a total amount of UGX. 81,600,000/= as compensation for both the loss and hiring of a private car to carry out its work.

Counsel for the 2nd defendant submitted that the 5th defendant did not avail court with a valuation report for the value of the car as at the time of the accident. he further submitted that the plaintiff did not provide any proof to show that the car was used for rental purposes or for any income generating activities to warrant the grant of the amount sought and prayed that the special damages in this regard ne denied.

Resolution

I have perused all the records adduced by the 5th plaintiff and do award the 5th plaintiff damages to a tune of **UGX 50,000,000/=** in respect of the damaged car and a sum of **UGX. 10.000.000/=** as costs incurred in hiring private cars to carry out the NGO's work.

The 1st plaintiff adduced receipts Exh. P7 where she claimed for the funeral expenses of USD. 51,183.65 that were incurred in the return of her late husband's body back to their home under Section 10 of the Law Reform Miscellaneous Provisions) Act, Cap 79.

The 1st plaintiff also claimed a sum of USD 2,436,000 as damages for loss of expectancy and dependency on her late husband under Section 6 (2) of the Law Reform (Miscellaneous Provisions) Act. She adduced evidence Exh. P15, a joint bank statement showing her late husband's contribution to his family and further claimed that she and the deceased's children were deprived of a monthly contribution of USD 7,000.

The 2nd defendant's counsel submitted that the 1st plaintiff had not demonstrated how she was deriving dependence from the deceased husband or provided court with any documentation to show that the deceased was in active employment. The 2nd defendant also prayed that court exercise its discretion and grant the 1st plaintiff an amount of UGX 35,000,000 which both the 2nd defendant and insurance company had offered. For the funeral expenses, the 2nd defendant prayed that court awards special damages for only the damages that were proved.

Resolution

However I have perused all the records adduced by the plaintiff and I am satisfied that the plaintiff has proved the special damages in respect of the funeral expenses to a tune of **USD. 51,183.65.** For the claim of loss of expectancy and dependency, this court shall invoke its discretionary power to award the 1st plaintiff a sum of **UGX. 100.000.000/=**

The 1st plaintiff is therefore awarded special damages to the tune of **USD 51,183.65** as prayed for and proved as funeral expenses and a sum of **UGX. 100,000,000/=** as damages for dependency and expectancy against the 2nd and 3rd defendants.

Costs to the plaintiffs against 2nd & 3rd defendants. The 1st defendant is not awarded any costs.

I so order.

SSEKAANA MUSA
JUDGE
20th December 2019