

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(CIVIL DIVISION)**  
**CIVIL SUIT NO. 188 OF 2018**

**TUMUSIIME SIMON-----PLAINTIFF**

**VERSUS**

**1. DRANI SIMON**

**2. NSIMBE JOHN-----DEFENDANTS**

**BEFORE HON. JUSTICE SSEKAANA MUSA**

**JUDGMENT**

The On the 30<sup>th</sup> day of October, 2016 at around 2255 hours, the 1<sup>st</sup> Defendant's driver/2<sup>nd</sup> Defendant who was in course of his employment drove motor vehicle Reg No. UAQ 717X Toyota Nadia silver in colour along Northern Bypass, negligently, recklessly in total disregard of other road users at an extremely high and terrible speed moreover on a road under construction with clear barricades and as a result he lost control of the 1<sup>st</sup> Defendant's vehicle and immediately moved from its left side of the road and consequently rammed into the Plaintiff's vehicle Reg No. UAU 380B Toyota Hiace White in colour, which was being driven carefully on the right side of the road at a place called Nsooba near Open Bible Church, wherein the Plaintiff's driver tried to swerve off but could not avoid such a speeding vehicle of the 1<sup>st</sup> Defendant.

Due to the vicarious and direct negligent acts of the Defendants, the Plaintiff's vehicle was gravely damaged among which are; front body, head lamps, offside front lamp assemblies, offside door panel, dashboard panel, steering wheel among others. Still as a result, the Plaintiff has lost daily income from his motor vehicle that was working as a taxi for now 13 months and 4 days since due to the

mechanical damages; it could not get back on the road and continues to lose the same income. The Plaintiff has further suffered grave inconveniences as shall be proved subsequently which shall call for general damages.

The plaintiff seeks to recover special damages, of 64,959,700/= from the time of the accident to date inclusive of repairs, loss of daily income, medical and other related expenses and general damages.

An interlocutory judgment was entered in favour of the Plaintiff, the Defendants having failed to file their written statements of Defence.

### **ISSUES.**

- 1. Whether or not 1<sup>st</sup> Defendant's driver was negligent for causing the accident?*
- 2. Whether or not the 1<sup>st</sup> Defendant is vicariously liable for negligence of his driver (2<sup>nd</sup> Defendant)?*
- 3. Whether the Plaintiff is entitled to the reliefs sought?*
- 4. Whether the Plaintiff should set off the amount awarded by Britam Insurance Company (Uganda) Limited from the amount awarded herein?*

At the trial the plaintiff led 2 witnesses 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 or not 1<sup>st</sup> Defendant's driver was negligent for causing the accident?***

The plaintiff's counsel submitted that the ingredients of negligence were stated in the case of **GAAGA ENTERPRISES LTD v SBI INTERNATIONAL HOLDINGS & ANOR HCCS NO.0019 OF 2005 at page 5**, while citing the case of **H. Kateralwire v Paul Lwanga [1989-90] HCB 56** as:-

- 1. There must exist a duty of care owed by the defendant to the plaintiff.***
- 2. The defendant ought to have failed to exercise that duty of care.***
- 3. That such failure must have resulted into injuries, loss or damage to the plaintiff.***

The driver of a motor-vehicle on a road is under a duty to take reasonable care for the safety of other road users to avoid a collision. This duty to take care involves taking all measures to avoid a collision. Once a possibility of danger emerging is reasonably apparent, then to take no precautions is negligence, notwithstanding that the other driver or road user is in breach of some traffic regulations or even negligent. A driver of a vehicle should guard against reasonable probability of danger arising from the carelessness of the other driver.

On the evidence adduced the driver of the heavy omnibus motor –vehicle registration number UAH 298R was negligent in that he failed to brake, swerve his vehicle or avoid knocking the deceased who was lawfully pedal cycling on his proper left hand side of the road.

The Plaintiff stated that on the 30<sup>th</sup> day of October, 2016, the driver of his motor vehicle Reg No. UAU 380B Toyota Hiace, White in colour was driving carefully at a normal speed and keenly on his side of the road, carrying passengers along the northern bypass.

On the same day, the 1<sup>st</sup> Defendant's driver i.e the 2<sup>nd</sup> Defendant who was in course of his employment was driving negligently, recklessly, in total disregard of other road users at an extremely high and terrible speed from the opposite side moreover on a road under construction with clear barricades. **(See paragraph 5 & 6 of the witness statement).**

Due to the reckless speed of the 1<sup>st</sup> Defendant's driver, without any regard to road signs, barricades, and other road users continued driving at an

extremely high speed and as a result, he lost control of the 1<sup>st</sup> Defendant's motor vehicle and immediately moved from its left side of the road and consequently rammed into the Plaintiff's vehicle which was being driven carefully on the right side of the road at a place called Nsooba near Open Bible Church wherein the Plaintiff's driver tried to swerve off but could not avoid such a speeding vehicle of the 1<sup>st</sup> Defendant.

The Police sketch map which was admitted in evidence as PE1 clearly indicates how vehicle B which belongs to the Plaintiff was being driven on the left hand side of the road and vehicle A which belongs to the 1<sup>st</sup> Defendant is seen moving from the opposite side, losing control and moving from the left to the right and ramming into vehicle B at point C.

The Police report admitted in evidence as PE4 at page 3 clearly indicates how the road, weather were clear and road in good repair and dry which indicates only recklessness can cause such an accident.

On top of that, when the 1<sup>st</sup> Defendant was traced, he admitted that his driver was negligent and as such he agreed to compensate the Plaintiff using third party insurance to a tune of UGX.15,339,000/= which amount was not enough to cover the Plaintiff's claim.

Moreover, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have not rebutted the Plaintiff's evidence since they failed to file their written statements of defence and hence they are deemed to have admitted liability. See **HAJI ASUMAN MUTEKANGA VS. EQUATOR GROWERS (U) LTD SCCA NO. 07/1995** – where it was held that ***“where an interlocutory judgment has been entered in favour of the Plaintiff, the question of liability of the Defendant is no longer in issue. What is in issue is the assessment of the quantum of damages.***

Similarly according to the case of **MWESIGYE WARREN V KIIZA BEN HCCS NO. 320 OF 2015 at page 2,...**where the Defendant failed to file a defence, court finds that he is deemed to have admitted the claim of the Plaintiff.

In the light of the above, the Plaintiff has proved on the balance of probabilities that the 2<sup>nd</sup> Defendant was negligent for causing the accident and we accordingly pray that court determines this issue in the affirmative.

### **Determination**

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 (19<sup>th</sup> 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 1<sup>st</sup> defendant's driver or 2<sup>nd</sup> defendant was negligent and this court agrees with the plaintiff's counsel submissions on this issue of negligence.

**Whether or not the 1<sup>st</sup> Defendant is vicariously liable for negligence of his driver (2<sup>nd</sup> Defendant)?**

According to **Black's Law Dictionary 7<sup>th</sup> Edition at page 927**, Vicarious liability is defined as; *"Liability that a supervisory party, (such as an employer), bears for the*

*actionable conduct of a subordinate or associate (such as an employee) because of the relationship between the two parties.”*

The Plaintiff under paragraph 5 & 6 of his witness statement states that 2<sup>nd</sup> Defendant was in course of his employment when he was driving negligently, recklessly, in total disregard of other road users at an extremely high and terrible speed from the opposite side moreover on a road under construction with clear barricades.

Likewise, the Police report which was admitted in evidence as PE4 on page 2 indicates that the driver of the car was the 2<sup>nd</sup> Defendant while the owner was the 1<sup>st</sup> Defendant which in absence of evidence to the contrary implies that the 2<sup>nd</sup> Respondent was in course of employment of the 1<sup>st</sup> Defendant.

Even when the 1<sup>st</sup> Defendant was traced, he admitted the fact that the 2<sup>nd</sup> Defendant was his driver in the course of employment and even he agreed to compensate part of the damages by insurance which did not fully cover the Plaintiff's claim without shifting the blame to the 2<sup>nd</sup> Defendant.

### ***Determination***

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***).

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 established that the 2<sup>nd</sup> defendant was a driver of the 1<sup>st</sup> defendant and when he was arrested later after the accident he confirmed that fact.

I therefore find that the 1<sup>st</sup> defendant was vicariously liable for the actions of the driver-2<sup>nd</sup> defendant.

## **ISSUE 2**

***Whether the Plaintiff is entitled to the reliefs sought?***

### **Special damages**

**Special damages for expenses incurred and continue to be incurred worth UGX. 64, 959,700/=**

According to the case of **GAAGA ENTERPRISES LTD (supra)** at page 21, the law is that special damages must be pleaded and proved. Court further cited with approval the case of **KYAMBADDE VS MPIGI DISTRICT ADM. [1983] HCB 44 court, where Masika C.J** (as he then was) held that special damages must be strictly proved but need not be supported by documentary evidence in all cases and agreed with the position but added that it depends on the circumstances of the case and position the party finds itself in.

In the instant case, the Plaintiff not only pleaded and particularized the special damages in the plaint at page 3 but as well strictly proved them in his witness statement at page 3-4 as **follows;**

Repairs of the damaged parts of the vehicle worth **UGX. 25,000,000/=** (Uganda Shillings Twenty Five Million Only).



The Plaintiff went ahead to provide receipts for the damaged parts but no receipts for the parts he obtained from his own auto shop making the total hereinabove. The said receipts were tendered in evidence as PE6.

Police Report worth **UGX. 79000/=** . Plaintiff also pleaded this in the plaint and the receipt was admitted in evidence as **PE7**.

Loss of daily income of UGX. 90,000/= (Uganda Shillings Ninety Thousand Only) for now 13 months and 4 days worth UGX. **30, 780,000/=**.

On this item, I would like to adopt the explanation of court in GAAGA ENTERPRISES LTD (supra) at page 23-24 while citing **Robert Cuossen Vs A.G SC C.Appeal No. 09 of 1999** thus;... *“As the authorities to which I have referred to clearly indicate, pre-trial loss of earning may be claimed and proved as special damages while post-trial loss should be claimed as general damages at assessment of which is left to the discretion of the trial court, based on the relevant facts having been proved. One of such facts which must be proved is the actual earning or income at the time of the injury.*

*However, pretrial loss of earnings may also be left to the trial court for assessment together with post-trial loss as part of general damages”.*

In the instant case, the Plaintiff in proof of his earnings before the trial, pleaded the same in the plaint and further stated it in his witness statement indicating amounts ranging from UGX.90,000/= to UG.180,000/= to UGX.270,000/= which means that sometimes the payments would come in as a lump sum for two, three days among others but when equally distributed per day, makes it UGX.90,000/= per day. Medical & other related expenses for the 5 injured passengers worth UGX. 7,100,700/=.

We therefore, pray that court adopts the reasoning in **STANBIC BANK UGANDA LIMITED v HAJJI YAHAYA SEKALEGA T/A SEKALEGA ENTERPRISES HCCS NO. 185 OF 2009** at page 7 where while citing Gapco (U) Ltd Vs A.S. Transporters (U) Ltd CACA No. 18/2004, court was of the view that *special damages must be specifically pleaded and proved, but that strictly proving does not mean that proof must always be documentary evidence. Special damages can also be proved by*

*direct evidence; for example by evidence of a person who received or paid or testimonies of experts conversant with the matters". In this case, the Plaintiff paid the money but circumstances would not allow him obtain receipts of documentary evidence for the same.*

Running expenses to track the Defendant worth **UGX. 2,000,000/=**. The Plaintiff pleaded the same in the plaint under paragraph 4(e) and paragraph 16 of the witness statements, however considering the nature of the costs which included among which transport and giving different sums to different people including the police for tracking at different intervals, no receipts were acquired for that. See **STANBIC BANK UGANDA LIMITED (supra)**

In the circumstances, counsel prayed that court finds the Plaintiff having proved the special damages on balance of probabilities and therefore we pray that they are granted as particularized above.

### **Determination**

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 appears the plaintiff's alleged special damages are exaggerated. The Claim form or Third Party Discharge Voucher indicated that; the repair costs were 15,560,000/= and towing charges 300,000/= police fees 78,000/=. This court agrees with the claim and repair costs as presented on the PE-5. The rest of the claims are rejected.

The loss of earning are not clearly proved to this court since the lost earning do not cover known overhead costs like repairs, salary or days not worked, taxes and KCCA fees etc. It presupposes that all the days would have been worked. This court would award a fair loss of earnings of 10,000,000/=.

### **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”*

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 5,500,000/= as damages for accident occasioned and general inconvenience.

#### Costs

The plaintiff is awarded costs of the suit.

It is so ordered.

***Dated, signed and delivered be email and whatsapp at Kampala this 10<sup>th</sup> day of July 2020***

**SSEKAANA MUSA  
JUDGE**