

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)**

CIVIL SUIT NO. 97 OF 2017

SEKITOLEKO JORAM =====PLAINTIFF

VERSUS

1. KATO EDWARD

2. THOMAS MUTEEBE EMMANUEL=====DEFENDANTS

Before: Hon Justice Ssekaana Musa

JUDGMENT

The facts constituting the cause of action which arose on 18th February 2017 were stated as follows in brief:

Those at all material times, the 1st Defendant was the Employee of the 2nd Defendant as a driver of motor vehicle registration number UAT 834N, which was Fuso white in color.

That on the fateful day, around 8:30 p.m., along Nabunya road in Lubaga Division in Kampala district, the 1st Defendant while in the course of his employment with the 2nd Defendant, negligently and recklessly knocked the plaintiff who was traveling as a passenger on a Boda Boda motorcycle.

That as a result of the negligent accident, the Plaintiff's arm and one leg were amputated, another leg broken with multiple fractures, suffered bruises and open wounds all over the body.

That as a result of the accident, the Plaintiff has suffered a permanent incapacity, under gone several operations and is still undergoing treatment which is costly and suffered mental anguish. The Defendants have not assisted him at all.

The Plaintiff contends that the accident was caused solely by the negligence of the 1st Defendant. Consequently he is holding the 2nd Defendant vicariously liable for the negligence of its employee.

The particulars of negligence as contained in paragraph 7 of the Plaint are as follows:

1. Driving the motor vehicle which was involved in the accident negligently at an excess/high speed which was not necessary in the circumstances hence causing the accident.

2. Negligently causing the accident at 8:30 p.m by knocking and bumping into a Boda Boda motorcycle on which the plaintiff was travelling without any justification since the conditions were still good, favorable and bright for seeing, observing and viewing anything a head and on the sides of the road.
3. Failing to properly and securely apply brakes or slow down or stop or mobilize the motor vehicle in time so as to avoid causing the accident.
4. Failing to exercise reasonable skills, management and control of the motor vehicle so as to avoid the occurrence of the accident.
5. Negligently causing the motor vehicle he was driving to cross or move from the middle of the road to the shoulders and or on part of the road where the Boda Boda he knocked was moving.
6. Causing the vehicle to skid from where it lost control up to where it knocked the plaintiff.
7. Failing to foresee the emanate danger/consequences of his negligent driving thus failing the test of foreseeability.
8. Failing to take any effective measures so as to avoid the accident.
9. Failing to exercise the duty of care in the circumstances which he owed to the persons who were using the same road in particular the plaintiff.
10. Negligently driving the vehicle which was involved in the accident at a very high speed at a highly populated and very busy place (Nabunya) without any care.
11. Causing the accident in conditions favourable for driving ie when the weather was clear, when the traffic was heavy, and the road was tarmacadan, when the road suffice was dry. Good repair and when the road was straight.
12. Causing the accident whereby the plaintiff shall rely on the doctrine of Res Ipsa Loquitur.

The Plaintiff further stated the particulars of injuries as follows: broken left arm and thereafter amputated of the same, suffered multiple fractures of the right leg which was after wards amputated, suffered open wounds all over the body and several bruises.

The plaintiff prayed for judgment against the defendants jointly and severely in the terms as prayed for in the plaint and or for any further and better reliefs deemed proper and fitting in the circumstances.

He further pleaded that he will rely on the principle of *Res Ipsa Loquitor* and averments in paragraphs 7 and 8.

DEFENDANT'S CASE

The Defendants on the other hand in their joint written statement of defence 7th November 2013 admitted the employment relationship but denied the other allegations alleging that the Plaintiff filed the suit in bad faith as the Plaint contains deliberate falsehoods to create a cause of action that does not exist.

The Defence alleged that the Plaintiff was injured as a result of his own negligence after which he tried to defraud the 2nd Defendant.

They further pleaded the Plaintiff is not entitled to the claims and other reliefs sought in paragraphs 3 of the Plaint or any part thereof.

They prayed that the suit be dismissed.

LEGAL REPRESENTATION

The Plaintiff was represented by *Mr. Mpagi Sunday* from *Mpagi Sunday and Company Advocates*, while the Defendants were represented by *Mr. Kiwanuka Muhammed* from *Kiwanuka & Mpiima Advocates*.

Both learned Counsel filed written submission which I have put into consideration while writing this Judgment. They are on record and I will refer to them as and when necessary.

ISSUES FOR COURT'S CONSIDERATION

- 1. Whether the 1st defendant was negligent while driving Motor Vehicle Registration No. UAT 834N?***
- 2. Whether the plaintiff's injuries were sustained as a result of the 1st defendant's negligent driving.***
- 3. Whether the 2nd defendant is vicariously liable for the actions of the 1st defendant and consequences thereof?***
- 4. Whether the parties are entitled to any remedies?***

LEGAL PRINCIPLES AND THE LAW APPLICABLE

It is trite law that in civil matters, the burden of proof rests on that person who desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he or she asserts exist and would fail if no evidence is given on either side unless it is provided by any law that the proof of any particular fact shall lie on any particular person. **Sections 101 -103 of the Evidence Act chapter 6 Laws of Uganda refers.**

The standard of proof unlike in criminal matters is on the balance of probabilities.

It is also trite that under the Common Law Doctrine of vicarious liability sometimes referred to as imputed liability, liability of another person is assigned to an individual or legal entity that did not actually cause the harm or injury complained of. In a work place context like in the instant case, an employer can be held liable for the acts or omissions of its employees, provided it can be shown that the injury or harm complained of occurred in the course of employee's employment.

In other words vicarious liability is founded in the tort of another even though the person being held responsible may have not done anything wrong.

To hold an Employer liable three pre requisites must be satisfied:

1. There must be an employment relationship.
2. There must be a wrong being committed by the Employee
3. The act must have been committed during the course of employment

The Plaintiff's Counsel relied on the doctrine of Res Ipsa Loquitur which in the Common Law of Torts, infers negligence from the very nature of an accident or injury in the absence of direct evidence on how any Defendant behaved.

It is a Latin phrase meaning ***"the thing speaks for itself."***

Court will be guided by the above legal principles and the law in resolving the dispute at hand.

RESOLUTION OF ISSUES.

ISSUE ONE.

Whether the 1st defendant was negligent while driving Motor Vehicle Registration No. UAT 834N?

Citing much authority, the plaintiff's counsel argued that the defendant's driver was negligent as he was unnecessarily over speeding and hence he could knock him. He drove at a high speed in total disregard of other road users and evidence showed he caused the accident and that being so, the plaintiff would be entitled to the remedies sought.

The plaintiff's counsel submitted on the law governing negligence. Negligence is essentially a question of fact and it must depend upon the circumstances of each case.

The standard of care expected is that a reasonable person proving breach of a duty is usually achieved by adducing evidence of unreasonably conduct in light of foreseeable risks.

To support his case the Plaintiff called four other witnesses to wit PW2 KIGHOMA PHILEX, PW3 OKILLU PETER AND PW4 SGT APOO CATHERINE NO. 18556.

PW1 Sekitoleko Joram in his written witness statement dated 14/04/2018 from paragraphs 4 to 8 narrates how the accident happened at kabusu road in Lubaga division Kampala district.

His evidence was to the effect that on the fateful day after his work of SUB CONCRETE LIMITED situated at Najjanakumbi he went home after work but from home he boarded a Boda Boda at Ndeba since he wanted to meet someone at Natete, that while on the said Boda Boda nearing kabusu he noticed that the suit vehicle REG NO.UAT 834N Fuso white in color which was behind the motor cycle on he was traveling was unnecessarily over speeding and hence could knock him, that on sensing danger he waved his hands in the air showing and begging the 1st defendant to either stop or reduce on the speed at which he was driving the suit vehicle or else danger was to befall the plaintiff.

Plaintiff's counsel cited the case of *OJARA THOMAS vs. MEWE BUS SERVICES LIMITED HCCS NO. 020 OF 2016* where court defined negligence in the same way as in Baali Jackson case but court added on page 18 that;

“The duty to keep a proper lookout means more than just looking straight. It includes awareness of what is happening in one’s immediate surroundings. A driver should have a clear view of the whole road from side to side and in case of a road passing through a built up are, as well as the pavements on the side of the roadcourt continued that even were an emergency which is predictable turns to be apparent, negligence can be inferred”

The defendants' counsel submitted that the plaintiff made little effort to contextualize the duty of care of a motorist on the road and thus reached a wrong conclusion when determining the culpability of the parties.

It's the plaintiff's counsel submission that the plaintiff in his further evidence told court that at the time of the accident he was in front of the suit vehicle which was being driven by the 1st defendant at around 8:30 p.m.

The defendants submitted in their joint written statement of defence under paragraph 9(e) that along the way, the Boda Boda cyclist decided to overtake the truck via the right hand side of the truck.

PW4-Karangwa Julius- in his witness statement paragraph 4 stated that the said lorry was moving to the direction of Natete but at the time I saw the said person beneath its tires, I found when it already knocked him and he was struggling to remove his leg from the behind tires but the leg had already been crushed.

The defendant's counsel submitted that the plaintiff has failed to prove the elements of negligence. The plaintiff had contended that the motor vehicle failed to break or could not break but no such evidence had been lead.

The sketch map clearly shows how both the motor cycle on which the plaintiff was travelling and the 1st defendant were on the road, both were taking the same direction but the motor cycle on which the plaintiff was traveling decided to overtake the Fuso truck thereby hitting the oncoming ipsum hence causing an accident.

PW1-Walyamboka Steven- a police officer. The officer submitted the police accident report which indicated that the traffic jam on the particular day was heavy and vehicle were moving very slowly. It pointed out that the suspected point of impact was the rear wheels of the defendants' truck, and not the front of the truck, and also placed the victim at the rear wheels which was the point of impact. The witness further pointed out that the Boda Boda was riding

in the middle of the road along the dividing lane. He also pointed out that the truck was carrying tiles, climbing a lane in heavy traffic.

DW2-Kato Edward-the witness stated that the time of the accident was at night, the traffic was heavy, and vehicles were moving slowly. The fuso truck was carrying tiles and was on a slope and was not speeding. There was no Boda Boda between his truck and the next car as they were move bumper to bumper. Suddenly he heard people who were knocking on his truck telling him not to move further because someone had fallen under the truck. Through his rear-view mirror, he saw someone under the truck at the rear tires.

DW3- Asadu Lujja- the witness testified that the traffic was heavy, it was night time, but cars were moving slowly. The plaintiff was in front of him on a motor cycles which was being driven in a rush way and they fell under the fuso truck. He confirms that the Boda Boda was not knocked down from the front by the defendants' truck, but it fell under the truck. He further confirmed that at the time, the Boda Boda was riding between outgoing and oncoming traffic (cars).

Counsel for the defendants cited the case of ***Bolton v. Stone* [1951] AC 850** The Lords believed there were policy implications in terms of the message of what liability would have meant in creating restrictions in what we can do in our everyday lives in an urbanised modern society. The risk that case may have been foreseeable, but it was so highly improbable that a reasonable person could not have anticipated the harm to the claimant and would not have taken any action to avoid it. In the words of Lord Normand, "It is not the law that precautions must be taken against every peril that can be foreseen by the timorous."

Counsel for the defendants further submitted that there is no evidence to prove that the 1st defendant was over speeding, as it was heavy traffic and the truck he was driving was climbing a slope and carrying heavy tiles. Secondly there is no evidence that there was a head-on collision between the truck and the plaintiff. The point of impact was determined by the police to be the back tires of the truck.

Analysis

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.

The court in the highly-celebrated decision of *Donoghue vs Stevenson* [1932] AC 562 provided what I can refer to as the ingredients of negligence, as follows;

- i. The defendant owed the plaintiff, a duty of care.
- ii. The defendant breached that duty resulting in damage on or against the plaintiff.
- iii. The defendant and no other is liable for the breach of duty.

A driver of a motor vehicle is under a duty to take reasonable care for the safety of other traffic on the road to avoid a collision. This duty involves taking all measures to avoid a collision. Once a possibility of danger emerging is reasonably apparent, and no precautions are taken by that driver, then the driver is negligent, notwithstanding that the other driver or road user is in breach of some traffic regulations or even negligent. See Paulo Kato vs Uganda Transport Corporation [1975] HCB

This court noted in the case of ***Male Charles vs Ntulume Ahmed Civil Suit No. 412 of 2016***;

“Negligence is essentially a question of fact and it must depend upon the circumstances of each case. The standard of care expected is that a reasonable person proving breach of a duty is usually achieved by adducing evidence of unreasonably conduct in light of foreseeable risks. 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. Negligence is conduct, not state of mind- conduct which involves an unreasonably great risk of causing damage 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.....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.....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..."

The question in this suit therefore is whether a reasonable driver in the position of the defendant driver would foresee the possibility of the accident as it happened; and would take reasonable steps to guard against such occurrence; and whether the defendant failed to take such steps.

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.**

From the evidence set out in annexure to the witness statements, it is not in dispute that the defendant's motor vehicle which was being driven by the defendant's driver in the ordinary course of his employment involved in an accident causing the plaintiff to suffer personal injuries for they incurred and continue to incur medical expenses, for which they seek compensation.

The defendants filed a witness statement of defence and adduced evidence to controvert the evidence of the plaintiff adduced before court that the driver was not negligent. The evidence on record shows that the plaintiff and the lorry driver were driving in the same direction towards Masaka in a heavy traffic jam since the cars were moving slowly. The plaintiff was seen in the behind tyres of the fuso track on the right side of the road. It is clear he was knocked by the behind tyres of the right side. The plausible explanation given for the accident is that the plaintiff while on the boda boda was knocked by different vehicle (Ipsum) and they fell in the tryes of the fuso track which crashed his legs and it cannot be true that he was knocked by the same truck as alleged. In his testimony, PW 1 appeared to have been prepared to implicate the fuso track driver inspite of there being no evidence to the contrary.

It is trite law that users of the road owe duty of care to other road users, it is equally true to say that where a person negligently injures another user he is in breach of that duty. It must however be said that not all accidents are necessarily results of negligence *per se* although may be evidence of negligence.

The duty is upon the plaintiff who sues in negligence to prove that his injury was occasioned as a result of the defendant's negligence nearly in all cases except where the doctrine of *res ipsa*

loquitur applies (*Halsbury's laws of England 3rd edition volume 15 page 268 paragraph 491 and volume 28 pages 73-79 paragraphs 75-79*).

In deciding whether or not a party was negligent the court is usually guided by the surrounding circumstances in each case. The circumstances usually taken into account are such things as the volume of traffic on the road at the particular time, the conditions of the weather and degree of visibility, the condition of the road (whether there was a corner, whether the road was slippery or there were bumps).

In the instant case the evidence from both sides clearly suggests that the traffic on the road was too much and the plaintiff's allegation that the 1st defendant was over speeding is not entertained because one wonders whether one can over speed where there is heavy traffic on the road, there is no suggestion inclined to say that this accident could have been avoided by the defendants driver if he had been careful. All the evidence on record shows that the defendant was not negligent and was never the cause of this accident as alleged by the plaintiff.

In respect to the foregoing 1st defendant did not do anything which any reasonable driver on the road would not have done. The 1st defendant was not negligent in conducting his business of driving the fuso truck on a road and did not fail to take all reasonable precautions to protect other road users.

This case is dismissed with no order as to costs.

I so Order

**SSEKAANA MUSA
JUDGE
30th/04/2021**