

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

CIVIL SUIT NO. 445 OF 2014

CHARLES BESIGWA ::: PLAINTIFF

VERSUS

STIRLING CIVIL ENGINEERING LTD ::: DEFENDANT

BEFORE: HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The plaintiff filed this suit seeking for recovery of special damages, damages for loss of expenditure of life, general damages for negligence and default, interest on all the aforementioned at bank rate of 30% from the date the cause of action arose till payment in full and costs of this suit.

The plaintiff alleges that he and his son; the late Agaba Jonan Besigwa were employed by the Defendant. On the 4th January, 2014 at 7:00 am, the deceased reported for duty at the Defendant's site at Kafumbe, Masaka Road. The defendant instructed him to go to work in an underground pit. The Back Hoe which was working closely from the ground above poured/ dumped soil which completely buried the deceased.

There was no supervisor to coordinate and direct employees while executing the defendant's excavation duties. The headman was the only person from the defendant on site. The plaintiff, his fellow workers and good Samaritans laboriously retrieved the deceased using spades and other rudimentary tools to dig him up whereupon the deceased's body was transported on a boda boda to Nsambya hospital. On arrival, the doctor examined the body and pronounced him dead. He referred them to Mulago hospital for post mortem. The

defendant's headman only reported the death to the police after 10:00 am, long after the body had been taken to Nsambya hospital. Police arrested and detained the headman who reported the death of the deceased.

Later in the night, the plaintiff transported the deceased's body to Keina, Ntungamo for burial. The plaintiff was left to foot all the other bills. The defendant only provided the coffin. The defendant usually paid workers salaries at the end of the month but she in writing claimed that the deceased was paid salary up to 4/1/2014. When the plaintiff raised the matter of Agaba Jonan Besigwa's death and brought this suit to court, he was summarily dismissed. However, he through his lawyers challenged the defendant's actions and was thereafter reinstated to his job.

The defendant filed a written statement of defence wherein it denied liability on all the allegations made by the plaintiff and stated that he was not entitled to any of the reliefs sought. It stated that the deceased was not its employee but a casual labourer and that the cause of his death was a pure accident and not one attributed to its negligence.

The plaintiff was represented by *Dr. James Akampumuza* whereas the defendant was represented by *Mr. Geoffrey Mutaawe*.

Agreed Facts

1. Both the plaintiff and his son the late Agaba Jonan were on 04/01/2014 employed by the defendant.
2. The deceased dies on 4/01/2014 when while working in a hole/pit, the driver/operator of the Back Hoc Registration No. UAP 866C poured soil on him
3. The deceased was delivered to Nsambya hospital where he was pronounced dead.
4. The defendant caused the deceased to be taken to Mulago Hospital for post-mortem.

5. A post-mortem was made in respect to the deceased's death.
6. The police made a report in respect of the deceased's death.
7. A death Certificate was issued in respect of the deceased's death.
8. The deceased was buried in Ntungamo District

The plaintiff proposed several issues for determination by this court which are as follows;

- 1. Whether the late Agaba Besigwa Jonan was not employed by the defendant at the time of his death.**
- 2. Whether the defendant did not negligently cause the late Agaba Besigwa's death.**
- 3. Whether the defendant is not liable to the plaintiff and his family for compensation for negligently causing the death of the late Agaba Jonan Besigwa**
- 4. Whether the defendant is not liable to comply with the statutory requirements for compensation for the entire funeral/ burial expenses.**
- 5. Whether the defendant is not liable for providing for the dependents.**
- 6. Whether the plaintiff is not entitled to recovery of the statutory payment due on account of his late son's negligently occasioned death.**
- 7. Whether either party is entitled to the remedies claimed.**

Order 15, Rule 5 of the Civil Procedure Rules SI.71-1 gives this court the power to amend and strike out issues at any time before passing a decree as it thinks fit as may be necessary for determining the matters in controversy between the parties. In the interest of adequate discussion of the legal issues at hand, the court rephrases the issues for determination to reflect as;

- 1. Whether the death of the late Agaba Besigwa Jonan was caused by the negligence of the defendant.**
- 2. Whether the plaintiff is entitled to the remedies sought in its plaint.**

The parties were directed to file written submissions in the interest of time which were considered by this court in resolution of the issues.

Determination

Whether the death of the late Agaba Besigwa Jonan was caused by the negligence of the defendant?

The plaintiff submitted that this is a civil matter where the standard of proof is on a balance of probabilities. Counsel relied on section 101 of the Evidence Act as to the burden of proof lying on whoever desires court to give judgement as to any legal right or liability dependent on the existence of facts which he or she asserts.

It was submitted that this action was based on the deceased and was brought by virtue of section 5 and 6 of the Law Reform (Miscellaneous Provisions) Act, Cap.79 and noted that the essential elements hereunder are; the death of the deceased and that he died as a result of the wrongful act or default of the peril on against whom the action is brought in circumstances in which the deceased, if he had not died, could himself maintained the action.

The plaintiff submitted that the deceased died as the result of an accident whilst working in a pit in his capacity as a servant of the defendant due to neglect on the part of the defendant. This was corroborated by PW1 who asserted that the death of the deceased could have been prevented if there was an emergency like an ambulance or better ways of rescuing the deceased. It was therefore submitted that the plaintiff had discharged his burden of proof on a balance of probabilities and prayed that court finds so. He submitted that the driver/ operator of the defendant's back hoc registration No. UAP 866C moved it where the deceased was working and the soil was heaped on his entire body.

The plaintiff also submitted that the defendant is liable to the plaintiff and his family to compensate for the death, funeral/ burial expenses, pay damages and

provide for the dependants under section 6 (1) of the Law Reform (Miscellaneous Provisions) Act.

It was submitted that that the deceased was not provided with any protective gear like helmet, gloves and related safety equipment to wear. Counsel relied on section 45 (3) of the Employment Act to state that the defendant had a statutory duty to provide these equipment, tools and material at no fee as they were necessary in the performance of her duties. Failure to do so was breach of section 50 of the Factories Act which is proof of negligence for which the defendant is liable.

Counsel submitted that the defendant failed to act quickly and swiftly to save the deceased's life, abandoned him and left him under the soil. The defendant never reported it to the police immediately for the latter to visit in time and help rescue the deceased which was in breach of section 26 of the Factories Act. (**NB.** *The Plaintiff's counsel cited repealed legislation; Factories Act instead of The Occupational Safety and Health Act, 2006-No.9 of 2006*)

For the defendant, counsel submitted that the deceased met his death when working in a hole/ pit when the driver of the back hoc poured soil on him. The defendant stated that the black hoc was hired and it came with its own operator who was not an employee of the defendant. He submitted that no evidence was adduced to show that the deceased was working in a pit with a spade was by itself a negligent act or that the defendant owned the back hoc or the driver was its agent.

Counsel further submitted that the plaintiff did not plead vicarious liability between the aid driver, Mwesigye Mudasiru and the defendant as the former was an independent contractor employing his own operator. He therefore stated that the particulars of negligence set out in the plaint were inapplicable in relation to what happened and were not proved in evidence.

He stated that the defendant's efforts to save the deceased after the accident cannot be said to have negligently caused his death. He therefore prayed that court finds that the defendant did not negligently cause the deceased's death.

Analysis

Section 5 of the Law Reform (Miscellaneous Provisions) Act provides that;

“If the death of any person is caused by any wrongful act, neglect or default of any person, and the act, neglect or default is such as would, if death had not ensued, have entitled the person injured by it to maintain an action and recover damages in respect of it, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under such circumstances as amount in law to a felony.”

Section 6 of the Act further provides that;

*actions brought under **section 5 shall** be for the benefit of the members of the family of the person whose death has been so caused, and shall be brought either by and in the name of the executor or administrator of the person deceased or by and in the name or names of all or any of the members of the family of the person deceased.*

Negligence as a tort has been widely defined and understood through several court decisions. The Court in the decision of **Blyth vs Birmingham Water Works (1856) 11 EX.78**, held that:-

“Negligence” is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.”

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

- a) The defendant owed the plaintiff, a duty care.
- b) The defendant breached that duty resulting into damage on or against the plaintiff.
- c) The defendant and no other, is liable for the breach of duty.

It is also the position of our law that in a cause of action based on negligence, the particulars of negligence must be pleaded. See; **Mukasa -vs- Singh & Ors 7 [1969] EA 422**. It is a requirement that the plaintiff in the pleadings must state the facts upon which the defendant’s duty is founded and also show the precise breach of duty complained of as well as particulars of the damage sustained. This

was satisfied in paragraph 6 and 12 of the plaint. The defendant is then duty bound to rebut them. The Court of Appeal in the case of **Embu Public Road Services Ltd vs Riimi [1968] EA 22** noted that where the circumstances of the accident give rise to the inference of negligence, then the defendant in order to escape liability has to show that there was a probable cause of the accident which does not connote negligence or that the explanation for the accident was consistent only with an absence of negligence.

The general rule is that in an action for negligence the burden of proof is on the person who complains of negligence. He must show that he was injured by an act of omission for which the defendant is liable. There must be proof of some duty owed by the defendant, breach of that duty and consequent damage to the plaintiff. Further the act or omission must be proximate cause of damage to the plaintiff. Where the balance is even as to which part is in fault, the one who relies on the negligence of the other is bound to turn the scale. The initial burden of making out a prima facie case of negligence against the defendant lies heavily on the plaintiff.

It therefore follows that the defendant must show that there was no negligence on their part which contributed to the accident, or that there was a probable cause of the accident which did not connote negligence on their agent's part or that the accident was due to circumstances beyond their control.

In this case, the plaintiff argued that the defendant's was negligent in its failure to supervise the driver of the back hoc, causing/ instructing the deceased to work without protective gear, failing to put in place precautionary health and safety measures and failure to put in place a person to supervise, coordinate and direct the workers among others.

The plaintiff's witness; Murinzi Nelson Gad PW1 testified that the deceased was found buried under soil in a pit and together with other workers, were trying to save him with spades. He testified that the death of the deceased would have prevented if there were emergencies like an ambulance or better ways to remove him from the ground because he had taken time while buried there and using spades was a problem. He also testified that the deceased was taken to hospital using a tipper lorry. PW1 also testified that the defendant only bought the

deceased's coffin and the rest of burial expenses were left to the plaintiff and the deceased's family.

PW3; Charles Besigwa also testified that Agaba worked with the defendant for one year and two months as a casual labourer where he was paid Ugsh. 12,700 per day. He testified that the tractor poured soil on Agaba, the deceased while he DW1, Kiggundu Daniel Sengero, the civil engineer of the defendant testified that he was the supervisor for the construction of Kafumbe Masaka road where the accident happened. He stated that he did not witness the accident as he was traveling to the site at the time it happened. he testified that when he arrived at the site, he found a group of boys who had just arrived from Nsambya hospital.

He also testified that the workers were being paid their wages per fortnight. He stated that the workers work for 10 hours a day with one hour as their lunch break. He testified that the defendant hired a black hoe which was used for excavation.

From the evidence on record, it is very clear that the defendant owed a duty of care to the deceased, Agaba during the time of his work as a casual labourer which included providing proper safety precautions, supervision and guidance while at the site for work. This is because the site operations were those that required supervision to avoid any accidents to the workers and other people on site. From the evidence of DW2, it can be deduced that this duty of care was breached by the defendant on the fateful day when the accident occurred since there was no onsite supervisor for the back hoc as expected and the safety precautions were not observed by the defendant.

Furthermore, upon the occurrence of the accident, it is very clear that there were no proficient tools or ways to dig the deceased out of the pit to ensure first aid for close to one hour thereby leading to his death. As a result, the defendant breached that duty resulting into death of its employee, Agaba for it is liable for the breach of duty.

It was an omission for the defendant to commence operations without the onsite supervisor well knowing that the kind of work or project that was being done was prone to risks and accidents for the workers and the people on site to do something which a reasonable man would consider.

Counsel for the defendant submitted that the plaintiff did not plead vicarious liability for the acts done by the contractor of the black hoc that caused the accident which I disagree with. The *Black's Law Dictionary 11th Edition (2019)* defines vicarious liability as; liability that a supervisory party (such as employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties.

According to the *East African Cases on the Law of Tort* by E. Veitch (1972 Edition) at page 78, an employer is in general liable for the acts of his employees or agents while in the course of the employers business or within the scope of employment. This liability arises whether the acts are for the benefit of the employer or for the benefit of the agent. In deciding whether the employer is vicariously liable or not, the questions to be determined are: whether or not the employee or agent was acting within the scope of his employment; whether or not the employee or agent was going about the business of his employer at the time the damage was done to the plaintiff. When the employee or agent goes out to perform his or her purely private business, the employer will not be liable for any tort committed while the agent or employee was a frolic of his or her own.

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*)

In the instant case, DW1 testified that the back hoc was hired by the defendant for the project and at the time, it was under the supervision of the defendant's site engineer. It is therefore very clear that the defendant had control of how it was to be used and operated and also supervised the driver therein. The failure of the defendant's engineer to supervise the driver of the black hoc on the day of the accident can therefore only be visited on the negligence of the defendant as had he done his job as required by the supervising the work on the site, the accident would have been minimized.

I therefore find that the defendant was negligent thereby causing the death of the deceased as discussed above.

This issue is therefore answered in the affirmative.

Whether the plaintiff is entitled to the remedies sought?

The plaintiff sought for orders that a declaration that the deceased's death was caused by the negligence of the defendant, special damages, damages for loss of expectation, general damages, interest at 30% from the date of cause of action until payment in full and costs of the suit.

In respect of the special damages, the plaintiff calculated the same as follows; Ugx. 200,000/= for medical expenses, Ugx. 2,000,000/= for meals and sundries expenses at the funeral, Ugx. 1,500,000/= for the motor vehicle hire to transport the deceased's body, Ugx. 1,000,000/= for the cost of labour and materials in constructing the deceased's final resting place, 1,062,000/= for the hire of public address system for the funeral and hire seats for the mourners, Ugx. 150,000/= for a making a post mortem on the deceased, Ugx. 78,000/= for purchase of airtime and announcements, Ugx. 10,000/= for the storage of the body at the hospital.

The plaintiff also pleaded that at the time of death, the deceased was only 28 years, a very vibrant and energetic man working with the defendant, operating a commercial farm at Ruheega Ntugamo, a son and brother in a family wholly dependent on him as the sole provider and bread winner. He stated that the deceased generated over Ugx. 1,181,946 as profit from his various labour services with the defendant and his business projects.

During cross examination of PW2, testified that the life span of a person by standard practise is 60 years or one could even live longer than that or shorter. The plaintiff also pleaded that basing on the conservative estimate of the life span of 60 years for an average healthy man, the deceased would have lived for 32 more productive years had it not been for the gross negligence of the defendant. He would have therefore generated 886,459/= per month for the 32 years which would amount to a total sum of 340,400,256/= for which the plaintiff claimed for the loss of expectation of life.

Analysis

In cases of this nature, the party entitled to any remedy in terms of damages usually gets two types of damages: *Special damages* that are compensatory in nature which refers to economic losses such as loss of earnings, damage to property, medical expenses, and *general damages* for pain, suffering, and emotional stress. Special damages are awarded to compensate for actual out-of-pocket expenses/financial costs that a claimant has incurred as a direct result of the defendant's actions or behaviour. The idea is that special damages will help return you, financially, to the position you were in prior to the accident.

Anyone injured due to another party's negligent, careless, or intentional actions is entitled to receive monetary compensation. The at-fault party must restore the injured party to their pre-injury state either by paying special damages or general damages. Special damages, also known as economic damages, refer to the financial losses you suffer from your injuries. They are relatively easy to prove and calculate with receipts.

It is trite that special damages must not only be specifically pleaded but they must also be strictly proved. See; *Borham-Carter vs. Hyde Park Hotel [1948] 64 TLR*. They must cover tangible harm that can easily be translated into monetary terms.

The burden of proof as mentioned earlier rests on that person who would fail if no evidence is adduced to prove an alleged fact. Special damages being compensatory, the plaintiff has the burden to adduce evidence proving them. In a case where there is loss of earnings, the plaintiff must adduce evidence of the lost earnings. Strict proof is not restricted to documentary evidence only and in some cases, evidence of a person who received or paid or testimonies of experts conversant with matters of the claim can suffice. See; **Stanbic Bank Uganda Ltd vs Sekalega Civil Suit No. 18 of 2009**.

On the other hand, 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.

The court in the case of **Kabunga Grace vs Kisambira Sentamu Ismail HCT-00-CV-0112 OF 2009** held that in grant of general damages, the plaintiff must be put in the position he would have been had he not suffered the wrong and the valuation would be as at the time of judgment. General damages are the direct probable consequence of the wrongful act of the defendant complained of and include damages for pain, suffering and inconvenience and anticipated future loss.

When assessing general damages, the court should be guided by the value of the subject matter or in the instant case the condition of the plaintiff and the economic inconvenience the plaintiff may have been put through as a result and the extent of the injury suffered. See; **Uganda Commercial Bank vs Kigozi [2002] 1 EA 305.**

In the instant case, the plaintiff tendered in court some receipts and post mortem report to support his claim for the special damages. In respect of the other claims under special damages like transporting the body, medical expenses, costs for the construction of the resting place, the plaintiff testified as to their expenditure during the burial.

I am satisfied that the plaintiff proved his claim for the special damages claimed being Ugx. 6,000,000/=.

In respect of the claim for loss of earnings, the first is future loss which is uncertain and has to be estimated and the second is loss of income after the incident up to trial of the suit. This can be easily estimated, unlike future loss. Courts have held that the starting point in assessing loss of earnings is to find how much the claimant was earning before the incident complained of See; *Bullingha vs. Hughs [1949] I K B 643, Daly vs. General Steel Navigation Co. Ltd. [1983] 3 All. ER. 696.*

The objective of an award of damages is to give the plaintiff compensation for the damage, loss or injury he or she has suffered. The heads or elements of damages recognised as such by law are divisible into two main groups: pecuniary and non-pecuniary loss. The former comprises all financial and material loss incurred, such as loss of business profit, loss of income, or expenses such as medical expenses. The latter comprises all losses which do not represent

inroad upon a person's financial or material assets such as physical pain or injury to feelings.

The former, being money loss is capable of being arithmetically calculated in money, even though the calculation must sometimes be a rough one where there are difficulties of proof. The latter, however, is not so calculable. Money is not awarded as a replacement for other money, but as a substitute for that which is generally more important than money. Damages have to be measured in order to arrive at what compensation should be awarded.

The general rule regarding measure of damages applicable both to contract and tort has its origin in what Lord Bluckbum said in **Livingstone vs Ronoyard's Coal Co. (1880) 5.App. cas 259**. He therein defined measure of damages as:

"that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

This statement has been consistently referred to or recited with approval in many subsequent cases. In cases of pecuniary loss, such as claimed in the present, it is easy enough to apply this rule in the case of earnings which have actually been lost, or expenses which have actually been incurred up to the date of the trial. The exact or approximate amount can be proved and, if proved, will be awarded as special damages.

In this category falls income or earning lost between the time of injury and the time of trial. In the case of future financial loss whether it is future loss of earnings or expenses to be incurred in the future, assessment is quite difficult as the prospective loss cannot be claimed as special damages because it has not been sustained at the date of the trial. It is therefore awarded as part of the general damages. The plaintiff would be entitled in theory to the exact amount of his prospective loss if it could be proved to its present value at the date of the trial. See: **Robert Cuossens vs Attorney General; Civil Appeal No. 8 of 1999**

However, in practice since future loss cannot usually be proved, the court has to make a broad estimate taking into account all facts proved and the probabilities of the particular case. It is therefore important that evidence given to the Court is

based on solid facts to enable it assess the prospective loss of earnings and one of this is the actual income which the plaintiff was earning at the time of his injury.

The method of assessment of loss of earning capacity after the facts have been proved has been stated by **Mc Gregor on Damages, 14th Edn. para 1164 at page 797** as follows:

“The Courts have evolved a particular method of assessing loss of earning capacity, for arriving at the amount which the plaintiff has been prevented by the injury from earning in the future. This amount is calculated by taking the figure of the plaintiffs present annual earnings less the amount if any, which he can now earn annually and multiply this by a figure which, while based upon the number of years during which the loss of earning power will last, is discounted so as to allow for the fact that a lump sum is being given now instead of periodic payments over the years. This figure has long been called the multiplier; the former figure has now come to be referred to as the multiplicand. Further adjustment however, may have to be made to the multiplicand or multiplier on account of a variety of factors; viz, the probability of future increase or decrease in the annual earnings, the so called contingencies of life and the incidence of inflation and taxation.”

It is therefore important to note what the plaintiff would have been earning at the date of the trial had he not been injured, his earning per annum at the time of injury will generally be easy to calculate where he is employed at a wage or salary; similarly, the amount which he is capable of earning in the future is often made clear by the terms of such post injury. It is important to note that damages for financial loss in actions for negligence should compensate the injured person for his loss and not punish the defendant for the tortfeasor's wrong doing.

The plaintiff testified that the deceased was earning a daily amount of Ugx. 12,700/= from the defendant amounting to Ugx. 393,700 and Ugx. 4,724,400 annually. The plaintiff further claimed that the deceased generated over Ugx. 1,181,946 as profit from his various labour services with the defendant and his business projects. However, he failed to prove the monies generated from the farm and other business of the deceased which were not lifted. He did not adduce any evidence about these earnings in form of any payment vouchers and or receipts. He therefore failed to prove these earnings completely.

Sections 101 to 103 of the Evidence Act are not in vein. The party alleging certain facts has the duty to prove that those facts exist or existed.

In the absence of particularized evidence concerning future earnings, past earnings may serve as an adequate guide to loss of earning capacity. Having been given no other relevant information, the plaintiff's salary at the time of the death was at Ugx. 12,700/= per day. However, plaintiff has not offered a basis for other monies claimed to be generated by the deceased.

Basing on the daily amount earned by the deceased when he was still working with the defendant, he would have earned a total sum of Ugx. 33,070,800/= to date.

This court therefore awards the plaintiff an award of Ugx.50, 000,000/= as loss of earnings for the deceased and general damages of Ugx. 30,000,000/=.

This court therefore orders as follows;

- a) A declaration the deceased's death was caused by the negligence of the defendant,
- b) An award of special damages of Ugx. 6,000,000/=
- c) An award for the damages for loss of expectation of Ugx. 50,000,000
- d) An award of general damages of Ugx. 30,000,000/=
- e) Interest at court rate from the date of cause of action until payment in full
- f) Costs of the suit to the plaintiff.

I so order.

SSEKAANA MUSA

JUDGE

11th April 2022