

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
CIVIL SUIT NO. 115 OF 2022**

HIRANI MANJI KANJIPLAINTIFF

VERSUS

UGANDA FUNERAL SERVICES LIMITED.....DEFENDANT

BEFORE: HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The Plaintiff filed a case against the Defendant who is vicariously liable for the accident involving motor vehicle registration No.513Y that the person in charge of the said motor vehicle whom the Defendant refused to disclose to the Plaintiff was driving the motor vehicle in course of his employment.

The Plaintiff prays that this honorable court grants an Order for the Defendant to pay the Plaintiff a sum of 161,456,000/=lion Four hundred fifty six thousand Uganda Shillings as Special damages pertaining to medical expenses and other attendant expenses incurred by the Plaintiff, 1,000,000/= (One Million Uganda Shillings) for repair of the Plaintiff's motorcycle Registration No.UEC 289N that was damaged in the course of the accident, Punitive, General damages and Costs of the suit.

The defendant in their defence did not make any specific answer to the plaint and rather made technical denials contending that the plaint does not disclose a cause of action; the defendant cannot be held vicariously liable for actions of an employee whose particulars are not indicated; the plaintiff does not attach any proof of medical facility where he treated for injuries suffered; the plaintiff did not attach any proof of medical documents to show the suffered any injuries; the plaint is frivolous and vexatious and does not disclose any cause of action and that the suit is an abuse of court process.

The plaintiff was represented by *Counsel Isaac Walukagga* while the defendant was represented by *Counsel Badru Bwango*

The parties filed a joint scheduling memorandum wherein they agreed to the following;

AGREED FACTS.

- The Plaintiff was involved in an accident on 21st December, 2021.

AGREED ISSUES.

1. ***Whether motor vehicle registration no.UAY 513 Y is owned by the Defendant?***
2. ***Whether the driver of the said motor vehicle was negligent and as a result caused the accident in issue leading to the injuries that were suffered by the Plaintiff?***
3. ***Whether the defendant is vicariously liable for the actions of the driver of motor vehicle Registration No.UAY 513Y ?***
4. ***What remedies are available to the parties?***

The suit was heard ex parte after the defendant and their counsel failed to appear on the day the matter was fixed for hearing.

DETERMINATION.

Whether motor vehicle registration no.UAY 513 Y is owned by the Defendant?

The plaintiff's counsel submitted Under Paragraph 4(ii) of the Plaint states that the motor vehicle that run over the Plaintiff with its registration number UAY 513Y is owned by the Defendant.

Paragraph 20 of the Plaintiff's witness statement labeled as PW1 testified that he made inquiries at Uganda Revenue Authority and confirmed that the vehicle UAY 513Y that was involved in the accident is owned by the Defendant and the evidence that corroborates the above fact is attached to the Plaintiff's trial bundle.

In Conclusion, the fact that the Defendant doesn't deny that the vehicle belongs to it then it's sufficient to admit that the motor vehicle UAY 513Y belongs to the Defendant.

Analysis

The applicant was run over by a motor vehicle registration number UAY 513Y that was driven off immediately after the accident. According to Exhibit PEx-9 which is letter from police confirms the motor vehicle knocked the plaintiff after examination of the CCTV camera.

The defendant did not make any specific answer to what was pleaded and also never came to court to lead evidence to support their defence. This leaves this court with only one inference and conclusion that motor vehicle UAY 513Y was indeed involved in an accident which injured the plaintiff.

The plaintiff further in proof of ownership produced evidence of registration of the said motor vehicle in the names of Uganda Funeral Services Limited which is the defendant company as per exhibited PExh 14. This evidence has not been rebutted in defence apart from the technical denial.

It is finding of this court that motor Vehicle registration number UAY 513Y which was involved in an accident indeed belonged to the defendant.

Whether the driver of the said motor vehicle was negligent and as a result caused the accident in issue leading to the injuries that were suffered by the Plaintiff?

The plaintiff's counsel submitted that under paragraph 7 of the Plaint it states that the specificities of negligence in this case are not denied by the Defendant. Also paragraphs 5 & 19 of the Plaintiff's witness statement it's testified that the driver of the vehicle recklessly rammed into him and that at the time it'd the accident he was driving on the right hand side of the road as opposed to the left side he was supposed to be driving from, the driver failed to brake to protect the other road users that were rightly using the road and drove the vehicle as an ambulance for which it was not.

Negligence is defined in the case of **Donoghue vs. Stevenson [1932]AC 562** that it's the omission of an action that a reasonable person would do or performing an action that a reasonable person would not do.

The vehicle had no right of way and there was no justification to drive in the opposite direction with no siren or warnings to the other road users that expected no traffic from the opposite direction. According to the video clip that's among the e exhibits brought to court it's clear that the driver of the

vehicle was on the wrong side and took no bother at all to protect other road users.

Furthermore, in the case of **Yosef Lubega & Ors vs. International Ventures Limited H.C.C.S No.517 of 1991** , while addressing what amounts to negligence in accident cases such as the instant one it was held as follows;

“First of all negligence as a tort is the breach of legal duty to take care which results in damage undesired by the defendant to the plaintiff. Thus its ingredients are;

- a) A legal duty on the part of A towards B to exercise care in such conduct of as falls within the scope of the duty.*
- b) Breach of that duty.*
- c) Consequential damage to B.”*

Counsel submitted that the driver of the vehicle was placed in a position that if he did not use ordinary care and skill in manning the vehicle, he would cause injury to others and therefore had a duty of care.

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. **Black’s law Dictionary 11th Edition 2019** defines Negligence as follows;

The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregarding of others’ rights; the doing of what a reasonable and prudent person would not do under the particular circumstances, or the failure to do what such a person would do under the circumstances.

Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property.

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 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". See Salmond and Heuston on The Law of Torts (19th Edition)

STANDARD OF CARE

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

FORESEEABILITY OF DANGER

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

ANTICIPATION OF GRAVITY OF INJURY

In considering whether some precaution should be taken against a foreseeable risk, there is a duty to weigh on the one hand, the magnitude of the risk, the likelihood of an accident happening, and the possible seriousness of the consequences if an accident does happen, and on the other the difficulty and expense and any other disadvantage of taking the precaution.

The gravity of possible consequences is a major factor in considering precautions. The more serious the likely damage, the greater the precaution

required and this is considered in determining the level of fulfillment of the duty of care. - Paris –v- Stepney B.C. [1951] A.C. 367.

STANDARD OF PROOF NEGLIGENCE

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

The plaintiff has satisfied the court that the defendant's driver was negligent and this court agrees with the plaintiff's counsel submissions on this issue of negligence. The driver was driving on the right side of the road as opposed to the left and he drove recklessly in total disregard of other road users. He failed to brake and drove vehicle as an ambulance whereas it was not. The defendant's vehicle did not have a right of way to be driven on the opposite side of the road.

Whether the defendant is vicariously liable for the actions of the driver of motor vehicle Registration No.UAY 513Y?

The plaintiff's counsel submitted that vicariously liability can be established where it's demonstrated that absence of proper supervision by the employer could have caused the accident in issue. Under paragraphs 24, 25, 26 &28 of the Plaintiff's witness statement (PW1) it's testified that the Defendant is liable for the actions of the driver of its vehicle, the Defendant was notified of the accident and elected not to disclose who the driver was at the material time and in the defence filed, the Defendant did not disclose the driver and at the time of the accident, the vehicle was being driven by an authorized person and in the course of duty. And that the Defendant is fully aware of the Plaintiff's claim and has to date never indicated that the vehicle was stolen or being driven by an unauthorized person. The Defendant on the basis of the above is vicariously liable for the actions of the driver of its vehicle.

In the case of ***Charles Besigwa vs. Stirling Civil Engineering Ltd H.C.C.S No.445 of 2014*** ;where the defendant was held liable for the negligence of that caused the death of the Plaintiff's son. The Defendant's engineer failed to supervise the driver of the black hoc on the day of the accident, if he had supervised the work on the site, the accident would have been minimized.

The plaintiff's counsel further submitted that the vehicle in issue was owned by the Defendant who had control of how it was to be used and also supervised

the driver that knocked the Defendant and drove off. Therefore failure of the Defendant to supervise the driver of the vehicle on the day of the accident should be visited on the Defendant.

Analysis

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 the defendant of the motor vehicle is vicariously liable for the actions of its agent/servant or driver. The defendant does not deny the actions of the reckless driving and has not atleast disowned the said driver for being on a frolic of his own.

What remedies are available to the parties?

According to paragraph 23 of the Plaintiff's witness statement (PW1) it's testified that he suffered grave injuries as a result of the accident and is still

undergoing treatment and he therefore seeks special damages for the expenses he incurred as a result of the accident including medical expenses and others.

The Plaintiff adduced medical receipts as part of the exhibits that show all the medical expenses incurred which are a sum of Forty eight million eight hundred eighty eight thousand three hundred fifty nine Uganda shillings.

The Plaintiff also has unreceipted expenses which are a total sum of Four million one hundred ten thousand Uganda Shillings (a walking supporter, transport, a sleeping bed , treatment & repairing the motorcycle) .

The issue of whether special damages must be backed up with documentary evidence was solved in the case of ***Irene Nankabirwa vs. Umeme Ltd H.C.C.S No.310 of 2016***; where it was stated that strict proof of special damages does not necessarily mean proof by documentary evidence in this case the factory had caught fire.

In this case the total sum of special damages claimed and proved by the Plaintiff are a sum of 52,980,350/= (Fifty two million nine hundred ninety eight thousand three hundred fifty nine Uganda Shillings).

The Plaintiff claims general damages against the Defendant as he testified in paragraph 31 (PW1) that he is not able to gainfully work as he cannot work without support and has been affected by continuous infections that have made it difficult for him to continue with his construction work and therefore prays for 300,000,000/= (Three hundred million Uganda shillings) as general damages to enable him to continue treating his injuries and start new means of survival.

The Plaintiff seeks punitive damages against the Defendant .In paragraph 32 of the plaintiff's witness statement it's testified that the Defendant has never bothered to assist the Plaintiff and has demonstrated a great degree of arrogance. The Defendant's driver run over the Plaintiff and didn't bother to stop to take him to the hospital that was 100 meters away which is inhumane and a total disregard of the Plaintiff's life.

The Plaintiff prays for a sum of 50,000,000/= (Fifty million Uganda shillings) as punitive damages.

Analysis

Special damages were defined in the case of **Mugabi John v Attorney General C.S No. 133 of 2002** as those damages that relate to past loss calculable at the date of trial and encompasses past expenses and loss of earning which arise out of special circumstances of a particular case.

The law relating to special damages is settled. **W.M Kyambadde v MPIGI District Administration (supra) and Bonham Carter V Hyde Park Hotel Ltd (1984)** holding that the guiding principle is that special damages must be specifically pleaded and strictly proved.

However, the case of **Byekwaso v Mohammed [1973] HCD 20** enunciates that the stated position confirms that for as long as there is sufficient proof of the loss actually sustained which is either a direct consequence of the Defendant's action/omission or such a consequence as a reasonable man would have contemplated, this would suffice in place of physical and/or documentary evidence.

The plaintiff has proved the special damages as pleaded and by way of receipts for what he has so far incurred. They can be verified by exhibits P5,P7,P8 and P16. Further receipts have been produced to prove the repair costs of the motor cycle of the plaintiff, special sleeping bed expense due to injury, expense on transportation and walking aide costs which are totally to a sum of 161, 456,000/=.

This court awards the plaintiff a sum of 161,456,000/= as special damages as pleaded and proved before this court.

General damages

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.

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 other words the whole process of assessing damages where they are “at large” is essentially a matter of impression and not addition. Per Lord Hailsham, LC in ***Cassell v Broome [1972] 1 All ER 801 at 825***

The awards reflect society’s discomfiture of the wrongdoer’s deprivation of the man’s liberty and society’s sympathy to the plight of the innocent victim. The awards, therefore are based on impression.

In the circumstances of this case, it is clear that the defendant tried to deny liability and avoided any contact of the plaintiff or to render any assistance in spite of the glaring evidence of the accident. They ignored or refused to give any medical care or financial support to mitigate the damage.

The plaintiff has sought general damages of 300,000,000/= for mental anguish, physical suffering and pain, body incapacity and inconvenience. This claim is on a higher side although he contended that he continues to receive medical treatment. The plaintiff is awarded a sum of 100,000,000/= as general damages.

The plaintiff has not made out a case for award of punitive damages.

The plaintiff is awarded costs of the suit.

I so order.

Ssekaana Musa

Judge

31st May 2023