THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT HINJA

CIVIL SUIT NO. 23/94

GRACE KAMIRA ..... PLAINTIFF

VERSUS

KIBAAYA ..... DEFENDANT

BEFORE: THE HONOURABLE JUSTICE C.M. KATO

J U D G M E N T

The plaintiff in this suit is one Grace Kamira, he filed this suit in his representative capacity on behalf of the family of the late George William Mulungana under the provisions of the law of Reform (Misc. provisions) Act. The defendant is Kibaaya who was sued for vicarious liability for the tort of negligence committed by his employee. By this claim the plaintiff is asking the court to award him general and special damages together with costs of this suit.

The background of the case is that on or about the 15th June 1994 at the village of Bufumba, on Kamuli-Jinja road there was a motor accident involving a mini bus reg. no. UPN 799 which was being driven by the defendant's driver called Umari Muhammadi and a bicycle which was being ridden by the deceased. In the course of that accident the late George William Mulungana who was riding his bicycle along the same road was knocked by the said mini bus. He was injured on the leg and clavicle region. He was admitted at Kamuli Mission hospital where he later on died on the 13th July 1994. The late Mulungana is said to have left behind him 2 widows, a daughter and 2 grandchildren whom he was said to have been looking after.

At the trial 3 issues were framed by both parties for determination of this court. The 3 issues being:-

1. whether or not the defendant's driver was negligent and caused the accident.

2. whether or not the defendant is liable for the injuries suffered by the deceased and his grandson.

3. Quantum of damages.

I will deal with the 3 issues in the order they are indicated above starting with the first issue first. Dr. Bakibinga who appeared for the plaintiff addressed the court at length and quoted a number of authorities to support his argument that the defendant's driver was negligent and responsible for the accident. Among the cases quoted on the issue of negligence were: Donoghue v. Stevenson (1932)AC 565; Epupi v. UEB (1980)HCB 136; Tigampenda v. TMK (1980)HCB 147; J.F. Ijjala v. Corporation Engero Project (1988-90)HCB 122 and Makumbi v. Kigezi African Bus Co. (1986)HCB 69.

The plaintiff called a total of 7 witnesses including himself (PW2 GRACE KAMIRA) who was at the scene of the accident immediately after the accident had occured and he assisted in taking the deceased to the hospital. PW3 Harrient Babirye who also said she witnessed the accident. According to her at the time of the accident Mulungana was trying to branch to his home because he had reached a path leading to his home he was on the opposite side of the road and he crossed the road to go to the other side of the road where the path to his home was and he was then knocked. Another witness was PW4 John Mukabya who was a passenger in the same vehicle. According to his evidence when the vehicle reached Bufumba village he saw the deceased moving towards the same direction as the vehicle but when the driver hooted the deceased moved from the left side to the right, the driver tried to brake in order to save the old man but it was too late and he knocked him. According to him the vehicle was not very fast because if it had been travelling very fast it would have over turned when the driver braked and in his opinion the old man was to blame for the accident. The other witness called on behalf of the plaintiff was a police man who visited the scene of the accident and drew a sketch plan. According to him it was not easy to tell who was in the wrong as the victim had already been carried away from the scene. The last 2 witnesses Irene Mulungana (PW6) and Jane Nakayega (PW7) were the widows of the late Mulungana who testified as to the nature of assistance their husband was rendering to them before his death.

On the other hand the defence called 2 witnesses who included the driver of the motor vehicle DW2 Umari Mohamadi and Mohamadi Isabirye (DW1) who was a passenger in the vehicle. The defendant did not testify as he was not at the scene of the accident, he does not deny the ownership of the

vehicle nor does he deny that Umar was his employee acting in the course of his employment when theaccident took place, Both of these witnesses admitted the occurance of the accident but they put the blame on the deceased who they say knocked the vehicle when they approached him from behind, It was the defence's contention that the defendant's driver was not negligent and therefore he was not responsible for the accident, for thesamereason the defendant who is the owner of the vehicle cannot be vicariously held liable for the accident,

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 perse although accidents may be evidence of 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 the present case the plaintiff did not plead the doctrine of res ipsa loquitur so the burden of proof lies on him in establishing that defendant's employee was negligent and caused the deceased's injuries,

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 road was visibly good as there was no rain, the traffic on the road was not much because apart from the cyclist and the defendant's vehicle there seems to have been no other traffic, there is no suggestion that the road was bad or that there was any corner. In these circumstances the court is inclined to say that this accident could have been avoided by the defendant's driver if he had been careful. It is my finding that the driver of m/v UPN 799 was negligent and he was partially responsible for the accident. The defendant's driver's negligence is to be seen from the

...../4

fact that he was driving from behind the deceased and he should have been more careful when he was approaching the deceased. I do not accept his evidence that the whole accident was due to the deceased who suddenly decided to move from one side of the road to the other side.

According to the evidence on record the deceased also contributed to the accident which might have been avoided. The deceased's negligence may be found in the fact that he decided to abruptly ride from the side where he was to the path leading to his home without giving any warning or having looked around to ascertain if it was safe for him to move from one side of the road to the other side, the mere fact that the deceased was partially deaf was not a good excuse for him not to have observed ordinary rules of the road. The deceased ought to have been cautious before he crossed the road in the way he did, he carried greater blame than the driver as the driver did not expect him to move across the road: Andereya Sinzinus v. Gomba Bus Service (1980)HCB 49.

Considering all the evidence on record as adduced by both sides I am of the opinion that thedriver of m/v no. UPN 799 was 40% to blame and the deceased was 60% to blame for the accident: In coming to this decision I have found much comfort in the case of: Mute v. Elikana and another (1975)EA 201. My answer to issue no. 1 is that the defendant's driver was negligent and was responsible partially for the cause of the accident and that the deceased was also guilty of contributory negligence, their degree of negligence is as indicated above.

That leads me to the second issue which is whether or not the defendant is liable for the injuries. Mr. Tuyiringire the learned counsel for the defendant conceded that if the court found the defendant's driver to have been negligent then the defendant would be found vicariously liable for the injuries. On this issue however there is one problem concerning the deceased's contribution to the accident; as I have already stated he was partially responsible for the accident and there is also the evidence of the doctor (PWI) who testified that the deceased aggravated his own pain further by refusing to accept medical treatment and eating when he had been admitted at the hospital, a behaviour which might have been responsible for his subsequent death, I feel that defendant's liability is bound to be affected by these peculiar circumstances brought about by the deceased's own conduct.

...../5

My finding on issue no. 2 is simply that the defendant is liable for the injuries suffered by the deceased subject to the deceased's own contributory negligence.

I turn to the third issue now, which is in respect to the quantum of damages. Dr. Bakibinga suggested that for the injuries on clavical region the damages should be 4,800,000/=, the injury on the ankle should be 12,000,000/= then 1,200,000/= for loss of life expectation. He also prayed for 57,900/= for medical expenses and 70,000/= for replacment of deceased's damaged bicycle.

On the other hand Mr. Tuyiringire the learned counsel for the defendant argued that no damages should be awarded to the plaintiff for injuries suffered by the deceased as such damages could only be awarded to the deceased himself had he not died. As for damages for expectancy he contended that such damages were not available because the deceased died at the age of 76 years when life expectancy in Uganda is estimated to be between 50 and 55 years.

I find it proper to deal with the issue of the deceased's age before I proceed to discuss issues affecting the damages generally. Dr. Marcel Schutgens (PWI) in his evidence told the court that the deceased was aged 76 years I take that age of the deceased to be correct. Both counsel who appeared in this case agreed in their submissions that in Uganda life expectancy has been estimated to be between 50 and 55 years: (see Amina Nalugya v. Uganda Transport Corporation (1978)HCB 301; G. R. Kassam v. Kampala Aerated water co., ltd (1965)EA 587 at page 589 and Teopista Namboze v. Attorney General (1974) HCB 102). I have no quarrel with this statement of the law as pointed out by both counsel. The issue that comes up for consideration is whether or not a person killed after he has attained the age of 55 years cannot be said to have been in a position to support his family. Mr. Tuyiringire was of the view that after a person has attained the age of 55 years his relatives or dependants should not be considered for damages under the Law Reform (Misc. provisions)Act. I agree with his contention on this point because the decided cases have shown that in cases of this nature the court has to find a multplier factor which is usually the age at which the deceased died and the time he was expected to be working for his family. In a case like the present one such a multiplier cannot be found because the deceased died about 18 years after his

life expectation had expired. In the case of: Teopista Namboze (supra) this court stated that "working life" meant the length of life an average Ugandan was expected to live while giving financial assistance to those depending on him. It is true that this preposition of the law is morally and economically unfair as some people keep working even after they have attained the age of 80 years, as it happened in this country where a certain vice president served the country actively even after he was 80 years, but this is not a court of morals but a court of law which administers the law and not moral principles. Dr. Bakibinga found some difficulty in convincing the court as to what formular or multiplier the court should adopt in assessing what dependants of the deceased would get since the deceased had no balance for his working life. It is my view that the deceased had legally out lived his usefulness to his family and therefore this court cannot violet the established principle of man's working age in Uganda ending at 55 years, hence, no damages can be awarded to the dependants of the deceased for loss of dependancy as a result of his death.

I now move to the issue of whether or not the plaintiff is entitled to the damages in respect of the pain suffered by the deceased before his death. Dr. Bakibinga was of the view that the plaintiff was entitled to such damages. On his part Mr. Tuyiringire felt that damages for pain suffered by the deceased could only be awarded to him if he survived and that his dependants are not entitled for damages for the pain suffered by the deceased. With due respect I do not agree with Mr. Tuyiringire's contention on this matter, the Law Reform (Misc. Provisions)Act in section 7 allows the dependants to get some damages for the pain suffered by the deceased since if the deceased had lived he would have recovered such damages. This principle of the law is well established in: Halsbury's Laws of England 3rd edition volume 28 page 100 paragraph 109; the present case must be destinguished from a case where a deceased dies instantly in an accident where by he does not live to endure any pain or where he dies without gaining consciousness as was the case in the case of: Benham v. Gambling (1941)AC 157 where the deceased died instantly. In the present case the deceased did not die instantly nor did he die without gaining his senses, he spent about one month in the hospital. The deceased's dependants or his estate is definitely entitled to some damages for the injury he sustained in the accident and for

the pain he suffered from those injuries for the period of one month.

According to the evidence of Dr. Marcel Schutgens the major injuries sustained by the deceased were generally two. There was a fracture of the left ankle and fracture of the left clavicle. As pointed out earlier, according to Dr. Bakibinga the plaintiff should be awarded 12,000,000/= for the fracture of the left ankle and 4,800,000/= for the fracture of the clavicle. Dr. Bakibinga gave the cases of: Naziwa v. Associated Architects (1981)HCB 81; Tamale Mukasa v. Attorney General (1980)HCB 161 and Umari Kato & others v. Uganda Transport Services Cooperative Society (1984)HCB 67, Kataratambi v. Magala and others (1979)HCB 237 and Mperabusa v. Eloit (1993)3 Kampala Law Report 45 at page 53; as his authorities in support of the above figures. The cases quoted by the learned counsel for the plaintiff are clearly destinguishable from the present case in 3 major respects:

(a) In thise case the plaintiff who sustained the injuries lived to suffer the pain for a long time but in the present case the pain was endured for only one month because the deceased died after that period.

(b) In the present case the deceased was greatly responsible for his own suffering because accprding to the evidence of the doctor he refused treatment and eating food or drinking anything; his conduct aggravated his condition and suffering, to use the doctor's own words "The man gave up life".

(c) In the present case the deceased has not been available to tell the court how much he suffered or what pain he endured unlike in the other cases referred to the court by Dr. Bakibinga.

In a case like this one the court cannot be so sympathetic to the deceased's pain when the deceased was not so sympathetic to himself, that being the psotion I assess the damages for deceased's pain and suffering as follows: 200,000/= for the injury of the clavical bone and 300,000/= for the injury on the ankle, the total damages for suffering endured by the deceased is therefore 500,000/=.

There was the issue of special damages, it is the law of this land that special damages must not only be pleaded but

Stanley Smolen-(1975)HCB-20, Board of Governors Gayaza High school v. Owodyo (1982)HCB 31, Kyambadde v. Mpigi District Administration (1983)HCB 44 and Kampala City Council v. Nakaye (1972)EA 446 at page 449. In the instant case special damages consisted of medical expenses and according to the learned defence counsel 70,000/= for replacement of the bicycle. According to the evidence of Dr. Marcel Schutgen the relatives of the deceased paid to the hospital 57,900/= which included all the charges at the hospital, this particular item was pleaded in the plaint in paragraph 6. I find that this amount was proved and I award it to the plaintiff. Regarding 70,000/= mentioned by Dr. Bakibinga in his submission, with due respect to the learned counsel I would say that amount was not pleaded any where nor was there any piece of evidence adduced to show that the bicycle was damaged and what its value was. The claim for the amount of 70,000/= for the replacement of the deceased's bicycle has not been proved and must be rejected.

I must now deal briefly with the position of the young boy whom the old man was carrying on the bicycle. According to Dr. Bakibinga this boy should also be compensated. Mr. Tuyiringire resisted this claim on the ground that the young boy who was the grandson of the deceased was never made plaintiff to these proceedings therefore the court should not entertain the case regarding him. With due respect I do agree with Mr. Tuyiringire's contention that the young boy has never been a party to these proceedings nor did the plaintiff file this suit on behalf of that boy; even if he had been made a party to these proceedings still there has been no evidence whatsoever to ascertain what sort of injury, if any, he sustained. This court cannot consider anything to do with the young boy Charles Muluvu who is a complete stranger to this case, he was not even called to tell the court as to what happened.

The final outcome of this case is that judgment is entered for the plaintiff for a sum of 557,900/= (500,000/= being damages for pain suffered by the deceased and 57,900/= being special damages for medical expenses). The money will earn an interest at court rate from date of this judgment till payment in full and defendant is to pay costs to the plaintiff. Since the deceased was 60% to blame for the accident the defendant is only to pay 40% of the above amount: (i.e. he is

/o

to pay 40 x 557,900 = about 223,160/=). The amount is to
100
be paid to the administrator of the estate of the deceased who will distribute the money among the lawful beneficaries of the deceased's estate.

C. M. KATO
JUDGE
18/3/1996