THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
Coram: Madrama, Mulyagonja & Mugenyi, JJA
CIVIL APPEAL NO. 160 OF 2019

BETWEEN

SECURITY GROUP UGANDA LTD :::::::::::::::: APPELLANT

AND

HAJJATI ZAM ZAWEDDE
Administrator of the Estate of
Tamale Ahmed } **::::::::::::::::::RESPONDENT**

(Appeal from the decision of Lady Justice Margaret Mutonyi dated 30th April 2013, in Mukono High Court Civil Suit No. 20 of 2014)

JUDGMENT OF IRENE ESTHER MULYAGONJA, JA

Introduction

This is an appeal from the decision of the High Court in which the trial judge held that the appellant was vicariously liable for the unlawful death of the respondent's son, and award UGX 336,000,000 as damages for loss of dependence, UGX 20,000,000 as payment for funeral expenses and UGX 20,000,000 for pain, trauma and loss of a son, as well as the costs of the suit.

Background

The facts, as I understood, them were that in the night of 16th April 2013, Ahamed Tamale who was a son to the respondent was gunned down by one Bosco Ogwang who was in the company of one Jimmy Wadri. The 2 were employees of the appellant and had been deployed

to guard the premises of a cooperative society in Mukono, Kayunga District. The shooting took place at Ntinda Zone in Seeta, Mukono. The assailants were arrested, charged and the 2nd defendant was convicted, on his own plea of guilt, for the murder of Ahmed Tamale.

The respondent filed a suit in the High Court for the recovery of damages for the loss of her son and alleged that the family was largely dependent on him for his care, love, financial support and the possible furtherance of the lineage of his family as he was soon to get married. The trial judge found for the respondent and awarded her damages as stated above. The appellant was dissatisfied with the decision and appeals to this court on 4 grounds of appeal as follows:

1. The learned trial judge erred in law and in fact when she based her computation of loss of dependency on a finger of UGX 2,000,000/= thereby arriving at a wrong decision.
2. The learned trial judge erred in law and in fact when she awarded the entire sum of UGX 2,000,000/= to the respondent in loss of dependency.
3. The learned trial judge did not properly evaluate the evidence on record thereby arriving at wrong conclusions, that:
    i) The appellant was vicariously liable for the wrongful and criminal conduct of the 2nd and 3rd defendants;
    ii) The respondent was entitled to UGX 336,000,000/= (Uganda shillings 336 million) as damages for loss of dependence;
4. The learned trial judge erred in law and fact when she awarded the respondent the following sums:
    i) UGX 20,000,000/= (20 million) for funeral expenses under the Islamic faith for burial and Duwa;
    ii) UGX 100,000,000/= (100 million) as general damages for pain, trauma and loss of her son.

The appellant prayed that this court allows the appeal and sets aside the judgment and orders of the learned trial judge with costs to the appellant in this and the court below. The respondent opposed the appeal.

Representation

At the hearing of the appeal on 2nd December 2021, the appellant was represented by learned counsel, Mr Ivan Engoru and Ms Ritah Nakalema. The respondent's counsel were Mr Ronald Oine and Mr Robert Nazaami.

Both parties filed written submissions in the appeal. The appellant's submissions were filed on 6th September 2021 and the respondent's counsel filed a reply on 13th September 2021. The appellant's counsel filed a rejoinder on 20th September 2021. This appeal was disposed of wholly on the basis of written arguments.

Duty of the Court

The duty of this court as a first appellate court, is stated in rule 30(1) of the Rules of this court (**SI 10-13**). It is to re-evaluate the whole evidence adduced before the trial court and reach its own conclusions on the facts and the law. But in so doing the court should be cautious of the fact that it did not hear and observe the witnesses testify.

Determination of the appeal

The appellant's counsel presented the submissions on each ground of the appeal chronologically. Counsel for the respondent replied in a similar manner. However, this appeal turns on the question that is contained in ground 3 (i) as to whether the appellant was vicariously liable for the wrongful and criminal conduct of the 2nd and 3rd

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defendants. It is my view that once this is disposed of there may be no need to deal with the rest of the grounds of appeal, because the question is capable of disposing of the whole appeal. I will therefore first review the submissions on this particular aspect of the appeal for both parties and then resolve that question.

Ground 3 (i)

In ground 3 of the appeal, the appellant's complaint was that the trial judge did not properly evaluate the evidence on record and thus arrived at wrong conclusions, one of which was that the appellant was vicariously liable for the wrongful and criminal conduct of the 2nd and 3rd defendants.

Submissions of counsel

In this regard counsel for the appellant submitted that there is no doubt that the 2nd and 3rd defendants were employees of the appellant, and the appellant concedes that point. That however, in view of the evidence on record the trial judge came to the wrong conclusion that the appellant was vicariously liable for their criminal acts. He referred us to the evidence of Bob Sunday Franko who testified as DW1. He testified that the 3rd defendant was on leave at the material time. He further submitted that the 2nd defendant committed the offence in a place called Seeta, outside his duty station which was set out in **Exhibit DE1**, the contract between the appellant and Mukono Teachers SACCO. He contended that these facts left the 2nd and 3rd defendants outside the contractual relationship with the appellant and therefore their actions on the fateful day were not within the contract.

He added that **Exhibit PE3**, the Record of Proceedings in respect of the Criminal Case in which the 2nd and 3rd defendants were tried and in

which the 2nd defendant was convicted on his on plea of guilt showed no link whatsoever with the appellant. And that because the appellant was their employer it did not of itself make her vicariously liable for the criminal acts of the 2 defendants in the circumstances. He submitted that the learned trial judge wrongly relied on the fact that the death of the deceased Tamale was not contested in the criminal trial to come to the conclusion that the appellant was vicariously liable for the death of the deceased because the relationship of employer/employee was not in dispute.

Counsel went on to submit that the trial judge overlooked the evidence of the appellant that the scene of the crime was outside the duty station of the 2nd defendant. That she also ignored the fact that the 3rd defendant was on leave and therefore not within the control of the appellant. That the trial judge also ignored the evidence that there were other people who were not the subject of the proceedings but employees of G4 Security, a different company which was also the subject of the criminal proceedings. That the actions of the 2nd and 3rd defendants in the court proceedings from which the trial judge drew the conclusions in her judgement were not reasonably contemplated by the appellant.

Counsel went on to submit that the learned trial judge widened the obligations of the employer to cover private frolics and associations of employees. That this was never contemplated in the master servant relationship because employee frolics, or leave are well-known exceptions to the concept of *respondeat superior*. That the law on the master servant relationship is that the employer is only liable for the actions of an employee which are reasonably incidental to their course of duty. He referred us to the decision in **Muwonge v Attorney General [1967] EA 17**, which suggests that the test as to whether the employer is liable is a subjective one where the circumstances of each case have

to be construed as a whole. Counsel also referred us to the decision in **Makoonjola v. Metropolitan Police Commissioner [1992] All ER 717**, in which a police officer on leave misused his warrant card to gain access to the plaintiff's premises and demanded for sexual favours and the courts held that the employer was not liable for his actions.

The appellant's counsel further pointed out that the trial judge correctly referred to the law and the liability of the master for the acts of employees. However, she arrived at the wrong conclusion when she held that what the 2nd defendant did was outside the employment contract but within the scope of his employment. He submitted that this ruling on the point contained a contradiction within it that cannot be true. Further that this holding by the trial judge contradicted her reliance on the judgment of Solomon LJ in **R v. Industrial Injuries Commissioner, *Ex Parte* A.E.U [1966]2 QB 21**, where he held that *"the course of employment also includes when one is doing something for purposes of his own which is reasonably incidental to the employment."*

Counsel went on to submit that it cannot be said that any form of crime, including those committed by the 2nd and 3rd defendant, for which the trial judge found the appellant vicariously liable were not and could not be said to be the lawful acts which are incidental to the duties of a guard employed by the appellant. That the appellant is a registered company and duly licensed to carry out the lawful business of provision of private security. But contrary to this the trial judge held that, *"Besides, armed robbery and murder by shooting is incidental to the employment of an armed guard."* And that therefore the appellant could not escape liability where her armed guards engaged in criminal, reckless acts using the weapons that she supplied.

Counsel reiterated that this conclusion was not supported by the test in **Muwonge v Attorney General** (supra) from which the trial judge cited at length. He went on to submit that the comparison of the situation in this case to the incidence of a medical doctor and hospital which the trial judge employed as an analogy (at page 346 of the record) was not useful because in that analogy the negligence she referred to related to a hospital facility.

He went on to submit that any employer in the shoes of the appellant would have fallen victim to the 2nd defendant's scheme. And that though it was unfortunate, applying the test in **Muwonge** (supra), the actions of the 2nd and 3rd defendants were not reasonably foreseeable in the law. He further pointed out that the 2nd and 3rd defendants were sued jointly and severally with the appellant. That this was a proper case for the court to separate the actions that were not contemplated of the 2nd and 3rd defendants in their employment relationship with the appellant.

He finally submitted that the conclusions that were drawn from the evidence by the trial judge suggested that she did not properly evaluate the evidence on record. He prayed that we re-evaluate the evidence as a whole and come to findings of our own, as is required of a first appellate court.

In reply, counsel for the respondent submitted that in the trial court the issue whether the 2nd and 3rd defendants were employees of the applicant was never in contention. Therefore, the trial judge correctly found that the only issue for determination by the trial court was whether the criminal acts of the 2nd and 3rd defendants were performed within the course of their employment with the appellant. He further submitted that the trial judge's findings of vicarious liability where in

tandem with the evidence and the law. He invited this court to affirm these findings.

Counsel went on to submit that the appellant's witness Bob Sunday Franko testified that according to the appellant's Guidelines, which were never produced in court, the 2nd and 3rd defendants always arrived at their workstation at 5.00 pm for the evening shift and at 6.00 pm a spot check would be done by DW1 the supervisor, to ascertain that all guards were present at their workstations. He went on to state that the witness confirmed that the 2nd defendant indeed arrived at Mukono Teachers SACCO at 5.00 pm. And that DW1's evidence was never challenged by the appellant during cross examination. He further submitted that during cross examination DW2, Daniel Arinaitwe, stated that the recruitment of security guards by the appellant included a background check which was done in liaison with district security. And that if they did not trust these sources they would go ahead and ask for academic documents as well as letters from referees. Further that DW2 admitted that the appellant did not do a good background check on the 2nd defendant and that had the appellant done a thorough background check she would have discovered that the 2nd defendant was a deserter; a former rebel without an amnesty certificate.

Counsel for the appellant asserted that this testimony showed the reckless conduct of the appellant which exposed the general population to a high risk of firearm misuse as was seen in this case. Counsel went on to submit that in further cross-examination DW1 and DW2 conceded that given the nature of their work which involved carrying firearms, the appellant had an obligation to protect the general citizenry and this duty was non-delegable. And that in the instant case the appellant through its employees the 2nd and 3rd defendants,

whimsically abandoned its noble duty to the general populace resulting in the death of the late Tamale Ahmed.

Counsel further submitted that DW1, though he was lying initially, conceded that the 2nd defendant did not sign for his gun in the arrival book, contrary to the appellant's well established protocols and procedures as was stated by DW1 and DW2 during cross examination, at page 330 of the record of appeal. And that in addition in **Exhibit PE4**, the 2nd defendant's plain statement, at page 75 of the record of appeal, the 2nd defendant unequivocally stated that he never signed for the gun and 6 rounds of ammunition which he received from one Godfrey, the guard who was in the station before him.

Counsel went on to submit that this proved that the 2nd defendant did not follow the procedures of his employer and that undetected without reporting to his supervisor, coupled with the appellant's failure to do a thorough background check on him, led to the conclusion that the trial judge was correct when she held the appellant vicariously liable for the murder of Tamale Ahmed.

The respondent's counsel further submitted that the appellant did not adduce any evidence to show the procedures they used to monitor the firearms that they placed into the hands of the guards. That they did not ensure that the guns were not used for illegal or unlawful purposes. He asserted that the doctrine of vicarious liability is now settled. He referred us to the decision in **Lugya v Attorney General & Another (1975) HCB 371**, where it was held that a master is vicariously liable for the acts of his servant carried out in the course of his employment, even though the acts were done contrary to the specific instructions of the employer, so long as it is shown that the employment offered the opportunity to carry out the work or unauthorised acts. He further

submitted that the meaning and scope of the term *"course of his employment"* was extensively and authoritatively discussed by Emily Frinch and Stefan Fafinski in their book *"Tort Law,"* 3rd Edition at pages 76 to 80. He quoted extensively from the text in that treatise to explain the principles upon which the phrase *"in the course of his employment"* is founded.

Counsel also referred us to the decision of the House of Lords in **Lister & Others v. Hesley Hall Ltd [2002] 1 AC 215,** where the court developed and adopted the *"closeness of connection test"* to determine whether an intentionally wrongful act by an employee would fall within the course of his employment. He submitted that the court found that where there was a close connection between the employment and the abuse, the employer would be vicariously liable. And that this was particularly so where there was an obvious risk of abuse, which in the circumstances the employer should have been alert of.

In applying the closeness of connection test the respondent's counsel asked us to consider the evidence of Sarah Nyanzi, PW1. She stated that the 2nd defendant reported to his workstation at around 5.00 pm and was supposed to stay until 7.00 am. That he was dressed in full official uniform of the employer and he received a firearm, the property of the appellant, which he did not sign for. That the trial judge found that the employment of the 2nd and 3rd defendants with the appellant entitled them to be armed and indeed the 2nd defendant was. That the trial judge followed the decision in **Paul Byekwaso v. Attorney General** (supra) where the court relied on **R v. Industrial Injuries Commissioner, Ex Parte AEU [1996] 2 QB 31,** where it was held that it is assumed that in law a man is working in the course of his employment, not only when he is doing that which he is employed to do, but also when he is doing something for purposes of his own which

is reasonably incidental to his employment. And that while the appellant desperately attempted to distance herself from the criminal acts of her employees, in light of this authority the learned trial judge rightly found the appellant vicariously liable for the actions of the 2nd and 3rd defendants. He prayed that the trial judge's findings and orders be affirmed by this court.

In rejoinder counsel for the appellant reiterated that the learned trial judge extended the scope of application of the principle of vicarious liability to cover instances never contemplated in the law when she held that the appellant was liable for the criminal acts of the 2nd and 3rd defendants. That she arrived at a wrong conclusion when she found that certainly what the 2nd defendant did was outside the employment contract but within the scope of his employment.

Counsel further reiterated that the trial judge's finding, at page 347 of the record, that *"besides armed robbery and murder by shooting is incidental to the employment of an armed guard"* was a grave error on her part. He reiterated his prayers.

Determination

In coming to her decision on the question of vicarious liability, the trial judge reviewed the evidence and held as follows:

> *"In my humble opinion, vicarious liability comes in where the employee misuses the authority given or acts in a manner that exhibit's negligence or recklessness during the performance of duty.*
>
> ...
>
> *Likewise, a gun/firearm is a lethal weapon that can be misused by the holder. Anyone using it must pass a background check. It is expected that a security firm like the first defendant before entrusting anyone with a gun must ensure that they are qualified to handle such firearms and have the credentials needed to perform their duty of security but not cause*

insecurity. Proven integrity of the employee before recruitment is very crucial.

If your employee turns out to be a robber and murderer like in the instant case, you cannot escape liability because he accessed the firearm in the course of his employment and such conduct is evidence of lack of due diligence during the recruitment exercise.

Besides, armed robbery and murder by shooting is incidental to the employment of an armed guard. The employer cannot escape liability where his armed guards engaged in criminal, and reckless acts using the weapons supplied by the employer.

I do not agree with the submission of counsel that the 1st defendant is not liable because the 2nd defendant was on the frolic of his own. (sic)

The first defendant had full control over them, armed them but failed to ensure that they are not a danger to the community around them.

I entirely agree with the holding of Solomon LJ as cited above that ***course of employment also includes when one is doing something for purposes of his own which is reasonably incidental to his employment****.*

The 2nd defendant went on a robbing mission using the firearm supplied by the 1st defendant. Being armed was incidental to his employment much as he did something which was illegal and for his own purpose. The first defendant provided him with the opportunity to rob and kill.

In view of the above, I find that the plaintiff has ably proved that the 2nd defendant's criminal acts were committed while in the course of his employment with the 1st defendant holding the first defendant vicariously liable for his employees' conduct."

It is worth noting that in her decision, the trial judge omitted the liability for the acts of the 3rd defendant. I too will not focus on him because no decision was made about him by the court upon which an appeal can be based. The matter was also not raised by the respondent and so I will not pursue it here.

Nonetheless, the trial judge correctly laid out the test of the master's liability for the acts of his servant as it was stated in **Muwonge v. Attorney General** (supra) and the relevant principle that she singled out and relied upon was as follows:

"I think it is dangerous to lay down any general test as to the circumstances in which it can be said that a person is acting within the course of his employment. Each case must depend on its own facts. All that one can say, as I understand the law, is that even if a servant is acting deliberately, wantonly, negligently or criminally, even if he is acting for his own benefit, nevertheless if what he did was merely a manner of carrying out what he was employed to carry out then his master is liable."

In that case the court went further to set down one principle of law which was then applied in determining whether the Attorney General was liable for the acts of the employee. The principal was whether the acts of the policeman were committed ***"in the course of his duty,"*** no matter whether they were committed contrary to general instructions. This seems to me to be similar to, or the same principle as the *"closeness of connection test,"* commended to us by counsel for the respondent. This is an important principle that should be observed in coming to a conclusion whether an employee acted in the course of his employment.

In **Namwandu v Attorney General [1972]1 ULR 54**, at page 56, the court pointed out that the leading case on this matter is **Muwonge v Attorney General** (supra). The court traced the test that was laid down by *Salmond on Torts*, 15th Edition, at page 620 in the following passage:

"It is clear that the master is responsible for acts actually authorised by him, for liability would exist in this case even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to an employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with the acts which he has authorised that they may rightly be regarded as modes – although improper modes – of doing them. In other words, the master is responsible not only for what he authorises his servant, to do but also for the way in which he does it. If a servant does negligently that which he was authorised to do carefully, if it does fraudulently that which was authorised to do honestly, or if he does mistakenly that which he was authorised to do correctly, his master will answer for that negligence, fraud or mistake. On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as

to be a mode of doing, but is an independent act, the master is not responsible, for in such a case the servant is not acting in the course of his employment, but has gone outside of it. He can longer be said to be doing, although in a unauthorised way, what he was authorised to do. He is doing what he was not authorised to do at all."

The court drew from these principles regarding the claim for compensation for the death of persons at the hand of soldiers of the Uganda Army. Rendering judgement in favour of the Attorney General, at page 57, the court ruled as follows:

"From the evidence before me, it is clear that the soldiers, angry at seeing their comrades dead, sought to wreak vengeance. They acted wilfully, wantonly and cruelly. There was no justification or excuse for their conduct. Their acts were barbarous, savage and outrageous. There is no doubt that the individual soldiers who killed the two deceased persons would be liable in damages for their wrongful acts. But before the Government of Uganda can be held liable, it must be proved that the soldiers were acting in the exercise of their duties. I find that they were not acting in the exercise of their duties. They were acting in furtherance of their own private purpose. Their acts were independent of and unconnected with their duties, whatever these may have been at the time. They were not acting in the exercise of the that had gone outside it."

The judge observed that the facts in **Namwandu's** case (supra) were similar to those in **Leesh River Tea Company Ltd v. British India Steam Navigation Co Ltd [1966] 3 All ER 593**, where it was held that the theft on the part of the ship by a servant of stevedores engaged in loading and unloading cargo, was quite outside the tasks normally involved in such duties. Hence, though the employment of the thief as a stevedore provided him with the opportunity to steal the part of the ship in question; such theft was not sufficiently connected with the employment in question to justify the conclusion that the act of the thief was one for which the ship owners should be liable to the cargo owners when, as a result of the theft, the ship was rendered unseaworthy and cargo was damaged.

The judge emphasised that the soldiers because they were clothed in the anonymity in their uniforms, because a number of them happened to be together in some force, had the opportunity to commit the double murder with impunity. But what they did on that occasion was in no way connected with their duties. He held so with great reluctance because he came to that conclusion by applying the law as he found it. He further pointed out that the law as it stood operated *harshly* in an emerging country especially when conditions were unstable.

The Supreme Court employed the same principles, with a positive result, in **A. K. P. M. Lutya v. Attorney General, Civil Appeal No 10 of 2002**. In that case the Attorney General was sued in circumstances where soldiers who had been deployed to carry out security duties at Mpoma Satellite Station entered onto the land of the appellant and destroyed trees while in the process of implementing their duties. The Attorney General pleaded that the soldiers acted on *"a frolic of their own."* The argument was accepted by this court, but on appeal to the Supreme Court, employing the principle in **Muwonge's case,** the court (per Tsekoko, JSC) found and held that:

> *"But, where, as is quite evident in this case, that soldiers made it routine to harvest timber and fruits from the appellant's farm for the purposes of enabling them to perform their functions, it ceases to be a frolic of the soldiers. The matter appears to have been so routine and so apparently official that the appellant had to complain not only to RCs but also to the resident District Commissioner and the Commanding Officer and eventually to the Chief of Staff of the army. The latter acknowledged the damage which he impliedly attributed to failure by the state to provide for the soldiers.*
>
> *The Ministry of Defence was bound to provide accommodation for and food to the soldiers. Failure to make the provisions for the soldiers tempted the soldiers and their commanders to use initiative for the soldiers to survive in order to be able to perform state duties. Surely it cannot lie in the mouth of the respondent to say that in those*

circumstances soldiers did what they did at their peril or that they should have slept in the open to face the vagaries of nature. I cannot agree."

In similar vein, Odoki, CJ held that:

"I agree that there was sufficient evidence to prove that the soldiers who plundered the appellant's farm and forest were acting within the course of their employment because the trees, timber and firewood they removed from the appellant's forests were used by them to facilitate the performance of their duties. The trees and grass they removed were used to build houses and huts for their barracks and the firewood was used to cook the food they had secured from his land. These activities were part of the manner in which they were enabled to carry out their duties. It was immaterial if the manner in which they carried out their duties was improper or unauthorised, so long as it was merely a manner of carrying out their duties. ***Muwonge v. Attorney General (1967) EA 7.***"

The facts in that case showed that the manner in which the soldiers vandalised the forests and farm was indeed incidental to carrying out the official duties that they had been detailed to perform in the area. That they vandalised the farm and forests in order to survive so that they could execute the instructions of their employer.

The facts in the instant case are very different from those where liability is extended to the employer for unlawful acts of the employee. Bob Sunday Franko (DW1) confirmed that the 2nd defendant was an employee of the appellant. That on the fateful day, as was his routine, he carried out spot checks on the sites under guard by the appellant, including Mukono Teachers SACCO, where Ogwang Bosco was deployed with another guard. That he found only one guard who informed him that Ogwang had gone to get treatment at a nearby clinic because he was not feeling well. Further that he spent about one hour at Mukono Teachers SACCO waiting for Ogwang to return. And that when he did not return, he began to search for him at nearby clinics in fear that his condition could have worsened, so that he could help him. That when he failed to find him, he called the night supervisor for Mukono, one

Robert Kerolin and together with Kerolin they reported the matter to Mukono Central Police Station, where they were advised to find out whether Ogwang was at his home.

Sunday Franko further testified that though he did all this to satisfy himself that Ogwang was well, he was also concerned that the Short Assault Rifle that he had been given to use to guard the SACCO premises was still in his possession. He wanted to know whether it was safe and in good hands. However, they did not find Ogwang at his home and the door was locked from the inside. And upon their return to the Police Station they got information that someone had been shot at, at Seeta, that evening at 9.00 pm. That after this information DW1 began to suspect that it was possible that Bosco Ogwang was involved in this incident.

Sunday Franko was cross-examined about the practices and procedures of the appellant with regard to the management of security guards and guns. He said that it was the practice to do spot checks on the security guards at their work stations; that guards were also not supposed to move around, loiter, with firearms but were to find them at their duty stations. He emphasised that as soon as he found out that Ogwang was missing he reported the matter to the police and was given a police vehicle to look for him, but in vain.

The 2nd witness for the appellant, Daniel Arinaitwe, stated that he was in charge of overseeing the operations of the appellant, as Head of Security. He stated that he was informed about the disappearance of Ogwang from his workstation on the fateful night and he participated in searching for him but in vain. He further stated that the appellant company operated a strict Code of Conduct which the 2nd defendant broke. That in fact, the crime that the 2nd defendant committed was not

at the place he had been deployed to guard, it was not even at any of the sites under guard by the appellant.

He further testified, as did the first witness, that the defendant Ogwang was not supposed to leave his duty station without first reporting to the supervisor. That he was supposed to wait for the supervisor to stand in for him before he could go and buy medicine, or to send the supervisor to buy it for him. At the very least, he was supposed to leave the firearm with his colleague at the duty station.

Sunday Franko further testified that in the same night, the 16th April 2013, they were informed that there was a shooting at a place in Seeta where the deceased was killed. That he was also informed that the baton that was in the possession of Ogwang Bosco, the property of the appellant, was recovered at the scene of the crime. Further efforts to search for Ogwang by the Military Police led to his arrest in Pader, where he was found with the deceased's telephone in his possession.

I observed that the facts in this case are similar to those in **Attorney General of British Virgin Islands v Hartwell [2004] 1 WLR 1273**. In that case, the Privy Council held that a police officer, who had abandoned his post and embarked on a vendetta of his own, was not acting in the course of his employment when, in a jealous fit of rage, he fired his police revolver in a bar injuring a tourist. Lord Nicolls held that this was not a case where a police officer had used a service revolver incompetently or ill-advisedly in furtherance of police duties. He used the revolver, to which he had access for police purposes, in pursuit of his own misguided personal aims. Although he was on duty before, he had left his post. He improperly helped himself to the police revolver and from first to last, from deciding to leave his post to the use of the firearm, his activities had nothing whatsoever to do with police duties, either

actually or ostensibly. He had deliberately and consciously abandoned his post and his duties and put aside his role as a police constable. That could properly be regarded as a *"frolic of his own"*. Vicarious liability was therefore rejected.

It is clear from the testimonies of the appellant's witnesses that not only did Ogwang breach the Code of Conduct of the appellant company by leaving his workstation with a firearm; he also used the firearm in a place far off from his work station for a purpose for which it was not entrusted to him. He used it to carry out a robbery in which the deceased met his death. This conduct was very different from what the appellant had instructed Bosco Ogwang to do on her behalf. It therefore cannot be said to have been *incidental* to his duty to guard Mukono Teachers SACCO. The learned trial judge therefore wrongly applied the principles that were established in this jurisdiction in **Muwonge v Attorney General** (supra) to circumstances that were akin to those in **Attorney General of British Virgin Islands v Hartwell** (supra).

As to whether the appellant was negligent in the process of recruitment of the said Ogwang, who turned out to be a former rebel, both of the appellant's witnesses were cross examined about the process of recruitment in the company. DW1 stated that they did a security check on Komakech (Ogwang). They took his finger prints and Police confirmed that he had no past criminal record. That he did not get information that he was formerly with Kony rebels as a captive, before he was employed and deployed.

Daniel Arinaitwe, in cross examination, stated that recruits for the company were identified upcountry, and that security checks were carried out at the source. That he thought the Police was competent so he did a background check on Ogwang with the Police which returned

the result that he was not a criminal. That the company checked on criminality and if the said Ogwang was with rebels before he was recruited, this must have escaped the Police; or if they knew about it, then they lied to him.

The court further took Daniel Arinaitwe to task about the process of recruitment in the appellant company. He explained that during security checks the company relies on academic papers, reference letters and they work with the District Security Committee. That in his view, the system was water tight. Further that they had processes that were flouted by Ogwang but it was also through the efforts of the appellant that he was arrested. That the Police left it all to the appellant company who worked with the Military Police to track him down at their own cost. Police was only involved in correction.

It is my view that the appellant's staff demonstrated that they were concerned about the antecedents of the people that they recruited and entrusted with firearms to carry out their business of providing security services clients. They also found out that the errant Ogwang was missing within an hour of his departure from his workstation. They participated in searching for him that very night and his eventual arrest is credited to them.

Criminal Conduct is personal conduct that often defies efforts to prevent it from occurring. The appellant company did all that was within its means to establish the character and antecedents of Ogwang before he was recruited but they seem to have been failed by the absence of information with the police about the fact that he was formerly with the rebels of Kony. This, in my view, further excepts them from liability for his subsequent criminal conduct for which he confessed and was punished in criminal proceedings before the courts.

In conclusion therefore, I would find that the trial judge erred when she held that the appellant was vicariously liable for the death of the deceased, Tamale Ahmed. Much as I greatly empathise with the family of the deceased for the untimely loss of their relative at the hands of a criminal, it follows that it is unnecessary to consider the rest of the grounds of appeal that were framed for determination by this court.

With regard to the costs of this appeal, it is a well settled principle that the successful party in civil litigation is awarded costs, but the court or judge may hold otherwise, and lawfully so. The principle flows from section 27 (2) of the Civil Procedure Act which provides that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

The discretion accorded to the court to deny a successful party the costs of litigation must be exercised judicially and for good cause. Costs are an indemnity to compensate the successful litigant for the expenses incurred during litigation. Costs are not intended to be punitive but a successful litigant may be deprived of his costs only in exceptional circumstances (**Wambugu v. Public Service Commission [1972] E.A. 296**).

In awarding costs therefore, the courts must balance the principle that justice must take its course by compensating the successful litigant against the principle of not gaging poor litigants from accessing justice through the award of exorbitant costs. In this case, the appellant has succeeded in her appeal but as was observed earlier in this judgment, the law in area is onerous. A litigant in the position of the respondent would be hard pressed to pay the costs of this appeal given her plea that she was dependant on the deceased. She lost her son and there is no compensation due to her as the law of vicarious liability is strict

regarding the actions of the employees apropos their duties in the course of their employment.

The respondent would have had recourse to the 2nd defendant in terms of damages for the loss of her son, but he was not party to this appeal. It is also known to this court that he is in prison for the offence that he committed when he murdered the deceased. In the circumstances, it is my view that justice demands some reprieve for the respondent. I would not add to her burden by ordering her to pay the costs of this appeal to the appellant, although she succeeded in her quest. It would appear to a bystander to be double punishment to the grieving respondent, which is contrary to the settled principles for awarding costs in civil litigation.

In the end result, I would allow this appeal, set aside the judgment and orders of the trial court, with each party to bear its own costs in this court and in the court below.

Irene Mulyagonja

JUSTICE OF APPEAL

15/2/2022

THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(CORAM: MADRAMA, MULYAGONJA, MUGENYI, JJA)

CIVIL APPEAL NO 160 OF 2019

SECURITY GROUP UGANDA LTD} ..... APPELLANT

VERSUS

HAJJATI ZAM ZAWEDDE

(Administrator of the Estate of Tamale Ahmed} .....RESPONDENT

(Appeal against the decision of Mutonyi J dated 30th April 2013, In Mukono High Court Civil Suit No. 20 of 2014)

JUDGMENT OF CHRISTOPHER MADRAMA, JA

I have had the benefit of reading in draft the judgment of my learned sister Hon. Lady Justice Irene Esther Mulyagonja, JA.

I agree with her that the appeal ought to succeed with the orders she has proposed and on the grounds given in her judgment and I have nothing useful to add. Since Hon. Lady Justice Monica K Mugenyi also agrees, the appellants appeal is allowed and the judgment of the trial court is set aside. Each Party will bear its own costs in this court and in the court below.

Dated at Kampala the 1st day of feb 2022

Christopher Madrama Izama

Justice of Appeal

THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA
AT KAMPALA

CORAM: MADRAMA, MULYAGONJA AND MUGENYI, JJA

CIVIL APPEAL NO. 160 OF 2019

BETWEEN

SECURITY GROUP COMPANY LIMITED ..... APPELLANT

AND

HAJJAT ZAM ZAWEDDE
(Suing as Administrator of the Estate
of the Late Tamale Ahmed) ..... RESPONDENT

(Appeal from the Judgment and Orders of the High Court of Uganda at Mukono (Mutonyi, J) in Civil Suit No. 14 of 2017)

JUDGMENT OF MONICA K. MUGENYI, JA

I have had the benefit of reading in draft the lead Judgment of my sister, Hon. Lady Justice Irene Mulyagonja, JA. I agree with the decision arrived at, the reasons therefor and the orders made, and have nothing more useful to add.

Dated and delivered at Kampala this ..15th.. day of ..feb....., 2022.

MMugenyi;

Hon. Lady Justice Monica K. Mugenyi

JUSTICE OF APPEAL