THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

HCT-00-CV-CA-0057-2007

TINDIMWEBWA NARISI :::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

MUTEBI SALIM ::DEFENDANT

JUDGMENT

The appellant herein, Narisi Tindimwebwa, being dissatisfied with the entire judgment of the Chief Magistrate of Mengo, Her Worship Margaret Mafabi, delivered on 02/11/2007 appealed to this court on the following grounds:

1. The learned Chief Magistrate erred in law and fact when she held that the plaintiff did not show how the defendant was vicariously liable, and thereby came to a wrong conclusion occasioning a miscarriage of justice.

2. The learned Chief Magistrate erred in law and fact when she held that the plaintiff failed to prove that he was employed as a Special Hire driver and thereby arrived at a wrong conclusion occasioning a miscarriage of justice.

3. The learned Chief Magistrate erred in law and fact when she held that the appellant had failed to prove special damages and thereby arrived at a wrong conclusion occasioning a miscarriage of justice.

4. The learned Chief Magistrate erred in law and in fact by dismissing the appellant's suit on the ground that he failed to add Adwan Rashid as a co-defendant, and thereby arrived at a wrong conclusion occasioning a miscarriage of justice.

5. The learned Chief Magistrate erred in law when she held that the appellant had failed to prove his case on a balance of probabilities and thereby arrived a wrong conclusion occasioning a miscarriage of justice.

It is prayed that the appeal be allowed; the judgment of the learned Chief Magistrate be set aside, and judgment be entered for the appellant; and the appellant be awarded costs of the appeal and the court below.

From the pleadings and evidence on record, the appellant sued the respondent on account of an accident that occurred on 21/07/2003 at 4.00 p.m. on Entebbe Road, Kampala. The appellant alleged in his plaint and testimony in court that the door of the defendant's lorry that was swinging carelessly as the lorry was moving hit him, thereby occasioning him injury and loss.

According to the affidavit of service of one Nsereko Muhammed, a process server, service was effected on the defendant on 26/11/2004. The defendant did not file a defence and judgment in default was entered against him on 01/02/2005. The matter thereafter proceeded exparte and was dismissed by the learned trial Chief Magistrate on the grounds that the appellant did not prove that the respondent was vicariously liable, that the appellant did not join the respondent's driver in the suit as a co-defendant, and further that special damages had not been proved. Hence the appeal.

It is the duty of the first appellate court to review the record of the evidence for itself in order to determine whether the conclusion reached upon the evidence by the trial court should stand. It is trite that if the conclusion of the trial court has been arrived at on conflicting testimony after seeing and hearing witnesses, the appellate court a arriving at a decision would bear in mind that it has not enjoyed this opportunity and the view of the trial court as to where credibility lies is entitled to great weight: ***Peters vs Sunday Post [1958] E A 424***.

I am of the view that the five grounds are substantially repetitious. They can conveniently be summarized as follows:

1. Whether the trial Chief Magistrate subjected the evidence before her to adequate scrutiny.

2. Whether the trial Chief Magistrate erred in law when she awarded no damages to the plaintiff.

I will therefore handle Grounds 1, 4 and 5 together and then Grounds 2 and 3 also together.

First, Grounds 1, 4 and 5.

At page 1, last line, 1st paragraph, the learned Chief Magistrate observed:

> "***He sued him under vicarious liability although he did not state so.***"

And at page 2, 2nd paragraph, she observed:

> ***"He did not even sue the driver or agent or employee as a defendant. He did not adduce any evidence to prove that Adwan Rashid was employed or was the agent of the defendant."***

And at page 3, 2nd last paragraph, she concluded:

> ***In court's view, the plaintiff completely failed to prove that the defendant is vicariously liable for the acts of Adwan Rashid. He did not even bother him to add him as a co-defendant."***

Learned Counsel for the appellant's argument is that the learned trial Chief Magistrate erred in her findings above; that on the contrary, there was ample evidence to show that the defendant was vicariously liable for the accident.

I have addressed my mind to the able submissions of Counsel.

In paragraph 4 (a) of the plaint, the plaintiff states that on 21/07/2003 while he was lawfully and properly walking along Entebbe Road, he was hit and/or banged by the swinging/loose rear door of the defendant's vehicle, an Isuzu Lorry Reg. No. UAD 967U. And in paragraph 4 (b) he states that at the time of the incident, a one Adwan Rashid, a servant and/or agent and/or employee of the defendant, was driving the said vehicle within the scope and course of his duties and/or employment. The pleadings are therefore clear that the defendant was being sued in his capacity as the owner of the affending motor vehicle. In fact, in paragraph 6 of the plaint, the plaintiff was categorical that the accident/incident was solely caused as a result of negligent and/or reckless driving on the defendant's servant/agent/employee within the scope and course of his duties/employment, for whose actions the defendant was vicariously liable. It is therefore not true, as the learned trial Chief Magistrate asserted, that he sued him under vicarious liability but did not state so.

From the records, summons in the case were served on the defendant but he ignored them. As a result, an interlocutory judgment was entered against him. Failure to file a defence raises a presumption of a constructive admission of the claim made in the plaint. The story of the plaintiff, in the absence of a defence to contradict it, must in such circumstances be accepted as the truth: ***Agadi Didi vs James Namakajjo HCCS No. 1230/1988***.

The question whether a plaint discloses a cause of action against the defendant is determined upon the perusal of the plaint alone, together with anything attached as to form part of it. It is also determined upon the assumption that any express or implied allegations of fact in it are true. A defendant who seeks to challenge the plaintiff's story

files a defence. Accordingly, the issue as to whether or not the defendant was liable, vicariously or otherwise, was determined upon the defendant's failure to file a defence and upon the interlocutory judgment being entered against him.

It was immaterial that the plaintiff had not joined the driver of the lorry as a party to the suit. The plaintiff was at liberty to sue the defendant either jointly with the driver or alone. There is ample authority for this. In ***Bahemuka vs Anywar [1987] HCB 71*** court held that the plaintiff is at liberty to sue anybody he thinks he has a claim against and cannot be forced to sue somebody.

At the hearing, he testified that upon sustaining injury, people present at the scene forced the errant driver to take him to the clinic for treatment. The driver was called Adwan Rashid. He also testified that the owner of the lorry, according to Police investigations and information furnished by the Turn boy, was the respondent herein. This evidence was never challenged. Under Section 133 of the Evidence Act, no particular number of witnesses shall in any case be required for the proof of any fact. Given that neither the plaintiff's pleadings nor his evidence was challenged, I would agree with the submission of learned counsel for the applicant, Mr. Brian Othieno, that the evidence on record was enough to show, in the absence of a defence to contradict it, that the respondent was vicariously liable. Learned trial Chief Magistrate did not subject the evidence before her to adequate scrutiny. If she had done so, she would have found the respondent liable. I would therefore find merit in the 1st, 4th and 5th Grounds of appeal and I do so.

I now turn to Grounds 2 and 3, together. They relate to special and general damages. First, special damages.

Special damages are those over and above the damage which the law presumes to have occurred and which are easily quantified in money terms, e.g. loss of wages, damage to property and so on. They must be specified item by item, in the claim. Hence the general rule that special damages must be specifically pleaded and strictly proved. In one of the

leading cases on pleading and proof of damages, ***Ratcliffe vs Evans [1892] 2 Q.B 524***, Bowden L. J stated (at pages 532 – 533).

> ***"The character of the acts themselves which produce the damage and the circumstances under which these acts are done must regulate the degree of certainty and particularity with which the damage ought to be proved. As such, certainty must be insisted on in proof of damage as is reasonable, having regard to the circumstances and the nature of the acts themselves by which the damage is done. To insist upon less would be to relax the old and intelligible principle. To insist upon more would be the vainest pedantry."***

I agree.

In the instant case, the plaintiff particularized special damages as follows:

1. Medical Expenses ……Shs. 675,000/=
2. Loss of earnings (Shs.40,000/= per day) ……. Shs.1,240,000/=
3. Transport expenses (special hire) …….. Shs.1,200,000/=
4. Police accident report ……..Shs. 50,000/=

Total Shs.3,165,000/=

As regards the prayer for Medical expenses, the appellant tendered in evidence Exh.P1, the receipt, in proof of what he paid at the clinic.

It is stated to be for medical treatment and investigations. He also tendered in evidence a Police Accident Report. Hence the claim of Shs.50,000/= in that regard.

Commenting on the two, the learned trial Chief Magistrate stated (page 2, 5th paragraph):

"It is possible he incurred the medical expenses and paid for the police accident report but has he proved on the balance of probabilities that the defendant is vicariously liable (sic)."

The sentence as it stands is meaningless. However, in the context of the entire judgment, court is able to tell that what she had in mind was that much as the plaintiff may have incurred the two expenses, since he had failed to prove that the defendant was vicariously liable, the claims had not been proved as well. In view of the court's holding that evidence on record had sufficiently proved so, there is no valid reason to deny him the same. I would, therefore allow the two claims and I do so.

As regards the claim of Shs.1,240,000/= being loss of earnings, the plaintiff did not plead anywhere in the plaint that he was a Special Hire driver. He merely claimed Shs.40,000/= per day as lost earnings. At the hearing, he testified that the swinging door hit him as he was walking along the road. He was not driving, to raise inference that he was in the business of Special hire. In any case, from his own evidence, his vehicle (whose registration number he did not disclose for verification purposes) had broken down at the time. He did not say for how long it had been off the road. By his own admission, he was not the owner of the vehicle he was using for special hire. The alleged owner did not appear as a witness either. He claims that he was earning Shs.40,000/= per day and his boss Shs.20,000/=, implying that his earnings were twice as much as those of the owner of the car. It is trite that a party is expected and bound to prove the case as alleged by him in the pleadings. He cannot be allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of amendment of the pleadings: ***Interfreight forwarders (U) Ltd vs EADB [1994 – 95] HCB 54***.

Given that the plaintiff did not plead in his plaint that he was a special hire driver and therefore claiming against the defendant in that capacity, his claim was like that of any other pedestrian involved in a road accident. It was incumbent on him to prove that he was indeed earning Shs.40,000/= per day, whatever of the source. It is immaterial that the defendant opted not to be heard on the matter. He still had to prove his claim on a

balance of probabilities. Commenting on this matter the learned trial Chief Magistrate said (p.2 of the judgment, 3rd paragraph):

> ***"The plaintiff did not adduce evidence that he was employed as a special hire and earned Shs.40,000/=. He did not mention the vehicle he used to drive neither did he bring the owner of the vehicle as a witness……."***

She saw the plaintiff as he testified and doubted his evidence on this point. In view of the plaintiff's failure to plead the source of earnings in the plaint and his failure to adduce independent evidence to support his testimony that he was a special hire driver earning Shs.40,000/= from the owner of the vehicle, I'm unable to fault the learned trial Chief Magistrate's conclusion on this point.

As regards his claim of Shs.1,200,000/= being transport expenses (special hire), there the appellant presented a receipt, Exh. P2. Asked how much he was paying per day, he kept quiet (according to the record of proceedings). Whereas he appears to have been told by his doctor that treatment would take a month, he did not say that he went to the doctor's place daily, for 31 days. Moreover, it sounds rather preposterous that an alleged special hire driver working for the owner of the car would in turn go in for a special hire vehicle from a Tour Company that charged him Shs.1,200,000/= a month and seek to pass on the cost to the defendant. At the end of the day, the learned trial Chief Magistrate rejected this claim.

Once again, she saw the witness as he testified and assessed his demeanour. Her view at to his credibility on this point equally deserves great weight. The court cannot rubber stamp a matter simply because the defendant has not contested it. If that were so, formal proof would be meaningless. In view of the doubt I have personally expressed on this expenditure, I'm unable to fault the trial Magistrate's conclusion on this matter. The end result is that only expenditures on medical treatment and Police accident report are allowed as special damages. The rest are disallowed for want of proof.

I now turn to the appellant's prayers for general damages.

As regards general damages, facts must be produced, not necessarily to prove the damages specifically but to show that the plaintiff incurred or must have incurred damage as a result of the defendant's wrongful act to him or her. In the instant case, the plaintiff was under duty to prove that as a result of the accident, which was caused by the negligent acts of the defendant's servant, he suffered damage or was financially disadvantaged.

The learned trial Chief Magistrate did not doubt the plaintiff's evidence that he sustained injury as a result of the defendant's servant's negligent act. Her refusal to grant him a remedy was based on wrong premises, that is, that the plaintiff had not proved on a balance of probabilities or at all that the defendant was vicariously liable for the acts of his driver.

It is now an established judicial practice that where the plaintiff claims damages and the suit is dismissed, the trial court should assess damages that would have been awarded if the suit had succeeded: ***Fredrick Zaabwe vs Orient Bank & Others SCCA No. 4/2006***.

Counsel for the appellant too did not propose to court any figure he would consider to be appropriate as an award of general damages to his client. Normally after determining the appeal I would remit the matter to the trial Magistrate for her to assess damages. I note, however, that the case has been in Courts for too long and the trial Magistrate may have since changed stations. Further, there is ample evidence on record to enable me make the assessment.

Assessments of general damages depend in the main on the status of the plaintiff and the degree of the pain and suffering occasioned. From the record of the proceedings, the appellant did not lead evidence of the Doctor who treated him for purposes of demonstrating to court the degree of the pain and suffering he experienced.

In ***Matiya Byabalema & Others vs UTC [1994 – 95] HCB 64***, the appellant had his leg amputated after an accident which was caused by the defendant. High Court awarded him Shs.4,000,000/= but on appeal, the Supreme Court enhanced the award to Shs.9m/=. In ***Moses Kimeze vs Afri Plast Industries Ltd HCCS No. 490/97***, my brother Lugayizi, J. awarded Shs.3.5m/= to a plaintiff who at the place of work had had his 2 fingers cut off by a rotating machine. He had worked for the defendant for 3 months as a casual labourer. And in ***Donald Egeju vs A. G. HCCS No. 585/90***, Tsekooko, J. (as he then was) awarded damages of Shs.3.5m/= to the plaintiff who had sustained open head injury in a motor accident causing brain contusion, multiple bruises on the face and all over the body. He had been rendered un conscious for sometime and had spent three and half months in Hospital. Each case must of course be decided on the basis of its own unique facts and circumstances.

In the instant case, the Medical Report of Dr. J. B. K. Ntege Sengendo dated 08/07/2004 shows that the appellant had sustained a closed head injury with soft tissue bruises and haematoma at the occipital area of the scalp. The x-rays done showed no fracture. He was treated conservatively with antibiotics and analgesics for a period of 4 weeks until improved. When he examined him on 8/07/04, the affected areas had completely healed but he had occasional headaches.

I have considered the nature of the injury he suffered. Under Article 126 of the Constitution, this court is enjoined to award adequate compensation to victims of wrongs. Considering all the factors above, the relatively high cost of living and the fact that his claims for loss of earnings and transport expenses have been disallowed, I consider a sum of Shs.2,000,000/= (Shillings Two million only) to be adequate compensation to him in respect of the defendant's wrongful act to him. It is awarded to him.

The award of special damages shall attract interest at court rate of 8% per annum from the date of filing the suit till payment in full. The general damages award shall attract interest of 23% per annum from the date of judgment till payment in full. The appellant shall also have the costs of the suit, here and in the court below.

Accordingly, the appeal is allowed. The judgment of the learned trial Chief Magistrate is set aside and judgment entered for the appellant in terms stated above. The appellant is awarded the costs of the appeal and the costs he incurred in the court below.

Orders accordingly.

Yorokamu Bamwine
JUDGE
18/09/2009

18/09/09
Appellant present in person
Patrick Serwadda – Clerk to Mr. Othieno present

Court:
Judgment delivered.

Yorokamu Bamwine
JUDGE
18/09/09