THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA, AT KAMPALA

CIVIL SUIT NOS – 1330, 1332, 1331 AND 1294 OF 1998

1. Saulo Mawanda Ssempa
   (Suing through next friend
   William Ndawula Ssempa)
2. Saulo Mawanda Ssempa
   (Suing through next friend
   William Ndawula Ssempa)
3. Ruth Nalumenya :::::::::::::::::::::: PLAINTIFFS
4. Milcah Nakayenga Mubiru

VERSUS

THE ATTORNEY GENERAL :::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: HON. JUSTICE. V.F. MUSOKE-KIBUUKA

JUDGMENT

INTRODUCTION:

The four Civil Suits were consolidated by an order which was issued by Lugayizi, J., on 12th October, 1999. The cases were subsequently re-allocated to Magezi, J., and later to me. I left the files incomplete when I moved to Masaka Circuit. There were technical

difficulties in moving from Masaka to Kampala to complete these suits. Hence the unusual delay which must be and is deeply regretted.

PLEADINGS:

It is not in dispute that on 29th March, 1998, a frightening incident happened along Hoima Kampala road at Wamika, near Busunju across river Mayanja. In that incident, four medical doctors drawned in river Mayanja. The Motor vehicle, in which they were traveling, namely, Mini-bus, registration number 607 UBK, plunged into the flooded river after the bridge had been swept away by flooding waters. The deceased doctors were Dr. Michael Kyakulumbye Ssempa, and his wife Dr. Catherine Othieno Ssempa, Dr. Francis Xavier Mubiru and Dr. James Nalumenya.

The first plaintiff is son to the late Dr. Michael Kyakulumbye Ssempa and Dr. Catherine Othieno Ssempa. He sued, in the two cases by his next friend, William Ssempa. The third and fourth plaintiffs are widows to late Dr. James Nalumenya and Dr. Francis Xavier Mubiru.

All the plaintiffs sued the defendant in his representative capacity under Section 10, of the Government Proceedings Act, Cap.77. All the suits were instituted for the benefit of the members of the deceased's' families under Sections 5 and 6 of the *Law Reform Miscellaneous Provisions) Act, Cap.79.*

In their pleadings, the plaintiffs seek uniform orders. Those orders are:

a) general damages for loss of dependence
b) interest on general damages
c) costs of the suit.

In all the three amended plaints, in paragraph 5, the plaintiffs claim that the death of the four deceased doctors was occasioned by the negligence of the Uganda Government's Servants at the

Ministry of Works and the Uganda Police officers stationed at Busunju Police Post at the time. The plaintiffs claim that the defendant is vicariously liable for the negligence of those employees of the government which occurred during the course of their employment.

The plaintiffs specify the following particulars of negligence:

a) Neglecting or failing, by the police, to close and or divert the road or to notify the road users of the dangerous state of the said bridge so as to avoid the said accident.
b) Failing to close and or divert the said road so as to avert the use of the road to the dangerous bridge in time as to avoid the accident;
c) Failing to act professionally in the circumstances as to avert use of the road to the dangerous bridge so as to avoid the said bridge.

The plaintiffs claim that as a result of the negligence on the part of the defendant's servants, the plaintiffs and the members of the families of the deceased doctors suffered loss and damage.

In the defences, the defendant, in paragraphs 5, 6, and 7, of the defences, denied that his servants were either negligent or responsible for the death caused by the accident. He claimed that all reasonable steps were taken as soon as possible after the bridge had collapsed to ensure the safety of all road users. The defendant also pleaded that neither the collapse of the bridge nor the accident, in which the deceased doctors died were foreseeable.

Lastly, the defendant pleaded that the accident was caused solely by the negligence of the driver of Minibus, Toyota Hiace No.607 UBK, in which the deceased were traveling, who never headed or yielded to a police sign requiring him to stop.

The defendant thus contends that his servants were neither negligent nor responsible for the accident constituting the subject matter of this suit. He denies all liability in total.

AGREED FACTS:

Three facts were agreed upon by the parties before the commencement of the trial. They were:

- the fact that the alleged accident did, indeed, occur on 29th March, 1998;
- the fact of the death of Dr. Catherine Ssempa;
- Drowning as the cause of death of Dr. Catherine Ssempa.

ISSUES:

The following issues were identified and agreed upon for determination by Court:

a) Whether the defendant's servants were negligent;
b) Whether the driver of Motor Vehicle 607 UBK was negligent
c) Whether the death of the deceased resulted from the negligence of either of the persons mentioned in a) or b) above;
d) Whether the plaintiff's are entitled to the remedies which they seek through their plaints.

REASONS FOR REJECTION OF PRELIMINARY POINT OF LAW

Learned Counsel for the defendant raised a preliminary point of law to the effect that the suits were barred by the doctrine of *res judicata*. She tendered the Judgment by Okumu Wengi, J. in **Eron Namigadde Vs. The Attorney General, Civil Suit No.96/99**. The suit had been instituted by Namigadde who was one of the survivors of the accident in which the deceased in the instant suits drowned. Namigadde had sought general damages from the Attorney General upon alleging negligence by the Ministry of Works and the Police.

This Court made an order rejecting the point of law relating to these suits being ***res judicata***. It promised to incorporate the reasons for the rejection in this judgment.

The first reason, for rejecting that point of law, is that in order for the doctrine of ***res judicata*** to apply, one of the essential test or element must be that the parties to the current suit must be the same parties in the decided or previous suit or, if different, must be claiming from the parties in the previous suit. That was not the case in the instant suits.

Secondly, and more importantly,

> "***where res judicata is pleaded by way of estoppel to the entire cause of action, it amounts to an allegation that the whole legal rights and obligations of the parties are concluded by the earlier Judgment, which may have involved the determination of questions of law as well as findings of fact. To decide what questions of law and fact were determined in the earlier Judgment, the court is entitled to look at judge's reasons for his decision and is not restricted to the record." (Halsbury's Laws of England Vol.15, 3rd Edition, Paragraph 357 at P184).***

Looking at the judgment by the Hon. Justice Okumu Wengi, it is clear that the crucial issue of failure, by the police, to comply with a statutory duty, was never an issue in the suit of **Eron Namigadde Vs. The Attorney General** (supra). The particulars of negligence as stipulated in paragraph 5(i) (particulars of negligence of the police), in the Amended Plaint, clearly reflect the wording of Section 150(b) of the Traffic and Road Safety Act 170 (now Section 142(b), Cap.361). That was never in issue in **Eron Namigadde Vs. The Attorney General** (supra).

What was in issue in Eron Migadde's case was not whether the police breached its statutory duty toclose or divert the road as stipulated under Section 150(b) of the Traffic And Road Safety Act. Instead, the case was decided upon common law rules. The learned Judge recognized this fact at P.9 of the Judgment when he wrote;

> **"No statutes were cited in support of the argument relating to Statutory duty or the public duty to maintain roads in a safe state and to enable road traffic to move in relative safety from construction, structural or dangers menacing road users. What seems to have been relied on were common laws rules and case law."**

Those were the reasons for the rejection of the point of law raised on behalf of the defendant claiming that these suits were ***res judicata***.

DETERMINATION OF THE ISSUES

a) **Whether the Defendant's Servants were negligent**.

In all the plaints, in the consolidated suits, the plaintiffs claimed or alleged negligence from two categories of the defendant's servants. These were the police and the officers of the Ministry of Works. For either category of the defendant's servants, particulars of negligence were separately specified in the pleadings. The entire trial proceeded as if the plaintiffs were pursuing the allegations of negligence by both categories of officers of the defendant who had been named in the plaint.

However, it appears to Court, from the final submissions by learned counsel Mr. Kanyemibwa, for the plaintiffs, that the Plaintiffs abandoned their claims relating to the claim that the defendant's Servants from the Ministry of Works were negligent. Mr. Kanyemibwa stated at page 3, of the final submissions:

> **"3.1 At the outset we must point out that the thrust of the plaintiff's evidence as presented was against the Uganda Police at Busunju Police Station for their omissions before the occurrence of the said accident. The plaintiffs virtually led no evidence of negligence against the civil servants at the Ministry of Works. Even then, the evidence adduced by the representatives of the Ministry of works suggests no negligence on the part of the said Ministry. Therefore, it is to the Uganda Police that we now focus for the purpose of these submissions."**

Consequently, this Judgment is, similarly, restricted to the allegation of negligence by the Police Officers at Busunju. It does not cover the plaintiffs' allegations which were contained in the plaintiffs' pleadings to the effect that the defendant's employees, the officers of the Ministry of works, were also negligent. That portion of the plaintiffs' case appears to court to have been abandoned.

It appears that the essence of the three particulars of negligence which have been particularized in all the plaints, as far as the allegation of negligence by the police at

Busunju is concerned, is that the police failed to carry out its statutory duty to close and divert the road or to effectively notify the road users of the dangerous state of the road. The plaintiffs also claim that, in the circumstances of these cases, the police officers at Busunju failed to act professionally so as to avert use of the dangerous road in order to avoid the occurrence of the accident.

Indeed, the question whether a statutory duty binding the police existed or not is settled by the provisions of section 150 (b) of the Traffic and Road Safety Act, 170 (now section 142 (b), of the Traffic and Road Safety Act, Cap.361). That provision reads, in the relevant part:

> **"150. Duties of Police**
> **Without prejudice to any powers or duties of the police under this Act or any other enactment for the time being in force, it shall be the duty of the police ---**
> **a) ----------**
> **b) To divert traffic temporarily, to close and deny public access to any road, parking place, thoroughfare or other place of public resort,**
> **Where any emergency or any anticipated event appears to render advisable such a course." [Emphasis Added.]**

The plaintiffs led evidence from 23 witnesses. The defence also led evidence from as many as 7 witnesses. With regard to the issue of whether the defendant's servants at the police post at Busunju were negligent, the plaintiffs presented evidence from 4 witnesses. The defendant also represented 4 witnesses in order to rebut the plaintiff's evidence and prove that the police officers at Busunju did act to try to warn road users including the deceased of the dangerous situation at river Mayanja and the collapse of the culverts and advised them to use an alternative route.

Before evaluating that evidence, court feels obliged, in this particular case, to lay out the gist of the evidence of each witness from either side of the case.

The plaintiffs presented **PWI, Mutyaba John**, a carpenter at Busunju trading centre. On 29th March, 1998, at about 4.00p.m, he observed that the waters of river Mayanja were extraordinarily swollen. He rode a bicycle for the one kilometer distance from Busunju trading centre to river Mayanja. He saw that the water was covering the road shoulders and still swelling. He rode back to Busunju to inform the police about the strange phenomenon. He met one Councillor Nabankema with whom he proceeded to the police post at Busunju. They informed PC Okiria, who was acting OC station and PC Okello, who was OC traffic at the post, of the dangerous state of river Mayanja. They talked to both officers in Kiswahili and English and explained the eminent danger paused by the swelling river. But PW1 observed that the two officers did not appear to pay much attention to the report. PW1 requested the officers to provide police men to prevent people from going to the river as anything dangerous could happen to them. But PC Okiria told PW1, "Leave then if they die – leave them to die."

As PW1 left the police post together with Councellor Nabankema, he met PC Kawuma. Who was the OC/CID at Busunju Police Station. PC Kawuma did not also seem to pay any regard to PW1's concerns. PW1 specifically asked PC Kawuma to locate a road block before the river. But the officer refused. PW1 returned to his home with a feeling of defeat and worry. At 7.30pm, he returned to the Busunju trading centre. While there, he was informed that a car had plunged into the river and people had drowned.

PW1 was later summoned as a witness in a police court, during the trial at Busunju of the police officers to whom he had made the report. A few days after the accident PW1 attended a rally held in the compound of Real College at Busunju and addressed by Honourable John Nasasira, Ruth Nankabirwa and Kiddu Makubuya. Hon. Nasasira apologized to the residents for the accident. About two weeks after the accident, PW1 attended another public rally at the same venue. The rally was convened by the then Inspector General of Police, one John Odomelo. He too apologized to the public "for the inaction of the police officers at Busunju, which facilitated the accident."

PW3, Harriet Namuyiga, a house wife of Najjanankumbi was a passenger in the vehicle that plunged into the river. She testified that about 14 persons were in the car, a minibus (Kamunye). They were returning to Kampala from an introduction ceremony at Kiboga. They found a police road block some 9 miles before Busunju (at Kikandwa).

The police checked their vehicle and they proceeded. They passed some persons along the road. Some waved down the vehicle. But since the vehicle was full and because they thought that the persons who waved down the vehicle wanted a lift, they did not stop. She heard the driver exclaiming loudly. The next thing she knew was that the vehicle had fallen into the river. It was at about 8.00p.m. She was rescued the following day at about 8.00a.m. She saw no warning signs in Busunju town or before the "bridge"

PW9 Mwesigwa Jackson was 29 years old when he testified. He was also a student in Senior 6 at Real College, at Busunju. At about 4.00p.m on 29th March, 1998, he went to see the river Mayanja after learning that the waters were swelling. He stayed at the river until 7.00p.m. During his stay at the river, he saw some police officers from Busunju Police Post who came to see the state of the river and went away. Apart from those, the OC of Busunju Police Post, when the witness knew well, arrived at the river in a car in which he had other people. He looked at the situation of the river and drove away towards Kampala. As he returned to Busunju town from the river, at about 7.00p.m, PW9 saw no sign of any warning to road users of the danger paused by the swelling river. He was so worried of the dangerous state of the river that he developed some kind of fever that forced him to go home early.

At 9.00p.m he learnt that the bridge at river Mayanja had been submerged and broken and that a car had plunged into the river. The witness stated that it was long after the accident when the police placed signs along the road warning road users of the danger.

The last plaintiffs' witness, on this issue, was PW15, Muwanga Charles. He was a resident of Busunju trading centre. Upon realizing that river Mayanja was flooding, he curiously went to observe what was happening. He crossed the river all the way to

Wamika trading centre. While at the river, he saw the OC/CID of Busunju police post riding a motor cycle. He rode that motor cycle across the river from Wamika back to Busunju. It was at about 6.30p.m. At about 7.30p.m, a small white car came along from Busunju. The owner feared to drive it across the first bridge from Busunju. One by-stander offered to drive the car across for him. The first bridge was already cracked. As the by-stander drove the small car across the first bridge from Busunju side, it collapsed. So did the third bridge. The time was about 7.30p.m. The owner of the small car could not cross the collapsed bridges to his car which had been driven across to it. He returned to Busunju town abandoning his car with the by-stander who had driven it across the river and was with it on the Wamika side. The water was flowing across the broken bridges at a terrific speed and in a very huge volume. The gap left by the collapse of the bridge was very wide. No car or person on foot could cross it.

At about 8.00p.m, PW15 moved from the river to Busunju town. He wanted to buy some food. He met two vehicles one following the other. He feared they would fall into the river. He tried to stop them. But they moved passed him. He soon heard a loud bang. He returned to the bridge only to find that one of the two vehicles had plunged into the river. The second car had stopped at the collapsed bridge.

PW15 then hurried to Busunju town to collect some rescue material; a panga, ropes and a torch. He came back to the river with one Santo Kabu and one Bakuli. While returning to the river PW15 met a police road block just which had just been erected near the road going to Mityana branching off the Kampala – Hoima road from near Real College, Busunju. The road block had not been at that place when PW15 passed there while going to collect the rescue materials.

On the other hand, the first defence witness, on this issue, was DW1 No.14684, Cpl. Adenyo Adungo Charles. He said that on 29th March, 1998, he was OC Station at Kikandwa Police Post whose mother station was Busunju Police Post. Kikandwa Police Post was 9 miles away from Busunju police post along Kampala-Hoima Road.

On 29th March, 1998, at about 6.30pm, DW1 received information from one Mohammed Kanyike of Kyasa village that he (Kanyike) had seen river Mayanja swollen. DW1 instructed SPC Ssembatya and SPC Kyagulanyi to stop every vehicle moving towards Busunju and inform travelers to stop at Busunju and inquire about the state of the river. However, DW1 did not record those instructions or the report, he had received from Mohammed Kanyike, in the Station Diary. He had no radio communication facility to contact Busunju Police Post. He learnt of the accident, at river Mayanja, the following day, at 8.00a.m, to the effect that 8 persons had drowned into river Mayanja.

DW2 was Sulaiti Ssembatya. He said he was an SPC and that in 1998 during the month of March, he was at Kikandwa Police Post.

The witness testified that on 29th March, 1998 at about 7.00pm, he was instructed by CPL. Adenyo to place a sign post reading ***"Accident Ahead"*** along the Hoima Kampala Road. The sign post was required, according to the witness, because the bridge at river Mayanja had broken down.

Before 7.00p.m, the witness stopped a Kamunye vehicle which was running fast and had indicators on. The people in it were dressed in Kanzus and gomeses and were talking loudly. The vehicle stopped at the road block. The witness informed the driver that river Mayanja had broken down and that the vehicle could not pass through that road. He advised the driver to use the Matte road which joins the main road at Wamika. The driver of the vehicle simply replied that they would see upon reaching the bridge. The time was about 7.10p.m. At about 8.00p.m, the witness and his colleagues learnt that there had been an accident at river Mayanja. DW2 could not produce any evidence proving that he was an SPC in 1998. His first identity card as an SPC was issued to him in 2001. He did not know whether the vehicle he had stopped at Kikandwa was the same vehicle which had plunged into river Mayanja.

DW3, Eriabu Ganafa, was a resident of Busunju. He reached at river Mayanja at about 7.10p.m, after learning about the flooding of that river. There were still vehicles crossing

the bridge by the time he arrived at the bridge. Some vehicles were stopped by people who were standing by the road side. DW3 himself stopped about 3 vehicles which had come from Kiboga side wanting to proceed to Kampala. Some of those cars crossed the bridge others turned and went back to Busunju. According to this witness, the bridge collapsed at 7.20p.m, after a small car had been driven across it. At about 7.45, a taxi came with full indicators on and at a high speed. It fell into the river some 10 or 15 minutes after the bridge had collapsed.

DW3, Mukalazi Deogratias, went to the swollen river at about 5.30pm. At about 6.30p.m the last vehicle crossed the bridge and the swollen and violent water broke the bridge apart. He saw many vehicles coming from Hoima and Kiboga side wanting to cross the river but were stopped by ordinary people. There were no police officers. There were no police warning signs anywhere.

At about 7.45pm, a taxi came from Busunju side. It was running fast. It had double indicators. It crushed into the broken bridge. DW4 was very disappointed that nothing had been done by the police to close the road.

With that testimony on record, it does not require any extensive evaluation to arrive at the conclusion that the police at Busunju did not discharge the statutory duty that was imposed upon it by ***Section 150(b), of the Traffic and Road Safety Act, 1970***, which was in force at the time.

The statutory duty that was imposed upon the police by section 150(b), of the Traffic and Road Safety Act, 970, was an absolute statutory duty. Such statutory duty must be discharged with due diligence. It must be discharged effectively. Nothing less will offer the kind of protection that Parliament intended to offer to the road users in enacting that provision of the law. Even if court were to accept the evidence of both DW1 and DW2 that the driver of a white Kamunye vehicle had been informed by the police at Kikandwa, to check the status of the river at Busunju trading centre, that evidence would not be sufficient to exonerate the police from its failure to close the road as the statute required

in the circumstances which are so vividly described by the evidence of the witnesses on either side of the case.

Court, however, does not accept the evidence of both DW1 and DW2. The bridge did not get swept away until after 7.30pm. Yet PW2 testified that the instructions he received from DW1 was to inform all travelers that the bridge at river Mayanja had broken down and that the time he received those instructions was 6.30p.m.

The failure of DW2 to record the report which he says he had received from Mohammed Kanyike and the action which he claims to have taken with regard to that report, in the station Diary creates a lot of doubt to the whole of his testimony. DW1 testified that he did not learn of the accident until 8.00a.m the following morning. DW2 testified that he and the police officers at Kikandwa learnt of it just one hour after it occurred. DW2 did neither recall the number plates of the Kamunye which he had stopped nor did he visit the accident scene to verify that the vehicle which fell into the river was the same vehicle which he had stopped at Kikandwa. In those circumstances it becomes very difficult for court to believe his evidence to the effect that he had informed the driver of the vehicle which plunged into river Mayanja of the danger that lay ahead of him.

Court, instead, would easily agree with Mr. Kanyemibwa that the evidence of DW2 that he had stopped the accident vehicle and talked to its driver was nothing more than mere conjecture. The authority of **Management Training And Advisory Centre Vs. Patrick Kakuku Ikaza, SCCA No.6 of 1985**, (unreported) is pertinent on that point.

Several witnesses, including almost all the four defence witnesses, whose evidence is laid out above, testified that several motor vehicles coming from Hoima and Kiboga side continued to move to the river purposely to cross towards Kampala. The evidence shows that those vehicles continued to move to the river until immediately before the accident occurred. Even the accident vehicle itself was followed by another vehicle which stopped short of falling into the river as well. If there was any warning at Kikandwa, even if Kikandwa was as remote as nine miles away, why would so many drivers have

been big-headed so as to defy the warning and refuse to take the Matte road so as to avoid the menacing river? Clearly, there was no such warning.

If there had been such warning at Kikandwa then why did this Scenario arise? Were all the drivers of so many vehicles stubborn and could not heed police warnings?

The accident vehicle had 14 passengers in it. Many of them doctors, highly intelligent people. If DW2 had given them the warning, which he says he did, could there not have been even a single one among them who would have rebuked the driver if the driver had remained stubborn and defiant of that warning? The fact that the driver made a loud exclamation, immediately before the vehicle plunged into the river, as PW3 testified, would seem to show that he was caught off guard and was highly surprised and that he had had not prior anticipation of finding what he suddenly saw where the bridge had been.

The police at Busunju had effectively been informed of the danger paused by the river to the public by PW1 at least by 6.00p.m, which was close to two hours before the occurrence of the accident. The OC of Busunju Police Post, the Deputy OC, the OC traffic and the OC/CID were all aware of the danger that existed along the road. None of them did anything at all. All the witnesses, on either side of the case, are unanimous on this point. No single police officer was placed at the swollen river until after the accident occurred. No road signs warning the public of the danger were placed along the road. The road was not closed and those travelling were not diverted in order to avoid the obvious peril.

Court has already pointed out that the statutory duty under section 150(b) of the Traffic And Road Safety Act, 1990, was an absolute obligation upon the police in situations such as the one that pertained at river Mayanja on the fateful day and time. Parliament did not provide a remedy for the breach of that absolute obligation. But parliament also did not exempt the police from liability arising out of the breach of that absolute duty. Clearly, a civil action lies in those circumstances. ***Ministry of Housing And Local Government***

Vs. Sharp 1970 2 Q.B.223. Otherwise, to what effect would the statutory obligation have been provided if the injured persons were to be left without a remedy? To use the phraseology of Lord Denning in ***Ministry of Housing And Local Government Vs. Sharp*** (supra), such situation ***"is unthinkable".*** **Lord Simonds had earlier on, in Cutler Vs. Wandsworth Stadium Ltd. (1949) A.C 398,** at page 407, stated the same Principle when he wrote:

> **"In the class of cases where a statute imposes a duty, but provides no remedy by which the duty can be enforced, the general rule is that an action for damages can be brought, provided that the person suing is one of the class intended to be benefited by the duty. For, if it were not so, the statute would be but a pious aspiration."**

Even at Common Law, as Lord Simonds observed in the same case **Culter Vs. Wandsworth Stadium Ltd. (Supra),** (at P.408). If such an absolute statutory duty is imposed by Parliament for the benefit of some particular persons,

> ***"there arises, at common law, a corrective right in those persons who may be injured by its contravention."***

Thus, the question whether an allegation of failure, by the police, to discharge its Statutory duty, if proved, would give rise to a private right or cause of action, does not appear to court to be in any doubt in this case. Moreover, government, ordinarily, is vicariously liable where negligence is proved on the part of its officers or employees while acting in the course of their duties. The police is not exempted from liability arising out of its own negligence while carrying out their official duties.

It may be necessary to observe that the statutory duty which was imposed upon the police under Section 150(b), of the Traffic And Road Safety Act, 1970, and now under section 142 (b) of Cap.316, stems, fundamentally, from the core functions of the Uganda Police Force as set out in article 212, of Constitution and Section 4, of the Police Act, Cap.303.

The cardinal functions among all those functions are to protect the life and property of all persons in Uganda and to maintain and preserve law and order throughout the country.

Court is satisfied that the questions of both foreseability and proximity are not in any doubt in this case. It was easily foreseeable, by the police officers at Busunju, that harm or injury, to the members of the public using the road, would be a likely result from their failure or unwillingness to close the road and divert traffic. Any person of ordinary intelligence and prudence would have anticipated such a danger. Drowning, which was the cause of death to the deceased persons, in this case, was indeed, a proximate consequence. In addition to being in the train of physical causation, it was not outside the range of expectation or probability, as may be viewed by an ordinary person.

It, therefore, appears to court, in light of the evidence and the law, as briefly set out above, that the police officers, at Busunju Police Post, breached the absolute statutory duty, imposed upon them by Section 150 (b), of the Traffic And Road Safety Act, 1970. They did so negligently. Furthermore, apart from failing to discharge that statutory duty, the police officers at Busunju Police Post, were also generally negligent. They failed or neglected to provide any warnings or to take any steps to prevent the road users from exposing themselves to the emergent situation which existed at river Mayanja, near Busunju, in the evening hours of 29th March, 1998.

WHETHER THE DRIVER OF MOTOR VEHICLE REG. NO.607 UBK WAS NEGLIGENT

The defendant contended that the driver of Motor Vehicle, 670 UBK, was negligent. He asked court to find that the driver either totally or contributorily negligent. The defendant specified three particulars of negligence:-

- failing to heed the warning and advice of the police men at Kikandwa;
- failing to take heed and stop when the vehicle was waved down by members of the public; and

- Speeding and failing to keep a proper look out while on the road.

The evaluation of the evidence of DW1 and DW2, already set out above, disposes of the first particular of the alleged negligence on the part of the driver of motor vehicle No.607 UBK. Court shall not repeat the analysis.

On the second particular of the alleged negligence court finds that while it is true that PW15 testified that he waved down motor vehicle No.607 UBK, in a desperate attempt to save it from the danger ahead, PW3, who was in motor vehicle 607 UBK, gave a convincing reason why the vehicle did not stop. She stated that she and the other passengers in the vehicle thought that those who waved down the vehicle wanted to get a lift. The vehicle was an ordinary taxi omnibus which could easily be waved down in that regard. But it was full. She saw people moving about along the road and some attempting to stop the vehicle in the same way as travelers wishing to get a lift usually do. Moreover, it was already dark in the evening. In those circumstances, court can hardly fault the driver of motor vehicle 607 UBK for not taking heed and stop. He cannot be regarded as having been negligent upon that account alone.

Regarding the third particular of the alleged negligence on the part of the driver, it was DW2 and PW15, who mentioned that motor vehicle 607 UBK was speeding. DW2 stated that he saw it speeding at Kikandwa which was about 10 miles away from the scene of the accident. That evidence is irrelevant when one is considering the speed at which the vehicle was running when the accident took place ten miles away after Kikandwa. Although PW15 testified that the vehicle was speeding when he attempted to wave it down near the scene of the accident, he could not tell at what speed it was moving. The word <u>speeding</u>, in the view of court, would be relative and quite elastic when used within the circumstances under which PW15 saw the vehicle moving at river Mayanja when he tried to stop it.

There is no evidence relating to the specific speed at which it was moving. The evidence of PW15 was a mere perceptive assessment. That assessment was made amiddist fears,

which PW15 himself confessed had engulfed him that some vehicle was going to plunge into the flooded and gaping river. In those circumstances, it is probable that PW15 would view any vehicle moving towards the dangerous spot of the river as moving fast. PW3, who was a passenger in Motor Vehicle No.607 UBK, testified that at the time of the occurrence of the accident, the vehicle was moving at normal and reasonable speed. Court tends to believe her testimony on this point in preference to that of PW15. She was in a better position, then PW15, to know and assess the speed at which the fateful vehicle was moving at the time when the accident occurred.

Court concludes that, upon the balance of probabilities, the evidence of DW2 and PW15, can not justifiably lead to the conclusion that the driver of motor vehicle 607 UBK, was negligent or contributorily negligent.

Whether the Death Of The Deceased Was A Result Of The Negligence of The Defendant's Servants Or The Driver

Court has already found that the defendant's servants were negligent and that they were negligent during the course of their duties. Court has also concluded that the driver of motor vehicle 607 UBK, was not negligent.

PW4, Dr. Wamala Dan, tendered in Court exhibits P1, P2, P3 and P4, all of which were death certificates relating to the deaths, respectively, of Dr. Nalumenya James, Dr. Catherine Othieno Ssempa, Dr. Michael Kyakulumbye and Dr. Mubiru Francis. The cause of death, in respect of all of them, is stated to be, ***"Asphyxia due to drowning."*** That evidence is not in dispute.

It, therefore, follows that that the death of each deceased person, by drowning, which was a direct and foreseeable consequence of the submerging, by flooding waters, of the road and the sweeping away of the culverts, casts liability upon those officers of the defendant who were charged with the statutory responsibility of preventing such catastrophy but neglected to do so. The defendant, consequently, is vicarious liable for the deaths of each of the deceased persons in this case.

Whether The Plaintiffs Suffered Any Damage

It is not in dispute that the plaintiffs were dependants of the respective deceased persons in this case. The plaintiffs led unchallenged evidence proving their dependency. The defendant agreed that the plaintiffs suffered damage when their dependencies were terminated by the death of the deceased persons. In the final submissions, learned counsel for the defendant wrote,

> **"It is not in dispute that the plaintiffs suffered damage as a result of the accident."** Court also so finds.

Whether The Plaintiffs Are Entitled To The Remedies Sought

The plaintiffs brought these suits under, sections 5 and 6 of the Law Reform (Miscellaneous Provisions) Act, for their own benefit and, indeed the benefit of other members of their respective families, upon the account of loss of dependency.

Court duly agrees with the submission of learned counsel, Mr. Kanyeimba that the principles governing the assessment of damages for loss of dependency were well laid down by the Privy Council in **Gulbanu Rajabali Kassam Vs. Kampala Aerated Water Co. Ltd. [1965] E.A. 587.** Similarly, the decision of Odoki J, as he then was, in **Jane Gaffa Vs. Francis X.S Hategа, HC Civil Suit No. 1158 of 1975**, equally provides an intensive and extensive guide in that regard.

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Generally, in assessing damages for loss of dependency,

- the Court takes the last earnings of the deceased person as the starting point. Out of those earnings is assessed the pecuniary benefit regularly accruing to the dependants;
- court then determines the appropriate multiplier. That is the number of years during which the benefit of the dependency would have continued to be available

to the dependants if the deceased had lived beyond the date of death and continued making earnings;

- the determination of the multiplier is guided by the age at which the deceased died and what his or her working life expectancy would have been had he or she not met his or her demise in the fatal accident;
- the total lost dependency or benefit is obtained by multiplying the annual lost benefit by the multiplier;
- the total lost dependency benefit is then apportioned among the dependants. If the deceased was the husband, the widow is entitled to a more substantial share of the damages in recognition of the fact that her dependency upon her husband's support would ordinarily continue longer than that of the children. If the wife was the bread winner in the family and she is the one who met her death, the surviving dependant husband would be treated in a similar manner.
- it is also a recognized principle that in apportioning the damages court would award the younger children relatively larger portions in recognition of the fact that their dependency, upon the deceased, would have lasted longer than that of older children.

Applying those principles, court will proceed to assess the loss suffered by the dependants in each of the four consolidated suits.

HCCS No.1332 of 1998 – Saulo Mawanda Ssempa Vs. Attorney General

The plaintiff, in this case was son to late Dr. Michael Kyakulumbye Ssempa. The deceased, according to exhibit P3, was aged 41 years by the time of the fatal accident.

According to PW7, the deceased was employed as a medical officer at Mulago Hospital where he earned Shs.322,884/- in salary per month. That would amount to Shs.3,874,608/= per annum.

The evidence of PW17 also showed that the deceased operated a private clinic in the name of **"GEM MEDICAL CONSULTANTS CLINIC"** along Tuffunel Road at

Kamwokya where he made some Shs.80,000/= to 100,000/= per day or about Shs.2,400,000/= a month. Half of that amount being net earning and about half being the cost of medicines and other requirements. Court would be justified to regard the net earnings to Shs.1,000,000/= as money earned by the deceased per month from that clinic.

The evidence of PW23, Dr. Samuel Mutumba, showed that the deceased earned a minimum of Shs.270,000/= per week on average, from Abii Clinic and Laboratory Services. That sum would amount to shs.270,000 x 4 = 1,080,000/=. The evidence of PW6 also showed that the deceased was earning Shs.80,000/= per month from St. Stephen's Hospital (C.O.U) Mpererwe. Thus the monthly earnings of the deceased totaled up to:

- Mulago Hospital - Shs.322,844/=
- GEM Medical Consultants Clinic - Shs.1,000,000/=
- Abii Clinic And Laboratory Services - Shs.1,080,000/=
- St. Stephen's Hospital (C.O.U) Mpererewe Shs. 80,000/=

Total = **Shs.2,482,844/=**

However, taking into account the fact that some of the earnings of the deceased would have been subjected to income tax and considering the fact that the benefits would be paid in a lump sum and other uncertainities, court would tax the monthly earnings down to Shs.2,000,000/= per month.

With the work at Mulago Hospital being public service, the deceased would have been expected to work up to age 60 Section 12(1) of the Pensions Act, Cap 286, requires a public officer to compulsorily retire upon attaining the age of 60 years. **(See Statute No.4 of 1994, Section 7).** The same age was recognized in **Dane Gaffa Vs. S. Hatega** (Supra) as the age at which a professional person would ordinarily be expected to stop making earnings. Accordingly the multiplier, in the case of the deceased in this case, would be 19 years since the deceased died at the prime age of 41 years.

Learned counsel Mr. Kanyemibwa submitted that it was trite law that a person spends two thirds of his or her income on his or her family. Probably that remains true only where the number of dependants is reasonably large or average. In this case, there appears to have been only one dependant, the plaintiff. It would be unfair to assume that the principle would equally apply to him in the peculiarity of this case. Court would consider that because of the size of his family, the deceased would save some of his income and would not have been spending more than half of his income on his family. Half of the deceased's monthly earning would amount to 2,000,000 x 1/2 =**1,000,000/=.**

The annual dependency would be 1,000,000/= x 12 = **12,000,000/=.**

Taking into account probable imponderables and other unforeseeable factors, court would reduce the multiplier from 19 to 15 years. Court considers that to be reasonable in the circumstances. Applying the multiplier of 15 years, the total dependency accruing to the plaintiff would be 12,000,000 x 15 = 180,000,000/=.

Court would, therefore, award the sum of Shs.180,000,000/= to the plaintiff in **HCCS 1332 of 1998**, as general damages for loss of dependency. In addition, there shall be interest, at 8% per annum from the date of judgment till the date of payment in full. The costs of the suit shall be recovered by the plaintiff from the defendant.

HCCS No.1294 of 1998 – Milcah Nakayenga Mubiru Vs. Attorney General

The plaintiff, PW2 is widow to the late Dr. Francis Xavier Mubiru. She gave evidence, which was not challenged that the deceased left her with four children, namely;

- Moses Kisamba - born 2.10.1982
- Jonathan Ssekalegga - born 29.01.1990
- Josephine Norah Bulya - born 06.07.1995
- Julian Nakkazi - born 25.04.1997

The evidence also shows that the deceased had 6 dependant relatives who were children of his late brother called Katabi and late sister called Luwedde Wampamba Ssebatta. These were:-

- Kikonyogo Paul 19 years
- Kitaka Godfrey 22 years
- Nankabirwa Milly 18 years
- Maria Nakisamba 9 years
- Nabigotto Christine 19 years
- Nakibuuka Rennet 5½ years

PW5, Prof. Roy D. Mugerwa, testified that the deceased was working under him on a Project for Research on Pneumonia and AIDS. The deceased was earning some US$250 per month. He testified that the rate of a dollar to the shilling was Shs.1,200/=. This comes to Shs.300,000/= a month or Shs.3,600,000/= a year. The evidence shows that the Project started in 1998 and closed in 2001.

PW7, Mr. Charles Godfrey Twinomugisha, who was Assistant Commissioner, Personnel, at Mulago hospital, testified that the deceased was employed as a Medical officer at that hospital on permanent and pensionable terms. He earned shs.405,959/= per month or Shs.4,871,508/= per annum.

Similarly, PW11, Frank Kiggundu, testified that the deceased was working as Health Co-ordinator for the SDA Church Central Field. He earned Shs.100,000/= per month. That totaled to Shs.1,200,000/= a year.

PW16, Dr. Donna Katesi testified that the deceased was also working with an NGO called **Traditional And Modern Health Practitioners Together Against AIDS And Other Diseases**. It was the unchallenged evidence of Dr. Katesi that by his death, the deceased was earning Shs.437,000/= a month or Shs.5,561,000/= a year.

PW12 also testified that the deceased was earning some Shs.291,614/= per month from TASO, Mulago, where he worked on part time basis. His annual earnings from that source was 3,499,368/=.

Lastly, PW18, Joel Lugoloobi testified that the deceased was also working with Buso Foundation, an NGO dealing with the improvement of community health in Wakiso and Luwero Districts. The deceased earned Shs.80,000/= per week. He would make two visits per week. His monthly earning was Shs.330,000/=. Annually he earned Shs.3,840,000/=.

Thus the deceased's total annual earnings went up to:

-	Pneumonia Study Mulago Hospital	-	Shs.4,871,508/=
-	SDA Central Field	-	Shs.1,200,000/=
-	SDA Central Field	-	Shs.6,200,000/=
-	TASO, Mulago	-	Shs.3,499,368/=
-	Pneumonia Study Mulago Project	-	Shs.3,600,000/=
-	THETA	-	Shs.5,561,000/=
-	BUSO Foundation	-	Shs.3,840,000/=
	Total Annual Earnings	=	**Shs.22,571,876/=**

Exhibit P4 shows that the deceased was aged 37 years at the time of his death. He too would be expected to work up to 60 years of age either as a Public Servant or as a Professional doctor in private practice. This yields a multiplier of 23 years. Again because of the probability of the uncertainties of human life, court would reduce the multiplier of 23 years to 20 years, which it considers appropriate.

The multiplier of 20 would apply to all the incomes from the various sources except the income earned by the deceased from the Pneumonia Study Project at Mulago Hospital which closed in 2001. Even if the deceased had not died in the accident, in 1998, he

would not have continued making the earnings from that Project because of its closure in 2001. The multiplier applicable to that lost income is therefore, 3 instead of the multiplier of 20.

The presumption that the deceased was spending too thirds of his earnings upon the maintenance of his family would appropriately apply by court here. Thus the total lost dependency would be:-

Source	**Annual Income**	**Two thirds Annual income**	**Lost Dependency 2 x 20 or 3 3**
-Pneumonia Study Mulago Hospital	3,600,000/-	2,332,912/=	6,998,736/=
-SDA Central Field	1,200,000/=	800,000/=	16,000,000/=
-TASO Mulago	3,499,368/=	2,332,912/=	46,658,240/=
-THETA	5,561,000/=	3,707,333/=	74,146,660/=
-Buso Foundation	3,840,000/=	1,280,000/=	25,600,000/=
- Mulago Hospital	4,871,508/=	3,871,508/=	77,430,160/=
Total lost dependency		=	**246,834,796/=**

Since some of the income of the deceased would be subjected to income tax and considering the factor of acceleration as well as other unforeseeable elements, court

would reduce the total lost dependency by some Shs.15,000,000/=. That would reduce the total lost dependency to Shs.231,834,796/=.

Court would, therefore, award the sum of Shs.231,834,796/= to the plaintiff and her four children as well as the side dependant relatives whom were dependant upon the deceased by the time of his death, as general damages for loss of dependency.
In addition, court would award interest to accrue upon the decretal sum, at the rate of 8% per annum, from the date of judgment to the date of payment in full. The costs of Civil Suit No.1294 of 1998, are awarded to the Plaintiff.

Court would apportion the sum of the general damages of Shs.231,834,796/= among the beneficiaries of the dependency as set out below:

Beneficiary	**Amount of Benefit**
- the Plaintiff, widow to the deceased	- 76,834,796/=
- Josephine Norah Bulya Daughter – (3 years)	-40,000,000/=
- Jonathan Ssekalagala (son – (8 years old)	-36,000,000/=
- Moses Kisamba (son) (16 years old)	-25,000,000/=
- Julian Nakkazi (daughter – (24 years old)	-20,000,000/=
- Nakibuuka Lynet Dependant niece – (5½ years old)	-8,000,000/=

- Maria Nakisamba
  Dependant niece (9 years old) -6,000,000/=

- Nambalirwa Milly
  Dependant niece (18 years old) -5,000,000/=

- Nabigatto Christine
  Dependant niece (19 years old) -5,000,000/=

- Kikonyogo Paul
  Dependant nephew (19 years old) -5,000,000/=

- Kitaka Godfrey
  (dependant Nephew) (21 years old) -5,000,000/=

Total **-231,834,796/=**

Court orders that the money payable by the defendant to:

- Josephine Nabulya
- Jonathan Ssekalagala; and
- Nakibuuka Lynet be, respectively paid to the Public Trustee to hold it in trust for each of those infant beneficiaries.

HCCS No.1331 of 1998 – Ruth Nalumenya Vs. Attorney General

The plaintiff is the widow of the late Dr. James Nalumenya. The evidence adduced before court shows that the late Dr. Nalumenya was survived by the plaintiff and four children, namely;

- Namagembe Nalumenya - 24 years
- Patricia Sylvia Nabateregga Nalumenya - 23 years

- Patrick Kaddu Nalumenya - 22 years
- Andrew Kevin Lugoloobi Nalumenya - 17 years

Exhibit P1 shows that at the time of his death, the deceased was aged 56 years. According to PW7, Charles Godfrey Twinomugisha, the deceased was a Senior Medical Officer employed at Mulago Hospital. His salary was shs.519,905/= per month.

Although learned Counsel for the defendant, Ms Patricia Mutesi, submitted that court should not consider the deceased to have lost any earnings from Mulago Hospital because he ought to have retired at age 55, one year prior to his death, court finds that submission not to be well founded. Section 7 of the Pension (Amendment) Statute, 1994, Statute No.4, of 1994, increased the compulsory retirement age of officers in the Public Service from 55 to 60. The deceased, therefore, still had 4 years to continue serving in the Public Service by the time of his death.

The evidence, which court accepted, at shows that the time of his death, the deceased was earning the following income:

- Shs.519,905/= per month or Shs.6,238,860/= per annum from Mulago Hospital.
- Shs.50,000/= per weekly visit to Budo Junior School, That came to Shs.200,000/= per month or Shs.2,400,000/= per year. This income, however would be earned only up to nine months from the death of the deceased had he not died at the time he did.

The total income lost owing to the deceased's death appears to be:-

Source:	**Annual Income**	**Lost Annual Dependency (2/3)**
Mulago Hospital	6,238,860/=	4,159,240/=
Abii Clinic	12,960,000/=	8,640,000/=
Budo Junior School	1,800,000/=	1,200,000/=

Alied Medical Consultants	2,400,000/=	1,600,000/=
Total Lost Annual Dependency		**= 15,599,000/=**

Out of the total shs.14,399,000/= is subject of a multiplier of 4 years, 14,399,000 x 4 = 57,596,960/=. The Shs.1,200,000/= lost income from Buddo Junior School is not subject to any multiplier as it would be earned by the deceased up to the end of the year 1998 only.

The total lost income is thus 57,596,960/= + 1,200,000/= 58,796,960/=. Court would, however, reduce the sum of 58,796,960/= by, to take care of possible income tax deductions especially with the salary from Mulago Hospital, any uncertainties that might have intervened and the factor of acceleration. Court deems the sum of Shs4,796,960/= as being appropriate deduction in that regard.

The sum of lost dependency left for award and distribution among the Plaintiff and her four children is thus Shs.54,000,000/=. It is awarded to them as general damages and distributed as below:-

- Plaintiff (widow) - Shs.25,000,000/=
- Andrew Kevin Lugoloobi Nalumenya (son – 17 years) - Shs.9,000,000/=
- Patrick Kaddu Nalumenya (son 22 years) - Shs.7,000,000/=
- Patricia Sylvia Nabateregga Nalumenya - Shs.7,000,000/=
- Namagembe Nalumenya daughter - 24 years - Shs.7,000,000/=

Total **=Shs.54,000,000/=**

In addition, the general damages shall attract an interest at the rate of 8% per annum. The costs of civil Suit No.1331 of 1998, is awarded to the Plaintiff against the defendant.

HCCS No.1330 of 1998 – Saulo Mawanda Ssempa (Suing Through His Next Friend William Ndawula Ssempa)

The Plaintiff in this case is also the Plaintiff in **HCCS No.1332 of 1998**. In that case, he sued claiming general damages for loss of dependency upon his father, the late Dr. Michael Kyakulumbye Ssempa. In this suit he claims general damages for loss of dependency upon his mother, the late Dr. Catherine Othieno Ssempa. Both parents drowned in the same accident at river Mayanja on 29th March, 1998.

The unchallenged evidence of PW13, Dr. Peter Ndimbirwe Mugenyi and PW21, Miriam Kasujja, showed that the late Dr. Catherine Othieno Ssempa was working with The Joint Clinical Research Centre, under a Project funded by case Western Reserve University. She was earning a salary of US$2,000 and UGShs.400,000/= per month.

PW13 testified that the deceased was uniquely qualified in the field of molecular biology/immunology and that she had a very high potential of getting employed into other projects in the event of the project she was working with getting wound up. The same witness testified that the project had a life span of 5 years. The deceased had worked for 2 years with the project by the time of her death. Three years, of the life span of the project was remaining. The project closed in 2001. The evidence in exhibit P.2 shows that the deceased was aged only 33 years by the time of her death. She, therefore, lost 27 years of her expected working life. However, since the earnings of US$2,000 per month and the Shs.400,000/= per month were based upon a specific project whose life span was only 5 years and, indeed the evidence shows that it closed in 2001, it would be speculative on the part of the court to accept the argument by learned counsel for the plaintiff that the deceased would have obtained similar terms in any other succeeding

Project if she had not died. Court can only accept the evidence that the earnings which the deceased lost were those relating to the duration of the 3 years during which the Project continued to run. That is the only lost income that is certain.

The deceased's annual earnings would add up to US$2000 x 12 = 24,000 US dollars which translates into 24,000 x 1890 =24,000,000/=. The Shs.400,000/= per month would fetch an annual sum of Shs.400,000 x 12 = 4,800,000/=. The total annual lost income, therefore, adds up to – 24,000,000/= + 4,800,000/= = 28,800,000/= using the multiplier of 3 years the total lost income would be Shs.28,800,000 x 3 = 86,400,000/=. Court would tax off shs.8,000,000/= to take account of income tax and other imponderables as well as the acceleration factor. The resulting figure would be 86,400,000/= - 8,000,000/= = 78,400,000/=.

Learned Counsel for the plaintiff, Mr. Kanyemibwa has argued in the final submissions that court awards a portion of two thirds of the lost income of the deceased to the plaintiff in this case. Court finds considerable difficulties with accepting that submission because of the unusual facts and circumstances of this case.

The plaintiff was the only child of the deceased, Dr. Catherine Othieno Ssempa and her late husband Dr. Michael Kyakulumbye Ssempa, whose death is the subject of Civil Suit No. 1332 of 1998, which has consolidated and decided together with this suit. In Civil Suit No.1332 of 1998, court awarded a sum of shs.180,000,000/= to the plaintiff for loss of dependency in relation to the death of his father who died together with the plaintiff's mother. The argument that the plaintiff enjoyed or would have enjoyed equal dependency upon both his father and mother is not sustainable. Court takes judicial notice of the fact that in Uganda when both father and mother are living together in a family setting, it is, in most cases, the father of the child who takes care of most of the financial obligations involving the child. That is often true even where both father and mother of the child are salaried employees or are both financially well off. The mother may supplement the father's efforts only in a small way.

In the instant case, there is no evidence to show that it was the mother rather than the father of the plaintiff on whom the plaintiff depended or would have depended for both upkeep and other financial obligations.

In the circumstances, therefore, court thinks that the facts and circumstances justify awarding only one quarter of the total lost income of the deceased to the plaintiff, in this case, as lost dependency.

Accordingly, court awards, as general damages to the plaintiff in this case, only quarter of the total lost income, that is to say, Shs.78,400,000 x ¼ = shs.19,600,000/=.

In addition, interest shall accrue upon the sum of Shs.19,600,000/=, at the rate of 8% per annum, from the date of judgment to the date of payment in full. The plaintiff shall recover the costs of this suit from the defendant.

V.F. Musoke-Kibuuka
(Judge)
28.08.09

Court: ORDER
The Deputy Registrar of this Court is directed to deliver this judgment on my behalf on Tuesday, 1st September, 09 at 10.00 a.m.

V.F. Musoke-Kibuuka
(Judge)
28.08.09