

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**[CIVIL DIVISION]**  
**HCCS NO. 162 OF 2006**

**KAWALYA ALOYSIOUS::: PLAINTIFF**

**VERSUS**

**1. SENDAGIRE NORMAN**

**2. COWIA/S:::DEFENDANTS**

**BEFORE. HON LADY JUSTICE M.S ARACH-AMOKO**

**RULING:**

The plaintiff is an adult Ugandan Mechanic based at Mubende Town. He brings this action under the provisions of the Law Reform (Miscellaneous Provisions Act on behalf of the family members of the late Kwesiga Bishagenda.

The 1<sup>st</sup> Defendant was a driver employed by the 2<sup>nd</sup> Defendant at the material time.

The 2<sup>nd</sup> Defendant is a foreign company registered in Uganda under the laws of Uganda and is found at Crusader building. Its postal address is 10591 Kampala.

The plaintiff's claim is for special and general damages as a result of the death of his sister, late Kwesiga Bishagenda. The suit was filed in the High Court at Kampala on the 23<sup>rd</sup> March 2006, summons to file a defence were issued by the Registrar on the 24<sup>th</sup> March 2006.

According to the affidavit of service filed on 1<sup>st</sup> June 2006 in court by a process server called Asimwe N. Stephen on the 27<sup>th</sup> March 2006, he was instructed by Mr. Mugisha Patrick, Counsel for the plaintiff to proceed to COWI operating at Crusader House and to effect summons thereat. On reaching the reception, he requested to see the Director of COWI, and the receptionist led him to the Director's office. When he reached he introduced himself and the purpose of his visit and gave him the said summons and a copy of the plant.

The director read, through it several times, but refused to receive the same, stating that the said COWI which existed at the time of the accident had ended its mission in Uganda and had dissolved its activities. That the plaintiff had come to him (the COWI Director) crying for help and they gave him some little compensation.

The Director told him that if they risked proceeding with the case, their client would lose and pay heavily without mercy, the Director however refused to acknowledge receipt of the summons. He however decided to leave him with a copy of the plaint and summons. There is however no proof of service against the 1<sup>st</sup> Defendant. The 21 days prescribed for service of summons under Order 5 r (2) expired. The suit against him was accordingly dismissed under Order 5 rule (3) of the CPR.

As for the 2<sup>nd</sup> Defendant Court is satisfied on the basis of the affidavit of service that the 2<sup>nd</sup> Defendant was duly served through its Director who refused to endorse an acknowledgement of service on the original summons Court declares that summons were duly served.(see: Order 5 rule 14CPR). The 2<sup>nd</sup> Defendant did not file a written statement of defence within the time prescribed in the rules. The suit proceeded ex-parte under order 5 rule 10.

The issues were:-

- 1) Whether the deceased K. Bishagenda was killed in an accident on the 27<sup>th</sup> June 2002, as alleged.
- 2) If so, whether the 2<sup>nd</sup> Defendant's driver was negligent.
- 3) Whether the beneficiaries in the pleading are entitled to the relief sought,

The plaintiff was the sole witness.

**Issue No 1. Whether the deceased K. Bishagenda was killed in an accident on the 27<sup>th</sup> of June 2002 as alleged.**

It was alleged in paragraph 5 of the plaint that on or about the 27<sup>th</sup> June 2002, when Kewesiga Bishegenda was lawfully standing at the side of the road, the 1<sup>st</sup> defendant negligently drove the

2<sup>nd</sup> Defendant's motor vehicle Reg. No. UPX 482 Mitsubishi, and tried to overtake another vehicle and he knocked her and killed her instantly.

The plaintiff in his oral testimony stated that he was at Katabalanga trading centre, next to Mubende National Teachers College on Fort Portal Road, on the material date. His sister the late Bishagenda had brought foodstuff (fresh cassava and potatoes) to the trading centre for sale. He had escorted her. As they by passed a vehicle selling fish by the road side, a white double cabin pickup UPX 482, Mitshubishi came very fast and tried to over take a lorry. Both lorry and pick up were coming from Mubende and were heading to Kampala. The plaintiff and his sister were on the left side of the road facing Mubende. The pick up knocked his sister. He saw her bleeding on head and nose. He immediately got a motorcycle and rushed to the village to inform then that she had been knocked by a motor vehicle. When he returned, he was informed that the police had already taken the body to the hospital. At the hospital, they collected the body and took it for burial at their village at Katabalanga LC1, about 7 miles from Mubende Hospital. He blamed the 1<sup>st</sup> Defendant for the accident. He tendered a post mortem report dated 28<sup>th</sup> June 2002 and a police report dated 12<sup>th</sup> March 2002 as exhibits P1 and P2 in support of his evidence,

The post mortem report indicated that a body of a female of the apparent age of 35 years was taken to the hospital mortuary at Mubende by police and was identified as that of Kwesiga Bishagenda, on the 28th June 2002. The cause of death was hemorrhage and pain and shock.

The police accident report (exhibit P2) indicates that on that 27<sup>th</sup> June 2002 at 1800 hours an accident was reported by Sendagire Norman (1<sup>st</sup> defendant) C/O M/S COWI to have occurred on the 27<sup>th</sup> June 2002 at Katabalanga Trading Centre. The person killed was described as:-

*“Kwesigwa Bishagenda f/a 37 years a Mukiga by tribe, a peasant of Mutambwa village, Kalonga in Mubende District who was a pedestrian crossing the road was knocked and died on the spot”*

The vehicle is described as:-

*“Motor vehicle Reg. No UPX 482 Mitshubishi pickup double cabin white in colour owner-Rakai Roads/COWI box 10591 Kampala. Driven by Sendagire Norman . Ins,*

*Cert No. C04001578 Pol No. 015290085 valid from 18/3/2002 to 17/3/2003 to 18/3/2003. Issued by American Int.(U).*

*-A pedestrian crossing”*

From this evidence, it is clear that the plaintiff has discharged the burden of proof to the satisfaction of the court. The answer to the first issue is therefore in the affirmative.

### **ISSUE NO.2:**

If so, whether the 2<sup>nd</sup> defendant's driver is negligent.

The plaintiff averred and contended that the accident was caused solely by the negligence of the 2<sup>nd</sup> defendant's servant who negligently controlled the said motor vehicle in the course of his employment.

Particulars of negligence are given in paragraph 6 of the plaint given as:-

- a) Driving at an excessive speed.
- b) Driving the said motor vehicle without due regard to the other road users.
- c) Overtaking another vehicle without due regard to other road users.

The evidence of the plaintiff is that the said double cabin was moving very fast and tried to overtake the lorry which was also going in the same direction. He and the sister were walking on the left side of the road when the pick up knocked her. The police report indicated that she died instantly. This evidence is in my view, adequate proof on the balance of probabilities of negligence, that is excessive speed, and overtaking without due regard to other road users. In the absence of any evidence to the contrary, the Court finds negligence on the part of the 2<sup>nd</sup> defendant's driver, and also answers this issue in the affirmative.

### **Issue No.3**

Whether the beneficiaries named in the plaint are entitled to the relief sought.

It is pleaded in paragraph 7 of the plaint that as a result of the accident and the death of the late Kwesiga Bishagenda, the plaintiff and other members of the family have been put to loss and suffering. Particulars of loss and suffering are:-

1. Loss of financial support from the deceased.

2. Loss of dependency.
3. Loss of expectations of use of the deceased.

Beneficiaries listed are:-

- 1) Kawalya Aloysius (Brother)
- 2) Bosco Jingo (son)
- 3) Jackson Guord (son)
- 4) Jane Kobusingye (daughter)
- 5) Patience Twinomugisha (Daughter)
- 6) Oliver Tumusime (daughter)
- 7) Kyatamu John (son)

All of them were produced before Court. Kyotamu said he was 16 years old; Kobusingye was 14, Jingo 12, Tinomugisha 10, Gourd 8 and Tumusiime 6. Some stayed with their uncle and others with their grandmother after the death of their mother. Some were at school and others had dropped out of school after their mother's death. Under section 5 of the Law Reform (Miscellaneous Provisions) Act,

*“If the death of any person is caused by any wrongful act, neglect or default of any person and the act neglect or default is such as would, if death had not ensure, have entitled the person injured by it to maintain an action and recover damages in respect of it, the person who would have been liable if death had not ensure shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under such circumstances as amount in law to a felony”*

**Section 6(1) provides that:**

(1) Every action brought under section 5 shall be for the benefit of the members of the family of the person whose death has been so caused, and shall be brought either by and in the name of the executor of the person deceased or by and in the names of all or any of the members (if more than one) of the family of the person deceased.

I have held that the death of the late Bishagenda was caused by the negligence of the 2<sup>nd</sup> Defendant's driver. The case therefore falls squarely under S.5.

"Member of the family" has the same meaning as in the Workers Compensation Act.

Section 1(q) thereof defines "*Members of family*" to include son, daughter and brother. The person listed in the plaint are described as brother, sons and daughter respectively. The plaintiff, who is the brother, was issued with letters of administration on the 8<sup>th</sup> July 2005 by the chief Magistrate's Court in Mubende respect of the estate of the late sister. The beneficiaries are thus entitled to the reliefs sought. The answer to this issue is also in the affirmative.

#### **Issue No 4. Quantum.**

The prayers sought are:

(a) General damages.

In the case of **Agnes Masane -vs- Uganda transport company (1975) Ltd [1992-93]HCB, 207 Kireju J as she then was held inter alia that:**

*"it is now settled, that courts in deciding the reasonable expectation of pecuniary benefit of a deceased's dependants the basis may be calculated by taking the annual figure of the dependency and multiplying it with the number of years that dependency might be expected to last, the later figure being referred to as the multiplier.*

*The resulting amount must be scaled down by the reason of two considerations first, that a lump sum is being paid, second, that contingencies might have arisen to cut off the benefit prematurely"*

In that case, the deceased was aged 25 years at the time of the accident. He had a bakery business from which he earned shs 50,000 per month and another shs 50,000 pm from coffee. Two widows and 9 children were produced at the trial. A tenth one was sick, so it could not be produced in court. All the children were minors and were being looked after by their mothers. The widows also qualified as dependants since the deceased was looking after them. The judge found that the deceased spent  $\frac{3}{4}$  of his monthly income of shs 100 that is shs 75,000 on his family. This means he spent shs 75,000 X 12 or shs 900,000 p.a on the family. He was 25 years

old, healthy and hardworking and had about 30 more years of working life. All the children were minors, so he would continue supporting them till they were 25 years for the boys and 21 years for girls or until they were married. Taking into account the above facts and considering the life style of the deceased, and the fact that damages would be paid in a lumpsum a multiplier of 20 years was considered appropriate. Applying the multiplier, to the multiplicand, the lost dependence was found to be shs 900,000 X 20, which gave shs 18,000,000. The said amount was reduced by 10% to take care of imponderances and the dependants were awarded shs 16,200,000.

Applying the same formula to the instant case, Court finds that the deceased earned at least shs 300,000 per month from her produce. It can be safely assumed that she spent at least 75% on the family that is shs 225,000 per month. That means shs 225,000 X12 which equals to shs 2,700,000, per annum on the family. The deceased was aged 35 years. The post mortem report showed a well nourished person. The brother described her as hardworking lady who made money from the sale of her farm produce such as beans, maize and potatoes. She had about another 20 more years of working life by Uganda standards. All her children were minors. The brother and it appears even the husband also depended on her. They would have continued to depend on her until probably 20 years. The husband actually died soon thereafter, according to Plot.

Taking into account the above facts especially considering the life style of the deceased and the fact that the damages will be paid in a lump some, a multiplier of 20 would be appropriate. Applying the multiplier to the multiplicand the dependency would be 2,700,000 X 20 which would give 54,000,000. This amount would be reduced by 10% to take care of imponderances and the dependants would be awarded 48,600,000.

In the Masane case, it was also held that in apportioning the damages, regard must be had to the dependants ages, the younger receiving a larger sum. The mother gets the lowest since her dependency would not last very long due to her advanced age. A saving account was to be opened for each child.

Similarly in the case before me, the damages shall be apportioned in such a way that the younger children receive a larger sum. The plaintiff should get the lowest since he is an able bodied young man of 27 years, who really had no business depending on the poor sister who had seven children to bring up literally single handed. An account should be opened for the deceased estate where the money should be paid directly, and applied for the children education and benefit.

**b) Special damages:**

In the plaint the total sum of shs 7,419,000 was claimed as special damages for burial expenses. I found it as an exaggeration considering the plaintiffs, almost non existent source of income. He was dependent on the sister. For instance there are two figures for transporting the deceased to and from the hospital indicated as shs 30,000 and 50,000 yet the plaintiff was only able to justify the shs 30,000 only. Then the shs 800,000 for hiring two coasters for transporting mourners. In court the plaintiff talked of shs 150,000 instead under this item. Under item (5) for feeding mourners he had indicated shs 60,000 for 100 kgs of maize flour, 60,000 for 100 kgs beans, and 200,000 for 50 bunches of matooke. When asked for clarification by court, the plaintiff stated that they used beans which were in the house. They also didn't buy matooke. They got matooke from the garden, and mourners brought some. The sum total is that I am persuaded in the circumstances to allow only reasonable expenses for burial of shs 500,000 plus shs 50,000 for the police Report and another 50,000 for the post mortem Report, since the deceased had to be buried and those two reports are never free of charge. The plaintiff is also awarded costs of the suit.

In conclusion, judgment is hereby entered in favour of the plaintiff against the 2<sup>nd</sup> Defendant following term:

- 1) shs 48,600,000 general damages.
- 2) Shs 600,000 special damages.
- 3) Costs of the suit.

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M.S Arach-Amoko

**Judge**



6/2/2009.

Judgment delivered in court in the presence of:

- 1) John Wagaba holding brief for Patrick Mugisha for plaintiff.
- 2) Okuni Charles.

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M.S Arach-Amoko

**Judge**

6/2/2009