THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

CIVIL SUIT NO. 1147 OF 1998

KASEKYA-KASAIJA SYLVAN:: PLAINTIFF

VERSUS

ATTORNEY GENERAL:: DEFENDANT

BEFORE: HON. LADY JUSTICE MARGARET C. OGULI OUMO

JUDGMENT:

The plaintiff brought this suit against the defendant seeking for the following orders:-

1. General damages,
2. Special damages as per paragraph 9 of the pleadings,
3. Interests on (a) and (b) above at the rate of 30% per annum from the date of filing until payment in full,
4. Costs,
5. Any other relief that this honorable court may deem fit to grant.

The plaintiff's case is that on the 21st November, 1997, at 8 p.m. the defendant's motor vehicle being negligently driven by one Addi Thomas, a servant, agent/or a driver of the defendant knocked and injured the plaintiff while he rode on the rightful side of the road, a long the Kibuli-Gaba junction in Kampala. That as a result of the accident, the plaintiff sustained head injuries, a compound splinter fracture of the right distal leg leading to its amputation, damage to the neuro-vascular structures; displaced structure of the left femur and head injury. That the plaintiff suffered permanent incapability assessed at 70%.

The defendant denied the claim and averred that even if the driver was charged and found guilty, the plaintiff and one Joseph Ruhweza were also contributorily negligent.

At the hearing of the case, the following issues were framed:

1. Whether the driver of motor vehicle Registration No. UX 0103 was negligent?
2. Whether the defendant is vicariously liable for the acts of the driver?
3. Whether there was contributory negligence from the plaintiff?
4. Whether the plaintiff is entitled to the relief sought?

The plaintiff called 2 witnesses, the plaintiff himself, PW1 and the doctor who attended to him- Dr. Nadumba (PW2). The Respondent did not call any witnesses.

At the hearing of the case, the plaintiff was represented by Mr. Omunyokol of Omunyokol & Co. Advocates and the defendant was represented by an Attorney General's Representative.

Both parties agreed to submit written submissions which I shall refer to in my judgment.

Issue No. 1, whether the driver of motor vehicle Hundai Registration No. UX 0103 was negligent?

Mr. Omunyakol Counsel for the plaintiff, submitted that the driver of motor vehicle No. UX 0103 was negligent. That the law imposes a duty on a person who drives a vehicle on a road to use reasonable care to avoid colliding with other road users. He cited the case of *F. J Ijala v Corporation Energo Project – (1988-1990) at p. 123* where Justice C. Byamugisha, as she then was held that a motor vehicle does not normally block others without some negligence on the part of the driver. She further held that,

" in this particular case, it was incumbent upon the defendant to show either there was a probable cause on his part or the accident was due to circumstances beyond his control".

That in the absence of explaining why the defendant's motor vehicle blocked and injured the plaintiff, it must have been driven in a very reckless and negligent manner. Counsel argued that the driver of motor vehicle Reg. No. UX 0103 was prosecuted for reckless driving in the chief Magistrate's Court of Mengo, in Traffic Case No. NPT 1221/1997, and was convicted on his own plea of guilty. The proceedings of Traffic Case No. NPT 1221/1997 were tendered as "Exhibit P3", and in the case *of Robert Wuyuu & Anor Vs, Sugar Corporation (1998)KLR 15 at 19: it was held that by pleading guilty in a traffic case, the 2nd defendant appeared to have admitted being negligent.*

That in this case, it can be inferred that by pleading guilty the driver admitted to having breached the duty of care he owed to the plaintiff. That the plaintiff had established that the accident was caused by the negligence of the defendant's driver and there were no other cars.

The defendant on the other hand contended that the evidence on record does not indicate the cause of the accident although the driver of motor vehicle No. UX 0103 pleaded guilty to causing bodily injury to the plaintiff through reckless driving. That the evidence of PW3 in Examination in Chief was contradicted by the plaintiff in Cross Examination and that no other person from the scene of the accident was called to testify as to the cause of the accident. That "Exhibit P3" has no evidential value on the cause of the accident and the case of Robert Wuyuu and Anor Vs. Scoul & Anor and that of Ijjala Vs. Corporation Energo Project(supra) are not applicable.

In the circumstance, the defendant did not bring any other evidence that could have showed the probable cause of the accident, and the driver admitted pleading guilty to reckless driving in the traffic case No. NPT 1221/1997 and on the authority of the case of **Ijjala and Wuyuu,** the court is of the view that the plaintiff has proved on a balance of probability that the driver was negligent.

Issue No. 2. Whether the defendant is vicariously liable for the acts of the said driver?

Mr. Omunyokol submitted that there was no doubt that the defendant was vicariously liable for the acts of his driver. That the defendant employed the driver in the Ministry of Foreign Affairs as is revealed in the Police Accident Report admitted as Exhibit P2. That this fact was not contested by the defendant at the trial. That PW1 testified that there was a police officer present at the scene of the accident and following the accident the police carried out investigations and one Thomas Addi was stated to be the driver of the motor vehicle Reg. No. UX 0103 and he was prosecuted for reckless driving before the Chief Magistrates Court Mengo under traffic case No. NPT 1221/1997 which was tendered in court as "Exhibit P3" to support his submission. Mr. Omonyokol cited the case of **Robert Wuyuu & Anor v Sugar corporation of Uganda & Anor [1998] KLR 15 at 29,** where it was held that by pleading guilty in the traffic case the 2nd defendant appeared to have admitted being negligent. That in this case it should be inferred that by pleading guilty, the driver admitted having breached the duty of care he owed to the plaintiff.

That it was held in **Muwonge v Attorney General [1969] EA. P.17 quoted with approval in the Wuyuu case (supra)** that the liability of a master extends to all torts committed by his servant when purporting to act in the course of such business as he was authorized or held out as authorized to transact an account of his master. That it would remain the position even when the servant was acting deliberately, negligently or criminally for his or own benefit. That according to the case of **Ijjala** (supra), it was held, inter alia that "*ownership of the vehicle in question is prima facie evidence that at the material time, it was being driven by his agent and servant unless the contrary is proved"*

That in the case of **Ketayomba v Uganda Securiko Limited [1977]HCB at 170.** It was held, inter alia that *"an employer is still liable for the tortuous acts of his servant if the servant acted dangerously, recklessly or for his own benefit as long as he was on his master's duty when he inflicted the tort"* and in the case of **John Imina v Arua Town Council [HCCS] No.01245 of 1973**, it was held that once the plaintiff pleaded and proved that at the time of the accident, the driver was driving the car and he was employed to drive, a prima facie case has been established that he was driving within the course of his employment and the burden of proving the opposite shifts to the employer and in the instant case, the defendant had failed to adduce evidence to the contrary, therefore the defendant could be held vicariously liable for the acts of his driver.

On the part of the defendant, learned counsel submitted that the evidence on record does not indicate the cause of the accident. That although the driver of car No. UX 0103 pleaded guilty to causing bodily injury to the plaintiff, through reckless driving, his evidence in "Exhibit P3", was contradicted by the plaintiff in Cross Examination. That no other person from the scene of the accident was called to testify on the cause of the accident. That PW3 has no evidential value in the course of the accident. That the case of **Wuyuu** – supra is not applicable. That the defendant is not vicariously liable for the Acts of the driver.

The defence counsel further submitted that "ExhibitP3" has no evidential value in light of the plaintiff's testimony in Cross Examination. That vicarious liability is not a presumption of law and even the case of Muwonge Vs. Attorney General, did not say so. That the plaintiff had a duty to prove beyond ownership of the vehicle if the relied, that the driver was acting within the course of his employment, especially in this case where the accident occurred after the working hours of the defendant.

The law with regard to vicarious liability is that an employer is generally liable for the act of the employer or agent- committed within the course of the employer's business.

In the instant case, there is no contention that the driver was employed by the defendant in the Ministry of Foreign Affairs.

I do agree with counsel for the defendant that vicarious liability is not a presumption of law. However in the case of **Muwonge v Attorney General, 1967 EA at p.7**, *it was held that unless there is evidence that the use of the gun was for the police man's own use and unconnected in any way to his driver, then the defendant was not liable.*

However, in this case, it is my view that the reckless driving of a driver who was employed to drive has a direct connection to the duties he was employed to perform unless the contrary is proved. The use of the car after the normal working hours of the defendant is not sufficient, since the hour of 8am – 5pm is only applicable to desk officers, unless there is evidence that it applied even to the drivers.

In view of the above, court is of the view that the defendant is vicariously responsible for the reckless acts of his driver, in the course of his duties.

Issue No. 3 whether there was contributory negligence from the plaintiff?

Counsel for the plaintiff Mr. Omunyokol submitted that, the issue of contributory negligence was raised by the defendant. That the defendant failed to adduce any evidence to prove any contributory negligence and thus the allegation of contributory negligence cannot hold. That as a general rule, the burden of proof lies on the defendant to prove that there was contributory negligence. He referred to the case of *Wayuu & Another v sugar Corporation of Uganda and another [1998] 11 KLR.15 (supra*. That in the absence of evidence to prove this, the issue should be answered in the negative.

Counsel for the defendant cited the principle of Res Ipsa loquitor deliberated in the case *of Mrs. Amida Mubandanga v Asgaralli Gulamhussein CS. No. 588 of 1971* and submitted that the evidence in the case proves contributory negligence on the part of the plaintiff. That there is no sketch map from the police who supplied everything else but the sketch map of the accident. Secondly, that no person who witnessed the accident was called to testify as to the cause of the accident. That the plaintiff never even saw what blocked him and thirdly that the weather was bad and it was dark. That all this undermines vision to the effect that there is no clear evidence of

who was driving/riding recklessly. That it is on a balance of probability to impute negligence on both the plaintiff and the defendant and he invited the court to do so.

The rule in contributory negligence is that the defendant has to prove the contributory negligence, instead what the defendant is doing here is raising the question of absence of a sketch map or no witness to the accident being called to testify to the cause of the accident and finally that the weather was bad and it was dark. All those do not prove that the plaintiff contributed to the accident and thus not sufficient. However, there is evidence from the proceedings of the court, which is an authentic court record to the effect that, the defendant's driver was prosecuted and pleaded guilty to reckless driving, which is not denied by the defendant. Consequently, court is of the view that the defendant has not proved that the plaintiff was contributory negligent as he had alleged and the plaintiff was not contributorily negligent.

Issue No. 4 whether the plaintiff was entitled to the relief sought?

The plaintiff pleaded for and sought for special damages and general damages.

On special damages, PW1 produced receipts exhibited as exhibit "P1" for medical treatment, transport, feeding, purchasing clutches and Motorcycle repair expenses together with receipts for obtaining the police accident and surgeon report in the sum of Ugandan shillings, one million, one hundred and seventy eight thousand, three hundred only (1,178,300/=)

The plaintiff also claimed for General damages for pain and suffering he underwent.

Counsel for the plaintiff submitted that the plaintiff is entitled to compensation for loss of his right leg which was amputated below the knee. That sufficient medical evidence was adduced to establish that the plaintiff suffered injuries to his right knee that he can flex it to fairly five degrees and he suffered permanent disability of 70 % to his knee. That in a case decided in *[1992-1993], Kityo Vs. Uganda Consolidated fund, and Another* J. Kityo awarded 10,000,000/- to the plaintiff who had suffered a fractured left arm, a twisted right arm whose permanent disability had been assessed at forty percent.

That in this particular case, there was amputation of the plaintiff's leg below the knee and permanent disability of 70 percent in relation to the whole body of the plaintiff – according to the surgeon, PW2. Counsel for the plaintiff proposed a sum of thirty million to be awarded to the plaintiff for the loss of the leg. That the plaintiff also suffered pain and was hospitalized for 5 weeks. That in **Wayuu's case** (supra) the plaintiff was awarded 2,500,000/- to cover other

injuries, pain and suffering. That the plaintiff in the instant case had to see a doctor up to the time of hearing the case, that he gets swellings and there is a plate and screw inside the femur. He prayed for 10,000,000/- for pain and suffering and the total sum of general damages is 40,000,000/-.

Counsel for the defendant submitted that the plaintiff is not entitled to the relief sought on of the 1st – 3rd issues. That other than the special damages, the plaintiff had not proved the general damages claimed. That the plaintiff's evidence in proof of the extent of his disability was so destroyed in cross examination that it carried no evidential value at all. That the plaintiff actually called PW2 to prove the extent of the disability. That PW2 did testify that other than the amputation, the plaintiff was fully recovered. That this means he suffers no more pain. That on the plaintiff's disability, PW2 testified that the 70% disability applies to the use of his amputated leg and not his other body. That no disability of his alive body was assessed by the doctor even during cross-examination. That he absolutely insisted on his assessment for the use of the amputated leg even after they pointed out to him it does not make sense to state that a person who is 70% disabled can walk, talk, walk and look like the plaintiff. That there is no evidence to assist the court to assess general damages. The defendant conceded that the plaintiff suffered pain at the time of the accident and proposed (one million shillings) as general damages.

The Defendant did not contest the plaintiff's claim for special damages, I shall take it as admitted and grant the plaintiff a sum of 1,178,300/= as special damages (Uganda shillings one million one hundred and seventy eight thousand three hundred shillings only).

General damages:

The plaintiff also claimed for General Damages for the loss of his leg which was amputated below the knees for pain and suffering arising out of it and counsel proposed 30 million for the loss of the leg and on pain and suffering, the plaintiff testified that he attends to a doctor to this day and he gets swellings and there is a plate and screws inside his femur. He prayed for 10 million for pain and suffering thus the total sum should be 40 million only.

General damages are damages which the law implies or presumes naturally to flow or accrue from the wrongful act and may be recovered without proof of any amount. *(See Traill v Bowker, (1947) 14 EACA 20) and Patel and Amin (1955) 11 EACA 1 post 258*, cited in East African cases on the law of Tort by Veitchat page 253.

1. In the instant case, the plaintiff claimed for thirty million for the loss of his right leg. The plaintiff is a boda boda rider and the loss of his leg is crucial for his business as it means loss of income for him because no one will trust being taken by a boda boda rider with one leg only.

2. The plaintiff also claimed for 10 million for pain and suffering. Although the defendant disputed this, I believe that it is the person who has the injury who feels the pain and even the doctor does not describe it. Although the Doctor did not testify that the plaintiff was feeling any pain, the plaintiff must be feeling pain because he has to adjust to the use of his amputated leg. I therefore believe that the sum of 10 million for pain and suffering is reasonable for the plaintiff to claim and together a sum of 40 million for general damages is appropriate.

3. I also order that the defendant pays interest on and as claimed at the rate of 30% per annum from the filling of the case that is October 1998 till payment in full.

4. Costs of the suit are granted to the plaintiff.

The defendant has a right to appeal the ruling.

Margaret C. Oguli Oumo

JUDGE

3/02/2009

Present:

1. Edward Angora holding brief for Mr. Omunyokol, counsel for the plaintiff

2. Plaintiff in court

3. Ms. Baiga Irene , State Attorney – for the defendant

4. Nalongo Nandaula, Court Clerk

5. Nyakwebara Elizabeth, Research Assistant