THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

CIVIL APPEAL NO. 0048 OF 2007

(Original Mengo C. S No. 571 of 2004)

GLORIA NAMUTYABA ::APPELLANT

(suing thru her next

Friend Lwebuga Jane)

VERSUS

ULTIMATE SECURITY LIMITED::::::::::::::::::::::::::RESPONDENT

AND

MISC. APPLICATION NO. 0079 OF 2010

(Arising out of Civil Appeal No. 0048 of 2007)

ULTIMATE SECURITY LIMITED :::::::::APPLICANT/RESPONDENT

VERSUS

GLORIA NAMUTYABA ::::::::::::::::::::RESPONDENT/APPELLANT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

JUDGMENT

The appellant being aggrieved by the judgment and decree of the Magistrate Grade I (Her Worship Sylvia Nabaggala) at Mengo dated 10th October, 2007 appeals to this court against the whole judgment. The grounds advanced are:

1. ***Trial Magistrate erred in law and on facts when she held that the defendant was not negligent in driving its motor vehicle.***
2. ***The trial Magistrate erred in law and on facts when she held that there was no proof that the appellant's leg was injured as a result of the accident.***

3. ***The trial Magistrate erred in law and on facts when she held that the contradictions in the plaintiff's case were so grave that they went to the root of the case.***
4. ***The trial Magistrate erred in law and on facts when she preferred the medical evidence of DW2 to that of the appellant's witness, PW5 whose evidence she rejected.***
5. ***The trial Magistrate erred in law and on facts when she held that the plaintiff did not suffer any significant injuries to warrant on award of damages.***

Counsel:

Mr. John Kityo for the appellant

Mr. Nsubuga Richard for the respondent

When the appeal came up for hearing on 20/04/2010 learned counsel for the appellant indicated to court that he was not ready to proceed. I rejected the prayer for adjournment because in my view it was not warranted and directed them to file written submissions. During the pendency of the appeal the respondent herein had filed ***Misc. Application No. 79 of 2010*** seeking an order that ***Civil Appeal No. 48 of 2007*** be struck out for non-service of court process.

I advised the respondent, if it so wishes, to address this issue as a preliminary objection to the appeal in its written submissions so that the court determines the competence of the appeal and the merits together. Counsel for the appellant was given up to 27/04/2010 to file written submissions, counsel for the respondent up to 4/05/2010 for a reply, and counsel for the appellant up to 11/05/2010 for a rejoinder, if any. Judgment would be on notice. As I write this judgment, long after the expiry of the last date for submission of written arguments in the matter, learned counsel for the respondent has not filed any. I will do the best I can on the basis of the available records as it must be business as usual whether or not Advocates comply with their own undertakings in such matters.

As regards the objection to the appeal, it is averred by learned counsel for the applicant/respondent in ***HCMA No. 74 of 2010*** that neither themselves as the applicant/respondent's advocates nor the respondents were served with a copy of the Memorandum of Appeal; that they (applicant/respondent's lawyers) learnt of the appeal for the first time on 3rd February 2010 when they received a copy of the amended memorandum of appeal, and informed the respondent/appellant accordingly; that the appellant by not serving them or the respondents with a copy of the appeal omitted to carry out an essential step in time.

By the time the matter was closed for written submissions the respondent/appellant had not filed a reply to the Notice of Motion. However, she filed a belated affidavit in reply with the consent of the other party.

It is submitted by learned counsel for the respondent/appellant that the affidavit sworn by Brian Kalule, learned counsel for the applicant/respondent should be struck out on the ground that it is defective; that the Advocate should not act as counsel and at the same time a witness; that the matter he deponed to in paragraphs 2, 3, 4 and 5 in his affidavit make him a witness in the application; and that those matters are contentious, prohibited by Rule 8 of the Advocates (Professional Conduct) Regulations, 1977.
From the records, the impugned affidavit though sworn by a member of the firm representing the applicant/respondent is not sworn by the lawyer representing the applicant/respondent, Mr. Richard Nsubuga.

From the records also the applicants/respondents were served through their counsel for the hearing of the Appeal on 20/04/2010 vide a Hearing Notice dated 22/03/2010. Counsel for the applicant/respondent duly attended court on 20/04/2010. It is an admitted fact that the applicant/respondent received the first Memorandum of Appeal in the matter in February, 2010. Learned Counsel for the respondent/appellant's concern is that upon receipt of the Memorandum of Appeal, his counterpart filed the Notice of Motion on 4/03/2010 despite the receipt of the Hearing Notice and Memorandum of Appeal earlier on. Learned Counsel contends that they could not serve the applicant/respondent earlier

with the Hearing Notices or Memorandum of Appeal in respect of the Appeal filed on 24/10/2007 because the grounds of appeal were not completed as the Chief Magistrate Court had not sent the original file with the proceedings to the High Court to enable them (respondent/appellant and her lawyers) to sort out the grounds of appeal after reading the proceedings; that although the appeal was filed on 24/10/2007, the lower court file was not sent to the High Court until after the Registrar of the High Court had ordered for it as per his letter dated 4th December, 2009.

It is my view a correct position of the law that an advocate is not allowed to depone to matters that are not purely formal but contentious as per Rule 8 of the Advocates (Professional Conduct) Regulation 1977: ***Charles Kabunga vs Christopher Baryaruha & 3 Others HCMA No. 41/95*** reproduced in ***[1995] VI KALR 29***.

In that case court held that when Counsel deponed to the value of the land he was deponing to a contentious matter since this was not a formal fact in his knowledge; that therefore his affidavit was materially defective and would not be relied upon in court.

I do not think that the decision in that case has a bearing on the facts herein. This is because under O.19 r.3 of the Civil Procedure Rules, affidavits shall be confined to such facts as the deponent is able by his knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted provided that the grounds thereon are stated.

An interlocutory application is one filed during the course of the proceedings. ***HCMA No. 79/2010*** comes within the meaning of an interlocutory application. From the pleadings, M/s Nsubuga & Co. Advocates took part in ***Civil Suit No. 571 of 2004*** as counsel for the defendant throughout the proceedings. Judgment was delivered on 10/10/07 and an appeal was filed on 24/10/07. It was therefore filed in time. However, from the affidavit of Jane Rwebuga, the initial Memorandum of Appeal lodged on 24/10/2007 was not brought to the applicant/respondent's attention till March this year. The reason advanced by the appellant is that she had not received the proceedings and

judgment of the lower court. This is of course a lame excuse since she filed a Memorandum of Appeal anyway. Therefore when the applicant/respondent's counsel avers that neither themselves as respondent's advocates nor the respondents themselves were served with the copy of the memorandum of Appeal, this is a fact easily verifiable from the records and actually admitted by the respondent/appellant. The averment cannot therefore be faulted.

For the above reason alone I would find the ***Charles Kabunga*** case, supra, distinguishable on facts from the instant one.

As to whether the appeal be struck out on account of non-service of court process on the applicant/respondent, the law cited to me, O.43 r.11, relates to service of notice of day for hearing the appeal, not service on the respondent of the copy of the Memorandum of Appeal and/or Notice of Appeal. The applicant/respondent was indeed served with the Hearing Notice in respect of the date of the hearing of the appeal. The application was filed upon receipt of notice of the pending appeal. The omission to serve on them copy of the Memorandum of Appeal was in my view an error or lapse in procedure. The errors of non-compliance with the rules of procedure have time and again been held not to be fatal as long as no injustice has been done to the other party.

See: ***Clouds 10 Ltd vs Standard Chartered Bank (U) Ltd [1987] HCB 64***
Also: Tarlol Singh Saggu vs Roadmaster Cycles (U) Ltd CACA No. 46/2000.

It is trite that courts do not exist for the sake of discipline but for the sake of deciding matters in controversy. Unless the other party will be greatly prejudiced, which has not been shown to be the case in the instant matter, hearing and determination of disputes should be fostered rather than hindered: ***Banco Arabe Espanol vs Bank of Uganda SCCA No. 8 of 1998.***

By saying so I should not be understood to mean that rules of procedure should be ignored. Each case must be decided on the basis of its own unique facts and

circumstances. In the instant case to order the respondent/appellant's case to be struck out would be to punish her for the lawyer's negligence and to give undue regard to a technicality which the makers of the Constitution in their wisdom meant to remedy in Article 126 (2) (e) thereof. For the reasons stated above, I would overrule the objection in ***HCMA No. 79/2010*** and proceed to determine the appeal on merits. It shall be so.

I have already noted that although the respondent was given up to 4/05/2010 to file a reply to the appellant's submissions, none was filed. I will do the best I can in these unique circumstances.

BRIEF FACTS

The background of the appeal is that the appellant, a minor aged 9 years, sued the respondent for general damages for injuries she sustained on 10/06/2004 when she was knocked down by the respondent's motor vehicle. The learned trial Magistrate Grade I dismissed the suit with costs on the ground that the appellant did not suffer any significant injuries to warrant an award of damages and that negligence and injury had not been proved. Hence this appeal.

Ground 1: ***That the trial Magistrate erred in law and on facts when she held that the defendant was not negligent in driving its Motor vehicle.***

This is a first appeal. It is the duty of the first appellate court to review the record of evidence for itself in order to determine whether the conclusion reached upon the evidence by the trial court should stand.

It is trite to say that if the conclusion of the trial court has been arrived at on conflicting testimony after seeing and hearing the witnesses, the appellate court in arriving at a decision would bear in mind that it has not enjoyed this opportunity and that the view of the trial court as to where credibility lies is entitled to grant weight: ***Flora Mbambu & Anor vs Serapio Mukine [1979] HCB 47*** at 49.

The appellant (at p.5 of the record of proceedings) testified that on the day in question she was from school going home. She was off the road with her friends when a speeding motor vehicle came form behind her and knocked her. The road was under construction, small and big stones had been put on the road. On being knocked, she fell down. She did not see the vehicle that knocked her before the accident but its tyre went over her. She said she was not going to cross the road to go to her home when the accident occurred. According to her, she did not have to cross the road and she was not walking on the road.

PW2 Lwebuga Jane, the mother, reached the scene of accident shortly after the event. On arriving at the scene she found many people had gathered. The plaintiff had been removed from the scene of accident and put at a point opposite the scene of accident. She was lying down. She only said one word and stopped talking. She agreed with the driver of the motor vehicle to take the child to Mulago Hospital but on their way, the driver said that they should go to Escort Hospital which they did.

PW3, Nakaweesa Kate, testified that she witnessed the accident from a nearby shop along Kawaala Road. She told court that the motor vehicle came at high speed knocked the appellant who was walking on the shoulder of the road. Her evidence was that the driver of the offending motor vehicle lost control, left the road and knocked the plaintiff. People made noise, she went to the exact spot of the accident and found the plaintiff under the motor vehicle.

The evidence of PW4 Wasswa Timothy is that he was walking when he saw the motor vehicle which knocked the appellant and after knocking her, the vehicle stopped.

The respondent had in its Written Statement of Defence undertaken to adduce evidence at the trial to prove that the driver was not negligent. However, at the trial, the respondent adduced evidence of three witnesses. The witnesses did not include the driver who caused the accident. In law a fact is said to be proved when court is satisfied as to its truth. The evidence by which that result is produced is called the proof. The general rule is that the burden of proof lies on the party who asserts the affirmative of the issue or

question in dispute. When that party adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof: that is, his allegation is presumed to be true, unless his opponent adduces evidence to rebut that presumption.

In the instant case the appellant/plaintiff alleged that the respondent/defendant was negligent in driving its motor vehicle. The burden was on her to prove the allegation. She adduced evidence of those who saw the vehicle as it approached her. They all said that the driver was at high speed. The only witness who would have challenged the plaintiff's evidence on this point, the driver of the Motor vehicle that caused the accident, did not testify. In these circumstances, I would agree with the submission of learned counsel for the appellant that the burden to prove negligence was shifted to the respondent. The respondent failed to discharge that burden.

In law whether or not an injured party has any redress against the vehicle owner depends on whether or not he/she can prove that the driver was negligent. The objective attitude of the courts to this tort is made clear in what Baron Alderson said in ***Blyth vs Birmingham Water Works (1856) 11 EX. 781***.

> ***"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."***

The plaintiff who alleges negligence must prove that:

(i) the defendant owed him a duty of care;
(ii) the defendant broke that duty; and
(iii) the plaintiff suffered loss.

Each of the above requirements is a hurdle for the plaintiff to jump. If he fails at any of them, he will lose and be without a remedy. I think it goes without saying that the

respondent/defendant's driver owed the appellant/plaintiff a duty of care. She was on her way home after school and the defendant's driver knocked her down. He did not appear as a witness to give his version of events. In my view the doctrine of res ipsa loquitur is very applicable to this case. The case of ***Scott vs London and St. Katherine Dock Co. (1865) H. C 596*** provides a useful and relevant illustration. It concerned a fall of six bags of sugar on a Customs officer who was in a warehouse. Erle, CJ looked at the fall of bags and inferred negligence on the part of the defendant. He put forward this test:

> ***"There must be reasonable evidence of negligence. But where the thing is shown to be under management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."***

I agree.

The practical effect of the above test is that unless the defendant is able to offer a reasonable explanation of how the accident could have happened, the judge would draw inference that the defendant had been negligent.

In the instant case, after considering the plaintiff's evidence which I have summarized above, the learned trial Magistrate held that the defendant was not negligent in driving its motor vehicle. She stated that the plaintiff left her case in equilibrium thereby failing to discharge the burden of proving negligence on the part of the defendant.

I am of the considered opinion that the learned trial Magistrate completely failed to evaluate the evidence of the plaintiff/appellant. At p.17 of the record of the proceedings, DW1 admitted that their motor vehicle had been involved in an accident and knocked the child. In the absence of explanation by the respondent/defendant's driver as to what led him to lose control and knock the appellant, DW1's evidence amounted to admission that

they were responsible for the accident. Learned Counsel for the appellant has submitted that negligence was proved against the respondent, that the trial Magistrate erred in law and facts to hold otherwise. On a revaluation of the evidence on record as I have done above, I am unable to come to a different conclusion. I am of the view that the learned trial Magistrate did not subject the evidence before her to adequate scrutiny. There is therefore reason for this court to interfere with her judgment on this point.

I would, for reasons stated above, allow Ground one and I do so.

Ground 2: ***That the trial Magistrate erred in law and on facts when she held that there was no proof that the appellant's leg was injured as a result of accident.***

Testifying on the nature of injury suffered by the plaintiff the plaintiff herself testified:

> ***"The motor vehicle tyre went over my left hand leg on my thigh. I felt pain. I was taken to Hospital. I was not admitted. I have a problem with my leg because at times I get pain in my knee. I don't experience any other problem as a result of the accident but I can't run properly because at times I fill (sic) pain. I also don't walk properly. I limp."***

Her mother, PW2 Lwebuga Jane, said she found blood at the scene of the accident. She was advised to take her to Hospital but on the way the defendant's driver persuaded her to take the child to another Health facility, Escort Hospital.

There was some discrepancy in the plaintiff's evidence as to which leg sustained injury: left or right. The victim said it was the left, PW2 said it was the right leg.

The plaintiff also adduced evidence of PW5 Doctor Bugeza Samuel, attached to X-ray Department, Mulago Hospital. He looked at the X-ray diagram of the plaintiff that had been taken in 2004 and his interpretation of the same was that the plaintiff had a fracture

of the left tibia, i.e. a broken bone of the left leg. The defendants in their defence did not say that the plaintiff did not suffer any injury. They submitted that the injuries sustained by her had been exaggerated and adduced evidence of DW2 Dr. Semanda who was by then at Escorts Hospital where the plaintiff had been rushed. He examined her on 11/06/2004 and found her to have bruises on both upper and lower limbs but no significant tenderness on other parts of the body. He found her to have soft tissue injury, i.e. injury that did not reveal any fracture. Faced with these contradictions, the learned trial Magistrate was of the view that the actual injuries caused could not be established; that the actual location of the injuries was so vital that it went to the root of the case. The learned trial Magistrate therefore accepted the evidence of DW2 Dr. Semanda and rejected that of PW5 Dr. Bugeza to come to the conclusion that the injuries sustained were bruises on both upper and lower limbs.

The learned trial Magistrate arrived at this conclusion on conflicting testimony after seeing and hearing the witnesses. This court has not enjoyed that opportunity. Therefore the view of the trial court as to where credibility lies is entitled to great weight.

On a revaluation of the evidence on this point, I am of the considered opinion that the trial Magistrate subjected the evidence before her to adequate scrutiny. There is no reason for interfering with her findings on the extent of the injuries suffered by the appellant.

I would disallow this ground of appeal and I do so.

My finding on this ground also disposes of Ground 3 and Ground 4. They too fail.

Ground 5: ***That the trial Magistrate erred in law and on facts when she held that the plaintiff did not suffer any significant injuries to warrant an award of damages.***

From my analysis of the evidence above, the appellant was knocked by the respondent's vehicle, a fact undisputed by the respondents. There was evidence that she was rushed to Escort Hospital where she received treatment. It is not indicated how much the respondent spent on her treatment. Even then there is evidence of her travel to Mulago Hospital to establish the extent of injuries suffered by her in the accident.

The plaintiff who has succeeded in proving his/her claim is entitled to be awarded such a sum of money that will as far as possible make good to him/her the loss for which the defendant is liable.

The injury may not have been as severe as the plaintiff/appellant had alleged but even then she was entitled to some award of damages commensurate with the defendant/respondent's tort against her. The learned trial Magistrate in my view erred in law and on facts to hold that appellant did not suffer any significant injuries to warrant on award of general damages. Such an injured party must as far as possible be put in as good a position in money terms to restore her/him to the original condition. The principle of law is that the plaintiff who suffers damage due to the wrongful act of the defendant must be put in the same position he would have been in had he not suffered the wrong.

The learned trial Magistrate did not assess the damages which she would have awarded the appellant if her claim had succeeded. Learned Counsel for the appellant has proposed a sum of Shs.4,000,000/= as general damages for the injuries she suffered. In ***Tumusiime vs Entebbe Municipal Council HCCS No. 921 of 1987*** the plaintiff was awarded Shs.5m and in ***Donald Egeju vs Attorney General HCCS No. 585 of 1990*** the plaintiff was awarded Shs.3m for the defendant's negligence. In ***Wasoma Ahamad vs Crown Beverages & Anor HCCS No. 33 of 1998*** (Jinja), I was unable to hold that the injury suffered by the plaintiff in that case was severe but considering all facts together I made an award of Shs.5m. I did say earlier on that each case must be decided on the basis of its own unique facts. In the instant case, I notice that the respondent was considerate enough to rush the appellant to its health facility. Although physical injury was not the only damage to the appellant, the respondent must earn credit for that. The

appellant testified at the hearing that she still had a problem with her leg, that she was at times getting pain in her knee, and that as a result of the accident she could not run properly because at times she felt pain. She was 10 years old at the time she said all this. She ought to have been believed or else a reason given for not believing her. Doing the best I can in the circumstances of this case, I deem a sum of Shs.1,000,000/= (one million only) adequate compensation for the insubstantial loss she suffered as a result of the negligent act of the respondent's servant. The award shall attract interest of 25% per annum from the date of this judgment till payment in full.

In the result the appeal is allowed and the order dismissing the suit is set aside. It is substituted with an order for payment of general damages in the sum of Shs.1,000,000/= (one million only).

The appellant shall be awarded half the taxed costs of the appeal here and in the court below.

Orders accordingly.

Dated at Kampala this …… 28th …….day of … May, …2010.

Yorokamu Bamwine
JUDGE