THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT ARUA

CIVIL SUIT NO. 0019 OF 2005

GAAGA ENTERPRISES LTD :::::::::::::::::::::::: PLAINTIFF

=VERSUS=

1. **SBI INTERNATIONAL HOLDINGS**
2. **NV UGANDA & ANOTHER ::::::::::::::::::::DEFENDANTS**

JUDGMENT

On the 16th August 2005 at about 10.00 am, Juma Muteguya was driving a public transport coach registration No. UAG 895A loaded with 67 passengers from Kampala to Arua. Around the same time the 1st defendant, a road construction company, was going about its ordinary activities of road construction along Arua – Karuma road. These activities apparently

involved transportation of road making materials. At a place called Pajok II, a traffic road accident occurred. It involved the bus I referred to above which belonged to the plaintiff company and a tipper lorry belonging to the 1st defendant company. The tipper was Reg. No. UAB 122 Z which at the material time carried stones/marram from a borrow pit. How did this accident happen? Each side tells its own version and basically it constitutes the main point of conflict in the case.

The plaintiff claims that the 2nd defendant entered the main road which had no alerting signs from a bush without warning and the accident occurred. The defendant claims the plaintiff's driver ignored all the road signs, including a flagman who warned him to stop. He failed to break and ended up knocking the defendant's vehicle from the rear side.

As a result of the said accident the plaintiff pleaded that it suffered loss and damage and filed the present suit in negligence to recovery of general and special damages resulting there from.

At the scheduling conference, the following facts were treated as admitted;-

a) That on the 16th August 2005 an accident occurred involving the plaintiff's motor vehicle Reg. No. UAG 895A and the defendant's motor vehicle Reg. No. UAB 122 Z.
b) That the 2nd defendant was in employment of the 1st defendant.
c) That the 2nd defendant was charged with the offence of reckless driving in court and pleaded guilty.
d) That the accident happened at Pajok along Arua – Pakwach road.

The following issues were agreed on and framed before court.

1. Whether the accident was caused by the negligence of the 2nd defendant.

2. Whether the plaintiff's driver was contributorily negligent in causing the accident.
3. Whether the 1st defendant was negligent as pleaded. (Rephrased by court to state **whether the 1st defendant is vicariously liable for the acts of the 2nd defendant.**
4. Whether the defendants are liable for the accident (rephrased to state by court **"whether the defendants are liable for damage and loss the plaintiff claims to have suffered".**
5. Remedies available to the parties.

The plaintiff called four witnesses who were all its employees. Only PW3 witnessed the occurrence of the accident. The defendant called 3 witnesses also. All of them were either employees or former employees of the defendant. Neither side in the case called an independent witness.

At the close of the evidence with leave of court both counsel elected to proceed by written submission, under a time frame that was set by consent before court. They all acted within that time frame and filed the submissions. I must say, detailed submissions were filed by both sides. I have seen serious attempts to review evidence that was adduced and application of the law by both advocates. I was provided with all the authorities counsel relied on. Except for the counsel for the plaintiff who provided so many authorities on matters that had already been agreed on and I never addressed them in my judgment.

Nevertheless I am thankful to both counsel for the attention they gave to the case. My judgment is a result of a careful study of their submission and my own evaluation of the whole case.

PROCEDURE

I must comment on the procedural aspect of the second defendant's participation in the suit before I turn to resolution of issues.

On the 30th Jan 2006 when this case comes for hearing before my brother Judge A.KANIA, Mr. Alaka represented the plaintiff and Mr. Walukaga appeared for the 1st defendant. Mr. Alaka made an application reasoning that since the 2nd defendant had been served and did not file a defence, judgment be entered against him. Court allowed that application and entered judgment against the 2nd defendant under 0.9 r 8 of the CPR. That happened in the presence of Mr. Walukaga.

However on 6th June 2006 without either getting consent from counsel for the plaintiff to set aside the order made under 0.9r8 against the 2nd defendant or making the necessary application under 0.9 CPR, M/s **Masembe, Makubuya, Adriko, Karugaba & Sekatawa Advocates** filed a written statement of defence for the 2nd defendant. This is the same firm Mr. Walukaga who was in court, comes from. This defence was perhaps inadvertently endorsed by the Registrar of this court on the 6th 04 2006.

In absence of consent or application to set aside the order of this court under 0.9 r 8, I will not take the 2nd defendant's written statement of defence to be a document constituting part of the proceedings. The order still stands. For the record, I take it that the second defendant did not participate in this case and the case proceeded against him for formal proof.

RESOLUTION OF THE ISSUES

The answer to any of the above issue will depend and depends on the amount of evidence adduced by a party having the legal burden to do so.

See S.**101** and **102** Evidence Act. In the case of **H. Kateralwire Vs Paul Lwanga [1989-90] HCB 56** three ingredients making up a case of negligence were established. These are:-

1) ***There must exist a duty of care owed by the defendant to the plaintiff.***
2) ***The defendant ought to have failed to exercise that duty of care.***
3) ***That such failure must have resulted into injuries, loss or damage to the plaintiff.***

I must add, from other authorities, there must not be conduct on the part of the plaintiff that contributed to the accident or conduct which indicates to voluntary assumption of risk.

I will resolve the issues in the order they were set and agreed on except for the phrasing of 3rd and 4th issue whose wording only, I changed.
It is already an admitted fact that the 2nd defendant was a driver of the 1st defendant. He was in the course of his employment. It is also admitted that the accident occurred at Karuma – Arua road at Pajok. This leads me straight to the issue of negligence.

ISSUE ONE

Whether the accident was caused by the negligence of the 2nd defendant.

The burden to prove that there was negligence is on the plaintiff see S.101 and 102 of the evidence Act.
To discharge that burden and relevant to this issue the plaintiff called PW3 who was the driver of the plaintiff's bus that was involved in the accident. He was therefore an eye witness. PW3 – Juma Muteguya is a mature man

of 50 years. He has driven vehicles for 22 years, he told court. In a brief account on how the accident occurred he said

> ***"I was coming from Kampala heading to Arua. My bus had 67 passengers that fateful day. …….The bus was new. I arrived at Karuma at 10.30 am and headed for Arua but on a straight stretch five kilometer away from Karuma, a tipper came from the bush, joined the road, it braked in the road, I swerved off the road and in the process, the front of the bus hit the cabin of the tipper. I entered the bush and went until the bus stopped".***

PW3 stated further that there were no flagmen on the road at the time of the accident. He said there were no road signs to warn if a vehicle is coming from the bush. He claimed to have been driving below 80 KMP. In cross examination he told court that the bus went off the road for about 50 meters from the point of impact. He said he applied his brakes and left tyre marks which he said were removed by the defendant's tractor before police came on the scene. According to this witness, this part of the road was not under construction.

I have given PW3's evidence the attention it deserves and found it to be of little help to me to find that the defendant's driver was negligent. Although I must quickly add that there are other circumstances which indicate to the negligence of the defendants.

It is not easily believable without any other evidence from the plaintiff that the tipper came from the "bush" and joined the road as PW3 claims. All witnesses of the defendant say that the tipper came from a borrow pit side where there was a road joining the main road.

PW3 is equally not helpful in describing the manner in which the driver of the defendant's tipper joined the road. Was it at a very high speed? It is not mentioned let alone detailing the negligent conduct of the driver. The plaint listed 8 items of particulars of negligence which I believe PW3 is the only witness who saw them happen. For clarity purposes, in summary the particulars were:-

a) Failure to give way
b) Failure to keep to his lawful of side of the road.
c) Failure to obey or observe traffic regulations.
d) Driving to fast and recklessly while entering the high way.
e) Failure to brake, steer, swerve to avoid the collision.
f) Failure to hoot while entering the road.
g) Entering the road recklessly.
h) Failure to head the presence of the bus.

I find the statement of evidence given by PW3 not to be covering the above particulars of negligence sufficiently. PW3's evidence would have gone an extra mile, especially in describing the conduct of the driver which he did not. There are questions which are not answered in proving the alleged particulars of negligence yet it would have been his evidence to provide the answers.

However on evaluating all the evidence, there are areas which point to the negligence of the defendants. The first one I will deal with is the **position of the flagman**. I agree with the evidence of the defence that there was a flagman but his position was of no help in preventing an accident. In his own testimony DW3 Robert Picture who was the flagman told court that at

the time of the accident, he was about 200 meters away from the turning point where the accident occurred. He stated this in his defence in-chief and re-affirmed it in cross examination.

It is my considered view that DW 3 as a flagman was in a wrong position. Being 200 meters away from the junction at which vehicles from the borrow pit entered the road, would not allow him to see the tippers from the borrow pit. He could only see vehicles on the main road. By the time he sees the tipper from the borrow pit, they would already be in the road. It seems he took his work to be the stopping or warning of the vehicles on the main road. This was wrong. His work was dual.

He had to be positioned at such a point, that he could see the vehicle from the borrow pit and the vehicle on the main road. His first obligation would be to stop the vehicle from the borrow pit so that it does not join the main road when they are other vehicles already. Secondly he had to warn the vehicles on the main road of the advance of tippers from the borrow pit. Depending on his good judgment, he would clear either the tipper or the vehicles on the main road when it is safe to drive and avoid collision of vehicles.

To do that kind of control, DW3 had to be positioned just a short distance from the junction. A distance in my view, which allows him to see into both ends, the borrow pit and the main road. At 200 meters from the junction, DW3 only controlled vehicles on the main road. It leaves room therefore that it is more probable than not that tipper registration No. UAB 122 Z which collided with the plaintiff's bus came into the road without sufficient

warning as DW3 could not see its advance properly given his admitted position.

Secondly the defendant's failure or refusal which ever is true, to call the driver Mr. Bernard Kyaligonza had a negative impact on the defendant's denial of liability. In this case, although the driver was sued and served, he never participated in the case. The 1st defendant's counsel as I said belatedly filed a defence for him but never bothered to call him as a witness. In **MILLY MASEMBE VS SUCAR CORP. & KAGIRI RICHARD Civil Appeal No. 01 of 2000 in his** lead judgment, My Lord ODER JSC (RIP) had this to say

> ***"Before leaving this issue of appointment of liability I would hasten to point out that it is the appellant who bears responsibility for the absence of explanation from the mini bus driver as to how the accident happened. She should have allowed the mini-bus driver to continue in the suit as a third party in respect of which the trial court had made an order. It should be added that in a case such as this one, evidence should be adduced from all parties to the accident in order to assist the court in its task of balancing responsibility regarding the cause of such an accident" (emphasis mine)***

The emphasized part of the learned Supreme Court judge's judgment applies to this case. In the case before me, the driver was not called to give evidence. There was no explanation given for this failure. This kind of conduct invited criticism from **WAMBUZI CJ** (as he then was) in **ANDEREYA SINZIMUSI VS GOMBA BUS SERVISE LTD** civil Appeal No. 8 of 1979 when he said

"…….the driver of the bus did not testify and there was no reason given for the failure. On the evidence of the only witness for the respondent Semambo, the ticket examiner, the driver should have seen the heifer on the road and the three men standing near them. The road was straight. What did the driver do in the circumstances? He was not there to say. However he collided with the appellant …….he was not there to explain what steps, if any, he took to avoid colliding with the appellant. Semambo can say what happened but he cannot speak for the driver who was in control of the bus".

In this case why didn't the 1st defendant call Mr. Kyaligonza as his witness? On failure to do, why was not any explanation given? Apparently according to the written statement of defence the driver filed using the same advocates like the 1st defendant, to me shows that the two were in contact. Under S.106 of the evidence Act, the person who has knowledge of a fact has the burden to prove that fact. If the driver of the tipper had the knowledge how the accident occurred on his side, he had the burden to prove that fact. He is no where to explain as stated in the cases cited the 1st defendant caries the blame for his absence.

I would for the reasons given find that to some extent (the degree of which I will later determine) the accident was caused by the negligence of the 2nd defendant.

ISSUE TWO

Whether the plaintiff's driver was contributorily negligent in causing the accident.

In **GEORGE PAUL EMENYU & ANOR VS A-G [1994] KALR 109** Okello J held that

> ***"Person is guilty of contributory negligence if he ought reasonably to have foreseen that if he did not act as a reasonable prudent man, he might hurt himself and he must take into account that others may be careless"***

In the present case by amendment of pleadings, the defendant pleaded that the plaintiff's driver was guilty of contributory negligence. The plaintiff's driver was accused of having failed to heed the flagman's warning, driving at a high speed. In the circumstances and failure to brake and swerve when need arose to avoid the accident.
Required of me, is to decide whether there is evidence on the balance of probabilities to establish the alleged contributory negligence.

From his own evidence PW3 the driver, told court that his bus stopped about 50 meters away from the point of impact. This would not have resulted if he was driving at a reasonable speed. The area where the bus got off road was rough according to him. If his bus had been slow, it would not have gone that far from the point of impact. 50 meters it's about ½ a football pitch in a bush, shows that the vehicle was too fast. PW3's evidence is that he got off the road. In **George Paul Emenya and another** (supra). It was held that

> **"If a motor vehicle swerves to the wrong side of the road and causes an accident, the driver must explain how his position on the wrong side was consistent with the reasonable care on his part".**

Secondly PW3 said he tried to brake and his vehicle created tyre marks. This is a result of a speeding vehicle. No tyre marks would have been

created if the vehicle was at a reasonable speed. He was unsuccessful in trying to stop the vehicle and he went off the road. In **Andereya Sinzimusi (supra) Nyamuchoncho JA** observed that

> ***"The fact that the bus skidded would suggest that the driver was too fast".***

PW3 told court he was aged 50 years out of which he had spent 22 of the 50 years driving. That he knew the route very well. The defence evidence was that the road was under construction. If I agree with the evidence of the plaintiff that at the particular spot of the accident there was no construction but PW3 had knowledge that at that time the whole road was under construction.

In my view "Road under construction" never meant or needed to be that the particular spot at Pajok II where the accident occurred be under construction. In any event by pleadings in paragraph 13 (a) the plaintiff admits that the road was under construction

It meant that the whole route was under construction and required any prudent driver to take extra care. By claiming that this part of the road was not under construction, It tempted PW3 to drive in the manner he wanted and over speeded. However there is also evidence that Pajok II spot had a borrow pit where the constructors of the road got stones/marram. That activity is part of road construction. I therefore find PW3's conduct of over speeding on the road he knew was under construction to have been negligence that contributed to the accident.

Evidence of DW3 Robert Picture on over speeding of PW3 before the accident is believable. It is corroborated by the claim by PW3 that he created tyre marks and the vehicle went off the road for 50 meters. I take DW3 to have witnessed the accident. Although from a big distance, he at least saw the bus before it collided and told court that it was over speeding I agree with him on the question of over speeding since his evidence is corroborated.

On the part of the vehicle that the plaintiff's vehicle hit on the part of the defendant's vehicle, evidence of the defence is that the bus hit the rear door of the tipper. PW3 told court that he hit the cabin – (meaning the tipping side) this shows that by the time the bus hit the tipper the tipper was positioned straight heading towards Arua. How then would the defendant's driver have swerved or controlled the vehicle in such manner as to avoid the accident? He can not see what is in the rear end. He can well use the driving mirrors but to a limited extent. The plaintiff's driver on the other hand, had the better chance to avoid the accident by not colliding with the vehicle in front of him than the driver of the tipper who could not see what is in the rear side.

I have also considered that after the impact, the tipper did not move much. It remained in the same place and the bus went a far. This shows which of the two vehicles was faster. If the tipper had been fast it does not matter that it was loaded. It would still have moved as a consequence of impact by momentum. The bus was not empty either. Evidence is available that it has 67 passengers and luggage but still it moved far off the point so impact. I believe as a result of over speeding which was a negligent act.

I have also considered the position of the two drivers. While the driver of the defendant carried stones and perhaps he was the only person in the tipper, PW3 carried 67 passengers in a public transport coach. He, (PW 3) therefore had bigger duty of care to be exercised on the road and to other road users. In my view the driver carrying 67 passenger in a bus has a greater duty **than** the one carrying stones. Whether there is a flagman or not, that cannot be over emphasized. The flagman was only available in respect of vehicles belonging to the construction company. What would PW3 do if the vehicle was of other road users who did not carry flagmen with them to warn others of their advance? He just had to be prudent.

What amounts to prudent conduct of a driver on the road has been stated in case of ANDEREYA SINZIMUSI Vs GOMBA BUS SERVICE C.A NO. 08 of 1979 quoting **Tart Vs Chitty** & co. (1931) ALL ER (Rep) 826 at 829 as follows

> ***"……it seems to me that when a man is driving a motor car along the road he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound to go not faster than will permit of his stopping or deflecting his course at any time to avoid anything he sees after he sees it".***

While in the case of **Paul Kato Vs Uganda Transport Corp. Ltd [1975] HCB 119** it was held that

> **If the possibility of danger emerging is reasonably apparent then to take no precaution is negligence because a driver ought to guard against reasonable probability of danger arising from carelessness of other drivers.**

The duty is bigger if the driver is driving a **public vehicle** carrying **passengers.**

In BROCKHURST Vs WAR OFFICER [1957] C.L.Y 2388 the Court of Appeal of England stated:

> ***"……..it is expected that a Public transport vehicle driver should at all times be aware of such obstacles on such roads. A driver should not assume that the road shall be clear all the time so as not to mind and look out to be prepared to slow down or stop suddenly in an emergency".***

In **Andereya Sinzimusi (supra) Nyamuchoncho JA said**

> *"**The driver did not exercise reasonable care…….. He should have reduced the speed so that he could stop the bus if necessary**. **His degree of care in this case would have been greater as he was carrying passengers** (empasis mine).*

For similar reasons as stated in the above cases and my review of the evidence in this case, I find that the driver of the plaintiff made a reasonable contribution in the causation of the accident by being negligent himself.

I have considered other factors before reaching the position, which I need to state below.

It was the strong argument of counsel for the plaintiff that the driver of the defendant had pleaded guilty to the charge of reckless driving. Counsel therefore asked court to give that fact very serious consideration and equally hold that based on that plea and conviction, the driver of the 1st defendant

was negligent. With due respect that is not the law and I disagree with the plaintiff's request.

In MILLY MASEMBE (supra) WAMBUZI C.J (As he thee was) reviewed the position by quoting **Ochieng Vs Obedo Nyambito C.A No. 92/1973** (Unreported) and stated;

> ***"It is trite and rudimentary that proceedings in a criminal case cannot be used to prove a cause of action in a civil suit. Of course the record of the criminal case can be used for certain purposes……. But the proceedings and the result of the criminal trial can not be made the basis of proof of a civil claim".***

As the law is as clearly above stated, I will disregard all the pleas by the plaintiff's counsel that I seriously consider the fact that the defendant's driver had pleaded guilty and still hold that the plaintiff's driver was contributorily negligent.

I have also considered the fact that the plaintiff while presenting its case selectively left out evidence that would point to the establishment of what actually occurred. Right from the pleadings the plaintiff stated that it would rely on the traffic accident report, sketch plan and the inspector of motor vehicles report. The three documents were duly attached to the pleadings and listed accordingly.

At scheduling conference, the plaintiff restated as in its pleadings that its case would rely on the 3 documents. When it came to hearing Mr. Ondoma Samuel for the plaintiff told court as below;-

"We have failed to trace the remaining witness in the circumstances we do close the plaintiff's case".

The record does not show any efforts to trace the witnesses. Counsel for the plaintiff did not extract any witness summons for the witness he was allegedly tracing. The witnesses he wanted were formal witnesses. By that I mean persons who hold established civil service or armed forces posts. That means, if you fail to get the actual person who processed the documents, the current office holder can come to court and tender the documents in evidence. No such effort was made.

Although it was not open and still it is not in my view, to counsel for the defendant to submit on the documents that had not been even exhibits as if, they were exhibits on record, merely looking at them as annextures to the plaint, one would get perplexed why they were ever left out. I am forced to believe that the omission to exhibit the sketch plan, the traffic accident report and the inspection report compiled by the IOV was deliberate. It was intended to cover some degree of truth about the negligence of the plaintiff's driver. Because of the above, I have been forced to make an adverse inference to the detriment of the plaintiff's case that inference is that there is some truth he wanted to avoid. This conclusion is supported by evidence. DW1 confirmed the existence of an access road. DW2 said the tipper was coming from a borrow pit to join what he called Kampala – Arua road highway meaning that there was a smaller road joining the main road. DW3 said the bus was coming from Kampala to Arua and the tipper was felling marram from the borrow pit. It was joining the road. This also to me, means there was a small road which joined the main road. There was no successful challenge to that piece of evidence in cross – examination. It is

only PW3 who claimed that there was no road and the tipper came from the bush. I find the claim that tipper came from the bush to be illogical. That is the kind of truth the plaintiff's side wanted to avoid by not tendering the above documents hence my adversely inferring so against the plaintiff.

In **Pushia d/o Roajibhai M. Patel Vs the flect transport co. ltd [1960] EA** 1026 at page 1033 the court of 1026 at page 1033 the court of EA African court of appeal said

> ***"Whether an adverse inference should be drawn from the fact that a particular witness has not been called is a matter which must depend on the particular circumstance of each case".***

That reasoning was followed in **Uganda Breweries ltd Vs Uganda Railway corporation civil appeal No. 06 of 2001.** Applying the same reasoning to the present case, its particular circumstances are such that it is inevitable for me not to draw adverse inference against the plaintiff for the failure or refusal to tender in evidence relevant exhibits which would help this court to reach a reasoned and evidence based conclusion. The traffic accident report and sketch plan had a lot to tell on the occurrence of the accident.

Having concluded that the plaintiff's driver was contributorily negligent, I must naturally proceed and apportion the degree of blame to each of the parties. In so doing I must take into account all the material facts and considerations. See **KHAMBI AND ANOTHER VS MAHITHI AND ANOTHER [1969] EA 70.** As seen in the first part of this judgment, I have considered the following;-

a) That the plaintiff's driver was driving a public vehicle with passengers while the defendant's driver carried stones.

b) That plaintiff's vehicle got off the road by 50 meters while the defendant's vehicle remained almost stationed.
c) The presence of tyre marks suggesting over speeding on the part of the plaintiff's driver and absence of the same on the part of the defendant.
d) Nature of the scene of accident, a straight road, time of accident, day light, surface of the road which was not slippery.
e) That although the scene of accident had no road construction activity, everyone agreed the road was under construction.
f) That the defendant's flagman was 200 meters away from the place which would have given him better control of the traffic.
g) That the defendant elected to have its driver, the 2nd defendant not participate in the case and no explanation at all was given by him as the primary participant in the accident.

Finally, considering all the facts surrounding this case, the plaintiff's driver for the bus must have been 60% to blame for the accident while the defendant driver for the tipper (2nd defendant) was 40% to blame.

3RD ISSUE

Whether the 1st defendant was negligent as pleaded. The above issue was framed in the language it appears. I changed it to an easier version to understand below

"Whether the 1st defendant is vicariously liable for the acts of the second defendant".

The fact that the 2nd defendant was in employment of the 1st defendant at the time of the accident was treated as an admitted one.

I would therefore answer the above issue in the affirmative. My resolution of the issue on contributory negligence apply to the above. The apportionment of blame I have made equally applies to this issue.

4TH ISSUE

Whether the defendants are liable for the accident.

I rephrased the issue to read;

> ***Whether the defendants are liable for the damage and loss the plaintiff claims to have suffered***.

The answer to the above issue is in the affirmative to the extent of the degree of blame I have apportioned. Where the plaintiff prove loss such loss or damage shall be limited to the defendant's degree of blame.

Res ipsa loquitur – whether the doctrine applies to this case?

There seem to be a sub issue of whether the doctrine of res ipso loquitur is applicable to the present case. Both sides submitted on it authoritatively. In the light of my finding on the first two issues, the doctrine can not apply here. I agree with counsel for the defendant's citing of SENTONGO & ANO. VS UGANDA RAILWAYS COTP. [1994] KALR 57 where it was held that;

> ***"…….it is well established that the plaintiff can only rely upon this inference of negligence if he has established in the pleadings and proved at the trial the facts from which this principle is to be drawn so that this event charged as negligence tells its own story of negligence on the part of the defendant, the story being so told being clear and unambiguous".***

The present case is far from fulfilling the above test. The doctrine had no room for application to the present facts.

REMEDIES

The plaintiff prayed for special damages, general damages, interest and costs. Particulars of special damages were given by items in paragraph 9 of the plaint. He called PW1 and PW2 to prove loss and damage the accident caused the plaintiff company. Exhibits PE1, PE 2, PE 3,PE4 and 5 were tendered in evidence for the same purpose.

SPECIAL DAMAGES OF SITS 118.120.862/=.

In submission counsel for the plaintiff tackled the subject, item by item. In reply the defendant's counsel did the same thing. I will also adopt their approach in my judgment. The law is that special damages must be pleaded and proved. Counsel for the plaintiff cited to this court the case of **KYAMBADDE VS MPIGI DISTRICT ADM. [1983] HCB 44 where Masika C.J** (as he then was) held that special damages must be strictly proved but need not be supported by documentary evidence in all cases. I agree with the above position of the law and add that it depends on the circumstances of the case and position the party finds itself in.

1) **Shs. 96.000.000=**

Under item 9 (1) of the plaint it is pleaded as follows;

"loss of earning of fares paid by the passengers and luggage per day at the rate of shs. 1.600.000= per trip for 60 days the vehicle was in the garage…….shs.96.000.000/=

PW1 Mr. James Nyakuni the managing director of the plaintiff was called to justify and prove the above loss. The relevant part of his evidence on this point runs as follows;

> ***"This bus had capacity to take 67 passengers…….. for the time it was in garage we had no bus to use in its place. In a day, the income from the bus for passengers was shs. 1.050.000= for luggage shs. 450,000/= the daily income came to shs. 1.600.000= in two months we lost shs. 96.000.000=".***

In submission, the plaintiff's counsel doesn't differ from the evidence of PW1 as quoted above. He repeated the same words and asked court to make the award. Counsel for the defendant disagreed. He argued that no evidence was at all adduced to prove the claim. He reasoned that income earned could not be the same all days (1.600.000=). No specific fare paid by passengers was mentioned. He finally said that the claims had not been proved.

It is not disputed that PW1's evidence on this claim was merely oral evidence. He told court he was the managing director of the plaintiff company. One would expect him to be more equipped on all company matters than any other person. I am surprised he never mentioned simple facts like how much each passenger pays to travel from Kampala to Arua or the reserve journey. Secondly what nature of luggage is charged to get an income of shs. 450.000= per trip amounting for shs. 27.000.000= for two months' loss. How would the passenger pay and how much they paid each for such luggage.

I do believe that on all those payment, receipts are issued either for fare or luggage and a counterfoil is kept by the company issuing the receipt. It would have assisted this court if PW1 brought to court the carbon copies the company keeps after issuing the receipts to passengers. He also had the option of bringing the books of accounts where entries of income earned from each bus per day or week are made. He did not.
He still had the liberty of relying on his bank records for days of banking or a particular period of banking and indicate to court how this particular bus or any other on the same route in a particular period of time performs financially. He still did not.

Court would have still expected the witness to explain to it how the figure is earned as 1.600.000= per trip. What is the cost of fuel used in a day, what amount is used for servicing the vehicle and any other incidental mechanical problem they ordinarily face on the way. With all that done, one would safely reach a figure that can be taken as an earning. I have found difficulty in filling the so many gaps PW1's evidence left.
However this does not mean that the plaintiff's company never lost. It has only failed to prove the loss strictly.

I will however resort to the position stated in **Robert Cuossen Vs A.G SC C.Appeal No. 09 of 1999** in a paragraph quoted by my sister learned Judge Mulyagonja Iren in **HCCS No. 39 of 2008 Clere Wekesa & Ors Vs Reliable Freight services ltd** and another which states as follows;

> ***"The passage of Judgment of Okello JA to which I have referred, indicates an erroneous view on the part of the learned justice of appeal that the appellant's claim for loss of earning must have been***

pleaded and proved as special damage. As the authorities to which I have referred to clearly indicate, pre-trial loss of earning may be claimed and proved as special damages while post-trial loss should be claimed as general damages at assessment of which is left to the discretion of the trial court, based on the relevant facts having been proved. One of such facts which must be proved is the actual earning or income at the time of the injury.

However, pretrial loss of earnings may also be left to the trial court for assessment together with post-trial loss as part of general damages".(emphasis mine)

In the result I find that the plaintiff unserious attempt to prove loss of sh. 96.000.000= as special damages fails but I reserve the same for consideration when I come to assessment of general damages.

2). The second item of special damages 5.000.000= paid to Munira Kayanja PW2 to rebuild the body of the bus.

PW2 who did the work was called to testify and an invoice which he issued claiming for payment was tendered in evidence as Exp. P1 through PW1. However, PW2 who was the author of the document (Exh. PE1) also testified. PW1 said he paid shs. 5.000.000= for the repairs to rebuild the body of the bus to PW2. What is not clear in assessing the evidence in exhibit P.1, PW1 and PW2 is how much was paid. PW1 said he paid shs. 5.000.000= to PW2 while EXh. P.1 has shs. 6.061.000= as the claim. PW2 on payment said;-

"After completing the job I was paid cash. Prior to doing the job we agreed to a figure of over shs. 6.000.000= what we agreed as the cost of my work is on my invoice which I invoiced Gaaga".

He does not say how much he was paid. Those anomalies would have been brought out by cross-examination of PW2 by Mr. Walukaga. However when his chance came to cross examine PW2 Mr. Walukaga is recorded by court to have said

> ***"I am not ready to cross-examine the witness as I propose to call another officer".***

Then court recorded that the cross-examination of PW2 was deferred to next hearing that was on the 6th 04.2006. The next hearing was fixed for 7/6/2006. Even at the next hearing of the case Mr. Walukaga never asked for the recall of PW2 for cross-examination. The law governing such conduct has already been stated. In **HARBE INTERNATIONAL CO. LTD Vs EBRAHIM KASSAM & ORS SC CIVIL APPEAL NO. 40 OF 1999 Karokora JSC** stated while following an earlier decision of court in **James Sowoabu and another Vs Uganda (SC) crim. Appeal No. 5 of 1990** (unreported) where it was held;

> ***"Whenever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination it must follow that he believed that the testimony given could not be disputed at all. Therefore an omission or neglect to challenge the evidence-in-chief on a material or essential point by cross examination would lead to the inference that the evidence is accepted subject to its being assailed as inherently incredible".***

Since Mr. Walukaga chose not to cross-examine PW2 and as there are no indicators that he PW2's evidence is inherently incredible, I will accept it. I however take the figure of shs. 5.000.000= which PW1 said he paid to PW2. I take the claim for shs. 5.000.000= paid by PW1 to PW2 to have been proved and I accordingly award it.

3). The third item of special is a claim for shs. 5.800.000= for mechanical works. It is claimed that it was paid to Manisuri Galabuzi. He was not called to testify but Exh. P.2 was tendered in evidence through PW1. Counsel for the defendant disagreed with this claim for lack of receipts to prove the payment.

I agree with counsel for the defendant. Unlike in respect Maniru Kayanja who issue an invoice and was called to court to prove that he was paid, the said Galabuzi never came to court. No receipt was exhibited but merely an invoice which can not be used to prove payment. According to Oxford, advanced learners dictionary, the word "invoice" means

> **"a request for payment" or list of goods sold or services provided together with the price charged and a bill"**

The above English meaning of **"an invoice**" cannot be said to be a receipt which can be used to prove a payment. Consequently this item is not awarded for want of proof.

4). The forth item of special damages is a claim for shs. 2.000.000= being the cost of hired transport for three days to Gulu. This money was spent according to PW 1 on transport to Gulu from Arua and from Kampala to Gulu in order to get the traffic accident report. Exhibit P.5 was tendered evidence to prove the claim. It is receipt from

Victoria service garage dated 17/08/2005. Mr. Walukaga for the defendant disputed this receipt but gave weak reasons. First that the report PW1 went for at Gulu was not exhibited. I find no relationship between going for the report and exhibiting it. Actually the traffic accident report is annexed to the plaint as a document to be relied on at the trial. Mr. Walikaga's second reason of objection is that the plaintiff used his own vehicle. That would amount to giving evidence from the bar as no witness ever said such a thing. Nevertheless I have my own discomfort with exhibit P.5 as weighed against the oral evidence of PW1.

In cross examination PW1 said he hired the pick-up to take him to Gulu from Kampala at shs. 2,000,000=. That he made three trips. He had said more or less the something in his evidence-in-chief. However exhibit P.5 does not say that. It clearly states that shs. 2,000.000= was received as **"being payment of hiring vehicle from Arua to Gulu"** that is what it cost. The additional 3 trips PW1 orally mentions, are not included in Exhibit P.1. PW4 in cross exam told court that the 4 wheel was hired to go to Gulu to obtain a police report. I find the contradiction serious enough to compel me to reject Exh. P.5. I will for those reasons agree with Mr. Walukaga that Exh. P5 is a fabrication. I consequently disallow the claim of shs. 2.000.000= as it has not been proved.

5. The 5th item as a claim for shs. 800.000= for transporting the luggage from the scene of accident to Arua. Pw4 Isaac Dawa testified that he paid this amount and tendered in evidence exh. P.4 being payment voucher. It had two items shs. 500.000= for fuel taken by the tipper for which exh. P.3 was issued. It is a receipt from Pearl oils (U) ltd

Arua service station and shs. 300.000= paid to the driver. I have given due regard to Mr. Walukaga's challenge of this evidence. I nevertheless accept this item as proved. The receipt proves that fuel was taken for shs. 500.000=. I accept the oral explanation that shs. 300.000= was paid to the driver for the work. I accordingly award shs. 800.000= under this item.

6). The 6th item is claim for shs. 5.000.000= for towering the vehicle to Naguru. Pw1 only gave oral evidence to prove this item. In his oral account he told court he got receipts. He never said from who the receipts were issued. He did not tender them in evidence. On balance of probabilities it is not proved that Pw1 paid any person. He gave no reason why he came to court for a refund of the money to his company without the receipts. True, an oral account could be accepted but not in such a sketchy manner without even mentioning who was paid and explaining why the receipt issued is not tendered in evidence. For those reasons I disallow the claim shs. 5.000.000= as cash payment for towering services.

7). The 7th item is a claim for shs. 2.000.000= being the cost of towering the bus from Naguru to a garage at Rubaga. For exactly the same reasons as for items 6th above, I would disallow this claim as have not been strictly proved.

8). The 8th and last item is a claim for shs. 50.000= being the payment for other accident report. PW1 mentioned the payment of this money still in a very casual way. Briefly he said

"I hired a pick-up to Gulu at shs. 2.000.000= to secure the accident report which cost me 50.000=".

That was all. He does not say he was issued with a receipt which for some reasons he failed to bring to court or show to court the accident report that cost him the 50.000=. This was his company's case and he chose to be casual. I find no basis for me to allow this claim. It is accordingly not awarded for want of sufficient proof, oral or documentary.

General damages

Apart from submission where counsel for the plaintiff suggested that shs. 50.000.000= be awarded as general damages none of the four witnesses called by the plaintiff gave any evidence which would guide this court in making the award for general damages. PW1 mentioned general damages as a prayer. He said "I pray for general damages". He did not tell court whether the accident forced him to get alternative bus and at what cost if any. The general inconvenience the witness suffered as a result of this accident if any, was not explained. As a managing director I would have expected him under the lead by his counsel, to give all the details that would assist this court in making the award. True it is a discretionary award, but the discretion cannot be exercised in absence of any evidence. The proposal of award of shs. 50.000.000= was based on no evidence at all. I therefore reject it.

I will however consider general damages under the rule in **Robert Cussoins** case (supra). I have already reproduced the relevant paragraph in my judgment. I will consider the pre-trial loss of earnings in this case as general damages. The plaintiff claimed shs. 96.000.000= claiming that shs. 1.600.000= was the loss of earning per day. I will take it that shs.

1,150,000= (written as 1,050,000=) from passengers and shs. 450,000= from luggages, making a total of shs. 1.600.000=. The fact that the bus spent 60 days without working was not disputed or challenged. I take it that for that fact alone, the plaintiff suffered some loss. I will treat this loss to be pre-trial and award it as general damages.

On 1.150.000= I will deduct shs. 300.000= as cost of fuel per trip and remain with shs. 850.000= On 450.000= for luggage, I will deduct shs. 100.000= as an allowance for frustrations in business as not every day is the same and remain is an average income from luggage of shs 350.000=. The two items;-(a) Shs. 850.000= for passenger and (b) Shs. 350.000= for luggage would give a total income of shs. 1.200.000= per day worked. From the 60 days I would allow 2 days off. One day each month for service of the vehicle and remain with 58 of the lost earning. 58 days multiplied by shs. 1.200.000= as daily lost income would amount to shs. 69.600.000= as the cost income. It must be noted that I have not assessed that item as special damages but adopted a formular which would guide me to placing the plaintiff in the same position if the accident had not occurred.

I would consequently have awarded shs. 69.000.000= if the plaintiff had not been guilty of any contributory negligence.
I would in the result enter judgment for the plaintiff against the defendants jointly or severally to the extent of only 40% and make the following orders:-

a) That the defendants pay to the plaintiff 40% of shs. 5.800.000= which has been proved as special damages.

b) That the defendants pay 40% of shs 69.600.000= awarded as general damages.
c) That the defendants pay interest of 8% on (b) from date of judgment to date of payment in full.
d) The defendants pay interest of 20% on item (a) from date of filling the suit to payment in full.
e) That the defendants pay to the plaintiff 40% of the taxed cost of the suit in respect of all other items expect the decretal amount which is already reduced to 40% in this order.

NYANZI YASIN
JUDGE
07/04/2011