

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA**

**CIVIL APPEAL NO. 0016 OF 2008
Arising from Jinja Civil suit No. 0071 of 2005**

HARRY KASIGWA ::::::::::::::::::::::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

ERIC MUBALE

Suing through his next friend

KAMBA DAVID ::::::::::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: THE HON. LADY JUSTICE FLAVIA SENOGA ANGLIN

JUDGMENT

This was an appeal against the Judgment/Decree of the Magistrate Grade I Jinja delivered on 30/01/08. The Respondent had sued the Appellant seeking damages for injuries sustained in a car accident, due to the alleged negligence of the Appellant.

In her Judgment, the Magistrate found among other things that, the Appellant or his brother while driving the Appellant's motor vehicle Reg. No. UAF 559M knocked down the Respondent, causing him bodily injuries. That the accident was as a result of the negligence of the Appellant.

The Respondent was awarded special damages of Shs.441,100/=, and general damages of Shs.10,000,00/= with interest at Court rate from the date of Judgment till payment in full together with costs of the suit.

Dissatisfied with the Judgment and attendant orders the Appellant appealed to this Court on three grounds:

- (1) *The trial Magistrate erred in law and fact to hold that the Appellant was personally negligent when there was no evidence that he drove the vehicle in issue at the material time.*
- (2) *The trial Magistrate erred to hold that the Appellant was vicariously negligent/liable, when vicarious liability had not been pleaded.*
- (3) *Alternatively but without prejudice to the foregoing, that an award of Shs.10,000,000/= in general damages to the Respondent was excessive in all circumstances.*

When the appeal was called for hearing on 31/03/2012 in the absence of Counsel for the Respondent, Counsel for the Appellant applied to be allowed to put in written submissions. He undertook to inform Counsel for the Respondent. The appellant's submissions were filed on 08/04/2011 while those of the Respondent were filed on 21/06/2011.

In respect of ground 1, it was submitted by Counsel for the Appellant that, at page 4 of the Judgment, the trial Magistrate held the Appellant/Defendant personally negligent but that if not, then he was vicariously negligent.

Counsel contended that, to be personally negligent, there ought to have been evidence that the Appellant was the one driving the vehicle at the material time and that in the course of the driving, he was negligent.

Secondly that, the Respondent never identified the driver of the vehicle at the time of the accident since he became unconscious and only regained consciousness in the Hospital. In his evidence, PW1 says he was **told** that it was the Appellant's vehicle that knocked him.

It was pointed out that, since the Respondent's father PW6 was not at the scene of the accident, he could not have seen the Appellant driving the vehicle.

And that going by the evidence of PW2, PW3, PW4, PW5 and PW6, there was no evidence led by the Respondent to show that the Appellant personally drove the vehicle on the date in question. Therefore that, the Magistrate had no basis to hold that the Appellant drove the vehicle and drove it negligently.

For the Respondent, it was argued in reply that the finding of the trial Magistrate could not be faulted. The accident took place during the day time 5pm and while the respondent may have been unconscious, PW2 was at the scene and noted the registration number of the vehicle.

When PW4 the Investigating Officer visited the scene on 20/07/04, that same evening he saw the vehicle of the Appellant parked along Main Street Jinja. The Appellant refused to co-operate and did not report to Police as advised.

While the Appellant denied ever seeing PW4 until he testified in Court, and insisted that his car was never involved in any accident, the Appellant's contention that he left the car for washing without the key and his brother Kato collected it at 6pm could not be believed. Neither the car washer nor Appellant's brother were ever called to testify.

Further that, the Appellant's claim that the number of the car was obtained from the car sticker when he went to see the DPC was a lie not worthy credit.

On the other hand that the evidence of PW5 who testified that the accident was reported and registered by Police and file was allocated to PW4; that the DPC advised the Appellant to settle the matter but Appellant declined, is more credible. The Appellant was eventually charged with reckless and careless driving since he declined to disclose who was driving the vehicle at the time of the accident.

It was concluded that, considering those circumstances, the trial Magistrate arrived at the right decision when she found the appellant personally negligent.

To support his arguments, counsel for the Respondent relied upon decisions where it has been held that **“proceedings in a criminal case could be used to prove a cause of action in a civil suit”** – Refer to **Charles Walusumbi & 2 Others vs. Richard Wandera HCCS 72/2000**, where the holdings in **Ernest Ochieng vs. Obeda Nyabito [1975] HCB 117** and **Andrew Owiti vs. Opio [1977] HCB 124** were cited with approval.

Counsel asserted that the Appellant failed to prove his defence in the lower Court as required under Section 101 (1) of the Evidence Act.

In resolving the issues raised by this appeal, I take into account the duty of a first appellate Court **“to subject the entire evidence on record to an exhaustive scrutiny, re-evaluate it and come to its own conclusion”** – Refer to **Uganda Breweries Ltd. Vs. Uganda Railways Corporation SCCA 06/2001**.

In the present case, it can be discerned from the Judgment of the trial Magistrate that the Appellant was found personally liable because his vehicle was identified as the one that knocked down the Respondent and caused him the injuries he sustained.

The Court also found that whoever was driving the vehicle failed to use due diligence in observing the road signs and was therefore negligent.

It was noted that, the Appellant denied being the driver of the vehicle at the time of the accident, but that since he failed and or refused to divulge the name of the person who had been driving the car at the material time, was unco-operative and declined to report to Police when required to do so then he was personally liable for the negligence of the driver.

The Magistrate also observed that, though the Respondent never pleaded vicarious liability, the evidence of the Appellant implicitly showed that he assigned a task to his brother Kato to drive the motor vehicle by giving him the key.

All the above circumstances placed responsibility on the Appellant for the negligence of whoever was driving the car at the material time. That is, there was imputed negligence on the part of the Appellant. The trial Magistrate was therefore right to hold that the Appellant was personally negligent.

Imputed negligence is a doctrine that places upon one person responsibility for the negligence of another, such responsibility or liability is imputed by reason of some special relationship of the parties such as “**owner of a vehicle and driver**”

The legal responsibility for the negligent conduct of whoever was driving the Appellant’s vehicle was rightly visited on the Appellant. The relationship between whoever was driving the car and the Appellant gave rise to an express agency (If it was the brother of the Appellant to whom he gave the key) or an imputed agency (If it was the car washer to whom the car had been entrusted) as either of the two committed the act of negligence giving rise to the accident. – See **Black’s Law Dictionary with Pronouncements 6th Edition page 1034**. The first ground of appeal is answered in the negative and it accordingly fails.

This brings me to the 2nd ground of appeal which is whether the trial Magistrate erred to hold that the Appellant was vicariously liable when vicarious liability had not been pleaded.

In his submissions in respect of this ground, Counsel for the Appellant referred Court to paragraph 6 of the amended Plaintiff where it says that “**the vehicle Reg. No. UAE 559 was being driven by Kasigwa Harry, the Defendant.**” All the particulars of negligence in paragraph 7 are attributed to the Defendant.

Counsel argued that, in order for the Respondent to take advantage of vicarious liability, he ought to have pleaded at least in the alternative to the effect that it was the driver or agent of the Appellant driving and that therefore Appellant was vicariously liable.

To support the above argument two authorities were cited to wit: **Z.E. Kangave vs. A.G [1972]11 ULR 150-157 and Clementina Nyadoi vs. E.A. Railways Corporation [1974]**

HCB 122. The two cases are to the effect that failure to plead that **“a party who committed an accident/act was at the time acting in the course of his employment as servant or agent is fatal for failure to disclose a cause of action.”**

In the present case, Counsel for the Appellant asserted, vicarious liability was only raised during the submissions and therefore the trial Magistrate had no legal basis to hold that the Appellant was vicariously negligent or liable.

The Respondent’s reply to the above arguments was that although vicarious liability was never pleaded, the evidence of the Appellant implicitly showed that he assigned a task to his brother Kato by giving him the key. And since the said brother never testified, the trial Magistrate arrived at the right conclusion.

Further that failure to plead vicarious liability is not fatal to the Respondent’s case because **“not every act done by a servant during the course of employment will make a master liable and that each case remains essentially a question of fact depending on the circumstances.”** The cases of **Fukasi Kabugo vs. A.G. [1975]HCB 338; James Kabagambe & Another vs. A.G. [1976] HCB 281 and Paulo Byekwaso vs. A. G. [2005]2 ULR 84** were cited in support.

Counsel concluded stating that neither the Appellant’s younger brother nor the car washer were said to be his servants or agents acting in the course of their employment.

From the outset I wish to state that this ground of appeal also fails for the reasons already stated in respect of ground 1.

Though vicarious liability was not pleaded, there was an **“implied agency”** between the Appellant and whoever was driving his vehicle at the time of the accident. This type of agency occurs when agent and principal have no express understanding as to the agent’s appointment but their conduct suggests agency arrangement. This relationship imposed liability on the Appellant for the conduct of whoever was driving his car, more so as the

Appellant declined to disclose who was responsible for the accident so that they could take personal responsibility. He thereby became indirectly or by imputation, legally responsible for the negligent acts of the person who caused the accident.

The trial Magistrate took cognizance of the fact that the evidence of the Appellant showed that he assigned a task to the car washer by leaving him with the car and to his brother by giving him the key and asking him to pick the car from the washing bay. Those acts made him indirectly responsible for the negligent acts of either of the two people. Ground two fails for all those reasons.

It is now left to determine whether the award of Shs.10,000,000/= was excessive in the circumstances.

Counsel for the Appellant contended that the Respondent suffered mainly bruises (evidence of PW3) and the injuries were classified as harm, since there were no permanent injuries or disfigurement. He was treated with pain killers and antibiotics and he was even able to visit the scene of the accident the next day.

That there being no grievous harm suffered, 40% permanent incapacity cannot be justified and the Doctor did not attest to how he arrived at the percentage, more so as the Doctor stated there was only **“a probability of permanent incapacity.”**

Taking into account the period of time that has lapsed since the accident occurred and the inflation that has set in, Counsel for the Appellant proposed that, if the Appellant is found liable then an award of Shs.3,000,000/= would be reasonable. He prayed Court to set aside the award of the trial Magistrate.

The response of Counsel for the Respondent was that, at the time the Respondent testified in 2006, he still felt chest pain and the Doctor PW3 Katende Joseph said he would suffer pain for the rest of his life, plus psychological and mental anguish. The Court then awarded the

special damages of Shs.441,000/= and the general damages of Shs.10,000,000/= together with costs of the suit and interest at the rate of 8%.

According to Counsel for the Respondent, the decretal sum was reasonable as it was in proportion to the pain the Respondent has to endure for life. The disability was put at 40%.

That considering the inflation that has set in since, the figure ought to be increased by Shs.5,000,000/= instead of being decreased. She prayed for the appeal to be dismissed.

From the outset, I wish to state that I am aware of decisions to the effect that **“an appellate Court should not interfere with the quantum of damages assessed unless it is satisfied that the trial Court had acted on the wrong principle of law or had misapprehended the facts, or that the award was so inordinately low or high as to represent a wholly erroneous estimate of the damages”** – **Kenya Bus Services Ltd. Vs. Gituma [2004]1 EA 91 (CAK)** where the following cases were followed: **Kassam vs. Kampal Aerated Water Co. [1965]EA 587; Idi Shaban vs. Nairobi City Council [1982-88]1 KAR 681; Butt vs. Khan [1981] KLR 349 and Kimotho & Others vs. Vesters & Another [1988] KLR 48.**

While in the case of **Haman Dass vs. John Corbine & Another [1959]1 EA 834 (CAN)**. It was held that **“a Court of Appeal may properly interfere with a trial Court’s assessment of the quantum of damages if satisfied that, the Judge in arriving at his assessment, cited or may have cited some wrong principle of law.”**

In assessing the general damages in the present case, the trial Magistrate observed that, **“The evidence on record indicated that the Respondent would have chest pain for life and is likely to suffer psychological and mental anguish. He has a permanent maimed chest and a permanent disability of 40% and has to take pain killers for life.”** The Magistrate then awarded Shs.10,000,000/= as general damages.

In the circumstances of this case however, the Doctor had classified the injuries sustained by the Respondent as harm. It is difficult to believe that any permanent disability resulted as

the Doctor only put it as a probability of future loss of life “**may lose his life....**” in his Medical Report.

The problems with playing sex in the future were not mentioned at all in the Medical Report.

I am therefore persuaded by the arguments of Counsel for the Appellant that there was no reasonable basis for putting permanent incapacity at 40% and that the award of Shs.10,000,000/= general damages was inordinately excessive as to represent a wholly erroneous estimate of the damages and was not justifiable.

Decided cases clearly stipulate that “**in assessing general damages for personal injuries, which is a very heavy task, a Judge doing the best he can, has to seek a reasonable award and not an aim for precision and giving complete satisfaction**” - See **Ugemya Bus Service vs. Gachoki [1976-85]1 EA 575 (CAK)**. Although a Court is entitled to take into account relevant factors such as inflation prevailing at the time of Judgment.

Considering the nature of the injuries sustained by the Respondent (bruises), the past awards and inflation, pain suffered, psychological trauma and inconvenience, I find that the sum of Shs.3,000,000/= proposed by Counsel for the Appellant is reasonable and adequate compensation for the Respondent. The proposal by Counsel for the Respondent to increase the award to Shs.15,000,000/= is hereby rejected for all those reasons given above.

The appeal is accordingly allowed on this ground. The award of Shs.10,000,000/= general damages is set aside and substituted with an award of Shs.3,000,000/= with interest at Court rate from the date of Judgment until payment in full.

Costs of the appeal and of the lower Court are granted to the Respondent.

Flavia Senoga Anglin

JUDGE

30/07/2012