



IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Suit No. 0009 of 2009

In the matter between

JANE AKELLO

APPELLANT

And

THE ATTORNEY GENERAL

RESPONDENT

Heard: 19 September, 2019.

Delivered: 8 June, 2020.

Negligence— *Negligence is proved by satisfying a three-part test: the existence of a duty of care owed to the plaintiff by the defendant; a breach of that duty by falling below the appropriate standard of care; damage caused by the defendant's breach of duty that is not too remote a consequence of the breach. — Neighbour Principle — a person must take reasonable care to avoid acts or omissions which he or she can reasonably foresee would be likely to injure his or her neighbour. Where possible harm is foreseeable, a duty of care then exists. The degree of caution that we must exercise will obviously be dictated by the likelihood of the risk. A breach of duty occurs when the party owing the duty falls below the standard of behaviour that is required by the particular duty in question — the question of whether the conduct of the defendant has met the appropriate standard of care in the law of negligence is a question of mixed fact and law. — The reasonable man only has to do what is reasonable in order to avoid risks of harm. This means that there is no obligation to go to extraordinary lengths, particularly if the risk is slight. Generally, though where the defendant has sufficient control of circumstances to be able to avoid the harm, he would be obliged to act.*

Law Enforcement — *use of tear gas and similar irritants — whoever employs instrumental violence must ensure that the violence remains within its designated limits and that it only affects the persons or property it ought to affect — any reasonable*

police officer should be able to perceive that persons within the vicinity of the intended target of teargas deployment are so closely and directly affected by the act of its deployment that such police officers ought reasonably to have in their contemplation as being so affected, when they are directing their mind to the questioned deployment of teargas — any violent act by law enforcement officers must meet the requirement of discrimination and protection of the innocent — The police have a duty to avoid harm to innocents that they could and should have foreseen — If conventional means are not enough and tear gas or any similar gas is used to disperse crowds, then the police must ensure that the gases have no unacceptable humanitarian consequences -

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The plaintiff sued the appellant for recovery of general and special damages for negligence, and the costs of the suit. Her claim is that on 18th November, 2008 she was going about her normal duties at the Maternity Ward of Lacor Hospital in Gulu Municipality, where she worked as a Nursing Assistant. In the process of dispersing an illegal assembly within the vicinity of the hospital, the defendants negligently lobbed a teargas canister onto the hospital premises in close proximity of the Maternity Ward. The plaintiff was adversely affected by the teargas resulting in a persistent pounding headache and partial loss of eyesight. As a result, she is incapable of engaging in basic house chores and her productivity at work has been greatly reduced.

[2] In their written statement of defence, the 1st defendant refuted the plaintiff's claim. The defendant contended that only eight tear gas canisters were lobbed that day in dispersing the unlawful assembly and all eight were accounted for at the end of the exercise. None of them was lobbed onto the hospital premises. It was not a windy day and therefore the tear gas never wafted into the hospital premises. They prayed that the suit be dismissed. AIP Wakadubi Fred and ASP Okello James had been jointly sued with the defendant but the suit against the

two of them was withdrawn at the commencement of the hearing for failure of service of court process.

The plaintiff's evidence :

[3] P.W.1 Akello Jane, the plaintiff, testified that on the afternoon of 18th November, 2008 she was at her place of work at the maternity Ward of St. Mary's Lacor Hospital when she saw patients and their attendant rush back into the ward from the veranda. Soon thereafter she felt the irritation of tear gas in her eyes. She reported to the security officer about the pain in her eyes and she went back home. She could not sleep at night due to the pain in her eyes. The following morning, she returned to the hospital and reported the pain she was feeling. She was referred to Gulu Regional Referral Hospital from where her eyes were cleansed and she received medication. The following day she returned to that hospital complaining of headache and pain in the eyes. She later sought and received medical treatment from Mulago Hospital without change in her condition. She then attended a private clinic in Kampala. She was advised to buy eyeglasses for regulating the amount of light getting into her eyes. During the year 2009 she was forced to resign from her job as she was no longer productive at work. She has six children all of whom depended on her income from that job for their sustenance and school fees.

[4] P.W.2 Achaye Godfrey Ajwany testified that he was a Security Guard at St. Mary's Lacor Hospital at the material time. He was at the hospital gate on 18th November, 2008 at around 3.00 pm when he saw scores of people running in all directions. He walked out of the gate and saw the Mayor had convened a public rally about 40 - 50 meters from the hospital gate. A tear gas canister was lobbed at a shop opposite the Outpatient Ward of the hospital. Smoke from the canister wafted into the hospital premises, into the maternity ward, the children ward, the Young Child Clinic and the outpatient area. One of the tear gas canisters landed near the Young Child Clinic, located about 10 - 15 meters away from the

maternity ward. Firing of tear gas stopped when the people dispersed. The police came later in the afternoon and conducted an investigation, during which they recorded his statement. Later in the evening the plaintiff began complaining of pain in her eyes. Tear were coming from her eyes.

[5] P.W.3 Dr. Watmon Benedict, an ophthalmic at Gulu Regional Referral Hospital testified that he first came into contact with the plaintiff in May, 2009. He made a detailed assessment of her condition. She presented with an eye irritation. She gave a history that she got into contact with tear gas. He found that most of her eye structure was normal except for a yellow spot (macular). It had an abnormal appearance, degenerative process. It was hard to establish the cause. The probable causes include solar radiation (e.g. looking directly into the sun), for some it is due to age (above 35 years), others due to abnormality at birth, trauma (any injury to the eye by a blunt object), and there are also some with unknown cause. He could not tell for how long she had had the condition. She had a refractive error (impaired vision that requires spectacles). The cause is unknown, it may be genetic, it may be the result of abnormal shape of the eye. The last time he saw her was 1st April, 2019. He conducted a standard test on each eye separately and found her vision was in normal range. Tear gas is a chemical which is packaged in powder, spray or liquid. The chemical in tear gas is to provoke glands of the eye to release tears in response to irritation. It causes itching, irritation and discomfort and the gland pour tears. Most of its action is on the external part of the eye.

[6] The glands are in the socket at the membrane which appears white. Most often the function of tear gas is limited to the glands and the cornea and the conjunctiva. It is meant to disorganise the victim who begin to focus on protecting themselves, distracting them away from other activity. There are many types of chemicals and of different concentrations. In many countries tear gas used to cause transient irritation without permanent damage. He did not know the type used in Uganda. Teargas may cause temporary damage to the cornea but this

gets off after a few hours. The plaintiff's complaints tended to point to tear gas but tear gas effects may not last ten years; it is a temporary situation. This is abnormality inside the eye. The symptoms he saw are in the interior. If it were to damage the interior then the external factors too should be damaged. The finding does not correlate to the complaint. Teargas might have happened on an existing problem that so happened to help her know about it coincidentally. Some people may not know that they are blind in one eye until something happens to the other. He could not discount her complaint but could not provide evidence of connection between it and tear gas either.

The defendant's evidence:

- [7] D.W.1 SP Wakadubi Fred testified that during the year 2008 he was based in Gulu as the Regional Commander of the Mobile Police Patrol Unit. On 18th November, 2008 he had forty policemen under his command, eight of whom had tear gas canisters while twenty of them had plastic shields. They confronted a crowd of demonstrators at Lacor Trading Centre, expressing dissatisfaction over government's failure to tarmac the Gulu-Lacor-Nimule road and the Layibi-Lacor road. The crowd was led by the then Mayor had blocked the Gulu-Nimule road and when they saw the police Mayor Acire said "we are tired of this government, lest us chase this police and do our work." The crowd began throwing stones and metal at the police. The police withdrew to a distance of about twenty meters and organised for engagement. Riot police came in to calm the situation. The shield men were deployed in front, the tear gas men followed. They used tear gas to disperse the crowd. They lobbed eight tear gas canisters and the crowd dispersed. The teargas canisters were thrown not fired from guns. Later he conducted a formal assessment of the impact. They recovered the eight shells from near Aria Bar and restaurant, ten meters from the road. The hospital perimeter wall is twenty meters from the edge of the road. Two canisters from near the market and two from near the garage. There was no canister thrown into the hospital premises. He noticed that tear gas was being blown into the direction

of the hospital for about a minute and that is why he checked the hospital premises. The nearest canister to the hospital wall fence was about twenty meters away. The nearest ward was the children ward. No one inside the hospital was irritated by the gas.

Arguments of Counsel for the plaintiff:

[8] In his final submissions, counsel for the plaintiff, argued that it is not dispute that teargas was used at Lacor Trading Centre on 18th November, 2008. P.W.3 Dr. Watmon Benedict was unable to tell conclusively that the injuries sustained by the plaintiff were as a result of that teargas. The plaintiff never had any eye complaint until after 18th November, 2008. She never used to wear eyeglasses before that. The eye complications are therefore attributable to the teargas. On basis of the "egg shell skull" principle, it does not matter that the plaintiff had a pre-existing condition worsened by the teargas. The plaintiff sustained pain and incurred considerable expenditure when obtaining treatment. She resigned her job, suffers a lot of pain and can barely sustain her children by reason whereof she is entitled to both special and general damages.

Arguments of Counsel for the defendant:

[9] In response, counsel from the Attorney General's Chambers, on behalf of the defendant, argued that P.W.3 Dr. Watmon Benedict who examined the plaintiff medically came to the conclusion that the plaintiff's eye problem cannot be linked to the teargas. The plaintiff has the burden of proving her case on the balance of probabilities. The plaintiff has failed to prove that the teargas is the direct cause of her eye complications. The suit ought to be dismissed.

First issue;- Whether the defendant owed the plaintiff a duty of care;-

[10] Negligence is proved by satisfying a three-part test: the existence of a duty of care owed to the plaintiff by the defendant; a breach of that duty by falling below

the appropriate standard of care; damage caused by the defendant's breach of duty that is not too remote a consequence of the breach. "Wherever one person is... placed in such a position with regard to another that everyone of ordinary sense... would at once recognise that if he did not use ordinary care and skill... he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger" (see *Heaven v. Pender* [1883] 11 QBD 503). A person must take reasonable care to avoid acts or omissions which he or she can reasonably foresee would be likely to injure his or her neighbour.

[11] The method used in determining the existence of a duty of care is the so-called "neighbour principle." "Who then in law is my neighbour?... persons who are so closely and directly affected by my act that I ought reasonably to have them in my contemplation as being affected so when I am directing my mind to the acts or omissions in question" (see *Donoghue v. Stevenson* [1932] AC 562). The defendant should contemplate that his or her actions may have an effect on potential plaintiffs. Therefore, where possible harm is foreseeable, a duty of care then exists. When determining where from the facts of a case there existed a duty of care, first it should be established that there is sufficient proximity between the defendant and the plaintiff for damage to be a foreseeable possibility of any careless act or omission (such that, in the reasonable contemplation of the former, carelessness on his or her part may be likely to cause damage to the latter). If this is established then it is only for the court to decide whether or not there are any policy considerations that might either limit the scope of the duty or remove it altogether (see *Anns v. Merton London Borough Council* [1978] AC 728), or the class of person to whom it is owed or the damages to which a breach of it may give rise.

[12] Alternatively, the question is whether or not it is fair, just and reasonable in all the circumstances to impose a duty of care (see *Caparo v. Dickman* [1990] 1 All ER 568). It is thus a question of mixed fact and law in this case as to whether the

defendant was a person who was so closely and directly affected by the act of the defendant's employees' act that they ought reasonably to have had her in their contemplation as being so affected when they were directing their mind to the acts or omissions in question. In short, whether the defendant knew or should have known of the danger teargas posed to the plaintiff, having regard to the duties of the ordinary, reasonable and prudent police officer.

[13] Teargas is a type of riot control agent. Riot control agents are compounds that cause temporary incapacitation by irritation of the eyes (tearing and blepharospasm - abnormal blinking or spasm of the eyelids), causing them to close, and irritation of the upper respiratory tract. They are often called irritants, irritating agents, and harassing agents; the general public usually calls them tear gas. The tear gas used by the police contains irritant chemicals that interact with mucocutaneous sensory nerve receptors in the eyes to cause rapid clinical effects with a wide margin between an incapacitating dose and a lethal dose. Tear gas has a debilitating but ordinarily non-permanent effect. Chemical irritants are generally expected to cause transient lacrimation, blepharospasm, superficial pain, and disorientation, without permanent injury or death. Tear gas is thus reputed to produce, in all but the most unusual circumstances, merely transient effects that disappear within minutes after exposure to the agent has terminated.

[14] Although brief in duration, clinical manifestations include tearing and burning sensations in the eyes, cough, dyspnoea, hypertension, nausea, vomiting, and agitation. Consequently, whereas able-bodied persons could recover quickly from the effects of the gases, but for elderly and sick people, pregnant women and children, the effects could be very grave and possibly fatal (see Rohini J. Haar, et al, *Health impacts of chemical irritants used for crowd control: a systematic review of the injuries and deaths caused by tear gas and pepper spray*, BMC Public Health (2017). The study found that chemical irritants cause severe injury, permanent disabilities, and in rare cases, death. They identified

one death directly caused by the blunt trauma from the projectile and another from high dose exposure to the chemical agent in a closed environment.

[15] Considering that chemical irritants, especially those deployed in aerosolised forms like teargas, are inherently indiscriminate, are difficult to control and can affect not only the intended targets but also peaceful demonstrators, as well as those against whom they are used, yet they are capable of causing severe injury, permanent disabilities, and in rare cases, death, any reasonable police officer should be able to perceive that persons within the vicinity of the intended target of teargas deployment are so closely and directly affected by the act of its deployment that such police officers ought reasonably to have in their contemplation as being so affected, when they are directing their mind to the questioned deployment of teargas.

[16] According to P.W.2 Achaye Godfrey Ajwany the targeted public rally was about 40 - 50 meters from the hospital gate. A tear gas canister was lobbed at a shop opposite the Outpatient Ward of the hospital. Smoke from the canister wafted into the hospital premises, into the maternity ward, the children ward, the Young Child Clinic and the outpatient area. One of the tear gas canisters landed near the Young Child Clinic, located about 10 - 15 meters away from the maternity ward. Being a person in close proximity of the deployment of teargas on that occasion, the defendants owed the plaintiff a duty of care.

Second issue;- Whether or not the defendant breached that duty of care;-

[17] A breach of duty occurs when the party owing the particular duty falls below the standard of behaviour that is required by the particular duty in question. The question of whether the conduct of the defendant has met the appropriate standard of care in the law of negligence is a question of mixed fact and law. Once the facts have been established, the determination of whether or not the standard of care was met is one of law. The basic requirement of foresight is

simply that the defendant must have foreseen the risk of harm to the plaintiff at the time he or she is alleged to have been negligent.

[18] While the standard of care in any situation is a question of law, whether or not the defendant has fallen below the standard is a question of fact that will be determined by reference to all of the circumstances of the case. Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate human affairs, would do, or doing something which a prudent and reasonable man would not do (see *Blyth v. Proprietors of the Birmingham Waterworks* [1856] 11 Exch 781). Ordinary care means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances. The standard of foresight of the reasonable man is an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset by lions; others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free from both over-apprehension and from over-confidence (see *Glasgow Corporation v. Muir* [1943] AC 448).

[19] There is no obligation on the defendant to guard against risks other than those that are within his or her reasonable contemplation (see *Roe v. Minister of Health* [1954] 2 QB 66). However, if the defendant is aware of the possibility of harm he must guard against it, and it will be a breach of the duty of care to fail to (see *Walker v. Northumberland County Council* [1995] 1 All ER 737). The degree of caution that we must exercise will obviously be dictated by the likelihood of the risk. The magnitude of the risk then can be balanced against the extremes that must be taken in order to avoid it. The reasonable man only has to do what is reasonable in order to avoid risks of harm. This means that there is no obligation to go to extraordinary lengths, particularly if the risk is slight. Generally though, where the defendant has sufficient control of circumstances to be able to avoid

the harm, he would be obliged to act. It had to be proved that the defendant knew or had reason to believe that that the harm, of the nature suffered by the plaintiff, would result or substantially be certain to result from his conduct.

[20] Considering its impact, teargas constitutes force which carries a significant risk of serious injury, and, thus, is not to be deployed lightly. The force to be applied must be balanced against the need for that force. The means by which to determine objectively the amount of force that is necessary in a particular situation include; (i) the severity of the crime at issue, (ii) whether the suspect posed an immediate threat to the safety of the officers or others; (iii) whether the target was actively resisting arrest or attempting to evade arrest by flight; and any other exigent circumstances that existed at the time of deployment. The force used can be deemed reasonable only on the basis of the facts and circumstances confronting the police when the incident took place. Such force cannot be justified on the basis of abstract notions of law and order.

[21] Police opting to use violence against persons may, under certain circumstances, be justified. For example section 28 (3) (c) of *The Police Act* authorises a police officer to use a firearm against a person who, through force, prevents or attempts to prevent the lawful arrest of himself or herself or of any other person, where there are reasonable grounds to believe that the police officer or any other person is in danger of grievous bodily harm, if he or she does not resort to the use of arms. The prohibition of unreasonable force applies to all attacks, regardless of whether the weaponry is more or less lethal.

[22] It was the testimony of D.W.1 SP Wakadubi Fred that on 18th November, 2008 they confronted a crowd of demonstrators at Lacor Trading Centre, expressing dissatisfaction over government's failure to tarmac the Gulu-Lacor-Nimule road and the Layibi-Lacor road. The crowd, led by the then Mayor had blocked the Gulu-Nimule road. Section 32 (2) of *The Police Act* empowers the Inspector General of Police, by notice in writing to a person responsible for convening an

assembly or forming a procession on any public road or street or at any place of public resort, to prohibit the convening of such assembly or forming such a procession, where the inspector general has reasonable grounds for believing that the assembly or procession is likely to cause a breach of the peace. It is when an assembly is convened or procession formed in contravention of such a prohibition, that section 33 thereof empowers the Inspector General or officer in charge of police to require the assembly to cease to be held or the procession to be stopped and may order the immediate dispersal of that assembly or procession. An assembly or procession of three or more persons which neglects or refuses to obey any order for immediate dispersal so given is deemed to be an unlawful assembly within the meaning of section 65 of *The Penal Code Act* (see section 34 of *The Police Act*).

- [23] D.W.1 SP Wakadubi Fred testified that the police opted to use force in order to disperse the crowd, after the crowd failed to obey its order to disperse. Whoever employs instrumental violence must ensure that the violence remains within its designated limits and that it only affects the persons or property it ought to affect. Any violent act by law enforcement officers must meet the requirement of discrimination and protection of the innocent. The criterion of discrimination prohibits direct and intentional attacks on nonparticipants in the riot. This requirement is not met if the act causes impermissible collateral damage. The police have a duty to avoid harm to innocents that they could and should have foreseen.
- [24] It is obvious that windy conditions at the time of deployment of teargas risk contamination of the law enforcement officers themselves, bystanders, or nearby residences and businesses. By ordinary standards, the police would be liable when they opt to use such a method of crowd control that may be unduly dangerous and inappropriate, in the light of the character of a specific place and its surroundings. Most often a large, diverse, and differentially susceptible group will be exposed, posing the risk of unnecessarily injuring nonviolent, potentially

vulnerable people. The decision to use chemical agents in specific environmental conditions and social contexts is one not to be taken casually. If conventional means are not enough and tear gas or any similar gas is used to disperse crowds, then the police must ensure that the gases have no unacceptable humanitarian consequences. The use of chemical irritants should be strictly limited to situations of imminent harm that cannot be policed effectively with safer methods.

- [25] It is common for the Police Force to resort to the use of tear gas as a valuable tool in managing violent outbreaks, containing riots, and ensuring public order, yet its use remains highly controversial. This is mainly due to the absence of official guidelines and self-help advice on health protection against the side-effects of tear gas. In light of its effects, the use of tear gas by a felon during the commission of an offence may constitute use of a deadly weapon, which under section 286 (3) (a) (ii) of *The Penal Code Act* is defined as "any substance, which when used for offensive purposes is capable of causing death or grievous harm or is capable of inducing fear in a person that it is likely to cause death or grievous bodily harm." Admittedly, police use of tear gas as a tactical tool to disperse a crowd is distinguishable from its use by a criminal during the commission of a robbery. Nevertheless, it is not safe when used indiscriminately.
- [26] No wonder *The Chemical Weapons Convention, 1993* (effective since 1997 with 192 state signatories excluding only Egypt, Israel, North Korea and South Sudan) prohibits the use of these riot control agents during warfare. Article II (9) (d) of the Convention though permits the use of "riot control agents" for law enforcement, including domestic riot control purposes. Article II (7) of the Convention defines a "riot control agent" as "any chemical not listed in a Schedule, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure."

- [27] According to conventional views on the morality of war, civilian casualties should be avoided, but if they cannot be avoided, they have to be proportionate to the immediate military gain. This view is also manifest in international law. According to Article 51, 5 (b) of *The Protocol Additional to the Geneva Conventions, 1977*, indiscriminate attacks are prohibited. An attack is considered indiscriminate if, among other things, it "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." It is important to note that while the Protocol prohibits indiscriminate attacks on civilians, it does not prohibit attacks that harm civilians or innocents *per se*, but only those that cause disproportionate damage to civilians in relation to the immediate military gain. The principle of proportionality prohibits an attack when the anticipated military advantage of the attack is excessive compared to the expected civilian harm.
- [28] Section 9 (2) (b) of *The International Criminal Court Act, 11 of 2010* domesticated article 8 (2) (b) of *The Rome Statute*, which relates to other serious violations of the laws and customs applicable in international armed conflict. Article 8 (2) (b) (iv) thereof proscribes a violation of the principle of proportionality as a serious violation of the laws or customs applicable in an international armed conflict. It defines the war crime of a disproportionate attack as; "intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term, and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated." The means and methods of warfare used must not be disproportionate to the military advantage sought.
- [29] Article II (7) of *The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (The Chemical Weapons Convention or CWC)*, 1993 defines a Riot Control

Agent as "any chemical not listed in a Schedule, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure." Whereas Article 1(5) clearly prohibits Riot Control Agents as a method of warfare, Article II (9) (d) clearly allows Riot Control Agents for law enforcement. The indiscriminate nature of chemical weapons, rather than their lethality, is most likely to be the impetus behind the efforts to ban their use in warfare. Low lethality alone ought not determine how humane a weapon is. The prohibition of indiscriminate attacks must be given its due consideration even when used for law enforcement purposes.

[30] In the civil context, teargas is generally considered to an indiscriminate area weapon. Typically it is so indiscriminate that not even those who deploy it are entirely safe from its effects, for example, when the wind changes directions after the gas is released. Therefore adopting the international humanitarian law principle of proportionality by way of analogy, a tactic used by the police in quelling a riot will be considered indiscriminate, if it is of a nature expected to cause incidental loss of life, injury, damage, or a combination thereof, to the law enforcement officers themselves, bystanders, or nearby residences and businesses, which would be excessive in relation to the concrete and direct law enforcement advantage anticipated. Similarly, it is impermissible for the police to justify the attack based on information not known or actually considered by them at the time. It is therefore necessary for the court to examine whether a reasonably well-informed police officer in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.

[31] The use of chemical irritants as crowd-control weapons must be considered in the broader context of human rights, public safety, use of force, and law enforcement practices necessary to maintain order in the context of demonstrations. Whether the use of force poses a risk of permanent or

significant injury is a factor to be considered in evaluating the need for the force used in a particular case. The general principles on the proportionate use of force by law enforcement would dictate that the police should be permitted to use tear gas only in extreme public order incidents where a senior police officer reasonably considers such action to be necessary because of risk of loss of life or serious injury or widespread destruction of property; or against armed besieged criminals or violently insane persons where a senior police officer reasonably considers that not to use it would endanger lives. Like all uses of force, the deployment of tear gas must be objectively reasonable and proportional to the threat.

[32] When faced with issues of proportionality, Courts will construe as narrowly as possible the discretionary power to attack rioters and, by the same token, so as to expand, the protection accorded to innocent bystanders. A court judging the proportionality of the force used would grant far more discretion to commanders in attacks required to eliminate an immediate and serious threat, the "urgent" category when time and resources are lacking to gather and analyse information regarding the potential results of their actions, as opposed to the premeditated variety.

[33] Riots are complex events. Their complexity lies not only in the range of motivations, but the fact that they result from a variety of underlying and proximate causes. At the simplest level, riots can result from the spontaneous convergence of a number of contributory factors fuelled by the acute interaction of precipitating events with a specific catalyst at a specific flashpoint. For example protests (which are generally lawful) can erupt into disorder when demonstrators are confronted by counterdemonstrations or unskilled police response. Another variation of spontaneous eruption is the case of "celebratory" sports riots. At the other end of the spectrum are organised, deliberate violent outbursts, such as orchestrated political violence. Rioters sometimes seek to

carry out opportunistic crimes by taking advantage of the temporary lifting of public order.

- [34] Disorder, protest, riots, and communal violence can be events that are focal, distributed, or networked. A riot is judged to occur when one or more individuals within a gathering engage in violence against person or property. Explaining the typology of crowds in *The Strategic Challenge of Riots*, Small Wars Journal, (2012), Adam Elkus characterised them as follows;

Casual crowds are composed of individuals gathered in a common space with no common purpose; they have no emotional tie to the crowd. Cohesive crowds assemble for a common purpose such as a sports event or concert; members identify themselves as individuals but the collective can possess strong internal discipline and react with high levels of emotion. Expressive crowds gather for a unified purpose such as a demonstration or protest, they have common purpose and display of range of emotions. They can become frustrated and agitated and quickly erupt if frustrated or provoked. Aggressive crowds have a strong unity of purpose and a strong sense of group identity. They can be stimulated or provoked into destructive and lawless behaviour. They are the most dangerous crowd form since they can transition into an aggressive mob.

Aggressive mobs engage in violent and lawless behaviour. Violence is usually transient and can be directed against persons or property. These are primarily emotion-driven and can trigger sustained rioting. Expressive mobs view violence as a legitimate tool of rebellion, resistance, or protest. Acquisitive mobs seek to acquire something. They can be looters exploiting chaos or confusion. They have little emotional investment and can be controlled effectively by police intervention. The final mob type is the escape mob, or persons fleeing imminent danger. These are extremely difficult to control since they are sustained by fear.

- [35] Adam Elkus opines that "the essence of containing a riot in progress is quick action to contain trouble spots before they metastasise, cancer-like, into greater dysfunction." The question would then be whether the use of tear gas on a handful of, nonviolent, unarmed protesters who are exercising their Constitutional

right to peaceful demonstration and whose only crime is trespass and therefore "negligible" would be reasonable. Although the commission of a misdemeanour offense is not to be taken lightly, it militates against finding the force used to disperse a crowd reasonable where the protestors are nonviolent and pose no threat to the safety of the officers or others. However in the instant case, D.W.1 SP Wakadubi Fred testified that when the crowd saw the police Mayor Acire said "we are tired of this government, lest us chase this police and do our work." The crowd began throwing stones and metal at the police. The police withdrew to a distance of about twenty meters and organised for engagement.

[36] Article 13 of *The United Nations Basic Principles on the Use of Force and Firearms, 1990* recommends the dispersal of unlawful, but nonviolent assemblies, by avoiding the use of force, but that where this is not practicable, may use force "to the minimum extent necessary." Regarding violent assemblies, the police may use firearms only when "less dangerous means" are impracticable and only to the "minimum extent necessary." The objectives for which force may be used include: self defence, defence of life and property, effecting an arrest, dispersing crowds, ensuring public safety, preventing crime, among others. The force ought to be minimum but effective and temporary. It ought to stop once the objective has been achieved or is no longer achievable. According to *Amnesty International's guiding principles to the interpretation of the Basic Principles on the use of Force and Firearms, (2016)* teargas may only be used when there is more generalised violence. Guideline 7 (i) states that;

Devices that have indiscriminate effects and a high potential of harm, such as tear gas or water cannon, may only be used in situations of more generalised violence for the purpose of dispersing a crowd, and only when all other means have failed to contain the violence. They may only be used when people have the opportunity to disperse and not when they are in a confined space or where roads or other routes of escape are blocked. People must be warned that these means will be used and they must be allowed to disperse. Cartridges with chemical irritants may never be fired directly at a person.

[37] Force used hastily and in an indiscriminate manner might cause serious problems. The courts though acknowledge that police officers' decisions about the appropriate amount of force to use in a given circumstance are often split-second judgments made in circumstances that are tense, uncertain, and rapidly evolving but the situation here was far from that of a lone police officer suddenly confronted by a dangerous armed crowd threatening immediate violence. The police was at the scene for a considerable time before deploying tear gas at the crowd.

[38] Although it is acknowledged that contemplative ability under exigent circumstances is significantly reduced, however in the instant case, the fact that the police had the opportunity to withdraw to a distance of about twenty meters and organise for engagement implies that they had an opportunity to consult with their superiors before deploying tear gas. During that time, although the crowd did not attempt or threaten to injure any person or destroy any property and according to D.W.1 SP Wakadubi Fred some individuals in the crowd had thrown stones and metal at the police, hence were armed with regimentally weapons. They posed an immediate safety threat. The decision was not made in the heat of the moment; the police did not make a split second decision. The circumstances evinced unhurried deliberation in deployment of tear gas because some of the protestors were physically menacing and posed an immediate threat to the safety of the officers and others. They therefore posed safety threat to themselves, the officers, and the public at large.

[39] The problems and danger posed by, and thus the tactics to be employed against, a crowd which is creating a disturbance are, and must be, differentiated from those involved in efforts to subdue an armed and dangerous crowd which has recently committed or is about to commit a serious offense. In the former instance, resorting to the use of force may, in a number of circumstances, exacerbate the situation; in the latter instance, a heightened use of less-than-

lethal force will ordinarily be helpful in bringing a dangerous situation to a swift end. In the former case, the need to use force is diminished by the fact that the officers are confronted, not with a violent or criminally motivated crowd, but with one simply causing a disturbance. A riot is distinguishable from a demonstration, which is essentially peaceful and lawful.

[40] That notwithstanding, peaceful demonstrations may graduate rapidly to riots (violent protest against the state), or to full blown armed violence, calling into question the possible application of several methods of riot control. There is no universal standard on what types of weapons are acceptable or would lead to disproportionate force when used under a crowd or riot control context. Because the protesters' conduct posed a danger to themselves or others, a reasonable police officer could conclude that using tear gas to disperse them bore a reasonable relation to the need for such force. In the determination of whether or not an officer used reasonable force, the question asked is whether a hypothetical officer reasonably could have believed that the force used was necessary under the circumstances and that the amount of force used was reasonable. I find that in the circumstances of this case, considering that the illegal assembly was so close to a hospital facility, had turned violent and had resulted in blockage of a public highway, dispersing the crowd as quickly as possible was of paramount importance. Deployment of teargas, objectively considered, was reasonable and proportional to the threat in the circumstances of this case.

[41] Where the police resorts to violence as a tactic, which is directed deliberately against a mob, four different scenarios emerge: (i) the police might know with great certainty that their violence against the mob would also affect innocent parties; (ii) the police might know that its violence against the mob would (very) likely affect innocent parties; (iii) the police might not have known that its violence against the mob might also affect innocent parties, but could have known this if

they had done sufficient research; and (iv) the police simply could not know that its violence against the mob would also affect innocent parties.

- [42] Just like in situations of armed conflict, incidental harm may be unavoidable in law enforcement. Incidental harm is that which is likely to ensue as a chance or minor consequence, or occurring merely by chance or without intention or calculation. Just like in situations of armed conflict where civilian casualties should be avoided, but if they cannot be avoided, they have to be proportionate to the immediate military gain, in the assessment of anticipated law enforcement advantage, the calculus of collateral damage is prospective. It is based on what harm was expected at the time of the attack, not the harm that actually occurs.
- [43] Typically, law enforcement decisions made in the fog of riot control are viewed generously because of the exigent circumstances involved. The danger posed to innocent bystanders depends on various factors, including: location (activities within or in the vicinity of a mob), the terrain, accuracy of the mechanism used to lob the canisters (greater or lesser dispersion, depending on the trajectory, the range, etc.), weather conditions (visibility, wind etc.), the specific behaviour of the mob, technical skill of the police officers (random dropping of canisters when unable to hit the intended target). All these factors together must be taken into consideration whenever an attack could hit incidentally non-participating persons and objects.
- [44] Where the police is substantially certain of the consequence but acts anyway it will be deemed to have acted knowingly. Where the police is aware of a (high) risk of harm but acts anyway it will be deemed to have acted recklessly. Where the police is unaware, but a reasonable person would have been aware of the high risk of harm, it will be deemed to have acted negligently. Where the police is unaware of the risk and not to blame for its lack of awareness it will be deemed to have acted obliviously. In the first two categories, the police actually foresees the unintended side effects of their action, while in the latter two they do not.

Hence the victims in the former two instances can be described as incidental and the latter two as accidental collateral damage. Accidental collateral damage may only be permissible if reasonable precautionary measures have been taken in order to avoid harm to innocent bystanders. This imposes a duty of care.

- [45] Under this duty, where there are other feasible ways of achieving the good end that do not involve the harmful side effects or involve fewer or less grave such effects, the police should choose them even where the alternatives involve somewhat higher costs to the police. Where force must be used, the anticipated bad effect must be genuinely unintended and not merely secondarily intended. Ultimately, the harm involved in the unintended outcome must not be disproportionate to the moral benefit aimed at in the act.
- [46] The requirement to adhere to a principle of due care raises the bar for violent police tactics when it is argued that a particular attack or manoeuvre could not have been carried out at a different time or in a different manner with less harm to innocent parties. Consideration must be paid to the honest judgment of responsible commanders of such law enforcement operations, based on the information reasonably available to them at the relevant time, taking fully into account the urgent and difficult circumstances under which such judgments are usually made. The plaintiff must prove that the attack was launched wilfully and in knowledge of circumstances giving rise to the expectation of excessive innocent victims. Liability attaches only in cases where the excessiveness of the incidental damage was obvious, but not in cases that involved mere errors of judgment by commanders in the field. Acceptable collateral harm will be viewed more leniently when it does not entail substantial physical harm to people.
- [47] The use of tear gas on a crowd is not reasonable simply because the police have the legitimate objective of dispersing the crowd. The law enforcement advantage anticipated must be concrete and direct. It must be immediate and substantial. Since court is concerned with the decision making ante, the anticipated law

enforcement advantage and expected harm must be assessed based on the time of the attack and not on the result of the attack. The decision taken by the person responsible has to be judged on the basis of all information available to him or her at the relevant time, and not on the basis of hindsight. In the circumstances of this case, .

[48] Police officers are under a duty to provide warnings, where possible, even when the force used is less than deadly (see *Headwaters Forest Defence v. County of Humboldt*, 211 F.3d at 1129 where police warned protesters before use of pepper spray). The behaviour of the crowd in the instant case involved the threat of deadly force or a significant level of physical force that justified the use of teargas. According to D.W.1 SP Wakadubi Fred, at the time the teargas was deployed, the weather was not windy. In such weather conditions, although the police would not have known with certainty, they ought at the least have known that their violence against the crowd by way of teargas was very likely to affect innocent parties. However, when the effects are foreseeably limited to transient irritation without permanent damage, persons so affected will be deemed to fall into the bracket of acceptable incidental damage. Liability attaches only in cases where the excessiveness of the incidental damage was foreseeable, and in favour only of those individuals who may have suffered particularised harm of a serious or permanent nature. The plaintiff has not made out a case of excessive incidental damage, hence has failed to establish on the balance of probabilities that the defendants breached their duty of care.

[49] That said, the nature of this claim underlines the need for guidelines on command decision-making in the deployment of tear gas as a crowd control mechanism. Guidelines on risk management, tactical considerations, and the need to assess weather conditions and crowd composition prior to deployment of tear gas. Even if organised, premeditated lawlessness menaces in a unique way the capacity of the police to maintain order and preserve the rights of citizens,

that alone is not justification enough for the use of tear gas as an option of first choice or indiscriminately.

Third issue;- Whether that breach cause the defendant damage;-

Fourth issue;- Whether defendant is liable for that damage;-

[50] The two issues will be considered concurrently. In the first place, the court notes that AIP Wakadubi Fred and ASP Okello James had been jointly sued with the defendant, in their individual capacities. Section 4 of *The Civil Procedure and Limitation (Miscellaneous Provisions) Act*, requires a suit commenced against any person for any act done in execution or intended execution of a public duty or authority, or in respect of any alleged neglect or default in the execution of any such duty or authority, to be instituted within six months "after the act, neglect or default" complained of, or in the case of a "continuance of injury or damage," within three months after the ceasing of the injury or damage. The first part of the provision addresses damage that occurs almost simultaneously with or immediately after the occurrence. In the majority of such cases, there will rarely be any uncertainty about whether there has been an injury, even if the full extent of the loss is not yet known. However, the second part addresses continuous or progressively deteriorating injury or damage.

[51] While most injuries and damage occur almost simultaneously with or immediately after the occurrence, the second part of the provision recognises the possibility that the cause of bodily injury or property damage may exist or continue for a period of time, unnoticed. In those cases, injury or damage may happen gradually, deteriorating or progressing over time. It is the case of continuous or progressively deteriorating injury or damage that the second part of this provision addresses. Injury or damage is deemed to occur starting at exposure and ending at manifestation. The provision is triggered as long as damage continues to occur, even after injury or damage has manifested itself or is or can be discovered. In such situations, the injury or damage is not deemed to have

started until it has manifested itself and ceases the moment it is no longer "damage in progress," i.e. when re-occurrence ceases after manifestation. In her plaint, the plaintiff did not make any averment of the fact that the injury she allegedly sustained on 18th November, 2008 at the hands of both police officers was of the "damage in progress" type. From her pleadings, the injury was inflicted on that date and was discovered on that date. Time began to run against her on that date and by the time she filed the suit nearly four months later on 5th March, 2009 the time had not elapsed. Nevertheless, she opted to withdraw the suit against them, leaving only the first defendant.

- [52] The defendant will only be liable in negligence if the plaintiff would not have suffered the damage "but for" the appellant's negligent act or omission. If the harm would not have occurred "but for" the breach of duty, the breach is deemed to have caused the harm. If the harm would have occurred anyway even if the defendant had not been in breach, the breach is not a cause of the harm (see *Cork v. Kirby MacLean Ltd [1952] 2 All ER 402*). Where the injury or damage would have occurred regardless of the defendant's conduct, there is no factual causation (see *Barnett v. Chelsea and Kensington Management Committee [1956] AC 613*). For example in *Barnett v. Chelsea & Kensington Hospital Management Committee [1969] 1 QB 428*, Three night watchmen from a college went to the casualty ward of the hospital at around 5.00 a.m. on the morning of New Year's Day complaining of vomiting and stomach pains after drinking tea. The doctor on duty, in clear breach of his duty towards the men, then refused to attend to them or examine them and told them to call on their own doctors in the morning. A few hours later one of the men died, as it was discovered later, through arsenic poisoning. The court found that the hospital was not liable for the failure to treat, even though this was a clear breach of their duty, because it was shown that the man would not have recovered even if he had received treatment. The failure to treat was not the cause of death.

- [53] Where there exists more than one possible cause of damage or harm, the plaintiff does not have to show that the defendant's actions were the sole cause of the injury suffered. Instead, it must simply be shown that the defendant's actions materially contributed to the harm (see *Wilsher v. Essex Area Health Authority* [1988] AC 1074; [1986] 3 ALL ER 801 and *Bonnington Castings Ltd v. Wardlaw* [1956] AC 613). An act contributes materially when its causative effects are in operation until the moment of damage. The term "proximate cause" means a cause which in a direct, natural and continuous sequence, unbroken by any superseding cause, produces the damage, injury or loss complained of and without which such damage, injury or loss would not have happened.
- [54] However, where the court finds that it is impossible to determine this with accuracy, the suit will fail. For example in *Wilsher v. Essex Area Health Authority* (supra) a baby after being delivered was given excess oxygen as a result of the admitted error of the doctor and the baby then suffered blindness through retrolental fibroplasia. The House of Lords identified that the excess oxygen was just one of six possible causes of the condition and therefore it could not be said to fall squarely within the risk created by the defendants. The court would not impose liability on the defendant in those circumstances.
- [55] In those circumstances where the defendant's act remains an effective or substantial cause of the damage, at least ordinarily, for example where the defendant's breach remains an effective or substantial cause of the damage, albeit in combination with the plaintiff's failure to take reasonable precautions in his or her own interest, the chain of causation will not be broken (see *County Ltd v. Girozentrale* [1996] 3 All ER 834, at p. 849 b-c, per Beldam LJ). In order to comprise a *novus actus interveniens*, so breaking the chain of causation, the conduct of the plaintiff "must constitute an event of such impact that it 'obliterates' the wrongdoing..." of the defendant (see *Clerk & Lindsell on Torts* (19th ed.), at para. 2-78). For there to be a break in the chain of causation, the true cause of

the damage must be the conduct of the plaintiff rather than the act of the defendant.

- [56] The act of the plaintiff does not excuse the defendant's negligence unless the plaintiff's negligence was the sole proximate cause of the plaintiff's loss or damage. What will constitute such conduct is so fact-sensitive to the facts of any case where the issue arises that it is almost impossible to generalise. It is always a question of degree at what point the damage claimed for ceases to flow naturally and directly from the breach. A new and independent cause means an act or omission of a separate and independent agency, not reasonably foreseeable, that destroys the causal connection, if any, between the act or omission inquired about and the occurrence in question and thereby becomes the immediate cause of such occurrence.
- [57] The nature and extent of chemical irritant exposure injuries is inevitably related to the chemical agent used, the mechanism of deployment, the environmental conditions prevailing at the time, the context of its use, proximity to the area where the chemical was released and the force of the propellant. Mechanisms of delivery can include sprays or pellets that target specific individuals. Alternatively, canisters, munitions, grenades, and chemical mixtures within water cannons. Consequences may be related to the chemical agents themselves, the total exposure dose, the deployment technique, or the way these weapons are used in different settings. The direct targeting of the face and eyes by hand-held spray has been noted to cause trauma and toxicity to the cornea and conjunctiva of the eye. Therefore when an injury is said to have been caused by noxious gases, evidence ought to be led about these factors.
- [58] The plaintiff testified that the pain in her eyes and headache developed after contact with the tear gas and persisted despite the cleansing and medication she received. P.W.2 Achaye Godfrey Ajwany testified that teargas was deployed by firing and one of the tear gas canister landed near the Young Child Clinic, located

about 10 - 15 meters away from the maternity ward. It is the gas the emanated from that canister that the plaintiff appears to attribute her injury to.

[59] That theory of causation is refuted by D.W.1 SP Wakadubi Fred who testified that the teargas canisters were thrown not fired from guns, and only eight canisters were used. They recovered the eight shells from near Aria Bar and restaurant, ten meters from the road. The nearest canister to the hospital wall fence was about twenty meters away, although he noticed that tear gas was being blown into the direction of the hospital for about a minute. Later when he conducted a formal assessment of the impact, he found that no one inside the hospital was irritated by the gas. This is corroborated by the testimony of P.W.3 Dr. Watmon Benedict, an ophthalmic at Gulu Regional Referral Hospital, who stated that the degenerative yellow spot (macular) he found in the plaintiff's eye was an abnormality inside the eye. The symptoms he saw were only in the interior of the eye. He opined that if the teargas were to damage the interior, then the external factors too should be damaged, which was not the case. He stated that his clinical finding did not correspond to the plaintiff's complaint. In his view, teargas might have only provided the plaintiff with an opportunity to have her eyes examined, in which process an existing problem was discovered. In that case the teargas was not the cause of the injury but rather it coincidentally helped the plaintiff get to know about an existing degenerative abnormality in her eye.

[60] In his testimony, P.W.3 Dr. Watmon Benedict further proffered multiple other possible cause of the degenerative abnormality he saw. The question then was whether in light of the multiplicity of possible causes of solar radiation (e.g. looking directly into the sun), for some it is due to age (above 35 years), others due to abnormality at birth, trauma (any injury to the eye by a blunt object), and other unknown causes, the plaintiff in the instant case would not have occurred but for the negligent act or omission of the defendant's employees.

[61] Proof of causation should not be accepted on anything less than the balance of probabilities, as is common with all civil suits. Proximate cause, like any other ultimate fact, may be established by circumstantial evidence. Circumstantial evidence requires inference to reach a desired conclusion. For an unknown material fact to be fairly and reasonably inferred from other facts proved in the case, the circumstances must raise a more probable inference in favour of what is alleged. The difference between the criminal standard of proof in its application to circumstantial evidence and the civil one is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while in the latter one needs only circumstances raising a more probable inference in favour of what is alleged.

[62] In order to prevail, the evidence should be adequate to establish the conclusion sought and must so preponderate in favour of that conclusion as to outweigh any other reasonable or possible inference or deduction inconsistent therewith. When a cause is shown which might produce damage, and it further appears that damage of that particular character did occur, it is a warrantable inference, in the absence of showing of other cause, that the one known was the operative agency in bringing about such result. An inference though can be clearly wrong where the factual basis upon which it relies is deficient or where the legal standard to which the facts are applied is misconstrued. In the instant case, considering the evidence relating to causation of the abnormality in the plaintiff's eye, the court is forced into the position of trying to determine which of the possibilities is the actual cause of the that deformity. There can be no cause in fact if the defendant's negligence merely furnished a condition that made discovery of an existing injury possible. For that reason the plaintiff has failed to prove this element to the required standard.

Order:

[63] In the final result, the suit fails, and it is accordingly dismissed with costs to the defendant.

Delivered electronically this 8th day of June, 2020

.....Stephen Mubiru.....

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the Plaintiff : Mr. Ocorobiya Lloyd.

For the Defendant : State Attorney from the Attorney General's Chambers.