IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Suit No. 063 of 2011

In the matter between

ACAYE RICHARD **PLAINTIFF**

And

1. **SARACEN (UGANDA) LIMITED**
2. **BARCLAYS BANK (UGANDA) LIMITED** **DEFENDANTS**
3. **KIBWOTA JOHN BOSCO**

Heard: 7 December, 2020.
Delivered: 14 December, 2020.

Law of Torts *— Negligence — Personal injury caused by a firearm — Since its possession or use is attended by extraordinary danger, any person having a gun in his possession or using it is bound to exercise extraordinary care — Where the circumstances of the incident give rise to the inference of negligence or recklessness, then the defendant has a duty to prove there was a probable cause of the accident which does not connote negligence — It is reasonably expected that since they inevitably have to regulate unarmed civilians as part of their duties, armed private security guards are accordingly trained in the appropriate use of defensive techniques and force; on how to avoid the use of fatal force save in exceptional circumstances, and even then only to use the bare minimum of force required, such as in the case of self-defence or defence of others — it is a basic rule in the handling of a firearm never to point your gun at anything one does not intend to shoot such that in the event of an accidental discharge, no injury can occur as long as the muzzle is pointing in a safe direction — irrespective of the circumstances, when a person holds a firearm, that is pointed at another and operates the firing mechanism, with or without the knowledge that the firearm is loaded, and the firearm is discharged, and the evidence so indicates, then a prima facie case of negligence is established — the 3rd defendant was negligent in permitting himself to be involved in an altercation while armed with a highly dangerous instrumentality, in*

circumstances where incautious hands of another might come in contact with it and such handling and the discharge of this instrumentality was the natural and probable consequence of the 3rd defendant 's negligence and such a consequence as might and he ought to have foreseen as likely to flow from his act — The defence of inevitable accident — An inevitable accident is an occurrence not avoidable by any precaution a reasonable person would be expected to take. The person invoking the defence must show that something happened over which he or she had no control, and the effect of which could not have been prevented by using great skill and care — A defendant who advances inevitable accident in the firing of a shot from a gun bears the onus of explaining how the projectile could have been fired without negligence — voluntary assumption of risk (volenti non fit injuria) — In order to establish this defence, the onus is on the defendant to prove that the plaintiff expressly or impliedly agreed to incur such risk voluntarily, with full knowledge of the nature and extent of the risk. The defendant must show that the plaintiff fully comprehended the risk of injury that materialised and freely chose to accept it. The defendant must show that the plaintiff fully comprehended the risk of injury that materialised and freely chose to accept it — Voluntarily agreeing to accept a risk suggests a degree of active mental deliberation and reflection at some point prior to action — where there is a disparity between the victim's conduct and the defendant's deadly attack, the defence of contributory negligence will not be available — provocation by the plaintiff can properly be used to take away any element of aggravation but not to reduce real damages.

Evidence *— Credibility of witnesses — A witness may not tell the truth about some matters, may exaggerate or downplay parts of the story to make his or her case better, or may be simply uncertain about matters, but still the court may be persuaded that the centre-piece of their story stands.*

Civil Procedure *— Pleadings — a trial court is entitled to consider an un-pleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The plaintiff sued the defendants jointly and severally for the recovery of general and special damages for personal injury arising out of negligence, interest and

costs. His claim is that on the morning of 21st April, 2009 while at the premises of the 2nd defendant's Gulu branch, he was negligently shot by the 3rd defendant as a result of which he sustained grave bodily injuries. At the time of the incident, the 3rd defendant operated as a security guard on the premises, and at all material time he acted in the course of his employment and within the scope of his duty and employee of the 1st and 2nd defendants.

[2] It their written statement of defence, the 1st and 3rd defendants contended that the incident was prompted by the plaintiff's act of abusing the 3rd defendant when he asked him to identify himself. This prompted the 3rd defendant to seize the plaintiff's car ignition keys from the ignition switch. The plaintiff thereupon pounced on the 3rd defendant assaulting him fiercely with fists and it is during the ensuing scuffle that a bullet was accidentally discharged from the 3rd defendant' gun, hitting the plaintiff and injuring him. On its part, the second defendant averred that the suit was misconceived against it. The 2nd defendant's Manager was inside the bank undertaking his normal duties when he heard a gunshot outside. When he rushed to the scene the 3rd defendant told him the plaintiff had attempted to disarm him and he had consequently shot him. The 3rd defendant is not its employee and he was not acting on their instruction when he fired the gun shot. The plaintiff consequently withdrew the suit against the 2nd defendant.

[3] The facts common to the two versions that emerged from the evidence of both parties are that while at the Barclays Bank Gulu Branch Automated Teller Machine during the late evening hours of 20th April, 2009 the plaintiff's motor vehicle developed a mechanical fault and could not start. That forced him to leave it overnight unattended in front of the bank premises. The following morning, 21st April, 2009 the plaintiff carried another battery back to the bank premises and began the process of replacing the faulty one in his car. It is during that process that he was confronted by the 3rd defendant who was concerned as to why the vehicle had been left overnight unattended in front of the bank premises. The parties disagree as to how the events unfolded thereafter. While the plaintiff's

version is that he was shot while seated inside his car, the 3rd defendant's version is that the gun shot went off accidentally during a scuffle between him and the plaintiff as the latter attempted to disarm him.

Submissions of counsel.

[4] Counsel for the plaintiff did not present any submission within the time indicated by court. On their part, counsel for the 1st and 3rd defendants argued in their written final submissions that none of the two defendants is liable since the gun shot went off accidentally. In the alternative, that the plaintiff was contributorily negligent when he engaged in a scuffle with an armed security guard.

The agreed issues;

[5] At the scheduling conference conducted on 11th February, 2014, it was an agreed fact that the 3rd defendant is an employee of the 1st defendant and that it is the 3rd defendant that shot the plaintiff. The following were then agreed upon by the parties as the issues to be decided by court;

1. Whether the 1st defendant is vicariously liable for the acts of the 3rd defendant.
2. Whether the 3rd defendant can rely on the defence of voluntary assumption of risk.
3. Whether the plaintiff was contributorily negligent in causing the 3rd defendant to fire the shot.
4. What are the remedies available?

First issue; Whether the 1st defendant is vicariously liable for the acts of the 3rd defendant;

[6] Negligence is the breach of legal duty to take care by the defendant which results in undesired damage to the plaintiff. Thus, its ingredients are (a) a legal duty on

the part of the defendant towards the plaintiff to exercise care in such conduct as falls within the scope of the duty; (b) breach of that duty; and (c) and consequential damage to the defendant (see *Blyth v. Birmingham water works 1856 11 Ex Ch. 781; Senyonjo Frederick v. Construction Engineer and Builders Pakwach Arua Road, [1979] HCB 232* and *Winfield on Tort,* eight Edition, Page 42).

[7] Negligence is also defined as the omission to do something which a reasonable man guided upon the consideration which ordinarily regulates the conduct of human affairs would or do something which a prudent and reasonable man would not do (see *Donoghue v. Stevenson [1932] AC 562*). Negligence is the omission of an action that a reasonable person would do or performing an action that a reasonable person would not do.

[8] It is trite that the plaintiff always bears the onus of proving negligence on the part of the defendant on a balance of probabilities. In determining whether the plaintiff has succeeded in discharging this onus, the court has to view the evidence which was led during the trial in its entirety. Where there are two mutually destructive stories, the plaintiff can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities.

[9] P.W.1 Richard Acaye testified that he had left the vehicle parked outside the bank's perimeter fence when he walked to the ATM. He was forced to leave it there overnight when it failed to start and the following morning at 8.00 am when he returned with another battery and started the car, he was seated inside the car when the 3rd defendant came running. The 3rd defendant removed the car keys from the ignition switch. The plaintiff asked him what the problem was and he responded that the plaintiff should see the Manager first. When the plaintiff extended his arm to get the car keys back, the 3rd defendant jumped one step

back, knelt down and fired a shot into the plaintiff's lower abdomen and then dashed into the bank where he locked himself with the rest of the bank's employees.

[10] Under cross-examination the plaintiff stated that he had started the car using the borrowed new battery. He stated further that he was at the front of the car near the bonnet in the process of removing the borrowed battery and replacing it with his old one as the engine was running at idling speed, when the 3rd defendant turned the engine off and removed the car key from the ignition switch. He was planning to drive to Tororo that morning so he held out his hand to get the key back and it is then that the 3rd defendant jumped one step back, cocked the gun, knelt down and shot him in the lower abdomen.

[11] This version was corroborated by P.W.2 Samuel Ojok who testified that he was approximately twelve to fifteen metres away at the material time when he saw the plaintiff was replacing a battery in his car to allow him start. A gentleman who had shortly before entered the bank returned and engaged in an argument with the plaintiff. He could hear the word "stupid" mentioned repeatedly by the man who had come from the bank. The man entered the bank and emerged again. The security guard then removed the ignition key from the ignition switch of the car. As the plaintiff tried to grab it back, one of the security guards shot him. The man who fired the shot was dressed in the SRACAEN uniform. The plaintiff fell down and they thought he had died. People ran away in shock.

[12] The defendant’s version is slightly different; D.W.3 Kibwota John Bosco testified that when the manager came out of the bank to talk to the plaintiff, the plaintiff instead was rude and this caused the manager to return to the bank. The 3rd defendant then told the plaintiff he had quarrelled with the manager of the bank yet he was a customer. He told the plaintiff they should push the vehicle and he handles the issue with the bank officials. The plaintiff did not accept that. The plaintiff instead said “you do not know who I am.” Realising that the plaintiff was

obstinate, the 3rd defendant went and removed the key from the ignition switch of the car. When the plaintiff saw him do that, he came from in front of him and he held the 3rd defendant tightly. The plaintiff was tall and in good physical shape. The 3rd defendant had a gun when the plaintiff grabbed him tightly and for about six minutes while they struggled with him. One bullet went off and it is the one that hurt the plaintiff. The plaintiff fell down and the police came and the 3rd defendant was taken by the police. The 3rd defendant was charged with attempted murder, was convicted during the year 2011 and sentenced to ten years' imprisonment which he served and was released during the year, 2017.

[13] This version is corroborated by D.W.2 No. 23347 Corporal Acom Stella a police officer who testified that on the morning of 21st April, 2009 she was at Barclays Bank where she had gone to deposit money. There were two security guards both of whom were armed. They were guarding the bank from outside. There was a car parked on the bank premises near the gate. A tall and fat man emerged claiming the car was his. One guard approached him and they began speaking Acholi and she could not tell what they were saying. She was about twenty meters away. She then saw the civilian grab the security guard and the two began struggling. The civilian held the guard from the side. The gun was strapped to the security guard's shoulder on the right. It appeared as though the civilian was disarming the security guard. As the second guard was approaching them, she heard the gun shot, and the civilian fell down. The guard did not aim the gun at the civilian. At such a short distance one cannot aim a gun. The security guard did not threaten to shoot. The plaintiff had not entered the car; hence he was not inside the car at the time the shot was fired. The guard was wearing SARACEN uniform.

[14] It is corroborated further by D.W.1 Okwalinga Mike Opolota, a retired police officer, who testified that at the material time he was employed by SARACEN as an investigating officer and Head of Investigations. He visited the scene on 23rd April, 2009. He was supposed to gather exhibits, interview witnesses who saw the incident and to interview the bank staff, and the guard, the victim and all those who

had been around so that he could make a report after discussing with the police as to their findings. Indeed, he made a report (exhibit D. Ex.1) showing that most of the witnesses who saw the incident blamed the action of the victim for having confronted a guard who was armed and as a result of that struggle a bullet went off from the chamber and hit him in the stomach. The officials of the bank tried to talk to the plaintiff but he was very aggressive. The victim had been told to remove the vehicle but he instead started struggling with the guard. The victim had become rough when he was told to move the car. The guard was trying to remove the key so that they would bring a breakdown. The victim became violent and almost disarmed the security guard before the shot went off. It is standard practice when guarding a bank to keep the guns cocked because they should be ready to fire quickly on attack. Guns have a safety catch in place. The victim approached the guard from behind. The bullet went off. It is the guard who fired the shot and it is him who disengaged the safety catch. The struggle between them lasted about ten minutes. The plaintiff was not armed. During that struggle is when the safety catch was opened. It is possible that the safety catch was opened in the process of the struggle. This was an unexpected incident.

[15] The estimate of credibility of a witness will be inexplicably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If, however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false. The defendant's version is then rejected as it does not accord with the probabilities.

[16] Form the sequence of events, it is not in doubt that the plaintiff acted in a manner that the 3rd defendant considered to be rude. It is the plaintiff's behaviour that prompted the 3rd defendant to pull the car keys out of the ignition switch. This escalated the tension. Although the plaintiff claimed to have only extended his

hand asking for the key to be handed back to him, it is more probable that he attempted to forcefully grab the keys back. This is corroborated by the testimony of P.W.2 Samuel Ojok who stated that the plaintiff tried to grab it back. It is then apparent that 3rd defendant's reaction in forcefully taking the key was an angry reaction to the plaintiff's rudeness and perceived disrespect. The plaintiff's reaction thereafter was similarly motivated. Both the plaintiff's action and the 3rd defendant's reaction were egoistic, each attempting to assert his own superior status through displays of gratuitous cruelty to the other.

[17] The manner in which the events unfolded shows an escalation of the conflict in a status contest of "if he puffs himself up, I puff myself up; if he chest-thumps, I will chest-thump," with each action taken by the opposite party, in an epic status contest. In such a situation, it is most improbable that the plaintiff only extended his hand to receive the key back. It is more probable that he attempted to forcefully grab it back, resulting in some sort of scuffle that prompted the 3rd defendant to fire a shot at the plaintiff. This does not justify rejection of the plaintiff's version as suggested by counsel for the defendants in his final submissions.

[18] A witness may not tell the truth about some matters, may exaggerate or downplay parts of the story to make his or her case better, or may be simply uncertain about matters, but still the court may be persuaded that the centre-piece of their story stands. I find that although the plaintiff attempted to understate his role in escalating the conflict to the point of resort to a firearm by the 3rd defendant, the centre-piece of his story stands; it is the 3rd defendant who deliberately fired the shot at him, an act of sheer recklessness, rather than the gun going off during a scuffle as contended by the defendants. Where the circumstances of the incident give rise to the inference of negligence or recklessness, then the defendant has a duty to prove there was a probable cause of the accident which does not connote negligence (see *Embu Public Road Services Ltd v. Rimmi [1968] E.A 22*).

[19] The question in this suit is whether a reasonable security guard in the position of the 3rd defendant would in the circumstances of this case have foreseen the possibility of a physical confrontation with the plaintiff and would have taken reasonable steps to guard against the firing of a gunshot when he engaged in such a confrontation; and whether the 3rd defendant failed to take such steps. The applicable test is how a reasonable security guard would have acted under the same specific conditions prevailing at the time of the incident.

[20] The law is that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger (see *Donoghue v. Stevenson [1932] AC 562*). The law requires of persons having in their custody instruments of danger, that they should keep them with the utmost care (see *Dixon v. Bell (1816) 5 M & Sel 198*).

[21] Guns are designed to kill; hence a loaded gun is inherently dangerous. Since its possession or use is attended by extraordinary danger, any person having a gun in his possession or using it is bound to exercise extraordinary care. The greater the danger the higher is the standard of the diligence which the law exacts. A person handling or carrying a loaded firearm in the immediate vicinity of others is liable for its discharge, even though the discharge is accidental and unintentional, provided it is not unavoidable. When the defendant has a gun is in a state capable of doing mischief, the law will hold the defendant responsible when it causes harm.

[22] In the instant case, the gun became imminently dangerous or mischievous by the act of the defendant loading it. It became even more dangerous when he cocked it and kept it in that state. Under the circumstances, the 3rd defendant was under a duty to keep his gun out of the reach of anyone else. The gist of the liability sought to be imposed is that the 3rd defendant was negligent in permitting himself to be

involved in an altercation while armed with a highly dangerous instrumentality, in circumstances where incautious hands of another might come in contact with it and such handling and the discharge of this instrumentality was the natural and probable consequence of the 3rd defendant 's negligence and such a consequence as might and he ought to have foreseen as likely to flow from his act.

[23] *The Police (Control of Private Security Organisations) Regulations*, S.I No. 11 of 2013, do not authorise employees of private security service companies and security guards to exercise any special authority or violate the rights and freedoms of others or intervene in lawful activities of individuals or groups. Although arguably the removal of unauthorised persons or persons constituting a security threat from guarded areas lies within the duties of a security guard, in the instant case, it is not the reason that prompted the 3rd defendant to pluck the car key out of the plaintiff's ignition switch. The 3rd defendant was not exercising any of his powers of search, exclusion, removal or restraint of suspicious or undesirable persons, nor the power to demand surrender and seizure of articles posing a security threat. Instead, he desired to force the plaintiff to go into the bank and reconcile with the Manager, towards whom the 3rd defendant perceived the plaintiff to have been rude and disrespectful shortly before. By acting in a way that might harm the rights, freedoms, life, health, reputation, dignity, property or lawful interests of natural persons, the 3rd defendant acted in breach of duty.

[24] Furthermore, irrespective of the circumstances, when a person holds a firearm, that is pointed at another and operates the firing mechanism, with or without the knowledge that the firearm is loaded, and the firearm is discharged, and the evidence so indicates, then a *prima facie* case of negligence is established. Whenever a duty is imposed by law and that duty is violated, anyone who is injured by the violation may have a remedy against the wrongdoer. This is a case of a dangerous instrument, a loaded gun, which the 3rd defendant knew to be loaded. He pulled the trigger while conscious of the fact that the muzzle was pointed at the plaintiff.

[25] Security guards at guarded premises ordinarily; (a) control, supervise, regulate or restrict entry to and exit from the premises or place, (b) control or monitor the behaviour of persons therein, and (c) remove persons therefrom because of their behaviour that is in or threatens to cause a breach the peace. As they control access, check identification, they sometimes interact with members of the public who are anxious, angry or under the influence of drugs or alcohol. It is reasonably expected that since they inevitably have to regulate unarmed civilians as part of their duties, they are accordingly trained in the appropriate use of defensive techniques and force; on how to avoid the use of fatal force save in exceptional circumstances, and even then, only to use the bare minimum of force required, such as in the case of self-defence or defence of others. The expectation is that their training instils skills of how to mitigate the risk of acting in a manner inappropriate to public safety and the prevention of crime.

[26] The 3rd defendant asserted a distended ego, increasingly needing to assert itself, and sensitive to slights. Permitting himself to be involved in a physical altercation with the plaintiff while armed with a cocked weapon, with its deadly potentialities, constituted an act of negligence on the 3rd defendant's part, since that conduct was of such a nature as created an unreasonable risk of harm to others. The intervention of the plaintiff did not break the chain of causation between his negligence and the injury which occurred, which was a natural and probable result to be anticipated from the original negligence. Although the plaintiff started the affray by his attempt to forcefully grab the keys back, yet the infliction of injuries by a gunshot by the 3rd defendant was done with retribution, and at that time the plaintiff was unarmed. Thus, the 3rd defendant cannot escape liability. I hold the view that the plaintiff has discharged the onus resting on him to prove on a balance of probabilities that the 3rd defendant was negligent.

[27] It was not disputed that at all material time the 3rd defendant was acting within the scope and in the course of his employment as the 1st defendant's employee. According to the *East African Cases on the Law of Tort* by E. Veitch (1972 Edition)

at page 78, an employer is in general liable for the acts of his employees or agents while in the course of the employer's business or within the scope of employment. This liability arises whether the acts are for the benefit of the employer or for the benefit of the agent.

[28] In deciding whether the employer is vicariously liable or not, the questions to be determined are: whether or not the employee or agent was acting within the scope of his employment; whether or not the employee or agent was going about the business of his employer at the time the damage was done to the plaintiff. When the employee or agent goes out to perform his or her purely private business, the employer will not be liable for any tort committed while the agent or employee was a frolic of his or her own. An act may be done in the course of employment so as to make his master liable even though it is done contrary to the orders of the master, and even if the servant is acting deliberately, wantonly, negligently, or criminally, or for his own behalf, nevertheless if what he did is merely a manner of carrying out what he was employed to carry out, then his master is liable (see *Muwonge v. Attorney General [1967] EA 17*).

[29] On basis of the evidence availed to court, I find that the plaintiff has proved on the balance of probabilities that the 3rd defendant's negligent acts and omissions occurred within the scope and in the course of employment of the 1st defendant as to make his master, the 1st defendant, liable even though he may have acted contrary to the orders of the master, the 1st defendant.

Second issue; <u>whether the 3rd defendant can rely on the defence of voluntary assumption of risk</u>.

[30] The defendants' contention must be considered in light of the case that was pleaded by the parties. Order 6 rule 1 and Order 8 rule 3 of *The Civil Procedure Rules* require defendants, in their written statements of defence, to make a brief statement of the material facts on which they rely for their defence. In paragraphs

4 (e) and 5 of their joint written statement of defence, the defendants averred that it is upon the 3rd defendant's seizure of the plaintiff's car keys that the plaintiff immediately pounced upon the 3rd defendant and hit him with punches and then attempted to disarm him during which scuffle the 3rd defendant accidentally discharged a single bullet from his gun thereby wounding the plaintiff. They contend therefore that the shooting was purely accidental. And in any event was prompted by the plaintiff's rowdy behaviour. The defendants thereby pleaded both the defence of inevitable accident and contributory negligence.

[31] The defence of inevitable accident is one that posits a non-tortious explanation for an occurrence. It asserts that where an accident is purely inevitable, and is not caused by the fault of either party, the loss lies where it falls. An inevitable accident is an occurrence not avoidable by any precaution a reasonable person would be expected to take (see *Charlesworth on Negligence*, 4th Edn. para 1183). It is an event which happens not only without the concurrence of the will of the defendant but in spite of all efforts on his part to prevent it.

[32] The person invoking the defence must show that something happened over which he or she had no control, and the effect of which could not have been prevented by using great skill and care. To succeed the defendant is required to prove that act causing the injury could not have been avoided by the exercise of the greatest care and skill. To escape liability, the defendant must show one of two things: (i) the cause (mishap) and the result of that cause were inevitable; or (ii) the cause (mishap) and the result could not have been avoided. The defence is unlikely to prevail if the person seeking to invoke it caused or contributed in any way to the emergency situation.

[33] Some event must have occurred over which the defendant had no control and the resulting consequence caused by the event should be of a nature that could not have been avoided by the exercise of reasonable care. The defendant therefore must show that despite the taking of all reasonable precautions, the mishap was

inevitable. Hence, the defendant must prove; (i) the actual cause of what happened and that he was not responsible for it; or (ii) prove all the possible causes of the mishap and that he was not responsible for any of them.

[34] A defendant who advances inevitable accident in the firing of a shot from a gun bears the onus of explaining how the projectile could have been fired without negligence. The focus will be on the gun handlers' actions. A person holding a loaded and cocked gun is expected to recognise the hazardous conditions, and use greater care. In the case at hand, there is no evidence to show that the shot went off as a result of a malfunction of the gun, of a nature that the exercise of reasonable care could or would not have revealed. It is common knowledge that regardless of the position of the safety, any blow or jar strong enough to actuate the firing mechanism of a gun can cause it to fire. This can happen even if the trigger is not touched, such as when a gun is dropped. The facts of this case though do not suggest that the gun was subjected to any such blow over which none of them had control, with sufficient force to cause the gun to discharge a bullet, before the shot went off.

[35] A safety catch is a lock mechanism on a gun that stops anyone from shooting it by accident, i.e., it is used to help prevent the accidental discharge of a firearm, helping to ensure safer handling. It is a latch that prevents the trigger and / or firing mechanism from moving. It must be actuated by the operator's hand before firing. Therefore, the gun will not fire unless the safety catch is disengaged and the trigger pulled. On the other hand, it is a basic rule in the handling of a firearm never to point your gun at anything one does not intend to shoot such that in the event of an accidental discharge, no injury can occur as long as the muzzle is pointing in a safe direction. The safe direction may be "up" on some occasions or "down" on others, but never at anyone or anything not intended as a target. The other is never touch the trigger on a firearm until one actually intends to shoot. Therefore, the safety must be kept "on" until one is absolutely ready to fire. It was the testimony

of D.W.1 Okwalinga Mike Opolota, that his investigations established that it is the guard who fired the shot and it is him who disengaged the safety catch.

[36] While the 3rd defendant offered an explanation of what occurred, suggesting that he could have inadvertently released the safety catch and pulled the trigger, it is not consistent with the existing conditions to neutralise the inference of negligence arising from the circumstances. The explanation advanced by the 3rd defendant is inadequate to offset the inference that his negligence had a significant role in the firing of the shot. All the circumstances, the fact that he admitted to have held the gun by the butt pulling it away while the plaintiff held it by the muzzle, establish on a balance of probabilities that firing the shot was a product of the 3rd defendant's negligence notwithstanding the explanation he advanced, since the trigger is operated by pulling it backwards, a motion that is consistent with the direction in which the 3rd defendant was pulling the gun. The shot going off may have been inevitable, but it had become inevitable by virtue of the defendant's negligence in releasing the safety catch of the gun and pulling the trigger and thus did not occur by accident. It occurred by the volitional act of the 3rd defendant.

[37] Related to this defence is the one of voluntary assumption of risk which although not pleaded, was canvassed in evidence and raised in the arguments of counsel for the defendants. Although this defence was not pleaded, a trial court is entitled to consider an un-pleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision. On the facts of this case, the issue was left for decision by the court as the defendants' advocate, without any objection from the plaintiff's counsel, led evidence and addressed the court on it (see *Odd Jobs v. Mubia [1970] E.A. 476; Nkalubo v. Kibirige [1973] E.A. 102* and *Railways Corporation v. East African Road Services Ltd. [1975] E.A. 128*). I will accordingly consider the defence.

[38] The defence of voluntary assumption of risk (*volenti non fit injuria*) is premised on the argument that when a person engages in an activity, by which they accept and

are aware of the risks inherent in it, they cannot later complain if they sustain an injury during the activity. They also cannot seek compensation for that injury. The idea is that if a plaintiff has assumed the risk, the defendant does not owe any legal duty to the plaintiff. Thus, the duty element of a negligence claim would not be met, and the plaintiff cannot recover for injuries caused either by risks inherent in the situation or dangers created by the defendant's negligence.

[39] In order to establish this defence, the onus is on the defendant to prove that the plaintiff expressly or impliedly agreed to incur such risk voluntarily, with full knowledge of the nature and extent of the risk. The defendant must show that the plaintiff fully comprehended the risk of injury that materialised and freely chose to accept it. In order to disqualify the plaintiff from all redress, the plaintiff must be shown to have consented to run that risk at his or her own expense so that the plaintiff, and not the negligent defendant, should bear the loss in the event of an accident. The test of whether the plaintiff was aware of a risk is whether he or she was aware of the type or kind of risk and not its precise nature, extent or manner of occurrence. Thus, the three elements of the defence of voluntary assumption of risk which must be proved by the defendant include: (i) that the plaintiff perceived the existence of the danger or risk; (ii) that he or she fully appreciated it; and (iii) that he or she voluntarily agreed to accept the risk.

[40] The defendant must prove that the plaintiff had actual knowledge of the risk and fully appreciated the danger. The risk that a plaintiff must have an awareness of is not a generalised risk of injury; the defendant must prove that the plaintiff appreciated the risk of the defendant's breach of duty. The extent of knowledge must correlate with the extent of the risk. The defendant must prove that the plaintiff fully comprehended the extent of the risk and freely chose to accept or ignore it, thus voluntarily assuming the risk (see *Monie v. Commonwealth of Australia, [2007] NSWCA 230*). The danger must thus be obvious or apparent, or the conduct must have been inherently dangerous.

[41] An inherent risk is one that is integral to the activity or a risk that cannot be reduced or minimised without changing the basic nature of the activity. A person armed with a lethal weapon owes a duty not to create a danger with a deliberate intent of harming the person and to not show a reckless disregard of their safety. In the instant case the defendants only proved that the plaintiff was aware that the 3rd defendant was armed. This was a long way short of consenting to the risk of being shot. It cannot be said that engaging in a scuffle with a person armed with a gun inherently exposes one to the danger of being shot or necessarily creates such a danger. Whether there was a real risk will depend on the circumstances of each case.

[42] Guns do not discharge projectiles simply by the fact of being held by a person, they have to be cocked first and the safety catch disengaged before they can discharge projectiles, which are all actions that require deliberate action. A person who does not know that the gun is cocked and the safety catch disengaged cannot be deemed to have appreciated the risk of being shot nor the risk of the defendant's breach of duty. Furthermore, the use of guns is regulated by law and persons issued with guns are not only trained and equipped with skills of tactical threat assessment and control, but also the skills necessary to legitimately exercise the lawful use of that lethal force, including the requirement of resorting to its use only in exceptional cases and after issuing a warning.

[43] Law enforcement officials are required to give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident (see for example section 28 (3) (b) and (c) of *The Police Act*). The intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life. Policing and soldiering are quite different professions. Provided that soldiers abide by the laws of war, in combat situations they can shoot to kill or injure enemy combatants. However, the police and other

law enforcement officials must protect the right to life, liberty and security of person. They can only use lethal force when there is a direct or imminent threat to life or of life-threatening injury; in self-defence or defence of others against the imminent threat of death or serious injury.

[44] According to Regulation 31 of *The Police (Control of Private Security Organisations) Regulations*, S.I No. 11 of 2013, an employee of a private security organisation may use authorised firearms, only; (a) in self-defence against an armed attack or the defence of any other person who may be under the protection of the employee from the threat of death or grave injury arising from such an armed attack; (b) when attempting to arrest a person who, to his or her knowledge, is fleeing from lawful custody after committing or suspected to have committed a serious offence and the person fleeing does not slop voluntarily or by any other lawful means; (c) to stop any serious threat to life or property if police assistance cannot be called in time to avert the threat. None of these situations applied to the circumstances of this suit. Moreover Regulation 16 thereof requires all private security organisations to observe and ensure strict observance of human rights of and by their employees.

[45] Employees of private security organisations don't just need firearms training on how to shoot straight and how to clean and maintain their weapons. They are expected to have the skill to know how to act with restraint, using persuasion and other non-violent means as far as possible, or respond in the most proportionate way to stop or prevent a direct threat to life. Firearms do not have to be used at all unless a threat is posed to life. Shooting by an employee of a private security organisation to stop a life-threatening attacker should only be an absolute last resort and should never be arbitrary or excessive. It was never proved that the plaintiff had actual knowledge of the risk that the 3rd defendant would breach these legal obligations.

[46] Secondly the defendant must prove that the plaintiff fully appreciated the risk. For example, in circumstances where the plaintiff's judgement has been adversely affected by alcohol to the extent of being incapable of appreciating the full extent of the risk, the defence of voluntary assumption of risk fails. Similarly, if due to the conduct of the defendant the plaintiff went into a fit of blind rage, the court may find that his mental state was impaired by rage that he did not fully appreciate what he was doing, and thus was incapable of appreciating the full extent of the risk. Common experience tells us that rage may beget purposeful conduct. On the other hand, it may also cause a person to act without regard to or consideration of the consequences of his or her actions. There may be cases where the conduct of the defendant produces in the plaintiff a state of excitement, anger or disturbance, as a result of which the plaintiff might not contemplate fully the consequences of his acts and might not, in fact, fully appreciate exposure to the risk of harm involved.

[47] Such a state of mind need not be such as would justify the defence of provocation in criminal trials. In situations of this nature, it is not whether or not the event triggering the rage was an act of provocation, it is the plaintiff's emotional state which is relevant to his ability to fully appreciate the risk. In order to come to this conclusion, the court only needs to find that the influence of the events that occurred was strong enough, important enough, and intense enough to impact on the plaintiff's state of mind in such a way that his faculties were significantly diminished to fully assess the situation. Anger, if sufficiently serious or intense, though not amounting to the defence of provocation, may render one incapable of appreciating the full extent of a risk. Thus, in some cases, the provocative conduct of the defendant might be a relevant item of evidence on the issue of the plaintiff's full appreciation of the risk.

[48] The ability to appreciate the risk usually is inferred from the plaintiff's conduct and the surrounding circumstances. In some cases, the provocation afforded by the defendant when considered in relation to the totality of the evidence, might create a reasonable doubt in the mind of the court whether the plaintiff the plaintiff

perceived the existence of the danger or risk. I find that the 3rd defendant's act of pulling the keys out of the ignition switch was sudden and unexpected. It was a wrongful act that would have caused an ordinary person to be momentarily deprived of his or her self-control. It in fact caused the plaintiff to react in anger before having recovered his normal control. The plaintiff acted in a state of anger or emotional disturbance such as panic or anxiety caused by a provocative act sufficient to negate the capacity to fully appreciate the looming risk. In that state of mind, the plaintiff was incapable of appreciating the full extent of the risk of being shot by the 3rd defendant.

[49] Thirdly, there should be evidence that the plaintiff freely and voluntarily agreed to accept the risk. In order to establish the defence, the plaintiff must be shown not only to have perceived the existence of danger, for this alone would be insufficient, but also that he fully appreciated it and voluntarily accepted the risk. The plaintiff would not ordinarily be presumed or deemed to have voluntarily accepted a risk merely because he or she knew about it and exposed themselves to it. The decision to voluntarily accept the risks associated with the negligence of the defendant might be inferred.

[50] There are many cases though in which the courts are loathe to infer that knowledge given the peculiar circumstances in which the plaintiff was placed, for example where the alternatives to accepting the risk are onerous or repugnant such as giving up employment, (see *Smith v. Baker [1891] AC 325*, per McClellan CJ at [78]), or circumstances where the plaintiff perceived and fully appreciated a risk, but had a genuine belief that the risk would not materialise (see *Suncorp Insurance and Finance v. Blakney (1993) 18 MVR 361; [1993] QCA 495* and *Canterbury Municipal Council v Taylor [2002] NSWCA 24*). For the defence to be established there must be a voluntary choice available to the plaintiff and then some form of election, agreement, or consent to accept the risk.

[51] Taking into account the fact that the plaintiff reacted in anger before having recovered his normal control, there was in this case, in a real and practical sense, a lack of choice about the risk. In the circumstances of this particular case, the plaintiff cannot be held to have voluntarily accepted the risk in the sense that he elected or agreed to undertake the risks involved. In the light of those considerations the evidence shows there was nothing that the plaintiff could do to avoid or reduce the risk if he was to recover his car keys immediately by self-help. Express assumption of risk involves showing the plaintiff explicitly accepted the risk, and there is no evidence to that effect. Implied assumption of risk, on the other hand, can be inferred through words and conduct.

[52] Specifically, implied assumption of risk exists when a plaintiff undertakes conduct with a full understanding of the possible harm to him or herself and consents to the risk under those circumstances. Voluntarily agreeing to accept a risk suggests a degree of active mental deliberation and reflection at some point prior to action. One cannot logically contemplate the consequences of one's actions if one acts in an unplanned and spontaneous manner. Consequently, the plaintiff did not voluntarily agree to the risk that eventuated. Accordingly, the defendants have as well failed to establish the third element of the defence. In conclusion, the defence of voluntary assumption of risk (*volenti non fit injuria*) fails. I reject the submission that this is a case in which the principle of "*volenti non fit iniuria*" applies so as to deprive the plaintiff of any right to claim damages.

Third issue; whether the plaintiff was contributorily negligent in causing the 3rd defendant to fire the shot.

[53] If a person suffers damage partly because of his or her failure to take reasonable care and partly because of the wrong of someone else, the damages recoverable for the wrong are to be reduced to the extent the court considers just and equitable having regard to the claimant's share in the responsibility for the damage. The plaintiff's failure to take reasonable care in order to reduce the risk of harm, confirm

that his damages should be reduced to an appropriate amount to reflect his contributory negligence.

[54] In order to successfully establish contributory negligence, a defendant must prove that the plaintiff, through his or her own negligence, contributed to the accident. To succeed in a defence of this nature, a defendant has to show that the plaintiff's negligence contributed to the causation of the injury. If the plaintiff's behaviour simply made his or her injuries worse, but did not actually cause or contribute to the causation of the accident, the defence is not available.

[55] To succeed, the defendant has to prove that (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and (b) the risk was not insignificant; and (c) in the circumstances, a reasonable person in the position of the person would have taken the precautions. In deciding whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following, among other relevant considerations; (i) the probability that the harm would occur if care were not taken; (ii) the likely seriousness of the harm; (ii) the burden of taking precautions to avoid the risk of harm; (iv) the social utility of the activity that creates the risk of harm.

[56] The burden of the plaintiff taking precautions to avoid the risk of harm was not arduous. A reasonable person, in these circumstances would take up the issue with the management of the Bank. There is minimal social utility of the activity of the plaintiff in terms of the overall benefit to the community. Instead, the plaintiff too descended into a distended ego, needing to assert itself, and sensitive to slights when clearly, the best way to respond was to step out or get out of the status competition game. In all cases, conflict inflames the ego, distorts it and degrades it.

[57] Although anger may be innate from a biological perspective, the first automatic and involuntary reactions to negative stimuli can be modified quickly as the aroused person thinks about his feelings, the instigating events, his conceptions

of what emotions he might be experiencing and the social rules regarding the emotions and actions that may be appropriate under the circumstances. Thus the reaction to aggression, even extreme aggression, can be controlled. Involuntary reactions to negative stimuli can suppressed, or eliminated altogether by giving attention to those feelings, exert self-control, restraining one's negative affect-produced aggressive urges and perhaps also lessening the anger perceived in oneself. Aggression and violence thus should be seen as instances of failed or inappropriate problem solving, or poor coping responses, rather than a failure to check some innate, destructive drive.

[58] From that perspective, it may be argued, as counsel for the defendants does, that the actions of the plaintiff constitute a failure to take reasonable care for his own safety. This is because although anger as an emotion may be uncontrollable, as humans we are capable of controlling our responses, and in particular the aggression response, rising above the natural urge toward animosity and instead adopting an elevated stance. "The people we admire break that chain. They quiet the self and step outside the status war. They focus on the larger mission. They reject the puerile logic of honour codes and status rivalries, and enter a more civilised logic, that doesn't turn us into our enemies" (per David Brooks, Feb. 6, 2015). However, no matter how provocative the conduct of the plaintiff may be, he is assured of compensatory damages in a tort action against the defendant unless the defendant can rely on self-defence where the circumstances permit.

[59] It is the function of the law not to encourage retribution or vengeance. It may thus be argued that a party who is provoked by another is enjoined from taking the law into his own hands by resorting to vengeance. In any case, the defendant who takes the law into his own hands cannot expect to benefit by the law through a mitigation of the damages awarded in compensation against him. Thus where the act causes any injury to the plaintiff, the latter is entitled to compensation irrespective of his own provocative conduct. The plaintiff who provokes a given

conduct cannot be said to have in effect invited it or to have implicitly consented to the interference with his rights.

[60] For example, in *Downham v. Bellette and others, (1986) Aust. Torts Reports 80-039, 67,824* the families of the plaintiff and the defendants had been feuding for about 16 years. Towards the end of this time, the plaintiff adopted a rather unique method of conducting the feud; he took to excreting on the driveway of the first defendant usually on Saturday nights. The first defendant noticed the human excrement which reappeared on his driveway on Sunday mornings. Naturally, he suspected the plaintiff being responsible for the unwelcome deposits. He consulted with the second and third defendants, who then decided to watch the driveway one Saturday night.

[61] After a fruitless wait into the night they gave up. But they returned early Sunday morning to continue their vigil and ambush. This time their luck held; at 6 a.m., the plaintiff approached with a .22 rifle. He walked up to the middle of the driveway, put down his rifle and proceeded to defecate unaware of the presence of the second and third defendants. The defendants came out of their ambush and approached the plaintiff exposing him *inflagrante delicto* with the glare of a torch light they carried. The plaintiff reached for his rifle but was forcibly disarmed before he could pose any threat. He was then apprehended and punched by both defendants.

[62] The plaintiff consequently suffered fractured ribs, abrasions to his head and back and scratches to a substantial part of his body. The second defendant restrained the plaintiff as a result of which the plaintiff suffered injuries to his thumb and fingers. Meanwhile the first defendant who had been asleep came to join them. After restraining the plaintiff for one and a half hours, the defendants received a message from the police to release the plaintiff and they did so accordingly. The plaintiff subsequently brought an action against the defendants claiming damages

for assault, battery and false imprisonment. His claim included aggravated damages for indignity and disgrace and humiliation resulting from trespass.

[63] After a consideration of the facts, Underwood J. held that "although the plaintiffs conduct was reprehensible it did not justify the assault and subsequent period of false imprisonment" and that "the plaintiff was the victim of an actionable assault, battery and false imprisonment." On the specific issue of provocation, Underwood J. noted that the plaintiff's act of defecating in the first defendant's driveway was calculated to annoy the defendants and members of their families who use that driveway and was the immediate and precipitating cause of the assault and false imprisonment. He however observed that the plaintiffs' conduct is relevant only to a claim for aggravated damages.

[64] The rule is that the defendant in an action in which exemplary damages are recoverable is entitled to show the plaintiff's own conduct was responsible for the commission of the tortious act and to use this fact to mitigate damages but it has no application to damages awarded by way of compensation. This principle was best summed up by Lord Denning in the later case of *Land v. Holloway [1968] 1 QB 379 at 387* thus: "provocation by the plaintiff can properly be used to take away any element of aggravation but not to reduce real damages." If the plaintiff has provoked the assault and battery complained of, such provocation only mitigates the award of exemplary and aggravated damages (see *Halsbury's Laws of England*, 4th edition, Vol. 12 Para. 1158 at 454). The plaintiff's provocative and insulting conduct only disentitles him from recovering aggravated damages but is not considered as contributory negligence.

[65] Furthermore, in cases of affray where there is a disparity between the victim's conduct and the defendant's deadly attack, the defence of contributory negligence will not be available. For example, in *Barnes v. Nayer (The Times 19 December. 1986)* the defendant assaulted and killed a neighbour whom he alleged had abused him and his family for years, and that on one occasion, after threats to his

son, he had killed the deceased with a machete. The Court of Appeal held that the disproportion between the conduct of the plaintiff and that of the defendant was such that it prevented any reduction of real damages (as opposed to exemplary or aggravated damage).

[66] In the instant case, in justification of the extreme violence meted out to the plaintiff it was averred by the 3rd defendant that the plaintiff attempted to disarm him. This was never proved as a fact, more especially since the scuffle appears to have been an attempt by the plaintiff to retrieve the car keys than to disarm the 3rd defendant. In any event, even if it had been true that the plaintiff had indeed attempted to disarm the 3rd defendant, to shoot him in the stomach at close range was a disproportionate reaction. The defence of contributory negligence is therefore not available to the defendants.

Fourth issue; what are the remedies available?

[67] The plaintiff claims general and special damages for negligence, interest and costs. General damages are such as the law will presume to be the natural and probable consequences of the defendant's words or conduct. They arise by inference of law and need not, therefore be proved by evidence. In the instant case, the plaintiff suffered pain, underwent several surgical operations, lost amenities of life and was unable to work for a considerable period of time.

[68] P.W.1 Richard Acaye testified that he is employed as an international Humanitarian worker. When he was shot, he collapsed unconscious and only came round the following morning at 7.00 am in great pain and found himself at Gulu Independent hospital. He paid shs. 4,666,387 at that hospital where he spent four days after undergoing surgery (exhibit P. Ex.3). Following a CT-Scan undertaken at Kampala International Hospital, it was established that the Ball and socket joint of his left hip was completely smashed. The large and smell intestines had multiple perforations. He underwent another surgical operation and another

on the hip joint. He was admitted there for about three months. He paid shs. 47,362,700/= out of which shs. 37,640,700/= was on medical bills. This was paid by "War Child." The ambulance cost him shs. 6,000,000/=

[69] He continued with treatment of bed sores and physiotherapy at St Mary's Lacor Hospital where he incurred a medical bill of shs. 1,267,500/= and a total of shs. 6,000,000/= on attendant costs. In August, 2009 he underwent a surgery at Gulu Regional Referral Hospital for cleaning the bone. He bought drugs privately at the cost of shs. 776,100/= He underwent three other surgical operations in Nairobi during February, 2011 incurring K.shs. 675,233/= and 23,000 euros for an air ticket. He was referred for further treatment to Mill Park Hospital in South Africa where he went on 5th March, 2011. He underwent bone replacement surgery and incurred a bill of 196,903.43 South African Rand which was paid by his employer Save the Children. All those expenses paid by his employers were subsequently deducted from his salary.

[70] P.W.4 Dr. Mukasa Joseph testified that the plaintiff was his patient while at Gulu Independent Hospital. The plaintiff was brought into the hospital emergency unit on the morning of 21st April, 2009 at 8.15 - 8.30 am. He had sustained gunshot wounds. He was bleeding and had other injuries he had sustained. A hip injury and he was bleeding to the abdominal wounds. His vitals were going down and his pulse was rising. They dealt with soft tissue injury and he was taken to the theatre for surgery after resuscitation in the emergency unit. He was opened up in the abdomen and he was found to have multiple puncture wounds in the small and large intestines. The descending colon had been perforated. The operation took nearly two and half hours. After carrying out the operation they did a colostomy, a hole in the abdomen for passing stool to allow healing. He spent four days with them and then he was transferred to International Hospital Kampala. He deeded further management of the hip injury. He was taken as soon as he was stable. It is the hospital that referred him to Kampala.

[71] P.W.3 Dr. Khingi Avua Ben, a Consultant surgeon at Mulago Hospital testified that he attended to the plaintiff who was brought in an ambulance on 25th April, 2009 while at Gulu Independent Hospital. The plaintiff had sustained gun-shot injuries to his abdomen and to his left hip. He had been resuscitated but he needed further specialised care. He evaluated the patient. He found that he had abdominal gunshot wounds, an incision on the abdomen made by his previous doctors. He had large wounds in his groin and buttock from the second gun shot. He was in a critical state. He required further resuscitation with blood transfusion. He undertook further surgery in the abdomen to find out where in the intestines' contents were leaking from. The gunshot had caused multiple perforations in the large and small intestine. He administered a total of seven surgical operations and six months later the plaintiff had improved and he was able to place the intestines back so that he could pass stool normally again. He handed over the management of the hip joint to my orthopaedic colleague Dr. Mumbale who could only remove the dead tissue of the bones. When we discharged him six months later, he was on two clutches.

[72] During the year 2014 the plaintiff underwent three other hip surgeries to clear the infection. They were done in Nairobi and one final hip replacement / reconstruction done in South Africa. He evaluated him from his history, physical examination and all the medical records and found that; - he has survived death and serious complications of the injuries that he has gone through an has a reconstruction of the hip joint which now allows him to walk some distances without clutches for short periods of time. Prolonged standing causes pain, ten to fifteen minutes. If he stands longer the pain intensifies. He has to sit down to relive the pain. His left leg is two inches shorter that the right. He walks with a limp despite with a corrective shoe on his left leg. It has a raised padding to try to correct the shortening. In his assessment that nature of walking will cause a degeneration / breaking down of his back as the plaintiff grows older.

[73] Psychologically he still goes back to the events that happened and seems to be stressed even talking about them. He is partially impotent. He said that he is unable

to sustain a normal erection anymore and had difficulty in that area. This condition will not be remedied. He has tried viagra but it has not worked. This is based on history and from the nature of the injury to determine if it is credible. Impotence may be party physical and partly psychological. He cannot stand for a long time, he cannot walk for long distances, he cannot run, he is made uncomfortable by pain, the partial impotence. He assessed permanent disability at 70% based on his professional work as per exhibit P. Ex.4.

[74] The plaintiff's wife Mrs. Acan Beatrice Acayo testified as P.W.5 and stated that during the plaintiff's admission he prepared food for him and themselves. She would prepare it from home and take it to hospital. During the six months spent at IHK managing hygiene was very costly as they had to wash constantly. They had to use a recommended detergent, JIK for cleaning and Dettol for cleaning him. They would buy a litre of Jik and Dettol and it would last two to three days. Jik would cost 3,500/= and Dettol 20,000/= a litre at the time. The plaintiff was thereafter transferred to Lacor where they stayed for two months and this continued. His diet had to change. They had to buy smashed Irish potatoes and soup bought from the supermarket. He had to undergo another operation of the infection to the bone. There was a flow of pus with very foul smell from the infection of the bone. It continued up to the year 2011. She would buy gauze and plaster. They needed to change sheets every after an hour. Up to now the plaintiff complains of pain on the hip bone. His intestine became shorter after the multiple surgeries and his diet has changed. He lives on soft food. She would have had several children. With him but they do not enjoy their conjugal rights anymore. They go without sex in a month due to his condition.

[75] It is not in doubt that the plaintiff suffered a lot of pain, especially between April, 2009 and 2014 where he underwent multiple major surgeries. His left hip joint was completely shattered and hip replacement / reconstruction surgery had to be undertaken. Despite all that medical intervention, the plaintiff still experiences pain caused by prolonged standing, his left leg is two inches shorter that the right such

that he walks with a limp despite with a corrective shoe on his left leg, he is partially impotent since he is unable to sustain a normal erection anymore and is reliant on drug induced erections for the enjoyment of his conjugal rights. His current degree of disability is assessed at 70% yet the prognosis is bleak since his post injury gait is projected to cause a degeneration / breaking down of his back as he grows older. He was 40 years old at the time the injury was inflicted.

[76] A hip injury of the nature sustained by the plaintiff can significantly affect a person's mobility on a permanent basis and may result in long-term medical care, time off work or job loss. The award of general damages can help to improve a victim's standard of life by covering medical bills and loss of earnings.

[77] Comparable cases, when available, should be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. I have made comparisons with awards made in similar cases such as; *Kabunga Grace v. Kisambira Sentamu Ismail, H.C. Civil Suit No. 12 of 2009;* where the plaintiff suffered multiple injuries including a broken right leg, fractured left leg which left him severely disabled. He was awarded shs. 100,000,000/= for pain and suffering and loss of amenities.

[78] In *ECTA (U) Ltd v. Geraldine S. Namurimu and another, S.C. Civil Suit No. 29 of 1994;* the plaintiff suffered multiple lacerated wounds all over the body the biggest being in the forehead elbow; a crush injury of the left foot, compound fracture of the left tibia and fibula; compound fracture of the right tibia with dislocation of the proximal tibia fibula joint, and dislocation of the right stermo claricular joint; she sustained grave injuries, which seriously incapacitated her; The amount of shs. 16,000,000/= though was considered to have been on the higher side and was reduced to shs. 12,000,000/= for pain and suffering and loss of amenities. This court however has to take into account the passage of time since those awards

were made and since the claim in this suit was filed, and the resultant fall in the value of money. When having regard to previous awards one must recognise that there is a tendency for awards now to be higher than they were in the past.

[79] General damages will ordinarily include anticipated future loss as well as damages for pain and suffering and loss of amenity (see *Uganda Commercial Bank v. Deo Kigozi [2002] 1 EA 293*). It is not always possible, if ever, to find a case where the injuries and consequences are on all fours with a matter under consideration. This can be attributed to the fact that each individual reacts differently to what may appear to be a similar injury. I have for that reason taken into account the plaintiff's entire circumstances; the severity of the injuries both to the organs in the abdomen and to the hip joint, the recovery time, his age and residual mobility of only 30% for the rest of his life, which is likely to reduce substantially as he gets older. The extent of this injury on its own and the pain and suffering it caused would justify an award of shs. 150,000,000/= This is coupled with that fact that as a result of that injury he now suffers erectile dysfunction yet he is married.

[80] Abdominal or pelvic vascular injuries can compromise circulation to the genitalia, producing impotence or other alterations in sexual responses by which sexual desire may be present but penile erection impossible. The extent of this injury and the emotional suffering and strain on his marital life it has caused, by making him suffer erectile dysfunction at an earlier age than ordinarily expected (more than ten years earlier), would justify an additional award of shs. 80,000,000/= Therefore in the final assessment, after considering the full extent of the impact on the plaintiff’s quality of life, the pain, suffering and loss of amenity a total sum of shs. 230,000,000/= is awarded as general damages.

[81] As regards the claim for special damages, the law is that not only must they be specifically pleaded but they must also be strictly proved (see *Borham-Carter v. Hyde Park Hotel [1948] 64 TLR*; *Masaka Municipal Council v. Semogerere [1998-2000] HCB 23* and *Musoke David v. Departed Asians Property Custodian Board*

[1990-1994] E.A. 219). In personal injuries claims, special damages encompass past expenses and loss of earnings. It is trite law though that strict proof does not necessarily always require documentary evidence (see *Kyambadde v. Mpigi District Administration, [1983] HCB 44; Haji Asuman Mutekanga v. Equator Growers (U) Ltd, S.C. Civil Appeal No.7 of 1995* and *Gapco (U) Ltd v. A.S. Transporters (U) Ltd C. A. Civil Appeal No. 18 of 2004*). By his plaint, the plaintiff claimed a total of shs. 250,000,00/= in medical expenses.

[82] The plaintiff did not provide an itemised list or tabulation of the various items on which expenditure is said to have been incurred. In his testimony, he claimed to have spent shs. 4,666,387/= at Gulu Independent hospital (document P. ID.2); shs. 47,362,700/= at Kampala International Hospital (document P. ID.3); shs. 6,000,000/= on hire of an ambulance from Kampala International Hospital to St Mary's Lacor Hospital, shs. 1,267,000/= at St Mary's Lacor Hospital (exhibit P. Ex.1); shs. 776,100/= on the purchase of drugs while undergoing treatment at Gulu Regional Referral Hospital (exhibit P. Ex.2); 23,000 euros for a flight from Ethiopia to Nairobi, K.shs. 675,233/= on the surgical operations undertaken at a hospital in Nairobi (document P. ID.4); and 196,903.43 South African Rand at Mill Park Hospital in South Africa (document P. ID.5). All these costs were met by his employers who thereafter deducted the amounts from his salary.

[83] There is a distinction between exhibits and articles marked for identification. The term exhibits is confined to articles which have been formally proved and admitted in evidence (see *Des Raj Shema v. R. (1953) EACA 310***)**. The mere marking of a document for identification does not dispense with the formal proof thereof (see *Okwonga Anthony v. Uganda S. C. Criminal Appeal No.20 of 2000*). It follows therefore that once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. The document then becomes part of the court record. If the document is not

admitted into evidence as an exhibit, it only remains as hearsay evidence, an untested and unauthenticated account.

[84] The only expenditure that the plaintiff proved to the required standard with documents formally proved and admitted in evidence is the shs. 1,267,000/= spent at St Mary's Lacor Hospital (exhibit P. Ex.1) and shs. 776,100/= he spent on the purchase of drugs while undergoing treatment at Gulu Regional Referral Hospital (exhibit P. Ex.2). For the rest of the expenditure, the documents submitted were never admitted into evidence as exhibits and thus, constitute untested and unauthenticated hearsay evidence.

[85] Although it is not in doubt that the treatment administered to the plaintiff came at a cost, in his testimony the payments were made by his employers. He did not adduce any evidence to back up his claim that the amounts were eventually deducted from his salary, yet documentary proof is expected with such claims. There is no evidence to show how much his salary was at the time, the number of instalments by which the sums were paid and the actual amounts deducted at each instalment. The evidence is most unsatisfactory, yet the court may not make speculative awards of special damages. Save for the three items, the rest of the claims for special damages were not proved. The plaintiff is accordingly awarded shs. 2,043,100/= as special damages.

Order:

[86] In the final result, judgment is entered for the plaintiff against the 1st and 3rd defendants jointly and severally for;

a) General damages of shs. 230,000,000/=
b) Special damages of shs. 2,043,100/=
c) Interest on both general and special damages at the rate of 8% per annum from the date of judgment until payment in full.
d) The costs of the suit.

Delivered electronically this 14th day of December, 2020 ……Stephen Mubiru……

Stephen Mubiru
Judge,
14th December, 2020

Appearances

For the plaintiff : Mr. Otto Gulamali.

For the defendants : M/s Kasirye Byaruhanga & Co Advocates.