THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CV-CA-0005-2015

(Arising from MBR-00-CV-CS-0044-2009)

BWALIGONZA SOLOMON :::::::::::::::::::::::::: APPELLANT

VERSUS

1. KATWERE VINCENT

2. MUGISHA ELIAS

3. KASAJJA ABDU :::::::::::::::::::::::::::::::: RESPONDENTS

BEFORE: HON LADY JUSTICE JOYCE KAVUMA

JUDGMENT

Introduction.

[1] This is an appeal against the orders and decree of the learned Principal Magistrate Grade one sitting at Chief Magistrates' Court of Mbarara at Mbarara delivered on **28th/04/2014**.

[2] The background of the appeal is that the Appellant sued the three Respondents in the Chief Magistrates' Court of Mbarara at Mbarara seeking for payment of general, special damages and costs as a result of a road accident that occurred on 8th December 2005 along High Street, Mbarara town. The Respondents filed a joint defence in which they denied every allegation set out in the Plaint and contended that the Plaintiff was not a passenger on the said motorcycle but was an illegal rider thereon, carrying the rightful owner. That the Plaintiff was negligent in riding the motorcycle and as a result caused the accident that resulted into his own injury.

The suit was heard and finally determined by the trial Magistrate in favour of the Appellant declaring that the 3rd Respondent was liable to pay UGX 4,000,000/= as general damages to the Appellant having contributed 50% to the accident. Special damages of UGX

476,750/= were also awarded against the 3rd Respondent, interest of 20% on both general and special damages from the time of the judgment till payment in full and 50% of the costs of the suit against the 3rd Respondent.

The Appellant being dissatisfied with the above decision and orders of the trial Magistrate filed the instant appeal on the following grounds;

1. **The learned trial Magistrate was wrong to hold that the relationship of master and servant between the 3rd Respondent and the 1st and 2nd Respondents was not proved in the light of the evidence of PW2 and PW3 and exhibit P8 and P11.**
2. **The learned trial Magistrate was wrong to hold in his judgment that the Appellant was guilty of contributory negligence which finding was contrary to the evidence on record and this error led him to making a wrong decision.**
3. **The learned trial Magistrate was wrong to apportion the liability for the motor-accident between the Appellant and the 3rd Respondent ignoring the evidence of PW 1, 3 and 4 which proved that the reckless and negligent conduct of the 3rd Respondent was the sole cause of the motor accident.**
4. **The learned trial Magistrate was wrong to base his findings on the question of negligence solely on the facts alleged in the written statement of defence ignoring the law which requires that a decision of the court must be based on the evidence adduced in court.**
5. **The learned trial Magistrate wrongly assessed the degree of injury caused to the Appellant as a result of the accident and awarded a low amount of general damages.**

The Appellant prayed for the appeal to be allowed, the findings and orders of the trial court be set aside and that this court awards adequate amounts of general and special damages commensurate with the degree of injury and loss suffered by the appellant and also award full costs of the suit in the trial court and this court to the Appellant.

Representation.

[3] At the hearing of this appeal, the Appellant was represented by M/s Katembeko and Company Advocates while the Respondents were represented by M/s Kahungu-Tibayeita and Co. Advocates.

The duty of this court.

[4] It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see **Father Nanensio Begumisa and three others vs Eric Tiberaga SCCA 17of 2000, [2004] KALR 236**). In a case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (see **Lovinsa Nankya vs Nsibambi [1980] HCB 81**).

In its appellate jurisdiction, this court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular, this court is not bound

necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally. **(See Nyero vs Olweny and Ors (Civil Appeal 50 of 2018) and Kaggwa vs Apire (Civil Appeal 126 of 2019) per Mubiru J.)**

I shall be guided by the above legal principles.

Analysis and decision of this court.

Ground 1

The learned trial Magistrate was wrong to hold that the relationship of master and servant between the 3rd Respondent and the 1st and 2nd Respondents was not proved in the light of the evidence of PW2 and PW3 and exhibit P8 and P11.

[5] Both counsel were given timelines within which to file their written submissions but upon the closure of the timelines, only the Appellant had filed his submissions. I will therefore determine this appeal based on the law and submissions of only the Appellant.

Counsel for the Appellant submitted on this ground that at trial, the Appellant testified that the 1st Respondent admitted at police that he owned the culprit vehicle. That in his written statement of defence at paragraph 4, the 1st Respondent denied ownership of the motor vehicle but admitted selling the same vehicle to the 2nd Respondent thus making him a special owner of the vehicle. That the evidence was corroborated by PW3 who testified that the 2nd Respondent reported himself to police claiming the motor vehicle

as the owner after the accident. That the 2nd Respondent then produced the car log book in the names of Katwire Moses, the 1st Respondent. Relying on the cases of **Muwonge vs AG [1969] EA 17** and **Kasekya-Kasaijja Slyvan vs AG Civil Suit No. 1147 of 1998**, counsel submitted that the Appellant had established that the vehicle belonged to the 1st Respondent through PW3 and that at the time of the accident, the 2nd Respondent was a special owner through both PW1 and admission in the WSD. That the person who was driving the vehicle (the 3rd Respondent) was a servant or agent of the 1st and 2nd Respondents. That the Respondents did not produce evidence to the contrary and therefore a master-servant relationship was proved on the balance of probabilities.

Counsel concluded by submitting that the learned trial Magistrate was wrong to hold that the master-servant relationship was not established.

[6] Employers may be vicariously liable for the torts of their employees that are committed during the course of employment. Vicarious liability is a relationship-based liability. Vicarious liability signifies the liability which a person (D) may incur to another (C) for damage caused to C by the negligence or other tort of a third party (A). The fact that D is liable does not, of course, insulate (A) from liability. (**See Peel, E., Goudkamp, J., Winfield, P. H., Jolowicz, J. A., & Winfield, P. H. (2014). *Winfield and Jolowicz on tort* at 21-001 and Standard Chartered Bank vs Pakistan National Shipping Corp [2002] UKHL 43).**

The type of relationship required to established such liability is a specific one, that is, it is one arising under a contract of service and the tort must be referable to that relationship in the sense that it

must have been committed by the servant in the course of his or her employment. This is what is known as a master-servant relationship. It is worth noting that the master-servant relationship may not be confined to employment in the strict sense, courts have looked at whether the relationship between (D) and (A) is one that is capable of giving rise to vicarious liability. However, employment is still the most common and best way of establishing the relationship of master- servant. (**See for example Catholic Child Welfare Society vs Institute of the Brothers of the Christian Schools [2012] UKSC 56 per Lord Phillips.**)

To establish and apportion liability in a case like the instant case, three questions are usually asked by the court;

1. **Was the tort committed?**
2. **Was there a relationship between the tortfeasor and employer which was capable of giving rise to vicarious liability?**
3. **Was there a close connection between that relationship and the tort committed?**

[7] On the first question, it was an agreed fact from the pleadings of both parties in the lower court that indeed a tort was committed on the Appellant. The learned trial Magistrate rightly found on the first issue in his judgment that there was an accident involving two motor vehicles along the Mbarara Highstreet in which the Appellant was injured. This was the tort complained of.

It is on the second question, that the learned trial Magistrate is being faulted for having not found that a master-servant

relationship existed between the 3rd Respondent and the 1st and 2nd Respondents.

In his judgment at **page 6**, the learned trial Magistrate while considering the issue of vicarious liability held that:

> *"In the instant case no evidence was called to establish that D3 was in employment of D1 and D2 or when D3 committed the act of negligence, he was acting in the course of his employment. It is not enough to claim that the motor vehicle liable for the negligence belongs to the defendant(s) but proof must e shown specifically that at the time of the accident the driver was acting in the course of employment of the other defendants."*

In **Vyas industries (supra)** the court held that;

> *"...although ownership of a motor vehicle cannot of itself impose liability on its owner, where it is proved or admitted that the defendant was the owner and that the motor vehicle was negligently driven or left stationary in the road, leading to a collision with another vehicle and causing damage, then in the absence of evidence to the contrary and thereby leaving the court without further information, a rebuttable presumption arises, and it is legitimate to draw the inference, that the negligent driver was the owner thereof or some servant or agent of his, or otherwise that it was driven or left stationary by a person for whose negligence the owner is responsible; this presumption is made stronger or weaker by the surrounding circumstances." **[Emphasis mine]***

In the instant case, ownership of the motor vehicle that caused the accident was admitted by the Respondents in their joint written statement of defence in **paragraph 4**; the paragraph states:

> *"The 1st Defendant denies ownership of the motor vehicle as alleged in paragraph 4 of the plaint but admits having sold it to the 2nd Defendant whose driver was the 3rd Defendant"*

This was also corroborated by the police witness on behalf of the Appellant at trial in his examination in chief. The witness stated at **page 11** of the record of proceedings that:

> *"On the 9th December 2005, a day after the accident, a one Mugisha Elias reported himself at Mbarara Police Station claiming the motor vehicle involved in the accident belonged to him. A statement was made to that effect and put on the file."*

The Respondents further admitted under **paragraph 6** of their joint defence that the 3rd Respondent was driving the motor vehicle at the time the accident was caused.

As I have already observed, no pleading in the Plaint connected either the 1st or 2nd Respondents to the tort apart from the fact of ownership of the motor vehicle that caused the accident.

In the absence of any evidence to the contrary and based on the admissions pointed out herein above, there was a rebuttable presumption that the negligent driver (the 3rd Respondent) was either a servant or agent of the 2nd Respondent.

Whereas I agree with the learned trial Magistrate's exposition of the law on vicarious liability that proof must be shown specifically that

at the time of the tort, the tortfeasor should have been acting in the course of his employment for the 1st and 2nd Respondents, I do no not agree with his conclusion that a master-servant relationship was not proved as against the 2nd Respondent.

As already noted herein above, whereas employment may still be the most and best way of establishing the relationship of master-servant for purposes of vicarious liability, it is no longer the only test used to attach liability in similar cases.

For a party to succeed in a claim against a Defendant based on their vicarious liability for the negligent actions of an employee or non-employee, the relationship a tortfeasor shares with the Defendant must be sufficient to trigger the doctrine of vicarious liability; and the tort committed by the tortfeasor must be sufficiently connected with that relationship to make the other person vicariously liable for the tort. (**See Catholic Child Welfare Society vs Institute of the Brothers of the Christian Schools (supra)**)

In the instant appeal, the Respondents having admitted in their written statement of defence that the 2nd Respondent was the owner of the motor vehicle that caused the accident a fact which was corroborated by PW 3 during trial and that the 3rd Respondent was the driver of the 2nd Respondent.

I find that this admission alone was sufficient to establish a master-servant relationship between the 2nd and 3rd Respondent which relationship was sufficiently connected to the alleged tort for the purposes of vicarious liability.

The learned trial Magistrate therefore erred in law when he made a finding that the 2nd Respondent was not vicariously liable to the Appellant.

Ground one of this appeal therefore succeeds in part.

Grounds 2 and 3

2. *The learned trial Magistrate was wrong to apportion the liability for the motor-accident between the Appellant and the 3rd Respondent ignoring the evidence of PW 1, 3 and 4 which proved that the reckless and negligent conduct of the 3rd Respondent was the sole cause of the motor accident.*
3. *The learned trial Magistrate was wrong to base his findings on the question of negligence solely on the facts alleged in the written statement of defence ignoring the law which requires that a decision of the court must be based on the evidence adduced in court.*

[8] Counsel for the Appellant argued the above two grounds together. It was counsel's submission that the evidence of the Appellant pointed to the fact that the motor vehicle came into the lane of the Appellant as if it intended to park but instead continued in motion and hit the motor vehicle on which the Appellant was riding. That PW 3 stated in court that the 3rd Respondent was to blame for the accident, was charged and pleaded guilty to the offences. That the burden of proof of contributory negligence lay on the Respondent. That having pleaded guilty to reckless driving in the criminal trial against him, the 3rd Respondent did not have the defence of contributory negligence before him anymore.

[9] Contributory negligence usually applies where the Plaintiff fails to take reasonable care of his or her own safety and that failure is causally implicated in his or her damage. When the doctrine of contributory negligence is triggered, it does not defeat a Plaintiff's action but his or her damages will be reduced according to what the court thinks is just and equitable. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless. (**See Winfield and Jolowicz on Tort (supra) at 23-036**).

It is settled law that a trial court's apportionment of liability by attributing blame to two or more tortfeasors involves an individual choice or discretion, and will not be interfered with on appeal save in exceptional circumstances, as where there is some error of principle or where the apportionment is manifestly erroneous as to require interference by the appellate court. (**See Vyas Industries (supra)**).

[10] In the instant appeal, the Respondents under paragraph 6 of their defence pleaded specifically the particulars of the Appellant's negligence as follows:

> *"(a) Riding a motor cycle belonging to TASO when he was not authorised to do so.*
>
> *(b) Riding very fast and recklessly regardless of traffic signs given by the on-coming motor vehicle.*

(c) Riding in a manner that was dangerous and reckless disregarding the security of other road users."

It is the function of pleadings to identify the issues, the resolution of which will determine the outcome of the proceedings. The particulars in pleadings apprise the opposite party of the case to be met. They enable the opposite party to know what evidence will be necessary to have available and to avoid taking up time with questions that are not in dispute. (**See for example the persuasive decisions of Bailey vs Federal Commissioner of Taxation (1977) 136 CLR 214 at 219 and Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd (1990) 169 CLR 279 at 286.**)

[11] The Appellant at trial led evidence that the 3rd Respondent left his lane as if he intended to park in the opposite lane but instead suddenly hit the Appellant's motor vehicle breaking his leg in an accident.

The Respondents in the instant case did not participate in the trial because the case proceeded ex parte. They stated in their written statement of defence that the Appellant was unlawfully, illegally riding a motorcycle recklessly and negligently thus injuring himself in the process. Counsel for the Appellant submitted that apart from stating contributory negligence in the written statement of defence, no evidence was produced before the trial Magistrate by the Respondents for him to hold that there was contributory negligence.

In his judgment at **page 4**, the learned trial Magistrate stated that:

"It should be noted that no evidence was adduced to show that D3 was entirely negligent as earlier pointed out. PW4 did not show court what he did to stop the collision. To the contrary he simply accelerated on the motor cycle hence colliding with D3's vehicle. PW4 in my view made a bigger contribution because he saw D3's vehicle coming but did nothing to avoid collision."

[12] It is well settled that the burden of establishing the defence of contributory negligence is on the defendant who admits that on account of the conduct of the plaintiff, his negligence had gone into the background and it was the conduct of the plaintiff that resulted in the accident; it is not for the Plaintiff to disprove it. (**See Sharada Bai vs Karnataka State Road Transport Corporation ILKR 1987 KAR 2730**).

In the above decision, the court persuasively observed that:

"The burden of proving contributory negligence is on the cross-objectors in this case. It is not for the Appellant to disprove it. If the tort-feasor's negligence or breach of duty is established as causative of the damage, the onus is on him to establish that the victim's contributory-negligence was a substantial or cooperating cause. In order to establish the defence of contributory negligence the propounder of that defence must prove, first, that the victim failed to take reasonable care of himself or, in other words, such care as a man of ordinary prudence would have done and that was a contributory-cause of the accident. The amount of care which a person could reasonably be expected to take, must needs

vary with the circumstances and the conditions actually prevailing at the material point of time. However, it is relevant to note that, in order to discharge the burden of proof, it is unnecessary for the propounder of that defence to adduce evidence about the matter. Contributory ***negligence*** *can be - and very often is- inferred from the evidence adduced already on the claimant's behalf or from the perceptive facts, either admitted or found established, on a balance of probabilities in the case"*

[Emphasis mine]

I do not find fault in the learned trial Magistrate's conclusion and inference of contributory negligence against the Appellant on the basis of the Appellant's own evidence on record. I therefore do not agree with the Appellant counsel's submission that the learned trial Magistrate erred when he held that there was contributory negligence on the part of the Appellant without evidence from the Respondent.

Grounds 2 and 3 therefore fail.

Ground 5

The learned trial magistrate wrongly assessed the degree of injury caused to the appellant as a result of the accident and awarded low amount of damages.

[13] Counsel for the Appellant submitted that at trial, the Appellant tendered in court receipts of expenses incurred but the trial magistrate ignored them. That the Appellant in his evidence stated that he went to Kibuli Muslim Hospital between 10th10/2006, he did not say he went to Kibuli once as stated in the

judgment by the earned trial Magistrate. That this was erroneous. That the Appellant went to hospital between that day and the other day not captured on court record. That the Appellant incurred such expenses between 16th July 2006 and 10th/10/2006 amounting to Shs. 1,826,400/=.

In his judgment at page 5, the learned trial Magistrate observed that:

> *"Secondly, the Plaintiff's evidence about treatment in Kibuli Hospital has not been consistent, has been contradictory and raises suspicion. He says he went to that hospital once on 10th October 2006 to check on ossification of the bones (natural process of bone formation). The letter from the office of the Executive Director of Mbarara Regional Referral Hospital to whom it may concern and which was admitted in court and entered as EXh. P.10 states that the Plaintiff was admitted in Kibuli Hospital for two weeks effective 16th September 2006. He further indicates in his plaint received in the High Court Civil Registry on 24th October 2006 under para 7 thereof that he spent in Kibuli Hospital two weeks. Of course, this contradiction is not minor and therefore cannot be ignored. There are two copies of the discharge forms. One is discharge form no. 685 dated 18th September 2006 and the other discharge form no. 6565 dated 10th October 2006 in respect of the same person who went to the same hospital once but discharged twice! Besides, there is no medical report from Kibuli Hospital, neither evidence of the medical personnel who worked on him there in court. He has also failed to*

show court proof of payment for the bed and other hospital deliverables extended to him by the hospital for stay there. He has instead been keen on showing consultation fees. These contradictory claims are treated as unproven."

[14] I have had the benefit of looking at the evidence from which the learned trial Magistrate derived his findings. The Appellant at page 7 of the record of proceedings stated that:

"I went to Kibuli Muslim Hospital between 10th/10/2006. I have photocopies of the receipts of payment to Kibuli Hospital.

Court: *copies of receipts dated 20th/04/2006, 16th/07/2006, 17th/09/2006, 18th/09/2006, 7/10/2006 and 10/10/2006 are admitted and marked P1, P2, P3, P4, P5 and P6 respectively."*

The receipts referred to as P1, P2, P3, P4, P5 and P6 are all titled Kibuli Muslim Hospital and add up to UGX 1,227,300/=.

[15] The law on contradictions and inconsistences is well settled that when they are major and intend to mislead or tell deliberate untruthfulness, the evidence may be rejected. If, however, they are minor and capable of innocent explanation, they will normally not have that effect. See **Makau Nairuba Mabel vs Crane Bank Ltd., HCCS No. 380 of 2009 per Obura J.; Okecho Alfred vs Uganda, S.C.Crim. Appeal No24 of 2001; Alfred Tarjar vs Uganda Crim. Appeal No 167 of 1969(EACA)**).

The Appellant stated that he had visited Kibuli Muslim Hospital and had incurred expenses. This was the fact in issue. He tendered into court receipts to back this up.

It is my finding that the inconsistences and contradictions regarding the date of 10th October 2006 were explained away by annexures P1, P2, P3, P4, P5, which had the various dates the Appellant attended hospital. The discharge forms relied upon by the learned trial Magistrate were never tendered into court as evidence.
I find it a total miscarriage of justice for the learned trial Magistrate having relied upon it.

[16] Counsel for the Appellant also disputed the amount of general damages that were awarded by the learned trial Magistrate. In the instant case, the learned trial Magistrate awarded damages of UGX 8,000,000/= out of which the 3rd Respondent is only liable for 50%.

Damages are that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. (**See Livingstone vs Rawyards Coal Co. (1880) 2 App. Cas. 25, 39**). The award of damages is an exercise of judicial discretion which like all judicial discretions ought to be exercised judiciously.

An appellate court will not reverse the finding of a trial court as to the amount of damages merely because it thinks that if it had tried the case in the first instance, it would have given a lesser sum.

In order to justify reversing the trial court's finding on the question of the amount of damages, it is necessary that the appellate court should be convinced either that the trial court acted upon some wrong principle of law, or that the amount awarded was so

extremely high or so very small as to make it, an erroneous estimate of the damage to which the Plaintiff is entitled.

In the instant case, I do not find any wrong principle of law applied by the learned trial Magistrate when coming up with the quantum of damages. This court finds that the sum of general damages that was awarded was sufficient.

Ground 5 therefore succeeds in part.

[17] Ground 4 of the appeal having been abandoned by Counsel for the Appellant; this appeal succeeds in part and the lower court decision is upheld save for the liability of the 2nd Respondent for the injuries caused to the Appellant by the 3rd Respondent.
The costs of this Appeal shall be borne by the 2nd and 3rd Respondents.

I so order.

Dated, delivered and signed on this **25th** day of **August** 2022.

Joyce Kavuma
Judge.