THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CV-CS-0106-2003

ALISON MWEBE :: PLAINTIFF

VERSUS

1. ANKOLE ORIGINAL TRADERS

2. MUGISHA JUSTUS :::::::::::::::::::::::::::::: DEFENDANTS

BEFORE: HON LADY JUSTICE JOYCE KAVUMA

JUDGMENT

Introduction.

[1] Alison Mwebe hereinafter referred to as the Plaintiff alleged in her plaint that on **25th February 2003** while going about her daily chores at the Mbarara Bus Park on a Motorcycle UDC 855B was rammed into by a Lorry UPF 426 belonging to the Defendants causing her serious injuries. This she claimed was due to the negligence of the Defendants the particulars of which she set out in the plaint as follows;

1. Failing to maintain the condition of lorry UPF 426.
2. Failing to obey traffic regulations; and,
3. Ignoring the Highway Code.

[2] Ankole Original Traders, hereinafter referred to as the 1st Defendant denied all the allegations stating that it did not own motor vehicle reg. no. UPF 426.

[3] Mugisha Justus, hereinafter referred to as the 2nd Defendant equally denied the allegations of the Plaintiff and contended that the cause of the accident was due to the actions of a third party who maliciously removed the parking hedge from the tire of the lorry. That the lorry was lawfully parked and with permission from relevant authorities.

Representation.

[4] The Plaintiff was represented by M/s Okecha Baranyanga & Co. Advocates while the 1st Defendant was represented by M/s Ahimbisibwe & Agaba Co. Advocates and the 2nd Defendant was represented by M/s Matovu Suwaya and Co. Advocates.

The advocates in the matter filed written submissions which I have considered.

The issues.

[5] As per the Joint Scheduling Memorandum filed by the parties on **23rd September 2019**, the following issues were agreed upon for resolution by this court;

1. **Whether the Defendants are liable for the accident?**
2. **What remedies are available to the parties?**

Analysis and decision of court.

[6] It is a settled principle of evidence that whoever desires any court to give judgment as to any legal right or liability dependent on the

existence of facts which he or she asserts, must prove those facts exist. (**See Section 101 of the Evidence Act**). It is said that this person has the burden of proof. This is the person whose suit or proceeding would fail if no evidence at all were given on either side. (**See Section 102 of the Evidence Act**).

The instant matter, being a civil in nature, the standard of proof is on a balance of probabilities. (**See Miller vs Minister of Pensions [1972] 2 All ER 372**).

The Plaintiff, being desirous of this court giving judgment in her favor on the claim that it was due to the negligence of the Defendants that Lorry UPF 426 rammed into her causing her injuries, had the initial burden to prove that these facts were probably true.

This burden is probabilistic in nature and can only shift onto the Defendants when the Plaintiff has led evidence that was more than probable to be true. Failure to discharge this burden will lead to a dismissal of her case.

Issue 1: Whether the Defendants are liable for the accident?

[7] Counsel for the Plaintiff on this issue submitted that before this court can answer this issue, the first question to be asked was who owned lorry reg. no. UPF 426 at the time of the alleged accident. This formed the substance of the submissions of the 1st Defendant's counsel.

According to counsel for the Plaintiff, at the time of the accident the 1st Defendant was the registered owner of lorry reg. no. UPF 426. Counsel relied on annexure **PEXA** a vehicle search report dated 1st November 2019 and **Sections 2, 30** and **31** of the Traffic and Road Safety Act, 1998 as amended (hereinafter referred to as TRSA). That the agreement of sale relied upon by the 1st Defendant was suspect and an afterthought and would not rebut the presumption of ownership under Section 30 of the TRSA because it purports to be a sale agreement and not a hiring agreement, or hire purchase agreement or a finance lease agreement. That no notification of sale to the licensing officer was ever done after the said sale as required by **Section 31 of the** TRSA. Further that the 2nd Defendant in his police statement following the accident stated that he was the owner of motor vehicle reg. no. UPF 426 an aspect he denied in his witness statement and in cross-examination.

On the part of the 1st Defendant, in relation to the ownership of motor vehicle reg. no. UPF 426 counsel submitted that the evidence of DW2 Yaguma Wilberforce showed that at the time of the accident, the lorry had been long sold to a one Tumusiime Enoss in 1998 and a sale agreement was admitted by this court as **DE1**. That property in the lorry had passed to the buyer in 1998. For this submission, counsel relied on **Section 18** of the Sale of Goods Act; **Sam Kaggwa vs Beatrice Nakityo (2001-2005 HCB 120) and Mutwalibu Lukungu vs Simon Lobia (2001-2005 HCB 71)**.

On the part of the 2nd Defendant, it was submitted by counsel that there was no existence of a master servant relationship between the 1st and 2nd Defendants leading to a conclusion that the 2nd Defendant was liable in the tort of negligence. That the accident occurred due to the negligence of the Plaintiff and not the 2nd Defendant.

In rejoinder, it was submitted by counsel for the Plaintiff that on the evidence on the court record in form of the vehicle search, there was a legal presumption created that the 1st Defendant owned the lorry at the material time of the accident. That the presumption was arrived at in accordance with **Section 30** of the TRSA. That this presumption shifted the burden of proof unto the 1st Defendant to disprove it which according to counsel, they did not. Counsel relied on the decision of the Supreme Court in **Nalongo Naziwa Josephine vs Uganda SCCA no. 35 of 2014**.

In rejoinder to counsel for the 2nd Defendant's submissions, counsel submitted that they were based on what they referred to as a distortion of this court's record of proceedings.

[8] Negligence is in its nature a specific tort which occurs in situations where a person fails to exercise care which the circumstances require. (See Grant vs Australian Knitting Mills Ltd [1936] AC and Vaughan vs Taff Vale Rly Co. (1860) 5 H & N 679). It therefore follows that

negligence is determined in accordance with the unique circumstances of each case.

Negligence is not synonymous to absolute carelessness but rather the want of such a degree of care as is required in particular circumstances.

In order for a Plaintiff to succeed in a claim in negligence, he or she must show that:

1. The Defendant owed the Plaintiff a duty to take care.
2. That duty has been breached.
3. The Defendant's breach of duty has caused the Plaintiff to suffer loss or damage.
4. The damage is caused in law by the Defendant's negligence/is not too remote/is within the scope of the duty.

The idea of negligence and duty are correlative.

Duty of care is an essential element of the tort of negligence. (**See for example in Fardon vs Harcourt-Rivington (1932) 146 LT 391 at 392**).

A Defendant will not be liable in tort of negligence for every careless act. A Defendant will only incur liability for negligence that causes damage if he or she is under a legal duty to take care. Such a duty to take care must be owed to the Plaintiff. (**See Peel, E., & Goudkamp, J. (2014). Winfield & Jolowicz on Tort. (19th Edition ed.) Thomson Reuters** at **pg. 611**)

Where on the facts of the case, the Defendant is found to owe a duty of care, then they are legally required to take reasonable care to avoid

such acts or omissions which can be reasonably foreseen to be likely to cause physical injury to others or property. (**See Halsbury's Laws (4th edn, 1980) 34, para 1;**).

What constitutes negligence varies under different conditions and the determination of whether it exists in a particular case requires the court to examine all the attending and surrounding facts and circumstances. To make a determination whether an act was negligent, it is relevant for the court to further determine whether if any reasonable man would foresee that the act would cause damage or not.

[9] During trial, counsel for the 1st Defendant raised a concern in relation to the plaint in this matter as having failed to specifically show that the 1st Defendant was vicariously liable of the alleged actions or that there existed an employee-employer relations with the 2nd Defendant. Counsel prayed to have the plaint struck out. I overruled the objection and reserved my ruling to be part of this judgment.

The law is that where the Defendant, in a suit premised on negligence, is in their nature incapable of physically doing the alleged acts save by its human agents, then the plaint must contain an allegation that such a defendant's liability was vicarious in nature arising out of the negligence of its human servant or agent.

Such a plaint, on account of failure to plead such material facts is defective in nature and a court cannot proceed on it unless and when it has been amended. Where however the plaint alleges ownership and

negligence as it was in the instant suit, there is a presumption that at the time of the accident the vehicle was being driven by a person for whose negligence such a defendant was responsible. (**See Vyas Industries vs Diocese of Meru [1976 - 1985] EA 596)**.

[10] In the instant case, it is not in dispute that the 1st Defendant was in its nature incapable, on the facts alleged, of doing the alleged acts in the plaint but through human agents.
The Plaintiff, in her plaint avers under **paragraph 5(a)** that the lorry UPF 426 belonged to the Defendants and under **paragraph 6** thereof, it was averred that the accident she suffered was caused solely by the negligence of the both Defendants who recklessly without due regard for other road users stationed a lorry in a dangerous mechanical condition along a publicly trafficked stretch of land.

It therefore follows and in agreement with the submission of counsel for the Plaintiff that the first question that this court must answer is who owned lorry UPF 426 at the time of the alleged accident.

[11] Where a person leaves a vehicle, wholly unattended, and it of itself moves and causes damage to person or property there is a *prima facie* rebuttable presumption of negligence on their part. (**See Gayler & Pope Ltd vs B Davies & Son Ltd [1924] 2 KB 75 and Parker vs Miller (1926) 42 TLR 408, CA**).

In the latter case of **Parker**, the Defendant, an owner of a motor car allowed his friend to drive his motor car to his house. The car was left on the roadside next to the Defendant's house and after half an hour started down a road with a steep gradient crushing into the Plaintiff's house. In an action for damages for negligence, it has held that the fact of the car running down the hill of itself when it was left unattended was sufficient evidence of negligence, and although the Defendant was not in actual control of the car when the accident occurred, yet, as he had the right of control, there was evidence on which the court could make a finding that he was responsible as principal.
This is also the case where there is interference of a third-party. (**See** Illidge vs Goodwin (1831) no. 732 E.R 934).

[12] It is a settled position of law that ownership alone of a motor vehicle cannot of itself be a basis for the imposition of liability against a defendant in negligence without proof a negligent act on their part. Ownership is just one of the elements in the process of apportioning of liability. (**See** Vyas Industries vs Diocese of Meru [1976 - 1985] EA 596). In **Vyas Industries**, the plaintiff's motor vehicle driven at high speed ran into and collided with the back of the defendant firm's stationary lorry left unlit on a straight road in the dark. In a suit against the defendant firm based on negligence, it was held by the Court of Appeal of East Africa as follows;

"…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; and in this case the allegation and proof of ownership of the defendant's lorry, and negligence in leaving the stationary lorry on the road in the dark with no rear lights on, were sufficient to raise a presumption that at the time of the accident the defendant's lorry was being driven or handled by a person for whose negligence the defendant was responsible, and the presumption had not been rebutted by evidence to the contrary."

[13] PW1 Alison Mwebe testified in chief that when she went to police to make a statement after the accident, she was informed that it was the 2nd Defendant who had parked the vehicle in the Bus Park and was

purporting to be the owner of the vehicle. She referred this court to a vehicle inspection report and Police Sketch Plan which this court marked as **PId4** and **PId1** respectively.

That she carried out a motor vehicle search at Uganda Revenue Authority which showed that the vehicle was registered in the names of the 1st Defendant. She referred this court to the search report which this court marked as **PEXA**.

In **cross-examination** she testified that according to her annexure **PId2,** the owner of the vehicle was Mugisha Justus. That by the time of the accident, the vehicle had already been sold to Mugisha Justus by the 1st Defendant. That the said Mugisha bought the vehicle in 1999. That the vehicle was no longer the property of the 1st Defendant. Later she stated that according to the police report she obtained after the accident, the vehicle belonged to both Defendants. That she had no proof that the person that had parked the vehicle that day was an employee of the 1st Defendant.

PW2 Atwine Denis testified that he did not know the owner of the lorry.

[14] To dispute the Plaintiff's claim that they owned motor vehicle **UPF 426**, the Defendants led evidence through two witnesses.

DW1 Mugisha Justus testified in chief that he neither owner nor drove motor vehicle **UPF 426**. That the police statement PE2 was not his.

In **cross-examination** he testified that he drove the organisation cars. That on **25th February 2003**, he did not own motor vehicle **UPF 426** and had no knowledge of it. He maintained that he has never gone to police to make a statement.

DW2 Yaguma Wilberforce the director of the 1st Defendant testified in chief that in 1998 the first defendant sold motor vehicle **UPF 426** to a one Tumusiime Enos. The sale agreement was admitted by this court as **DExh 1**. That after the sale, the purchaser took possession of the motor vehicle and at the time of the accident it was not in the 1st Defendant's possession nor any of its agents.

In **cross-examination** he testified that the company sold the motor vehicle **UPF 426** to Tumusiime Enos in 1998. That he did not transfer the motor vehicle to Dr. Mutyogoma Joseph four months after the accident.

[15] I have examined **PEXh A** and a letter from Uganda Revenue Authority in relation to motor vehicle **UPF 426** addressed to **M/s Okecha Baranyanga & co. Advocates**. According to the said document, motor vehicle **UPF 426** was first registered on **22nd March 1989** in the names of a one Ezra Mbwisha who transferred it to M/s Ankole Original Traders (who according to the testimony of **DW2** was a partnership from which the 1st Defendant was incorporated in 2000). M/s Ankole Original Traders then transferred motor vehicle **UPF 426** to a one Dr. Mutyogoma Joseph on **24th June 2003**, approximately five months after the alleged accident.

I equally examined **DEXh 1** an agreement for sale and purchase of motor vehicle **UPF 426** in which **DW2** claimed to have sold the motor vehicle to a one Enos Tumusiime at a consideration of UGX 8,000,000/=.

[16] A rebuttable presumption exists to the effect that in absence of evidence to the contrary, the person in whose name a motor vehicle, trailer or engineering plant not subject to a hiring agreement, or a hire-purchase agreement or a finance lease agreement is registered is the owner of the motor vehicle, trailer or engineering plant. (**See Section 30 of the TRSA**).

The above presumption lay in the documents that the Plaintiff produced before this court as jointly **PExh A**. from the said documents as I have already observed, the owner of motor vehicle **UPF 426** as at **25th February 2003** the date of the accident was the 1st Defendant.
The evidential burden to rebut that presumption at this point shifted to the Defendants to lead evidence to the contrary.
Whereas **DEXh 1** which was heavily relied upon by the Defendants to show that they were not the owners of motor vehicle **UPF 426** contains all the elements of a valid contract of sale and purchase of a motor vehicle, it was never dated. The document only contained a year which is **1998**. There was no other evidence led by the Defendants to rebut the presumption.

The above notwithstanding, **Section 31** of the TRSA provides for notification of changes in ownership of motor vehicles. Of relevance to the instant suit, the provision specifically provides as follows;

> *"31. Notice of change of ownership.*
> *(1)Within fourteen days after sale or disposition of any kind of any registered motor vehicle, trailer or engineering plant, the person selling or otherwise disposing it shall-*
> *(a)notify, in the prescribed form accompanied by the prescribed fee, a licensing officer of the sale or disposition, the name and address of the new owner,…"*

No proof of any of the alleged changes was brought to this court in line with the above provision.

In the upshot, I am of the considered opinion, on the evidence before me on a balance of probabilities that as of **25th February 2003** the date of the accident the owner of motor vehicle **UPF 426** was the 1st Defendant and that the motor vehicle was left stationary on the road side by an agent of the 1st Defendant, leading to the accident.

[17] As I summed up above the submissions of both counsel, counsel for the 2nd Defendant pointed out that from the evidence on the court record, it was due to the negligence of the Plaintiff and **PW2** that the accident occurred.

Where the Plaintiff fails to take reasonable care of his or her own safety where means and opportunity are afforded to do so leading to injury, they are said to have, by their actions or omissions contributed to their injury. (**See** Lewis vs Denye [1939] 1 KB 540). This is the doctrine of contributory negligence.

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 or she ought reasonably to have foreseen that, if he or she did not act as a reasonable, prudent person, he or she might be hurt; and in his or her reckonings he or she must take into account the possibility of others being careless. (**See** Peel, E., Goudkamp, J., Winfield, P. H., Jolowicz, J. A., & Winfield, P. H. (2014). *Winfield and Jolowicz on tort* at 23-036).

In cases of contributory negligence therefore, the court considers whether the injured plaintiff was negligent and if so, whether they were solely or partly responsible for the accident and the extent of their responsibility.

Contributory negligence only applies to the conduct of the Plaintiff. The actions of the Plaintiff should have materially contributed to the damage they suffered and such acts should in their nature be able to be classified as negligent. (**See** Charlesworth, John, 1893-1957 and Percy, R. A. (Rodney Algernon). (1959). Charlesworth on Negligence/ by J. Charlesworth. London: Sweet & Maxwel 3rd Edn. Para 328).

[18] At trial, **PW1** the Plaintiff testified in **cross-examination** that on the date of the accident, she had just stepped out to board a motorcycle going back home. That just when she boarded the motorcycle, she heard people screaming which prompted her to turn back and she saw a lorry behind her by a short distance. That she got hold of PW2's shirt who tried to dodge and in the process, she fell down from the motorcycle. That she was not aware how the lorry knocked her but she found herself under the lorry.

PW2 Atwine Denis testified in cross-examination that at the time of the accident, the Plaintiff was on his motor cycle which was moving.

That the Plaintiff out of fear, tried to pull his shirt while he rode because people were making noise. That as she pulled his shirt his concentration was disturbed and he also fell.

[19] The test on which contributory negligence depends is whether either party could by exercise of reasonable care, have avoided the consequence of the other's negligent act. Whichever party the court finds as one that could have avoided the consequence of the other's negligent act would be liable for the accident.

In the instant case, I find that the actions of the Plaintiff and **PW2** prior to the accident were merely natural reactions to the impending danger that was approaching them in form of a lorry. I therefore do not find the Plaintiff blameworthy or an author of her own wrong.

[20] I am in agreement with the submission of counsel for the 2nd Defendant that the Plaintiff failed to produce evidence before this court

to show that the 2nd Defendant was an agent of or employee of the 1st Defendant.

The evidence before this court as bought by the Plaintiff was only able to prove that only the 1st Defendant was liable for the accident that she suffered.

Therefore, in answer to the first issue that was raised herein above, only the 1st Defendant was liable for the accident.

Issue 2: <u>What remedies are available to the parties.</u>

[21] The Plaintiff in her plaint sought for UGX 30,000,000/=, general damages with interest at commercial rate from the date of filing this suit till payment in full.

Counsel for the Plaintiff in their submissions added a claim for special damages which was not pleaded in the plaint which they fixed at UGX 120,000,000/= in medical expenses and general damages of UGX 450,000,000/=.

Counsel for the 1st Defendant submitted that the Plaintiff was not entitled to any remedies since she did not produce any documentary evidence to prove specific damages.

On their part, counsel for the 2nd Defendant submitted that special damages were unpleaded and thus could not be awarded to the Plaintiff. Further that the Plaintiff failed to produce evidence to prove either the special damages or general damages.

[22] It is a general position of the law that a party should clearly state the reliefs claimed in their plaint. (**See** Order 7 Rule 1(g) of the Civil Procedure Rules and Butera Edward vs Mutalemwa Godfrey Court of Appeal Civil Application no. 0391 of 2017).

In Ms Fang Min vs Belex Tours and Travel Limited SCCA no. 6 of 2013 consolidated with Civil Appeal no. 1 of 2014, Crane Bank vs Belex Tours and Travel Limited it was stated by the court as follows;

> *"…It is now well established that a party cannot be granted relief which it has not claimed in the plaint or claim. See Attorney General vs Paul Ssemogerere and Zachary Olum, Const. Appeal no. 3 of 2004 (SC) and Julius Rwabinumi vs Hope Bahimbisimwe, Civil Appeal no. 10 of 2009 (SC); Hotel International Ltd vs The Administrator of the Estate of Robert Kavuma SCA no. 37 of 1995 and Standard Chartered Bank (U) Ltd vs Grand Imperial Hotel Ltd."*

On the above authority, this court will only go ahead and determine whether the Plaintiff is entitled to only those reliefs she sought in the plaint.

In relation to general damages, it is the position of the law that general damages are at the discretion of court and their award is not meant to punish the wrong party, but to restore the innocent party to the position he or she would have been had damage not occurred. (**See** Uganda Commercial Bank vs Kigozi [2002] 1 EA 305, Charles Acire vs

M. Engonda HCCS No. 143 of 1993 and Kibimba Rice vs Umar Salim Supreme Court Civil Appeal no. 17 of 1992).

It is also now settled that in reaching a quantum of general damages, the court considers the nature of harm, the value of the subject matter and the economic inconvenience that the injured party might have been put through.

[23] At trial, **PW1** testified in chief that after the accident, she was rushed to Mayanja Memorial Hospital for first aid where she was admitted for two weeks on treatment. That an orthopaedic surgeon **PW3 Dr. Bitabriho Deogratius** was called to examine her. That she was later transferred to Mbarara University Hospital where she was informed that she had sustained grievous bodily injuries. That she was operated upon and thereafter admitted up to **28th April 2003** when she was discharged. That at an agreed fee, **PW3** continued to check up on her. That by reason of the accident she could not do her previous work. In **cross-examination** it was her testimony that she did not sustain any fracture but sustained injuries as a result of the accident.

PW3 Assoc. Prof. Dr. Bitariho Deogratius testified in chief that the Plaintiff became his patient around February 2003 after getting involved in an accident in which she sustained wide bruising on her upper thigh, left lower thigh and unstable fracture of the pelvis. That the Plaintiff was hospitalised from **25th February 2003** to **28th April 2003** and given strict bed rest for 6 months with constant medical

attention. That she has continued to come for medical attention. That the Plaintiff suffered permanent incapacity at 25% to 30%.
In **cross-examination** he maintained his testimony in chief. And further testified that the Plaintiff continued visiting his clinic.

[24] From the above evidence, it is quite clear that the Plaintiff suffered a series of economical and physical hardships as a result of the injuries she got as a result of the accident.

In the premises, I find a sum of UGX 15,000,000/= an appropriate sum of general damages considering the hardships she has gone through.

In relation to interest on the above figure, the law is now settled that that award of interest is at the discretion of the court. The determination of the rate of interest is also at the discretion of the court. (**See** Omunyokol Akol Johnson vs Attorney General [2012] UGSC 4. Interest rates on special damages should be with effect from the date of loss till payment in full while on general damages it should be from the date of judgment as it is only ascertained in the judgment. (**See** Hope Mukankusi vs Uganda Revenue Authority UGCA CA no. 06 of 2011). In the instant matter, I find a court interest rate of 8% to be appropriate in the circumstances. The rate is to run from judgment till payment of the damages in full.

In relation to the costs of the suit, the general rule is that costs follow the event. The Plaintiff being the successful party in the instant suit is awarded costs of the suit.

For the foregoing reasons, the Plaintiff's claim succeeds and I make the following orders;

1. **Only the 1st Defendant is found liable for the accident that occurred on the Plaintiff.**
2. **The Plaintiff is awarded UGX 15,000,000/= as general damages.**
3. **A court interest rate of 8% per annum is further awarded on the general damages which is to run from the date of judgment till payment in full.**
4. **The Plaintiff is awarded the costs of the instant suit.**

I so order.

Dated, delivered and signed at Mbarara this **16th** day of April **2024**.

Joyce Kavuma
Judge