

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**CIVIL DIVISION**

**HCCS. NO. 275 OF 2014**

**OTIM SOLOMON.....PLAINTIFF**

**V**

**1. NSEREKO ANTHONY**

**2. COMMUNITY INTERGRATED DEVELOPMENT INITIATIVE**

**.....DEFENDANTS**

**BEFORE HON. LADY JUSTICE H. WOLAYO**

**JUDGMENT**

From the particulars in para. 8 of the plaint that gave rise to the cause of action, it is apparent that the plaintiff sued the two defendants in negligence Para. 5 shows that the suit was brought under the Law Refrom (Misc. provisions Act) cap. 79 . The plaintiff is the eldest son of the deceased Ojangor Nicholas and he sued as a family member to recover damages for loss of dependency of the deceased.

The plaintiff was represented by Ms. Onyango & Co. Advocates.

None of the defendants filed a written statement of defences even after two efforts to effect service. The first effort was by Andama Jonathan who filed an affidavit of service on 29.8.2014 showing he had effected service on one of the managers of the 2<sup>nd</sup> defendant at their head office in Muyenga.

The second effort was by Hope Ayesigire a court process server who effected service on the legal manager of the 2<sup>nd</sup> defendant at Muyenga on 26.10.2016. None of the efforts yielded any results as the defendants did not file a defence.

Judgment had earlier been entered by the deputy registrar on 13<sup>th</sup> May 2015 so the case came up for fromal proof by witness statements.

Counsel for the plaintiff filed written submissions that I have carefully considered.

The plaintiff filed a witness statement and supporting evidence which I have carefully examined.

In her submissions, counsel framed three issues for trial.

1. Whether the plaintiff is entitled in law to make a claim under the Law reform (misc. provisions) Act.
2. If Issue No. 1 is answered in the affirmative, whether the 2<sup>nd</sup> defendant is vicariously liable for the action of the 1<sup>st</sup> defendant.
3. Remedies.

**Whether the plaintiff is entitled in law to make a claim under the Law Reform (misc. provisions) Act.**

The issue as framed is dependent on the resolution of a key issue: whether the 1<sup>st</sup> defendant drove negligently MV UAJ 433R thereby causing the death of the deceased Ojangor Nicholas.

Section 5 of the Law Reform Act provides for the survival of a right to sue in tort where the deceased would have been entitled to sue had he survived the tort.

Thus as son of the deceased Otim Solomon is entitled to sue in negligence. However, the plaintiff must demonstrate that the deceased died as a result of the negligence of the defendant's servant. In other words, negligence must be pleaded and proved.

The particulars of negligence pleaded in the plaint are as follows:

1. Driving in total disregard of other traffic on a straight murrum road.
2. Driving at a speed that was reckless and/or excessive in the circumstances
3. Failing and or refusing to obey the Highway code and adhere to required speed limits.
4. Causing the death of Ojangor Nicholas
5. Failing to stop, swerve, brake or in any other way avoid colliding with motor cycle reg. No. UDU 352 P.

Three witness statements were filed but the key evidence is that of the eye witness and the police officer who visited the scene.

According to PW1 Micholas Ojangor, on 20.5.2012, he left home in Omurang village with his late father Ojangor Nicholas abode a motor cycle and rode to Mukongoror sub county.

On their return journey at Mukongoro Kumi road at about 5 p.m, the pair stopped by the road side to allow dust to clear .That was when a speeding car from the opposite direction burst a tyre , the car swerved off its lane and knocked the witness and his father . His father died on the spot. The car was reg. No. UAJ 433 R.

The witness sustained a broken left arm and was taken to Atatur hospital where he was discharged after placing the hand in a plaster.

It was the testimony of Okello Peters that he was the district traffic officer in Kumi in 2012 when he received a report of an accident on 20.5.2012 which occurred at 5 p.m at Mukongoro Kumi road.

He visited the scene and ascertained that Ojangor Nicholas had died .

From the skid marks, he found that motor vehicle UAJ 433 R bust a tyre, lost control , veered off its path and crashed into the deceased and his son at the edge of the road.

Like all civil cases, the plaintiff has a duty to prove his case . It is not enough to allege that someone died as a result of an accident. The plaintiff had a duty to prove that the 1<sup>st</sup> defendant owed his father a duty to take care, that duty was breached resulting in death and the family members have lost a reasonable expectation of a pecuniary benefit by the death.

The claim is based on a statutory tort created by Section 5 of the Law Refrom Misc. Provisions Act as follows.

*‘ if the death of any person is caused by any wrongful act, neglect or default of any person, and the act, neglect or default is such as would , if death had not ensued, have entitled the person injured by it to maintain an action and recover damages in respect of it, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured , and although the death was caused under such circumstances as amount in law to a felony.’*

The plaintiff has a duty to prove any or all or some of the conduct described in section 5, i.e, wrongful act, neglect or default. Each category constitutes negligence as the caption to the section suggests (***Action maintainable when death is caused by negligence***)

The plaintiff had a duty to prove that the conduct of the 1<sup>st</sup> defendant was negligent under the circumstances.

Nicholas who was with the father states that there was dust, the motor cycle he was riding with his father parked by the roadside on a murrum road for the dust to clear, in the process an oncoming car burst a tyre and knocked his father dead. Otim further stated that the driver lost control of the vehicle which crashed into himself and the deceased. Nicholas sustained a broken arm. The sequence of events point to negligence by default.

**Halsbury's Laws of England, 3<sup>rd</sup> edition, vol. 28:36** states that default under this provision means 'not doing what is reasonable in the circumstances'. The short title to the Law Reform Act indicates that the Act was intended to give effect to the Fatal Accidents Act of England 1846-1908, among other English statutes. Halsbury's definition of default by a defendant is therefore relevant .

The fact that the driver could not control the vehicle after it burst a tyre on a murrum road suggests that he was speeding as narrated by Nicholas. The clean bill of health given to the vehicle by the police accident report leads to the conclusion that the driver of the vehicle did not act reasonably to prevent the accident. He is responsible for the death of the deceased by default.

According to Nicholas , the motor cycle on which he was riding with deceased father were riding stopped along the road to allow the dust to settle before it proceeds, when the accident happened.

In **Mrs. Melanie Whitehead v Stephen Bruce and two others, 2013 EWCA 219**, the third defendant's motor vehicle developed mechanical problems and it stopped in the road thereby compelling him to switch on hazard lights. The second defendant overtook him but slowly and as she did so, the first defendant who was riding a motor cycle and carried a passenger approached from the opposite direction. The first defendant alleged visibility was poor and he skidded to avoid colliding with the second defendant's car thereby lost control and him and his passenger sustained injuries. The trial judge found the first defendant drove with

excessive speed given the circumstances. He did not allow himself sufficient time to stop nor was he able to react safely to emergencies which suggested he was driving fast.

The Court of Appeal of England confirmed the findings of the trial judge. Although this case is only of persuasive authority, it is relevant to the instant case where the driver who was moving on a murrum road and therefore a village road should have exercised extra care and driven with a speed that would allow him to react to emergencies like what happened. Having failed to control the vehicle, he was liable for the consequent death of the deceased.

### **Whether the 1<sup>st</sup> defendant is vicariously liable for the conduct of its driver.**

The police accident report on PF7 dated 20.5.2012 identifies the driver as Nsereko Anthony and the vehicle as registered in the names of CIDI ( the 2<sup>nd</sup> defendant).

Furthermore, a letter marked 'L' attached to the witness statement of Ojangor Nicholas dated 17.3.2014 written by Sebalu, Lule and co. advocates addressed to counsel for the plaintiff is with reference to the defendant's liability under an insurance policy is relevant in as much the accident is not denied. This means the driver Nsereko Anthony was an employee of the 2<sup>nd</sup> defendant. Having found that the driver failed to prevent injuries to the deceased and caused the death of the deceased , the 2<sup>nd</sup> defendant is vicariously liable.

### **Remedies.**

Section 6 (2) of the Law Refrom Act prescribes damages that may be recoverable. These are damages that are proportionate to the injury resulting from the death. These damages have been interpreted by precedents to mean the reasonable pecuniary expectation by the relatives of the deceased.

### **Loss of dependency and expectation of life**

The plaintiff claimed damages for loss of financial support from the deceased; loss of dependency and loss of expectation of life. **Salmond on the Law of Torts, 17<sup>th</sup> edition , Sweet & Maxwell 1977: 582-587**, reasons that damages for loss of dependency is premised on the proof of a pecuniary loss by the death of the deceased . The widow recovers damages for loss of financial support by her deceased husband.

The children recover the portion of income their father would have expended on them during her working life and while they are still minors.

The practice of the High Court has been to apply the multiplier principle in arriving at the quantum of damages for loss of dependency. **Hon. Mulengani (supra)** and **HCCS No. 112 of 2009 Kabunga Grace v Kisambira Sentamu Ismail**

**Salmond (supra)** states that the multiplier is the estimate of the probable length of the deceased's earning period. The amount earned is subjected to deductions like the sums that would have been spent by the deceased on himself. The uncertainty of farming and business had the deceased lived, the prospects of re-marriage by the surviving spouse are all taken into account after the multiplier is determined. **Salmond (supra page 585)**, citing **Daniel v Jones (1961) 1 W.L.R 115** makes the point that

*'At the end of the day, arithmetic may have to be mitigated by common sense, for it is an assessment and not a calculation which is being made.'*

I will take into account the sum of 5,000,000/ (five million) paid under an insurance cover to one Hon. Ebokorait by the insurance company, Chartis (Uganda) on behalf of the defendant.

Evidence was led through Nicholas the son, Janet Anyango the widow that the deceased was the sole breadwinner and carried out business as follows.

He was a large scale produce farmer and earned approx.. 7,000,000/ per season from sale of crops and in each year he earned from two planting seasons. This translates into 14,000,000/ annually from crops. He also sold milk. He engaged in money lending business from which he earned 200,000/ per month. Which translates into 2,400,000/ annually.

The deceased was aged 50 years as indicated in the post mortem report marked A and attached to the statement of Anyango.

Given that life expectancy in Uganda is 60 years and other unexpected occurrences, I will place the total income he would have earned annually at 10,000,000/. I deduct 3,000,000/ he would have spent on himself.

This leaves 7,000,000/ as annual income multiplied by 10 years brings the total income to 70,000,000/ less 5,000,000/ paid by the insurance company.

Of the 65,000,000/, I award 30,000,000/ to the widow.

The nine children named in the plaint will share equally 30, 000,000/.

The two dependents named in the plaint will share equally 5,000,000/.

### **Damages for funeral expenses**

Section 10 of the Law Reform Act permits damages to be awarded for funeral expenses.

These were proved by receipts and through the testimonies of Anyango and Nicholas. The sum of 3,397,000./ will be awarded as special damages.

Nicholas Ojangor , son of the deceased who suffered a broken arm also claimed damages for the injuries. However, since the suit was brought under the Law Reform Act, I cannot award him general damages for the injuries suffered. Fortunately, he will benefit from the damages awarded for loss of dependency and expectation of life.

In the result, I allow the plaintiff's claim and make the following orders.

1. A sum of 65,000,000/ damages is awarded as loss of dependency and loss of expectation of life broken down as follows:
  - a) 30,000,000 for the widow Anyango Mary
  - b) 30,000,000/ for the nine children of the deceased named in the plaint to be shared equally.
  - c) 5,000,000/ for the two named dependents to be shared equally.
2. 3,397,000/ special damages spent on funeral expenses.
3. Costs of the suit to the plaintiff.

**DATED AT KAMPALA THIS 14<sup>th</sup> DAY OF JUNE 2017.**

**HON. LADY JUSTICE H. WOLAYO**