

CIVIL SUIT No. 0027 OF 2002

5 **OMONYI ROGERS** **PLAINTIFF**

VERSUS

1. THE ATTORNEY GENERAL }

10 **2. UGANDA REVENUE AUTHORITY } DEFENDANTS**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

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The plaintiffs sued the defendants jointly and severally for recovery of general and special damages for negligence, interest and costs. The plaintiff's case is that on the 8th of June, 2001 while he was going about his business in Nebbi Town, he was shot in the leg and injured by an armed officer of the Special Revenue Protection Services (SRPS), who at the material time were acting in the scope of their duty and course of employment as agents, servants and employees of the defendants. As a result of the gunshot, he suffered a fracture of the upper third of the right tibia, soft tissue damage to the muscles surrounding the entry and exit wounds, excessive bleeding and pain. He contends that the shooting was negligent, hence his claim for the remedies mentioned.

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In the written statement of defendant filed by the first defendant, the plaintiff's claim is denied and it is contended that the officers involved in that incident were customs officers for whom the first defendant is not responsible. In the written statement of defiance of the second defendant, liability for the plaintiff's claim is denied. It is contended instead that staff of the SRPS are not employees of the second defendant. Both defendants prayed that the suit be dismissed with costs.

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In his testimony, the plaintiff stated that on 8th June 2001 at around 8.30 pm, he was coming from Nebbi hospital and when he came close to the round-about, he met a crowd. There was a double cabin vehicle that was setting off as he arrived, the Revenue people collected jerry-cans

containing diesel and petrol from the kiosks near the roundabout. They drove away shortly towards Pakwach Road. When the vehicle came close towards where they were, people began making noise that the URA people were returning. When they arrived, they started firing gunshots. He did not see the number plate of the vehicle. He saw one soldier who was on the
5 white double cabin pick-up pull out a gun. He was dressed in an army uniform. As he was emerging from the crowd he was shot in the right leg. The bullet hit him below the right knee.

When he was shot, he was picked by people in the crowd and placed in a vehicle whose owner he did not know and taken to Nebbi Hospital. He had sustained a shattered bone in the right leg.

10 In hospital he was placed on a drip. He was bleeding profusely so the wound was bandaged. He stayed in hospital for around three months, receiving medical treatment, being attended to by a one Pimundu Collins. He was later discharged and stayed for one month at home. His leg was still unwell and he went to Angal Hospital for further treatment on 4th April 2002. He was admitted in that hospital as well for one month. They found out that the bones had not united
15 well and his leg required an operation, which operation was done. There are visible scars on his leg left by the operation.

He was spending shs. 3,000/= each on himself and his attendant per day for feeding for the three months. He would buy food for ten thousand which would carry them on for four or five days.

20 He used to obtain some of the drugs free from the hospital but would buy others. He spent shs. 731,000/= on treatment in total. From Nebbi Hospital he went to Angal Hospital by a vehicle he hired it at the cost of shs. 75,000/= He also bought a pair of crutches at shs. 60,000/= Even after the treatment, he had not recovered fully and he proceeded to Mukono at his paternal uncle's place. He was taken to another hospital there known as Mukono Health Centre and paid for
25 treatment there. Currently, he is not so well. He cannot kneel using both legs. He can only kneel with one leg, he cannot stand for a long time, run or carry a heavy load. Sometimes when he engage in heavy work the leg swells and he has to tie it with a bandage.

As a result of that injury, he has difficulty operating his business. Before the accident, he was
30 capable of carrying his stock as a second hand clothes dealer in the weekly markets, but he cannot do it now. Before the accident, he could carry a load of over 80 kgs and now he carries 50

kgs with difficulty. He now can carry only 30 kgs comfortably. Before, he would buy four bales each weighing about 40 kgs to 100 kgs. He has a stall in Nebbi market but also engages in the weekly or fortnightly mobile markets. In one week he can move for five to six days. It is only on one day, Tuesday that he is in Nebbi Market and rests on Sundays. In his absence, the stall is closed as he engages in the distant markets.

under cross-examination, he testified that he saw a large crowd as he approached the roundabout. There was commotion on that day. He stopped out of curiosity because he did not know what was happening there. He did not expect such an incident to happen. He only saw one person who was in the vehicle firing shots and no one else in the crowd was armed. He has lived in Nebbi since he was 15 years old but has never heard of armed smugglers in the area. The man who fired the shots was in the camouflage type of army uniform. He was about 20 metres away and it was dark. He did not see any URA badge on that uniform. He had been at the scene for about twenty minutes before the shots were fired. Some of the shots hit the kiosks as the man shot randomly. He could not run away because he was taken by surprise. He did not sustain the injury from falling because he saw an entry and exit wound. At Mukono it was established that the pain was from the wound and he underwent surgery again that required cutting off part of the vein that was producing pus. His home is within a walk-able distance from the market. He moves by motorcycle or a vehicle to the distant markets. He carries his cargo by car since his stock weighs 70 kgs on average. Although it was dark when the incident took place, there was light from street lights and security lights at the verandas of shops nearby. The incident happened next to a veranda.

P.W.2 Ondoga Samuel, an Orthopedic Officer at Nebbi Hospital at the material time, testified that on he was treating fractures, deformities, physiotherapy and cleft-foot deformities. When he reported on duty on the morning of 9th June 2001, the nurses from the ward informed him that there was an emergency of a gun-shot wound. The plaintiff had already been admitted the previous evening and was on bed 9. He went to the theatre and informed the staff there to prepare for surgery involving a gun-shot wound. When the theatre informed him they were ready, he proceeded to the theatre. He had seen the patient before while he was still in the male ward. He was bleeding from a wound from the upper one third of his right leg. It had an entry

was on the inner part and the exit wound and it had shattered the tibia, the tissues and skin. It was a commutated fracture with so many bone fragments. The outer part of the bone remained intact. It was a penetrative wound. It is not possible that it was sustained due to falling.

5 He took him to the operation table with the anesthetist Mr. Kwach and another orthopedic Officer Gideon Agondua. After putting him to sleep, they did wound care (cutting away the destroyed skin and tissue which had been burnt black), removed very many pieces of bone fragments, washed the wound with five litres of saline solution until the wound returned to its colour. They then packed the empty space with plenty of gauze to stop the bleeding and they had
10 to apply an elastic bandage which we left in place for 76 hours and then took him back to the theatre for removing the pack which is very painful. They placed him under anesthesia and on skin traction.

During the fifth week, the wound developed very severe sepsis. There were a lot of maggots.
15 They applied high antibiotics for they could not kill the maggots because they were doing some work of eating rotten tissue thereby cleaning the wound after which they die. When the wound started getting clean during the third month, he put him on a high above-knee plaster with a window to allow dressing because the wound was still there. They sent the pus to Kuluva Hospital for culture and sensitivity to drugs tests. They wanted to determine which drug would
20 be effective. He was admitted 8th June 2001 and discharged on 26th September 2001. After discharge he went back for review as he was supposed to do once every month. At the review done on 12th November 2001, he was found with sepsis (infection) as the reason for his delay to heal. The x-rays done showed the bone injury to the upper part of the leg. That cavity is where the bullet went through. Near that cavity they found a bullet fragment (the bright white spot) they
25 did not remove it and probably it came out with the pus. In the second x-ray the hole was healing. That is where their role ended and they left the rest to nature to heal.

Under cross-examination he testified that the upper part of the Tibia is rich in blood supply. Blood was oozing and the plaintiff lost a considerable volume of blood. He was on drip for fluids
30 but not blood transfusion was done. The bone fragments were dead and had to be removed.

If a bone does not heal properly the victim will not walk normally. It depends on the healing process. The maggots are caused by infection. Bullet wounds are smelly and attract flies. The plaintiff is the one who obtained the photocopies of the documents. They could determine the extent of the injury without an x-ray. When you open the wound the fragments are visible
5 because the tissue around the area is thin. This was an emergency and they could not do the x-ray. The plaintiff was lucky that the bullet struck dead centre of the bone. The injury was not complex as to require an orthopedic surgeon. Healing may take a few months or longer. A bone will not grow when there is no infection around it. Age may not be a significant determinant of the rate of healing. He did not know whether the plaintiff has healed and he cannot project the
10 future prospects since he was not requested to make a prognosis. That was the close of the plaintiff's case.

On behalf of the second defendant, D.W.1: Ojiambo Paul, testified that he is an employee of URA in the legal department where he has worked for twenty five years and six months. He
15 began in the Customs Department Task Force Unit which was responsible for convoying transit trucks coming from Malaba and Busia to Kampala. They would then convoy them to the respective exit points for those which were in transit. They used to work hand in hand with the anti-smuggling unit from 1993 to 1997. In the latter year, during the second half, there was a mini reshuffle and the anti-smuggling unit became the Revenue Protection Service and he was
20 deployed in Team One in charge of Kampala Mpigi and Mukono Districts. There were five teams. As RPS Officer in Team One, his main duty was to fight smuggling through verification of imported goods. They would enter into premises and search where they suspected contraband or smuggled goods. After the structural changes of 1997, they were no longer escorting trucks in transit but would monitor their movements by log sheets and various check points and they
25 would liaise with the points and do surveillance along the roads in case of a missing truck out of the convoy.

At the formation of RPS Captain Mbonye Herbert, now a Colonel in CMI, was deputised by the operations commander Cpt. Tweheyo and as a member of Team One he was headed by the late
30 Esau Begumya as Team Leader. Cpt. Mbonye had been seconded to URA and he had a URA ID and was on the URA payroll. They had civilian and military officers. The military officers would

be seconded for two or three years. He left the PRS in mid August 2000 and was transferred to the expenditure division in the department of Finance and administration.

5 The plaintiff was shot at by officers said to be SRPS (Special Revenue Protection Services) as it was then. It was an outfit created, dressed and fed from the Office of the President. It was led by the Military Assistant to the President who was by then Kale Kayihura the current IGP. Their offices were situated in Bukoto behind the white flats. SRPS was counterchecking the operations of the main URA. URA by then had Revenue Protection Services fully managed by URA. SRPS was an oversight organ and it had mainly military officers. They could enter any office and
10 search. They would mount roadblocks separate from those of the URA. They were totally independent of URA. They were not even using letter heads of URA. Their offices were on a building owned by Hon. Hanifa Kawooya. He came to learn about the existence of SRPS towards the end of 1999. It was disbanded after the Sebutinde Commission inquiry into URA.

15 In June 2001 they still had the SPRS. They were mounting roadblocks. They used to have armed personnel. RPS was still operational in June 2001. RPS had specific permanent roadblocks but on information they would mount a search. At that time they only had a roadblock at Pakwach and not in Nebbi, although he would not know whether there was an operation in Nebbi around that time. The number plate of the vehicle was not URA. He crosschecked with the register in
20 order to tell that the vehicle used in that operation was not among their fleet. He knows the one who led the operation and it was Lt. Silver Chelengat from the report he wrote. Cpt. Mbonye did not know about the operation and queried him and that is how he obtained that information. From the information he has, this was an operation by SPRS and not RPS.

25 Under cross-examination, he testified that when SRPS was formed they only took over de-seconded RPS staff and not in-service RPS staff. The SRPS would file reports to URA where they impounded goods, conducted searches or audited books just like the police does when they have cases involving revenue. SRPS did not hold URA IDs. URA's RPS had a revenue check point at Pakwach and it still exists to-date. They had the mandate to operate in their sub-region.
30 He never came to know of any situation where SRPS would borrow vehicles from RPS. He did not know whether RPS would facilitate SRPS with fuel. SRPS never used any civilian staff of

RPS except if they impounded goods and needed to calculate the tax due from the goods, but not in operations. The military officers URA took on were issued with civilian uniform; a white shirt and an ID. There are instances when they wear their military uniform while on duty but only the escorts would wear army uniform. The second defendant closed its case with this witness while
5 the first defendant did not call any witness

At the scheduling conference undertaken on 26th August, 2003, the following are the issues that were agreed upon by the parties for the determination of the court;

1. Whether or not the officers of SRPS were negligent in shooting the plaintiff.
- 10 2. Whether or not the defendants are vicariously liable for the actions of the SRPS.
3. Whether or not the two officers were acting within the scope of their employment.
4. Whether or not the Attorney General or the URA is liable for the actions of the SRPS.
5. Whether the plaintiff is entitled to any remedies.

15 In his final submissions, counsel for the plaintiff Mr. Donge Opar argued that it is not denied that the plaintiff was shot at and injured. The evidence of the plaintiff who narrated the whole incident. There is the evidence of P.W.2 who treated the plaintiff. He testified in court that indeed the plaintiff's injuries were as a result of gunshots. Exhibit P. Ex. 1 indicates that the shooting was done by officers of the SRPS. These pieces of evidence confirm that the plaintiff
20 was shot at and injured. The issue then is whether they were agents of URA. D.W.1 denied that SRPS were agents of URA. His evidence is that they were transformed from Revenue Protection Services and to him they were agents of URA. Some Staff from the Revenue Protection Services were taken on by the SRPS. When on operations, the military officers in SPRS put on URA uniform while the escorts put on military uniforms. The fact that these officers are given URA
25 uniform is an indication that they were agents of URA. Apart from the uniform, they filed reports to URA. The control therefore vested in URA. Even the accident was reported to URA by Chelingat. They are also deployed by URA doing its work. He submitted that the evidence establishes that it is the second defendant who is liable. In the alternative, if the control was with the President's office, since they originated from the President's office, then the first defendant
30 would be liable. There is no possibility of failure to attribute blame. Issue number one should be answered in the affirmative.

The second issue is whether the officers were negligent. To aim a gun directly into a crowd is negligent. The plaintiff was not armed and he did not even provoke the one who shot him. Those who shot the plaintiff did not bother to report to any police station nor did they take him for any medication. This is evidence of negligence. The second issue should therefore be answered in the affirmative.

The last issue is about the remedies. One who is injured by another due to negligence is entitled to be compensated for the wrong. The plaintiff is entitled to be compensated. He was hospitalised for three months in Nebbi Hospital and one month in Angal Hospital. According to P.W.2 he bled throughout one night and an operation had to be done on his leg which was injured. He was forced to buy medicines for his treatment and to meet transport expenses, he also fed himself and his attendant in hospital and also bought crutches. All these figures are pleaded and there are receipts exhibited in court. There are no receipts for feeding. The special damages is shs. 1,000,000/=. He prayed that the figure be awarded. The plaintiff is entitled to general damages. He deserves shs. 80,000,000/= There is permanent injury he has suffered. He has scars and cannot kneel. He is also entitled to aggravated damages. The gun used was meant to protect him but was turned against him. The person who shot him did not bother to take him to hospital or report. The plaintiff was not armed. Counsel proposed twenty million for aggravated damages. He prayed that judgment be entered for the plaintiff with costs.

In reply, counsel for the first defendant Ms. Rita Kirungi, State Attorney submitted that the fact of shooting was an agreed fact. As to whether he was shot by agents of either defendant, the incident happened at night at around 8.30 pm and the plaintiff said he was aided by security lights. Under cross-examination he said he was unable to see whether the one who shot had a badge or not yet he was twenty meters away. In 2001 Nebbi town there was no street lighting. The light was coming from buildings nearby. He said the person who shot was in army uniform and that does not mean that anyone wearing camouflaged uniform is an army officer. It cannot be clearly established whether it was an officer of the first defendant who shot and injured the plaintiff. The person who shot might have been a smuggler.

In the alternative if the person who shot was an agent of the first defendant, negligence has been defined using the standard of a reasonable man, would or would not do. In the case of *Donoghue*, the elements are a duty of care, breach of the duty and the plaintiff suffered injury. There would be a duty of care but the circumstances justified shooting. The shooting was meant to scare and considering the fact that he stayed around he was threat. In *Nyendi v. KPI Security Services*, H.C.A 001 of 2014, it was held that it is not enough to allege that the defendant acted negligently and thereby cause damage. No evidence was led to prove the particulars.

On the general damages sought, P.W.2 testified that the injury was not so complex as to require an orthopedic surgeon. He has fully recovered. On the issue of special damages, *Mukasa v DAPCB S.C. CA. 1 of 1982* is to the effect that special damages must be explicitly claimed and proved that they were a direct result of the conduct. The feeding was not as a result of the defendant's conduct. On aggravated damages, they should not be awarded since there was the possibility of mob justice, especially when officers are impounding smuggled good. She prayed that the suit be dismissed with costs to the first defendant.

Counsel for the second defendant, Mr. Kasuti submitted that the case against the second defendant is that the SRPS soldiers who shot and injured the plaintiff were agents of the second defendant, which has not been proved. The evidence of P.W.1 is that he only saw soldiers who were wearing camouflage uniform but he could not identify whether they were wearing any uniform of the URA. It was not an exercise by URA. There was no official from URA involved in this activity. P. Ex. 1 makes it clear that they were not employees of the second defendant. The nature of their operations, as was held in *Wandera Abdu v A.G and URA* was to curb contraband. It was a special unit under an independent command. D.W.2 explained that the activities of SRPS were under the command of the current IGP. URA had their own Revenue Protection Services staff who are stationed at fixed points. The second defendant is not liable for the acts of SRPS on that particular day.

In the alternative, he associated himself with the submissions of counsel for the first defendant as regards negligence. On damages, aggravated damages are punitive. Form this case there is lack of evidence that justifies it. The evidence of P.W.1 indicates there was commotion. It was not

done out of willful exertion of force. On general damages, they are compensatory in nature, there is no evidence of permanent effect he can only get damages for the discomfort and pain shs. 10,000,000/= would be adequate. Finally on the issue of special damages, he submitted that what was pleaded in paragraph 7 (f) of the plaint was not proved before the court. Paragraph 7 (d) too was not proved. He prayed that the suit be dismissed as against the second defendant with costs.

At the scheduling conference undertaken on 26th August, 2003, the parties agreed on the following facts as uncontested;- the plaintiff was the victim of a gunshot to the leg; the shooting was by an officer of the SRPS; the plaintiff suffered injury as a result of the gunshot. The only issues therefore that remain for determination are; whether the plaintiff was shot out of out of the negligence of a law enforcement officer, whether any of the defendants is liable for the shooting, and whether the plaintiff is entitled to the reliefs sought.

First issue: Whether the plaintiff was shot out of the negligence of a law enforcement officer.

Negligence is a person's carelessness in breach of duty to others. As a tort, it is the breach of a legal duty to take care. It involves a person's breach of duty, that is imposed upon him or her, to take care, resulting in damage to the complainant. The tort was defined in *Blyth v. Birmingham Water Works Co (1856) 11 Exch. 781* as a breach of duty caused by the omission to do something which a reasonable man guided by those considerations which ordinary regulate the conduct of human affairs would do or doing something which a reasonable man would not do. There is a general duty to take reasonable care to avoid acts or omissions which one can reasonably foresee, would be likely to injure persons who are so closely and directly affected by the act, that one ought reasonably to have them in contemplation as being to affected when one is directing his or her mind to the acts or omissions which are called in question (see *Donoghue v. Stevenson [1932] A.C. 562*). Although the law imposes on all persons a general duty of reasonable care not to place others at foreseeable risk of harm through conduct, negligence is essentially a question of fact and it must depend upon the circumstances of each case. The standard of care expected is that of a reasonable person.

Proving breach of a duty is usually achieved by adducing evidence of unreasonable conduct in light of the foreseeable risks. The question then is what a reasonably prudent person under the same or similar circumstances would have done. The question to be answered is; would a reasonable person have acted this way under the circumstances? A person will not be found negligent negligence if he or she exercised a degree of care that a reasonably careful person would have exercised under the same or similar circumstances.

In the instant case, the plaintiff was injured as a result of use of deadly force by a law enforcement officer. Deadly force is that force which when used, would lead a reasonable law enforcement officer objectively to conclude that it poses a high risk of death or serious injury to its target. Firearms are obviously instruments of deadly force. Generally speaking, a law enforcement officer may use only so much force as is reasonable under the circumstances. The general rule is that a law enforcement officer may not use deadly force to make a misdemeanor arrest. The only exceptions are; if deadly force is necessary for self-defence or defence of the life of a third person, i.e. where it is necessary to defend themselves or others against an apparent imminent risk of death or serious bodily harm, and prevention of a felony suspect from escaping.

However, the use of use of deadly force to prevent the escape of an apparently unarmed suspected may be disproportionate, in that where the suspect poses no immediate threat to the law enforcement officer and no threat to others, the harm resulting from failing to apprehend him or her does not justify the use of deadly force. A law enforcement officer's conduct lacks reasonable care where the burden to take a precaution to mitigate harm is less than the probability of the harm occurring combined with the probable severity of the harm.

In the instant case the plaintiff's testimony and exhibit P. Ex. 1 suggest that the shooting occurred in the process of intercepting suspected contraband fuel. The circumstance prevailing at the time attracted a curious crowd of on-lookers. It would appear that as a result of some rowdiness in the crowd the law enforcement officers may have decided to use force either to quell or disperse the crowd or to effect seizure of contraband or arrests of suspects. In law enforcement operations, circumstances that call for immediate action or a sudden or unexpected occasion for action are not uncommon and whenever they occur, they pose some degree of difficulty of judgment on the

part of the law enforcement officers. In those situations, a law enforcement officer may act upon what he or she reasonably believes or perceives is a threat of death or serious bodily harm to himself or others. This must be based on the facts that the officer knows at that time, or reasonably believes that he or she knows, rather than looking back at the circumstances with
5 hindsight or on the basis of information later discovered but not then known. However in the instant case, there is no evidence of probable cause to believe that the plaintiff posed a threat of serious physical harm, either to the law enforcement officer who fired the shots or to others or engaged in any apparently threatening conduct. It is standard practice that where lethal force is about to be applied, unless the circumstances are such that there is no possibility of issuing a
10 warning, a law enforcement officer is expected to warn the likely victim either verbally or by firing warning shots into the air or the ground, taking care in the process not to expose anyone to the risk of being harmed. There is no evidence in this was case that this was done or that it was not possible to do so.

15 On the other hand, this is a case where the doctrine of *Res Ipsa Loquitur* would apply. In situations where the incident is proved to have happened in such a way that *prima facie*, it could not have happened without negligence on the part of the defendant then it is for defendant to explain and show how the accident would have happened without negligence of the defendant. It is not necessary to plead *res ipsa loquitur*. If the facts pleaded show that the cause of the accident
20 was apparently and on its face due to some negligence, that is sufficient (see *Bennet v. Chemical Construction G.B [1971] 1WLR 1571*).

In the instant case, the applicant pleaded in his plaint that negligence on the part of the law enforcement officer who fired the shot was constituted by; failure to properly manage, control or
25 maneuver his gun so as to avoid shooting and injuring the plaintiff; shooting directly at the plaintiff or the people where the plaintiff was; and shooting or discharging the bullets from the gun in circumstances where it was unreasonable or not necessary or uncalled for.

The accident which resulted in the plaintiff's injury is not one that ordinarily happens without
30 negligence and the instrumentality that caused the harm, a gun, was under the exclusive control of a law enforcement officer. The gun was shown to have been under the management of a law

enforcement officer, and the accident is such as, in the ordinary course of things, does not happen if those who have the management of a gun use proper care. Guns do not fire off on their own. That the accident occurred therefore of itself affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care. The part of the plaintiff's body that was hit, the lower limb, is of itself suggestive of the fact that the gun was aimed at hitting him rather than scaring him off. This is an appropriate case where the plaintiff establishes a prima facie case by relying upon the fact of the accident.

That being the case, if the defendants adduce no evidence there is nothing to rebut the inference of negligence and the plaintiff will have proved his case. But if the defendants adduce evidence, that evidence must be evaluated to see if it is still reasonable to draw the inference of negligence from the mere fact of the accident. Faced with a prima facie case of negligence the defendants will be found negligent unless they produce evidence that is capable of rebutting the prima facie case (see *Scott v. The London and St Katherine Docks Co*, (1865) 3 H & C 596). Having considered the evidence as a whole, I find that the plaintiff has proved on the balance of probabilities that the law enforcement officer who fired the shot that injured him, was negligent.

Second issue: Whether any of the defendants is liable for the shooting.

It was an agreed fact that the law enforcement officer who fired the gunshot which injured the plaintiff belonged to the SRPS. It was the uncontroverted evidence of D.W.1 Ojambo Paul that the SRPS was an outfit created, dressed and fed by the Office of the President, used to countercheck the operations of the main URA. It had mainly military officers, they could enter any office and search, mount roadblocks separate from those of the URA and were totally independent of URA.

Although sued jointly, the court has to determine which of the two defendants is vicariously liable for the actions of the SRPS. Vicarious liability in this situation depends on proof of the existence of a superior-subordinate relationship, whether *de jure* or *de facto*, by showing that the subordinate, the SRPS, is subject to the effective control of either of the two defendants, that is to say, by proving that one of the defendants had the material ability to prevent the tort or punish

the responsible tortfeasor subordinate, or that the superior was able to give orders and these orders were actually followed. Influence alone is not enough. The superior-subordinate relationship manifests itself in the exercise of effective control over subordinates. Within the context of the facts of this case, *de facto* authority may be of greater importance than *de jure* authority.

The evidence before court is to the effect that although members of the SRPS occasionally provided reports to the second defendant, the second defendant had no effective command and control over them. They provided an oversight function over the second defendant and operated independent of the second defendant. The evidence of D.W.1 and exhibit P. EX. 1 being uncontroverted, I find that it is the first defendant and not the second defendant that is vicariously liable for the acts of any member of the SRPS.

Once that is established, an employer is in general liable for the acts of his employees or agents while in the course of the employers business or within the scope of employment (see *East African Cases on the Law of Tort* by E. Veitch (1972 Edition) at page 78). This liability arises whether the acts are for the benefit of the employer or for the benefit of the agent. 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). On basis of the evidence availed to court, I find that the plaintiff has proved on the balance of probabilities that the law enforcement officer who fired the shot did so in the scope of his duty and course of his employment for which the Attorney General is vicariously liable.

Third issue: Whether the plaintiff is entitled to the reliefs sought.

In his plaint, the plaintiff sought an award of general and special damages for personal injury, exemplary damages, interest on the award and costs. As regards special damages, 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). The plaintiffs pleaded expenditure of shs. 866,100/= as transport, medical and other expenses such as the purchase of crutches but did not produced only a few receipts (exhibit P. Ex.2) . 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). I have scrutinized the medical records in exhibits P. Ex.2, P. Ex.3, P. Ex.4, P. Ex.5, P. Ex.6, a P. Ex.7 and P. Ex.8 which indicate the prolonged period of treatment that the plaintiff underwent. I do not find the sum of shs. 866,100/= to be in any way an exaggeration of the costs he incurred. He is therefore awarded the sum as pleaded as special damages.

In the assessment of general damages, the court should be mainly guided by the nature and extent of the injury suffered (See *Uganda Commercial bank v. Kigozi* [2002] 1 EA 305). Furthermore, a plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been if she or he had not suffered the wrong (See *Hadley v. Baxendale* (1894) 9 Exch 341; *Charles Acire v. M. Engola*, H. C. Civil Suit No. 143 of 1993 and *Kibimba Rice Ltd v. Umar Salim*, S. C. Civil Appeal No. 17 of 1992). General damages are the direct natural or probable consequence of the wrongful act complained of and include damages for pain, suffering, inconvenience and anticipated future loss (see *Storms v. Hutchinson* [1905] AC 515; *Kabona Brothers Agencies v. Uganda Metal Products & Enamelling Co Ltd* [1981-1982] HCB 74 and *Kiwanuka Godfrey T/a Tasumi Auto Spares and Class mart v. Arua District Local Government* H. C. Civil Suit No. 186 of 2006). All this is subject to the duty to mitigate. At common law, the plaintiff had a duty to take all reasonable steps to mitigate the loss sustained (see *African Highland Produce Ltd v. Kisorio* [2001] 1 EA 1).

In the instant case, the plaintiff suffers a fracture of the upper third of the tibia, lost a lot of blood, experienced excruciating pain, underwent surgery and now suffers a reduced flexibility of the right knee since he can only kneel with one knee. Although the evidence establishes that he suffered a lot of pain for a prolonged period of time, the degree of permanent incapacity he suffered as a result of the injury was never assessed. The court therefore is not in position to make an assessment of the permanent damage he suffered based on any prognosis as to his chances of healing in the future. The assessment will more or less be based on the pain and suffering he experienced.

In *Nansubuga Josephine v. Vision For Africa, H. C. Civil Suit No. 969 of 2005*, a decision delivered on 5th February, 2009, the plaintiff suffered injuries as a result of a road traffic accident caused by the defendant's vehicle, which included; fracture of neck of the left femur, fracture of the right acetabulum, fracture of the interior right pubic, fracture of the left tibia plateau, comminuted fracture of the distal third of the right tibia and fracture of the medial malleolus, multiple fractures with the hemorrhagic shock, fracture of rectal femur, right fracture, dislocating right 1st metatarsal- phalanges joint and post traumatic avascular necrosis of left femoral head and post traumatic osteoarthritis of the right hip joint. Her injuries were classified as maim, and her permanent disability was fixed at 80%. She was awarded shs. 35,000,000/= as general damages.

In comparison, the plaintiff in the instant case suffered less than a third of the injuries the victim in that case suffered. Taking into account the inflationary tendencies that have inevitably affected this claim, I will accordingly award the plaintiff shs. 12,000,000/= in general damages.

The plaintiff claimed exemplary damages. These damages, also referred to as punitive damages, represent a sum of money of a penal nature in addition to the compensatory damages given for pecuniary loss and mental suffering. They are deterrent in nature and aimed at curbing the repeat of the offending act. They are given entirely without reference to any proved actual loss suffered by the plaintiff (see *WSO Davies v. Mohanlal Karamshi Shah [1957] 1 EA 352*). If the tort is accompanied by aggravating circumstances, the plaintiff may be awarded exemplary damages.

Exemplary damages should only be awarded in two categories of cases; - cases in which the wrong complained of was an oppressive, arbitrary or unconstitutional action by a servant of the government, or cases in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation made to the defendant (see *Kanji Naran Patel v. Noor Essa and another* [1965] 1 EA 484). There are no aggravating factors in this suit that either pleaded or proved. The evidence of the plaintiff does not show that the defendant engaged in any oppressive or arbitrary acts, beyond the mere fact of shooting. I find that the shooting although negligent, was not accompanied by circumstances of aggravation. The claim for exemplary damages is thus rejected.

In summary, the suit against the second defendant is dismissed with no order as to costs while judgment is entered for the plaintiff against the first defendant in the following terms:-

a) General damages of shs. 12,000,000/=

b) Special damages of shs. 866,100/=

c) Interest on the awards in (a) and (b) above at the rate of 8% per annum from the date of judgment until payment in full.

d) The costs of the suit

Dated at Arua this 21st day of December, 2017

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Stephen Mubiru
Judge,
21st December, 2017.