THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCT-04-CV- CA- 95 OF 2014

ATTORNEY GENERAL::::::::::::::::APPELLANT

VERSUS

DAN KISEMBO::::::::::::::::::::::::RESPONDENT

BEFORE: HON. JUSTICE HENRY I. KAWESA

JUDGEMENT

Appellants were sued by the respondent in the Chief Magistrate Court Mbale for damages, loss of property, and costs arising for tort committed by the Attorney General. Learned trial Magistrate found for respondents. The appellants raised 6 grounds of appeal in the memorandum of appeal.

Appellants argued grounds 1 and 2 together, 3, 4 and together and ground 6 separately.

Respondents followed the same order of arguments which I will also adopt.

The duty of a first appellate court includes the duty to reevaluate the evidence and reach its own conclusions , taking caution that it never listened to the witnesses.(see cases of Uganda Revenue Authority V Rwakasaija Azarious & 2 Ors CACA 8/ 2007 (un reported).

I have reviewed the evidence. Judgment of the learned trial Magistrate, and the submissions herein. I now make findings as here below;

Grounds 1, and 2: VACARIOUS LIABILITY & ASSESSMENT OF EVIDENCE

Appellants argues that the learned trial Magistrate failed to evaluate the evidence on record and misdirected herself in holding that Attorney General is vicariously liable for the action of the police officer. H argues that the learned trial Magistrate erred in law and fact by ignoring the evidence of the appellant "witnesses" hence making a wrong decision as to the liability of the Attorney General.

In resolving this ground, I will make reference to the lower court proceedings and immediately correct the wrong assertion by counsel for appellant in his submissions that " the defendant called two witnesses who were police officers" (page 2 of his submissions).

This is wrong. In court the plaintiff called one witnesses PW1 Hamdan Kisembo and defence called one witness DW1 CPL Musamali James only.

There are no other witnesses on record being referred to by appellants in his submissions.

Secondly the appellant's narration of the facts seems to be at variance with what on record. The record of proceedings is that PW1 was driving his motor vehicle. He came to a police post where the police stopped him and requested for a lift.

This was done by them standing in the road, and ordering him to abide. He obliged took them and in the mess that followed.

DW1 relates the events in brief not giving details as to how they were able to use PW1's car. He narrates his statement thus;

"A report was entered and OC instructed his… to go and see. As we proceeded to the scene, Dan Kisembo came with his vehicle we requested for a lift and he obliged and we moved to the scene…" however PW1 had states thus"

At Konekoi police station I met police of files who were armed.

They were six. Two stood in the middle of the road and ordered me to stop …. Their bosss OC Came and told me to help them….."

"I first refused to take them and told them I would not leave the place…"

The evidence above shows that the act of taking these police officers was not voluntarily. PW1 Was intercepted by the police who were on an agent call, within the scope of their duty to go and protect victims of a theft.

Is the Attorney General, therefore vicariously liable for what transpired thereafter?

Appellant's argument is that Attorney General is not liable because the police officers did not commit and wrongful act, while in Course of their duty. They burn the car.

The respondents on the other hand on the strength of the evidence argue that the policeman are agents of the Attorney General and by were on duty and hence their acts having resulted into the damage suffered by respondent , Attorney General should found vicariously liable.

The law has been settled that a master is liable for the servant's acts improperly done in the course of doing what the servant is employed to do.

In **SAM KATIMBO V Attorney General** (1981) HCB 99, the plaintiff was driving at home at night when he was stopped by soldiers guarding the resident of a high ranking soldier.

He was brutalized and made to sit down and released after other interventions.

On trial the Attorney General argued that he is not liable because the soldiers were acting outside the scope their duties.

It was held that the Attorney General is liable for the acts of the soldier because they are so connected with their duty and the violence committed on the plaintiff was just improper mode of executing their duty of guarding the army commander.

The above authority shows that in determining liability court looked at the conduct of the solders and how it affected the plaintiff v1z- v1z their duty to the state.

In the case before me, the policemen were on call to go and quell theft. They had instructions to reach the scene. The chain of causation began flowing at the point the order was given to go and respond, to quell the theft.

As they set their duty in motion, they needed transport, and decided to mount a roadblock to grab any car (From PW1's evidence) 2 of them survived on the road, facing him to stop.

They told him to drive them to the scene. He refused, the OC came and talked to him showing him that he must oblige. He drove them to the scene, and in the process the operation turned violent and his car was vandalized by the angry mob.

Like the court found in the Katimbo V Attorney General (Supra) case above the actions of these police officers was so connected their duty in that PW1 shows they shot in the air , tried talking to the mob, left him in the vehicle to give them light from headlamps – all facts were part and parcel of the same transaction. The resultment anger of the mob was a direct response to the police action. If the police had not taken PW1 and his car to the scene, no mob violence could have happened. It's the police in the normal cause of their duty who employed a wrong tactic to quell the 'theft' at the scene and led to PW1's car being burnt.

The entire transaction is one and the same chain of causation.

In the case of **TMK V TIGAMPENDA AND OR (1985) HCB 32**

It was held that the master will be liable for a tort committed by the servant even if he had forbidden the servant from doing the act if the act though forbidden was tacitly allowed.

In this case it was shown that the OC sanctioned the actions of the police officer and also asseirerigly convinced PW1 to go along with them. No evidence on record controverts these facts, though DW1 simply said that PW1 allowed to go with them to the scene. PW1 explained that they coerced him into it.

The import of the TMK case above therefore operates to make the master liable for actions of his servant.

In KITYO V AG (1983) HCB 57

It was held that contrary acts, criminal acts or activities done contrary to orders, do not relieve a master of liability once a servant is on official duty.

The court found that "the solders in the case were not acting in good faith because if they were supposed to be searching for guer.. and illegal weapons they should have confined their activities to doing that only and nothing else. They were guilty of criminal offences of assault, wrongful confinement, demanding money with mences and arrived robbery by those presence in the plaintiff's house and compound actionable in the trespass ab…..

In a similar way the police in this case forced themselves on the road and cause PW1 to stop. They then caused him to drive them to the scene. All these actions were not with his consent. They put him under risk at the scene forcing him to keep on driving towards the village roadblock. All these were done contrary to plaintiff's consent". However their actions like those

of the soldiers in the **KITYO v AG (Supra)** case made their presence in his car a trespass. They were liable for criminally abducting him and his car. They could not therefore plead "intervening circumstances" or "act of God ". All happened was foreseeable by them as police officers on the line of duty .

However for an innocent civilian like PW1- none of these outcomes were foreseeable.

The solders in Kityo (Supra) were found to have acted towards the plaintiff in an unprofessional manner using their official position to threaten and humiliate him. similarly in this case, the police used its official position to gain access to PW1's car and to forcefully utilize his services for a very dangerous operation. Their actions were high handed and oppressive. They being officers of the appellant, they were in scope of duty and hence liable for what happened.

From the above discourse I am in agreement with the respondents that the matters raised in G1, 2 and 3 are not proved and they fail. The learned trial Magistrate was right in the findings on the said matters.

Grounds 3,4 and 5 : WHETHER PLAINTIFF HAD LOCUS TO BRING THE SUIT

Appellant alludes to the fact that since the car was burnt by the villagers, then respondent has no cause of action against the appellant. He argues that respondent did not prove that;

1. He had a right
2. The right was infruged by the defendant
3. Defendant is liable

Respondent argues that the standard in **Auto Garage V Motokov (3) (1971) EA 514** was satisfied.

To begin with I did not see on record any issue framed on the question of cause of action. The learned trial Magistrate in the Judgment considered 4 issues which she determined and the issue of cause of action was not one of them. It is surfacing an appeal.

However the discussions that are raised are … on the determination of the question of whether the AG is vicariously liable for the actions of the police officers which I have already found in the affirmative. The plaintiff's cause of action was .. on that point of law. I note that from the evidence which was adduced in court, through PW1, the pleadings on defence through DW1, and the WSD taken all as a whole, the plaintiff/ respondent was able to show on the balance of probability that he was quietly enjoying the use of his vehicle. The servants of the appellants (police on duty and at their police post) intercepted his right to drive home, diverted him took him to a theft scene, where they abandoned him to savage villagers who attacked him and vandalized his car. The police men (on duty) shot in the air, ran away and abandoned him to his fate. He found his way back to police. His car was later towed to the police. All this evidence is standard of **Auto Garage V Motokov N03 (1971) EA 514**, that a cause of action has three elements to prove

1. The plaintiff had a right
2. The right was violated
3. Defendant is liable

From all facts above, there was a cause of action against the appellant. These grounds all fail.

GROUND 6: PPDP ACT

I do not find the relevancy of the PPDP Act on the facts of this case. There is no evidence that any procurement was in issue before court. I do not find any nexus to that ground.

The evidence of PW1 and DW1 shows that the vehicle was not procured but forcefully diverted by the officers to go far the operation. The submissions by appellants on this ground are not sustainable and the learned trial Magistrate was right to reject them. This ground fails as well.

In the result I find no merit in this appeal. It fails on all grounds. It's dismissed with costs to the respondents. I so Order

Henry I. Kawesa

JUDGE
22.02.2017