THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
CIVIL SUIT NO. 391 OF 2014

KAGGWA VICENT:: PLAINTIFF

VERSUS

ATTORNEY GENERAL:::DEFENDANT

BEFORE HON. JUSTICE MUSA SSEKAANA

JUDGMENT

BACKGROUND

The plaintiff filed this suit seeking compensation, general damages, special damages, exemplary damages interest and costs of the suit for the injuries suffered as a result of the negligent, wanton, callous, unjustified and illegal acts of police officers who shot and severely injured him.

The plaintiff was shot and severely injured by the officers of the Uganda Police Force which left him in a state of permanent physical disability. The plaintiff claims that the acts of the police officers were grossly negligent, wanton and unjustified. The plaintiff thus seeks compensation for the injuries occasioned to him by the negligent acts of the police officers for which the defendant is vicariously liable.

The defendant filed a written statement of defence wherein they denied liability on all the allegations and stated that the defendant was not entitled to any of the reliefs sought.

The plaintiff was represented by *Mr. Brian Kabayiza* whereas the defendant was represented by *Ms. Suzan Apita Akello* and *Mr Sam Tusubira*.

The parties filed a joint scheduling memorandum wherein they proposed the following issues for determination by this court.

1. *Whether the plaintiff was shot by the officers of the Uganda Police Force; if so whether the police or its officers conducted themselves and acted recklessly, negligently and unlawfully.*
2. *Whether the defendant is vicariously liable for the actions or conduct of the Uganda Police Officers that occasioned severe injuries to the plaintiff.*
3. *What remedies are available to the parties?*

The parties were ordered to file written submissions which they both filed and the same have considered by this court.

DETERMINATION OF ISSUES

Issue 1

Whether the plaintiff was shot by the officers of the Uganda Police Force; if so whether the police or its officers conducted themselves and acted recklessly, negligently and unlawfully.

Counsel for the plaintiff submitted that the plaintiff was injured as a result of use of deadly force by a law enforcement officer in circumstances where the same was not at all warranted.

The Plaintiff testified that on the 3rd day of June 2013, at or about 11:00pm, he returned to his residence in Kalungu, in the company of his wife the then Deputy RDC for Kalungu, Theopista Mbabazi. The Plaintiff was driving a motor vehicle Registration No. UAT 222A and was being followed from behind by his wife's official Driver Paul Musoke who was driving his wife's official car, a Pick Up Truck No. UG 2121C. He testifies that he had just parked at their residence, when he was shot by someone from outside the gate. The plaintiff later established that he was shot by a drunken police officer on foot patrol identified as a one No. 50595, Corporal Angura, and this was verified by the area DPC Martin Akuyo who profoundly apologized for the unfortunate incident.

The above testimony of the Plaintiff is corroborated by that of his wife (PW2) and his wife's driver Paul Musoke (PW6). These testified that the Plaintiff had been shot by a police officer through a peephole in their gate and that Plaintiff's wife had been able to identify the assailant as a police man, whose actual identity was later confirmed by the DPC as a one Corporal Angura.

From the evidence adduced by the plaintiff, it is clear that the Plaintiff was shot and injured by officers of the Uganda Police in the course of their duty.

It is also clear that the circumstances surrounding the fateful shooting are not such as would necessitate the said acts of the police officer. 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 that he engaged in any apparently threatening conduct.

As was held by *Justice Steven Mubiru* in ***Omonyi Rogers vs AG & Anor HCCS No. 27 of 2002***;

> *"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 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 case that this was done or that it was not possible to do so.

Res Ipsa Loquitor

In addition to the foregoing, we submit that the instant case is one where the doctrine of Res Ipsa Loquitor applies.

It has been held that;

> "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 ispa loquitur*. If the facts pleaded show that the cause of the accident was apparently and on its face due to some negligence, that is sufficient" **(see *Bennet v. Chemical Construction G.B [1971] 1WLR 1571 as cited in* Omonyi Rogers vs AG & Anor**, Supra).

In the instant case, the Plaintiff pleaded and led evidence to show he was shot and severely injured by police officer acting wantonly, without any level of caution nor any justification and in circumstances where the shooting was unreasonable, unnecessary and uncalled for.

The incident which resulted in the plaintiff's injury is not one that ordinarily happens without negligence and the instrument 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 while still seated in the car-the chest, right through the spine, 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. (see observations of *Justice Mubiru* in ***Omonyi Rogers vs AG & Anor, Supra)***

The foregoing being the case, and since the defendant adduced no evidence at trial, there is nothing to rebut the inference of negligence and the plaintiff has proved his case.

It was their plaintiff's counsel submission that the Plaintiff's claim and evidence stand uncontroverted by the defendant, and invite court to find that the actions of the police officers were negligent, wanton, illegal and unjustified.

The defendant's counsel submitted that the law on negligence has been well stated by the Plaintiff. He fully associated himself with Plaintiff's submission on the law in regard to negligence and on the authorities too.

However, he contended that the facts before the court, the circumstances under which the alleged shooting was done leave doubt as to whether it was done by the Police Officer as alleged.

The alleged shooting occurred at or about 11:00pm, PW1 testified that when the shooting happened, the main gate was closed. That they had entered and he was parked facing towards the gate. That the shooting happened through the small opening in the gate where one pushes his / her hand to open the small gate on the big gate.

Further, PW1 testified that he did not see the face of the shooters but saw the uniform PW1, further testified that the shooter was identified to him by others who were with him on a patrol.

Therefore, it was not possible in the circumstances that prevailed at the time for the Plaintiff to identify the shooter. since 11:00pm, amidst shooting / gun shots it was possible for one to see through the small opening at a gate where only a hand can pass.

In addition, PW2 testified that she was the one who took PW1, to hospital (Bulamu medical Clinic) where she gave firsthand information on what happened to the Plaintiff.

The defendant's counsel referred to PA1, Medical form of Bulamu Medical Clinic dated 4/6/2013 at the beginning (middle column) heading examination, Diagnosis

and treatment where it is stated “brought at about 3:00 am after sustaining gun shoot wounds at Kalungu. This happened after security guard was alerted about thieves.

It is therefore clear that there was an attack by thieves and the Plaintiff was shot in the attack but he now wants to turn around and allege that he was shot by a police officer who was on night patrol.

In addition my Lord, PW6 Paul Musoke testified that the distance between the gate and where PW1 parked his car was 10 feet. Therefore it was not possible for one to view through that opening on the gate, amidst shooting to establish who the alleged shooter was but rather in such a circumstance, everyone takes safety and hides.

We therefore pray that court is not swayed by the Plaintiff testimony and further be pleased to find that the Plaintiff was not shot by a police Officer and that no Police Officer conducted themselves recklessly, negligently and unlawfully.

Lastly, this matter was allegedly reported at Kibuli Police Station. PW1 testified to this effect PW1 further stated that PW2 Theopista Mbabazi recorded a statement. No police report was produced at Court. This was a matter which happened at Kalungu, why was it reported to Kibuli Police. If at all it was PW1 could not even avail CRB numbers to Court and he never followed up this matter.

In regard to the doctrine of *Res ipsa Liquitor* , defence counsel submitted that it is not applicable in this matter and the same was not raised by the Plaintiff and neither was it an issue. My Lord, parties are bound by their pleadings.

Resolution

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.

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.

In this case the plaintiff testified that on the 3rd day of June 2013, at or about 11:00pm, he returned to his residence in Kalungu, in the company of his wife the then Deputy RDC for Kalungu, Theopista Mbabazi. The Plaintiff was driving a motor vehicle Registration No. UAT 222A and was being followed from behind by

his wife's official Driver Paul Musoke who was driving his wife's official car, a Pick Up Truck No. UG 2121C. He testifies that he had just parked at their residence, when he was shot by someone from outside the gate. The plaintiff later established that he was shot by a drunken police officer on foot patrol identified as a one No. 50595, Corporal Angura, and this was verified by the area DPC Martin Akuyo who profoundly apologized for the unfortunate incident.

His evidence was corroborated by that of his wife (PW2) and his wife's driver Paul Musoke (PW6). These testified that the Plaintiff had been shot by a police officer through a peephole in their gate and that Plaintiff's wife had been able to identify the assailant as a police man, whose actual identity was later confirmed by the DPC as a one Corporal Angura.

The defendant did not lead any evidence to contradict the above testimonies hence the only inference is that it's true.

The defendant's submission that that there was an attack by thieves and the Plaintiff was shot in the attack was not backed by any evidence but was therefore a mere fallacy and had no basis to draw such conclusions without any evidence being led.

Issue 1 is resolved in the affirmative.

Issue 2

Whether the Defendant is vicariously liable for the recklessly negligent

Counsel for the plaintiff submitted that it is a well-established rule that a master is liable for the acts of his servant committed within the course of his employment.
It was held by ***Newbold, P*** in ***Muwonge v Attorney General, Civil Appeal No. 10 of 1966,*** that;

> *"It is not in dispute that the principles of law governing the liability of the Attorney General in respect of the acts of a member of the police force are precisely the same as those relating to the position of a master's liability for the act of his servant. This being so the legal position is quite clear and has been quite clear for some time. A master is liable for the acts of his servant committed within the scope of his employment or, to be more precise in relation to a policeman, within the exercise of his duty. The master remains so liable whether the acts of the servant are negligent or deliberate or wanton or criminal. The test is: were the acts done in the course of his employment or, in this case within the exercise of the policeman's duty. The acts may be so done even though they are done contrary to the orders of the master."*

To begin with, it is an agreed fact in the Joint Scheduling Memorandum that the Defendant has locus to be sued for the acts and omissions of individual employees or agents and various departments of government.

Secondly, the Plaintiff led evidence to show that the police officer who shot him had been on foot patrol to the knowledge of the DPC. This evidence stands uncontroverted and clearly proves that the negligent police officers were operating within the scope of their duty and as such the Defendant is vicariously liable for their tortious actions.

The plaintiff's counsel invited this honorable court to find that the Defendant is vicariously liable for the wanton and negligent acts of the police officers as pleaded and proved by the Plaintiff.

The defence counsel submitted on the law on vicarious liability and he confirmed that it was well stated by the plaintiff and he associated himself with it as stated and relied on the same authority of ***Muwonge vs AG, CA No. 10/1996***.

In regard to the facts before this case the plaintiff failed to prove that the alleged shooting was done by Police Officers. Needles to repeat, PW2 statement given at Hospital where she stated that the shooting occurred after security guard was alerted of thieves.

This is a firsthand information and so, the Plaintiff cannot turn around and shift the burden to Police Officer.

Thus it is our humble prayer that this issue is resolved in the negative.

Resolution

PW1 testified to the fact that it was a police officer who shot him while in the due course of his employment. The defendant did not lead evidence before this court to contradict the plaintiff's testimony and neither was the evidence challenged during cross examination.

This court agrees with the submissions of counsel that the Plaintiff led evidence to show that the police officer who shot him had been on foot patrol to the knowledge of the DPC. and that since this evidence stands uncontroverted and clearly proves that the negligent police officers were operating within the scope of their duty and as such the Defendant is vicariously liable for their tortious actions.

Furthermore as counsel submitted, it is indeed a well-established rule that a master is liable for the acts of his servant committed within the course of his employment.

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*)**

This issue is therefore answered in the affirmative.

Issue 3
What remedies are available to the parties?

The plaintiff in his pleadings prayed for:

1. A declaration that the Defendant is vicariously liable for the acts of the Police Officers.
2. General damages.
3. Loss of earnings.
4. Special Damages
5. Exemplary damages
6. Costs of the suit
7. Interest on the damages at 25% from the date of filing the suit.

General damages
The plaintiff suffered multiple gunshots to his chest and back, leading to fractures of the right 4th and 5th ribs. He had *a hemopneumothorax and spinal injury (T7 & T8), resulting in paraplegia.* Resulting from these injuries and paraplegia, the plaintiff suffered permanent double incontinence and has a permanent urinary catheter in situ and permanently uses diapers.

The plaintiff submitted that the evidence establishes that he suffered a lot of pain for a prolonged period of time and the degree of permanent incapacity he suffered as a result of the injury was assessed at 100%. It would therefore be just and in the interest of fairness that the Plaintiff be awarded compensatory damages to cover non-pecuniary loss, ie the injuries, pain, embarrassment, mental anguish and permanent incapacity he has suffered and continues to endure as a result of the shooting, and

we propose that a sum of UGX 500,000,000/= (Uganda Shillings Five Hundred Million) would suffice for this purpose.

Further to the foregoing, the Plaintiff will continue to incur certain costs/ expenses for the remainder of his life as a result of his injuries. For instance; costs of diapers, catheter & urine bags, personal caretaker, physiotherapy services, wheel chairs et al.

It is trite that compensation for future expenses falls under General Damages and court ought to make consideration of the same in assessing general damages due to an injured party.

As was held in ***Robert Coussens vs Attorney General (Supra***),

> *"Prospective loss cannot be claimed as special damages because it has not been sustained at the date of the trial. It is therefore, awarded as part of the general damages. The plaintiff no doubt would be entitled in theory to the exact amount of his prospective loss if it could be proved to its present value at the date of the trial. But in practice since future loss cannot usually be proved, the Court has to make a broad estim ate taking into account all the proved facts and the probabilities of the particular case. "*

The plaintiff's counsel invited the court, in its assessment of general damages to be awarded, to include a reasonable amount to cater for future expenses to be incurred as pleaded by the Plaintiff.

As far as damages are concerned, it is trite law that general damages are awarded in the discretion of court. Damages are awarded to compensate the aggrieved, fairly for the inconveniences accrued as a result of the actions of the defendant. It is the duty of the claimant to plead and prove that there were damages losses or injuries suffered as a result of the defendant's actions.

I find that the plaintiff has discharged his duty to prove damages and injuries as a result of the defendant's actions.

The plaintiff is awarded ***UGX 50,000,000 as general damages***.

Loss of earnings

Counsel submitted that the Plaintiff pleads in paragraph 7 of the Plaint, that before he was permanently disabled, he was a successful businessman, trading in cattle, he sold an average of 100 heads of cattle per month and would make an average of UGX 80,000/= per head of cattle sold, giving him an average income of UGX

8,000,000/= Per month and a total annual income of UGX 96,000,000/=. At the age of 50 years at the time of the shooting, the plaintiff had a further working life in his trade for a minimum of 20 years up to the age of 70 years. Accordingly, the plaintiff suffered a loss of earnings equivalent to annual income of UGX 96,000,000 x 20yrs = 1,920,000,000/= We therefore invite the honorable court to award this amount as loss of future/prospective earnings by the Plaintiff.

Defendant's counsel submitted that PW1 Kaggwa failed to produce his book of accounts to court. He was directed to produce the same but to date, he has not. He also does not process a Tin No. to show that, if indeed he is a business man of such status, he was paying tax. PW1 does not even possess a cattle trader's License. The question that remains to be resolved is, whether it is possible to carry out such a business without a trading License? He failed to also show any cattle movement permit to court yet he claimed to have been in the said business for 30 years and acknowledges that it was compulsory to have cattle movement permit while carrying out the said business.

PG1 which he relied on is another person's license/ permit. My lord PWIV Asiimwe who claimed to have had a business relationship with the Plaintiff failed to identify himself as a member of CATDA, during cross examination. He did not produce any evidence to show how he and PW1 carried out their transactions. In addition, he failed to show any deposit slips of cash payment advanced to PW1. However, he confirmed to court that movement permit bears the name of person selling cattle.

The Plaintiff failed to prove that he was earning 96,000,000/= annually. He did not produce evidence to prove his allegation. The law is to the effect that he who alleges must prove. Therefore we submit that court should be pleased to reject this claim. Moreover the Defendant's agent did not cause this loss to the Plaintiff. The claim of 1,920,000,000/= is speculation and court cannot be dragged to make orders which are speculator or issue orders in vain.

In ***Parry vs Cleaner (1970) A.C. 1*** Lord Morris of Berth - Y - Guest said at page 22:

> *'in my view, the general principle and the general approach in calculating monetary loss in a case such as the present is that an injured person should receive such an amount of money as will put him in the same position as he would have been in f he had not received the injuries (see: British Transport Commission vs Gourley (1956) A. C. 185, 197). A plaintiff should receive such a sum in money as will represent the actual loss which has resulted to him in consequence of the defendant's negligence. This was described by Diplock L. J in Browning vs War Office (1963) IQB 750, 766 as "the difference, between the money which the plaintiff would have received had he been able to*

continue the gainful occupation which lie would have followed if he had not been physically injured, and the money which he has received or will receive (on the assumption that he has acted or will act reasonably) while his ability to carry on that occupation is extinguished or reduced by his physical injuries."

The plaintiff is therefore entitled to compensation for the loss of future earnings. However from the evidence on record, the plaintiff did not adduce enough evidence to warrant the grant of 1,920,000,000/=. There were no receipts acknowledging payments from his buyers. The plaintiff did not produce the cattle movement permit or other evidence to show that he is a licensed cattle trader.

PW3 and PW4 also failed to bring proof of their transactions with the plaintiff.

The plaintiff however led evidence to show that he had a steady income based on the bank statements brought before this court for the period of 19th May 2009 to 6th October 2014. Within that period alone, the plaintiff amassed a total of UGX 221,087,666 which is proof to this court that the plaintiff had a steady source of earning.

With due regard to the submissions of counsel for the plaintiff and the evidence on record, this court awards the plaintiff **UGX 100.000.000** as loss of earnings.

Special Damages

As submitted by counsel for the plaintiff, it is indeed trite that special damages must not only be specifically pleaded but they must also be strictly proved (see ***Borham-Carter v. Hyde Park Hotel [1948] 64 TLR.***

The plaintiff led evidence to show that he incurred expenses for his treatment in Uganda and India. He testifies that he received emergency treatmeant at Bulamu Clinic, and Kitovu Hospital. He had tests and an MRI scan at Kampala Hospital and was admitted for a month at Mulago Hospital. The Plaintiff was then referred to Yashoda Hospital in India, for further treatment by Dr. Ravi Suman Reddy a consultant neuro surgeon.
The Plaintiff tendered documentary evidence in the form of receipts, as proof of his expenses, to wit:
"PE3" –

Medical Receipts (Uganda) for a sum of UGX 7,286,600/= (Uganda Shillings Seven Million Two Hundred Eighty Six Thousand Six Hundred) – *See pages 52-68 of trial bundle.*
"PE4" –
Medical Receipts (India) for a sum of USD 18,252 (US Dollars Eighteen Thousand Two Hundred Fifty Two) – *See pages 69-71 of trial bundle.*
"PE5"
Transport Receipts for a sum of UGX 3,020,000/= (Uganda Shillings Three Million Twenty Thousand) – See pages 72-90 of trial bundle.
Plus US Dollars 2,500 for Air Tickets (See Page 81 of Trial Bundle
"PE6"
Visa Fees to India - UGX 470,000/= (page 91).
Adult Diapers 60,000/= per 30 piece Pack = 120,000 per month x 72 months
Totaling to Uganda Shillings 8,640,000/= (Eight Million Six Hundred Forty Thousand) as at the time of filling this suit.
Catheter and Urine Bags at UGX 4,500/= each per day = UGX 135,000/= per month x 72 months. Totaling to UGX 9,720,000/= (Nine Million Seven Hundred Twenty Thousand) as at the time of filing this suit.
Physiotherapy services UGX4,300,000/= (Uganda Shillings Four Million Three Hundred Thousand)
Wheel chair UGX 2,000,000/= (Shillings One Million)
Personal caretaker at Shs 300,000/= per month since June 2013 to date of filling this suit (300,000x72 months) = UGX 21,600,000/=
The sum total of expenses so far incurred by the Plaintiff is UGX 55,038,600/= (Uganda Shillings Fifty Five Million Thirty Eight Thousand Six Hundred) plus USD 20,752 (US Dollars Twenty Thousand Seven Hundred Fifty Two.)

The defendant's counsel submitted and prayed that court be pleased to reject the particulars of the special damages for not being original and for failure to be tendered by another as required by the law.

However I have perused all the records adduced by the plaintiff and I am satisfied that the plaintiff has proved the special damages.
The plaintiff is awarded special damages to the tune ***of UGX 131,758,744*** as prayed for and proved.

Exemplary damages
Counsel submitted that it is clear from the Plaintiff's evidence that the acts and conduct of the Plaintiff were wanton, "oppressive, arbitrary and unconstitutional," and therefore an award of Exemplary Damages would serve not only as a punitive

measure but also as a deterrent the commission of similar wanton and negligent acts in the future.

The rationale behind the award of exemplary damages: exemplary damages should not be used to enrich the plaintiff, but to punish the defendant and deter him from repeating his conduct.

An award of exemplary damages should not be excessive. The punishment imposed must not exceed what would be likely to have been imposed in criminal proceedings, if the conduct were criminal. Per Spry V.P. in ***Obongo Vs Municipal Council of Kisumu [1971] EA 91***. All circumstances of the case must be taken into account, including the behaviour of the plaintiff and whether the defendant had been provoked. See ***O'Connor Vs Hewiston [1979] Crim. LR 46, CA; Archer Brown [1985] QB 401.***
Bearing those principles in mind I find that an award of ***UGX 15,000,000*** is sufficient as exemplary damages.

The plaintiff is awarded interest at a rate of 15% special damages from the date of filing the suit until payment in full and 10% on general damages, loss of earnings from the date of judgement until payment in full.

Costs to the plaintiff.
I so order.

SSEKAANA MUSA
JUDGE
2nd August 2019