



**IN THE HIGH COURT OF UGANDA SITTING AT GULU**

Reportable  
Civil Suit No. 020 of 2016

In the matter between

**OJARA THOMAS**

**PLAINTIFF**

And

**MEWA BUS SERVICES LIMITED**

**DEFENDANT**

**Heard: 19 February 2019**

**Delivered: 11 April 2019**

**Summary: Personal injury claim resulting from a traffic accident.**

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**JUDGMENT**

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**STEPHEN MUBIRU, J.**

Introduction:

- [1] The plaintiff sued the defendant for the recovery of general and special damages for negligence, interest and costs. His claim is that the defendant company is the owner and operator of a passenger bus service and bus registration number UAM O45 V is part of its fleet. The plaintiff was a fare paying passenger on that bus on the night of 30<sup>th</sup> April, 2014 on his way from Gulu Town to Kampala, when it was involved in a collision at or around Koro Balogal. As a result of that collision the plaintiff sustained multiple injuries including a compound fracture of his left leg resulting in a life threatening bone infection that necessitated multiple surgical operations within the country and abroad at great medical expense. He contends the defendant's driver was negligent in causing that accident.

[2] In its written statement of defence, the defendant despite acknowledging that the accident did occur and that the plaintiff was one of the fare paying passengers on the ill-fated bus that day, the defendant contends its driver was not negligent. The defendant as well refutes the claim for special damages made by the plaintiff.

The plaintiff's evidence:

[3] In his testimony as P.W.1, the plaintiff, Ojara Thomas, testified that on 30<sup>th</sup> April, 2014 when he was travelling to Kampala by the 11.00 pm bus, the bus was involved in an accident at Koro Bar Olal. The plaintiff was seated right at the front on the passenger seat beside the driver. The driver of the bus was driving very fast and when they reached Koro Barogal on a straight road, he saw a trailer at a distance of about 200 metres. He asked the driver whether he had seen it and he said the lorry had been down there at that spot for some days. As they approached the lorry, the driver was moving very fast. The trailer was on the left side lane as one drives to Kampala. As the driver was in the process of overtaking the trailer, they saw an on-coming lorry flashing its headlights. They were by then about 50 metres from the broken down trailer. The driver of the bus tried to manoeuvre between the fallen trailer and the oncoming truck. There was a collision and he blacked out, only regaining consciousness as he was being pulled out of the bus. He was placed on a pickup and taken to the main hospital at Gulu Regional Referral Hospital. He was later taken to the military barracks and was placed in an army ambulance and was taken to Lacor Hospital where he became unconscious again.

[4] The plaintiff regained consciousness after five to seven days while at Lacor Hospital where he was admitted for ten days. He had sustained a compound fracture of the left knee. There was a cut on the left foot around the ankle, which was holding only by the skin. While at Lacor, a team of doctors came who said they wanted to amputate his leg. He began crying and asked the doctor for a

referral. He was referred to Mulago Hospital in Kampala. He asked to be taken to Kumi instead where he knew there was an orthopaedic centre. Several operations were done, more than thrice, repairing his leg. Two strips of metal were inserted and he had them about two months while admitted in the hospital. There was a lot of pus from the bones and he was told his bone was dead. It took time for them to treat that until they opened the bone and cut a section of the thigh bone and the pus stopped. He was left with one bone and he did not know how much was left of the other. Right from the ankle to the hip he has one bone and he was advised not to go to physical therapists. In Kumi he was on and off for one year.

[5] He received treatment in stages. He would be periodically discharged for about two weeks to change environment and would spend at least two months at a time in hospital. He developed vomiting complications. He had lost blood and he was referred to Mulago Hospital. He had 18 units of blood transfused and that is when his normal colour returned. He was taken back to Kumi for bone treatment. He was officially discharged from Kumi in 2015 but visits frequently whenever he feels a sharp pain. He still visits the hospital. The condition is improving, he can walk with crutches. He cannot bend the leg at the knee nor twist the ankle. He still feels pain on and off.

[6] For two years he could not go to the office at UBOS Gulu. He was serving on contract and received payment on contract but for six months he could not be paid because he was away from work. It was during June 2015 - January 2016 that he was not paid. I was earning shs. 850,000/= per month. He is a data collector and every month he would receive shs. 400,000/= He went through interview and he was given a permanent job. He holds a degree in agriculture and he was farming on his land in Amuru. His farming stopped with the accident. He would grow maize and rice over 100 acres in a year. There are only two seasons but he targeted only the second rains in order to harvest during the dry season. He would earn shs. 55,000,000 - 60,000,000/= per year. People have

now began encroaching on his land and he has a pending case over that in court.

[7] Treatment cost him a lot of money. For the medical treatment he spent over shs. 20,000,000/= He also spent money on transport using special hire all the time. He had four caretakers constantly and he had to sustain them though Kumi is an expensive town. He would spend shs. 12,000/= to 15,000/= daily. Some of the expenses were receipted. He has some of the receipts in respect of the medical and transport expenditure. Medical treatment cost him shs.19,217,300/= Transport cost him shs. 29,652,750/= Receipted feeding is shs. 18,810,000/= He paid for a police report at shs. 82,500/= Photocopying and communication, shs. 800,000/=The total is shs. 69,748,650/= That was the close of his case.

[8] P.W.2 Inspector Ojobile Festo, testified that he was O/C Traffic Gulu from 2012 to 2014. On 1<sup>st</sup> May, 2014 he visited the scene of accident and drew a sketch map. At the scene he found three vehicles were involved in the accident. One was an Isuzu bus UAM 045 V belonging to the defendant. The second was a Mitsubishi Fuso Truck UAM 938 N. The third was a trailer UAR 939M / ZD 9839. His first visit to the scene was on the night of the accident and he found many people injured and crying. The bus UAM 045 V was facing Kampala and was slightly inclined toward the road surface. It was more or less in the middle of the road. The Isuzu Truck UAM 938 N was heading to Gulu, next to the trailer but on its lane. The trailer UAR 939M / ZD 9839 truck's head was covered with orange tarpaulin. The head was about half a metre into the lane from the edge of the road. The lane is 2.35 metres. He could not remember exactly how much space was left between the fallen truck and the middle of the road. There is no way the defendant's driver could have bypassed the truck without crossing over into the opposite lane, since the trailer had blocked part of the road.

[9] According to the highway code, once a driver's lane is blocked, that driver is required to stop and wait for oncoming vehicles to clear the road then bypass the

obstacle. The bus driver had to stop because of the oncoming truck which had the right of way. There was no sign of stoppage or skid marks. It means the driver continued to drive without stopping at the obstacle. The weather was good. It was dry weather. The edges of the road at the scene had been degraded by the elements reducing the tarmac on the road surface from 7 to 5.7 meters. He heard from the people at the scene that the bus driver was among those injured and had been taken to hospital. He saw him after five months and he was limping. He was charged but had jumped bond. The bus was taken for inspection by the Inspector of Vehicles, a one Mbwayi Samuel, and a report was generated.

[10] On basis of the fact that the chassis was deformed, he deduced that the bus was moving at a high speed. The driver of the bus had breached the highway code. He overtook when there was an oncoming vehicle. He took a risk. The trailer was an obstacle. There were branches of trees on the road to warn drivers from Gulu of the presence of the trailer on the road. He was supposed to slow down and if necessary stop but he did not do either. The trailer was visible from beyond fifty metres. It was a straight road. It was level, it was not a slope. He had been at the scene two days before the accident because of the fallen trailer. It had not been removed because of scarcity of breakdowns. The bus had been moved from the point of impact when he arrived after the accident. He found the scene of the accident had been tampered with to that extent. He did not find any skid marks. There were no skid-marks left by the Mitsubishi Fuso Truck UAM 938 N. He drew the sketch at 6.00 am the following morning. He did not bother about the truck because it was on its lane. I investigated the truck but did not see any skid marks.

[11] P.W.3 Dr. Omona Otto Charles, 67 years old, testified that he examined Ojara Thomas, the plaintiff, at the request of the Uganda Police. Exhibit P. Ex. 4 contains his findings which were that he was unable to ambulate freely except with the use of assisting devices. He analysed reports from Lacor Hospital and Kumi Hospital. He found multiple fractures on the left leg. The left femur was

cracked and the knee joint was unable to flex. The left ankle joint was torn and mobility was disabled. He suffered a chronic infection of the left leg. It caused the death of a bone within that left femur and it was removed. External fixation was done. The internal structure of the bone was removed. It takes the bone long to reconstruct that part. X-rays were done to confirm the findings. The harm was dangerous. He had lost consciousness for one week and therefore his life was in total danger. He signed his report, stamped it and forwarded it to the police. In his view, the plaintiff sustained permanent disability of 75%.

- [11] An orthopaedic surgeon, Dr. John Ekure the regional orthopaedic consultant, did the assessment and estimated the permanent damage. He received his report on 30<sup>th</sup> May, 2015. He worked with him and could recognise his signature. His finding were that the bone was broken into several pieces and the patella was torn. The bone was broken and dislocated at the ankle joint too. He underwent several surgeries but sustained an infection. He was advised that if there is pain at any time, the patient should be taken to him. The witness too examined the plaintiff recently and found that he is normal mentally but has physical disability, and erectile dysfunction is total at the moment. He cannot easily escape in case of fire.

The defendants' evidence:

- [12] In defence, D.W.1 Acaye Ivan, testified that during the year 2014 he was working with the defendant company as a tonne-man. He was on the ill-fated bus 30<sup>th</sup> April, 2014 when it departed from Gulu bus park at 11.00 pm heading to Kampala. Before they set off, prayers were conducted. He then told everyone to fasten their seat belts and they started the journey. At Koro sub-county, he checked all passengers and everyone had a seat belt on. The plaintiff too had a seat belt on. As he was placing a passenger's luggage on the overhead rack, he noticed that the plaintiff had placed his leg on the dash board, but he continued placing luggage onto the rack. The driver began slowing, he bent low and saw a

vehicle ahead. It was a trailer which had fallen. He continued with his work. Suddenly there was a collision involving the bus.

[13] He heard the sound of a bang and felt the shock of the collision. He grabbed the rail. No luggage fell. He was the only person standing. The time lag between his sighting of the trailer and the bang was two to three minutes. The trailer was about 200 meters away when he saw it. People began screaming and calling on Jesus. He was not hurt. The driver got injured, the plaintiff and four or five other passengers too were injured. Those occupying seat Nos. 1, 2, 3 and 7. They were on the front passenger side of the bus. I do not know whether any more people were hurt. I was at the scene until morning. When the Fuso Truck was removed, since it had pressed the bus onto the trailer, only the bus remained. The truck was driven away. The bus was not pushed off the road until the traffic officers came. He did not go to hospital that night. He saw skid marks. The bus left skid marks on the left side of the road. The bus had suddenly braked. The bus had slowed down by the time of the collision.

[14] He had worked with the defendant for about five years before the accident. When the bus was taken for repair, he secured another job. The bus repairs took a month and it was back on the road. It operated for some months and then sustained an engine knock. By that time he was no longer employed by the defendant. The bus driver on the fateful day was Ojok Christopher. He sustained injury on one of the legs. It was on the lower front part, near the ankle, as a result of the collision. The driver was trapped in the wreckage by the steering which pressed his chest. The plaintiff too sustained injuries on the leg. He fell in front of his seat, below the dash board. The witness was in shock and could not remember the details. People were helping those who were injured as he stood by in shock, not doing anything.

[15] He could not remember who was seated at seat No. 2. He saw an orange tarpaulin on the fallen trailer. The Fuso truck was on its lane, the lane from

Kampala to Gulu. The Fuso knocked part of the bus on the driver's side. The bus had left Kampala the previous day, Monday 29<sup>th</sup> April, 2014. They left Kampala between 11.00 am - 1.00 pm and arrived in Gulu at 7.30 - 8.00 pm. He was on the bus, being driven by Ojok Christopher but he did not see the trailer because he was seated on the staff seat. The night of the collision is when he first saw the trailer. As the driver braked he could not tell whether the trailer was in motion or not. The trailer head was in the bush but the trailer was on the road.

[16] Before the collision, when the driver braked suddenly, he peeped to see the cause. The bus was proceeding at about 30 kms per hour. The obstacle was 150 metres away but he could not tell why the driver was braking at that distance. It is because of the hard braking that he looked. He did not see any vehicle approach when he looked. He was near the exit and proceeded with his work. He had placed two bags on the rack when the collision happened. He grabbed the rails as a result of the collision and he was not injured. He did not see the Fuso truck before the collision. The driver said the Fuso truck pressed the bus onto the trailer. He said the truck had no lights and he did not see it. It was too late to avoid the collision when he was it. The bus was on the left. It is the truck which left its side and banged into the bus. The braking before the collision was not sudden but hard.

[17] D.W.1 Akweny John, testified that he was one of the passengers on the bus on the night of 30<sup>th</sup> April, 2014. They set off at around 11.02 pm after a prayer. An announcement was made for all passengers to wear their seat belts. He was seated in the fourth seat behind the driver. He recognised the plaintiff when he was trapped in the bus together with the driver. He was seated in seat No. 1. He saw him at the time they were told to fasten seat belts. He saw the plaintiff wear his seat belt as well. At a point past Koro, at around 11.20 pm the driver knew about the vehicle which had fallen on the road because he slowed down but a truck that was coming from Kampala banged into them. The bus was by-passing the trailer when the truck collided with the bus and both stopped. He did not get



hurt but many people got hurt. People struggled to get out. The driver's door could not be opened. He saw an oncoming vehicle flashing lights before the collision. By the time he saw it, it was near almost knocking the bus. He had not seen the truck before it flashed its lights. He got scared when the bus was braking. The braking was sudden and because of the light. The oncoming truck was on its lane. The driver did not tell him that he knew of the fallen truck. He assumed so because he had slowed down. There was sudden braking at the point of impact. He saw a tarpaulin on the trailer. The colour could be seen from a distance. The fallen trailer was about 100 metres away when the bus began slowing down. When the bus approached the trailer it was not at a high speed. He had not see any truck as they by-passed the trailer. The light of the truck flashed as they by-passed the trailer. He got scared by the bang. It hit the bus on the side of the driver. It was not a head on collision. The bus driver did not brake or stop but was only stopped by the impact.

- [18] D.W.2 Charles Okot Kit, one of the defendant's directors testified that some of the safety measures on their buses include; safety belts for all passengers, fire extinguishers, first aid box. In this case the bus had safety belts on all seats. It had 65 passengers on board but only a few sustained scratches. Because of the safety belts, the injuries were limited. The plaintiff, a person he has known since childhood, was one of the passengers on the bus and he told him that he sustained injuries on their bus and claimed compensation. Three vehicles were involved; their bus, a trailer that had broken down and a ten-tyre truck. They advised the plaintiff to jointly sue the owners of the other vehicles involved. The oncoming vehicle squeezed their bus onto the truck. The trailer had not been removed within 24 hours. It had been on the highway for over 48 hours. The other two directors of the defendant are Hon. Simon Tolit and Hon. Penytoo Ochieng. He came with Hon. Simon Tolit to the scene of crime. He did not record a statement at the police. Odong Michael was the conductor of that bus that day. Their driver Obita was given police bond after the accident but he did not know whether the driver was still on police bond. The driver quit the job in 2015. The

driver sustained a small cut on his leg. Many other passengers apart from the plaintiff got injured. They visited all that had been injured at St. Mary's Lacor Hospital. Some had been discharged. About ten to fifteen were still admitted at Lacor Hospital. They contributed some small money towards the treatment of the plaintiff. It was in the region of shs. 6,000,000/= given in about three instalments. The plaintiff did not sign for that money. They contributed some money for the treatment of the other passengers. Most of them settled their own medical bills since the injuries were minor.

[19] The defendant does not have a policy regarding injured passengers in case of accident. The practice is that the directors sit down as a company and decide what to do. They deny responsibility and only step in when they choose to. These were ex-gratia payments made to the injured passengers. They were paid as sundries or miscellaneous expenditure. The directors signed a cheque together. It is Hon. Simon Tolit who signed for the money from the company. He signed on the cheque payment voucher. He returned some accountabilities. From the plaintiff he never returned accountability. The defendant's bus was insured by First Insurance Company Limited. The defendant took out a comprehensive insurance policy at an aggregate of about 250,000,000/= They reported to the Insurance company following the accident and they were told to approach Ojara, the plaintiff, and obtain documentation from him such as medical bills. They informed him verbally and the insurance company contacted him. He saw a discharge voucher dated 27<sup>th</sup> October, 2016 by which the plaintiff was to be paid shs. 10,000,000/= He did not know whether that payment was made.

[20] The defendant disposed of all its buses to Makome Bus Limited. Other were sold off to other companies. The defendant still has the bus that was involved in this accident. It developed some mechanical problem. Tolit is neither a shareholder no director in Makome Bus Limited. The other director as well is not involved in Makome Bus Limited. The bus returned to the road after the accident. The defendant helped Ojara out of corporate social responsibility. The collision was

not the fault of the defendant's driver. The driver's life was saved by the safety belt and the fact that the bus was not speeding at the time. The plaintiff Ojara did not have a safety belt on but was not ejected because the speed was not fast. He had his leg on the rail according to the driver. The bus touched the oncoming truck and swerved to the left.

[21] D.W.3 Ojok Christopher testified that he was the official driver of the bus at the time of the accident. The accident happened on 30<sup>th</sup> April, 2014 at Bar-Ogali at about 11.00 pm when they were proceeding to Kampala. Before setting off, prayers were recited. The tonne-man announced that seat belts should be put on. At Bar-Ogali he saw a lorry with orange tarpaulin and he reduced speed. The lorry was about 150 metres away. He thought the lorry was moving yet it had broken down. It had covered part of the road. He reduced the speed to 20 kms per hour. He swerved into the lane for oncoming vehicles. He had nearly bypassed the truck when he saw an oncoming truck and it flashed its lights at him. It knocked the bus and pushed it onto the trailer that had broken down on the road. It pressed the bus onto that trailer and it almost killed him. The oncoming lorry had the impact on his side of the door. He had the safety belt on and he remained on his seat but the door which had been crashed, pressed against him.

[22] Before the collision, he had seen a passenger who was seated at the front. He had not put on the seat belt. He had raised either one or both legs and put them on the rail. I did not pay much attention to this because he was driving. It was one leg but he could not remember whether it was the left or right leg. He noticed this from the railway crossing at Layibi, about five kilometres from the scene of accident. The driver of the lorry came out after the accident and began quarrelling with him. That driver was reeking of alcohol. The driver from Kampala was on his lane while the bus was overtaking the trailer. He thought there was nothing coming and he asked for a way by using full lights and then flicking the lights.

[23] As he overtook, he had full lights on. He could see within a distance of 100 metres but the oncoming truck was only about 10 metres away when he saw it. His view of the road ahead had been obstructed by the broken down truck. He did not see the oncoming truck because it had no lights on. He experienced pain at the ribs and chest as a result of the collision. As people pulled him out, some object pricked his left leg and cracked one of the bones at about four inches below the knee. It took him six months to recover fully. He did not know who else was hurt in that collision. He was the last person to be pulled out of the wreckage. All the passengers had come out of the bus by the time he was pulled out and he did not know where they went.

[24] He kept on reporting to the police for about two months when the O/c traffic stopped him. He was not given a discharge form but he was told that if the complainant came in future, they would inform him. He still has a pending case at the police. The rail on which the plaintiff had his leg is in the front section of the bus. It is below the windscreen. It is meant for holding onto in case of sudden braking. He did not say anything when he saw the plaintiff with his legs on the rail because passengers are always wild. He feared he would be reported to his bosses that he does not respect passengers and he was concentrating on the road. There was no obstruction between me and the passenger. He saw one leg up but he did not know which one. It was dark in the bus as they always switched off lights when they travelled at night. He braked when he saw the oncoming vehicle. The oncoming truck crashed into the bus and pushed it against the broken down truck. He saw the full lights of the oncoming vehicle, he dimmed his lights and stopped thinking that the oncoming truck had seen his lights and would stop. The truck was about ten metres away when he saw it. He saw the broken down truck from a distance of about ten metres. I did not see light because on the road at night he is always on the lookout for light. He wanted to approach the truck and see what was wrong with it. He stopped at about ten metres, and moved onto the other lane when he realised there were no fallen objects from the

truck. He was climbing a hill and so he had engaged gear number two. The road was straight ahead of him.

[25] He saw the lights of the oncoming truck when it was about ten metres away. He had not seen any light before that. He noticed the lorry only when it flashed its light. The oncoming truck was moving fast. On knocking the bus, the truck stuck with the bus. He had stopped by the time of impact. His leg was not affected during the impact. The chest pain was caused by the crashed door. There was no moonlight.

[26] D.W.4 Okello Simon, was travelling to Kampala that evening and he boarded a bus registration number UAM 045 V that departed at 11.00 pm and he took seat number three. As they approached the railway crossing at Bar-Ogalo a trailer had fallen onto their lane. They were not driving fast. He saw it when it was about 200 meters ahead. In a minute or two, the bus had reached the fallen vehicle and as the bus tried to overtake, he saw an oncoming vehicle without lights. It suddenly flashed its lights and shortly thereafter there was a collision. The bus remained in the middle with the truck on the right and the fallen trailer on the left. He did not get hurt. As the bus neared the fallen trailer, the passenger on seat one had both his legs on the rail. He heard him crying after the crash. He heard many other people crying after the accident. They were crying because they had been injured. There were more than ten people who were hurt. Seat number three is on the passenger side of the driver. He was seated behind the plaintiff. I kept the receipt for that day. After the accident he returned home. He did not record any statement at the police.

[27] The stationery truck was covered by an orange tarpaulin. It was truck with a trailer. As the driver of the bus approached the fallen vehicle he reduced the speed and moved into the other lane as he approached it. He changed lane about 15 meters from the fallen truck. The driver did not stop, he reduced speed. There was no light to show that there was an oncoming vehicle and so he did not

stop. The impact happened as they were in the middle of the road before they overtook the fallen truck. They were in process of overtaking the truck. The bus was in motion as they moved slowly. Other passengers on the bus were looking at the fallen vehicle on the road. He saw the oncoming vehicle and my attention was on the fallen vehicle but when he turned he saw an oncoming vehicle and the collision happened. It was a bright light. He noticed the oncoming vehicle as they by-passed the fallen truck. As he turned in the process of overtaking the fallen truck that he saw the oncoming vehicle. He had not seen that light before he changed lanes. The truck flashed the light and turned it off when it was about five metres away.

The issues for determination;

[28] At the scheduling conference conducted on 16<sup>th</sup> August, 2018, the following were agreed upon by the parties as the issues to be decided by court;

1. Whether the defendant's driver was negligent.
2. Whether the plaintiff is entitled to the reliefs sought.

Final submissions of counsel;

[29] In her final submissions, Ms. Roselyn Kunihiro counsel for the plaintiff argued that there were no skid marks at the scene indicating that the bus driver did not stop when he encountered the obstacle on his side of the road. The bus driver instead attempted to overtake the obstacle despite the oncoming vehicle. The bus driver took a risk which resulted in a collision from which the plaintiff sustained injuries. The bus driver did not take any precautions and as such his conduct was negligent. Since he acted within the scope and in the course of his employment at the time, the defendant is vicariously liable in general and special damages.

[30] In response, Mr. Charles Dalton Opwonya, counsel for the defendant argued that it was wrong for the plaintiff to have sued the defendant, whose driver saved his life, and not to have sued the owners of the other two vehicle involved in the collision, whose drivers were the primary cause of the collision. It is the plaintiff's decision to place his leg on the rail that caused the injury to his leg. Although the bus driver was able to see the fallen trailer from about 150 - 200 meters away, he did not see the oncoming truck because its headlights were off. The bus driver at the time of impact had slowed down and was in the process of overtaking the trailer. The oncoming truck only flashed its lights at a very short distance before the impact. It is the bus driver's cautious approach that saved the passengers from fatalities. He was not negligent in any way and the suit should therefore be dismissed.

**First issue; Whether the defendant's driver was negligent;**

[31] Negligence is the breach of legal duty to take care by the defendant which results in undesired damage to the plaintiff. Thus its ingredients are (a) a legal duty on the part of the defendant towards the plaintiff to exercise care in such conduct as falls within the scope of the duty; (b) breach of that duty; and (c) consequential damage to the defendant (see *Blyth v. Birmingham water works* 1856 11 Ex Ch. 781; *Senyonjo Frederick v. Construction Engineer and Builders Pakwach Arua Road*, [1979] HCB 232 and *Winfield on Tort*, eight Edition, Page 42).

[32] Negligence is also defined as the omission to do something which a reasonable man guided upon the consideration which ordinarily regulates the conduct of human affairs would or do something which a prudent and reasonable man would not do (see *Donoghue v. Stevenson* [1932] AC 562). Negligence is the omission of an action that a reasonable person would do or performing an action that a reasonable person would not do.

- [33] It is trite that the plaintiff always bears the onus of proving negligence on the part of the defendant on a balance of probabilities. In determining whether the plaintiff has succeeded in discharging this onus, the court has to view the entire evidence which was led during the trial in its entirety. Where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities.
- [34] The question in this suit is whether a reasonable driver in the position of the defendant's driver would foresee the possibility of colliding with an on-coming motor vehicle; and would take reasonable steps to guard against such occurrence; and whether the defendant failed to take such steps. The applicable test is how a reasonable person would have acted under the same specific conditions prevailing at the time of the accident, as experienced by the driver of the motor vehicle whose conduct is being scrutinised.
- [35] The plaintiff alleges that the collision was caused solely by the negligent driving of the defendant's driver, who was negligent in one or more or all of the following respects;- he was over-speeding; he failed to keep his vehicle under proper control; he failed to apply brakes timeously, adequately or at all; he failed to avoid the collision when, by exercise of reasonable care, he could and / or should have done so; and he failed to keep a proper lookout. The defendant refutes this and contends that the driver was not negligent in that in circumstances involving the oncoming truck whose headlights were off and the broken down trailer that had not been removed from the road for over 24 hours, it is the driver's slow speed and split second prudent actions that prevented fatalities from occurring among the passengers on the bus.



- [36] According to the High Way Code, the general rule for driving on Uganda's roads is “keep left pass right.” Any person driving a vehicle on a public road has to do so by driving on the left side of the roadway and, where such roadway is of sufficient width, in such manner as not to encroach on that half of the roadway to his or her right. Such encroachment is permissible where it can be done without obstructing or endangering other traffic which is or may be on such half and for a period and distance not longer than is necessary and prudent and provided that it is not prohibited by a road traffic sign.
- [37] Where the roadway is of sufficient width divided into traffic lanes by appropriate road traffic signs for two or more lines of moving vehicles moving in each direction, passing of a vehicle, object or obstacle on the left of a vehicle is permissible if the person driving the passing vehicle can do so with safety to himself or herself and other traffic or property which is or may be on such road. Vehicles may be passed on the left hand side in circumstances provided for in *The Highway Code* (March, 2009 edition by the Ministry of Works and Transport).
- [38] It is not in dispute in this case that the collision occurred as the defendant's driver had pulled out of his lane, onto the lane for oncoming traffic, and was in the process of by-passing the broken down trailer that had blocked part of the nearside lane. In a country whose highway code is premised on “keep left pass right,” proof that a motor vehicle on a straight road collided with an oncoming vehicle in a lane intended for oncoming traffic, is prima facie proof of negligence.
- [39] When overtaking a stationary object on the road or swerving into the lane meant for on-coming traffic, a driver must anticipate the possibility of colliding with oncoming traffic. A driver undertaking that manoeuvre is thus under a duty to regulate his speed and his distance in light of the oncoming traffic ahead so as to be able to avoid a collision. If the driver undertaking that manoeuvre is unable to do so and a collision results the inference is that he or she was not keeping a

proper look-out, hence, proof of negligence: in fact, *res ipsa loquitur*, in the absence of a plausible explanation from the defendant, that the defendant was negligent.

[40] It is a primary duty of drivers on a highway to keep a reasonable lookout for obstructions or traffic ahead in time to avoid a collision. Whether a driver is excused for failing to see an obstruction in time must be determined on the facts of the particular case. While a driver cannot be excused for failing to keep a proper lookout, it may not be unreasonable to expect a driver to keep a sharper and more vigilant lookout for something he or she may reasonably expect to be on the highway than he or she would for something he or she is entitled to expect would not be there.

[41] It is the duty of a motorist to do more than watch the road. The motorist must watch for objects approaching from both sides, and if the condition of the road itself or the traffic situation is such that he or she is required to give all his or her attention to the road, it becomes the motorist's duty to slow down to such a rate as will give others ample opportunity of avoiding him or her without his or her being able to do his or her full part in avoiding them when an emergency arises.

[42] The duty to keep a proper lookout means more than just looking straight ahead. It includes awareness of what is happening in one's immediate surroundings. A driver should have a view of the whole road from side to side and in the case of a road passing through a built-up area, as well as the pavements on the side of the road. Whereas there is no obligation, as one proceeds, to maintain special preparation for an unseen emergency or a mere possibility, if on the other hand, the possibility of the danger which in fact materialised is reasonably apparent, the failure to take precautions is negligence.

[43] When a driver makes the decision to overtake, he or she should consider that this may be the last decision the driver will ever make. For this reason, it is

essential that driver gets it right first time, every time. The driver will first have to position the vehicle in such a way that it allows him or her the opportunity to carefully consider that decision. This should be a position from a distance from the stationary obstacle or moving vehicle, where the driver might not be able to overtake at that moment but allowing the driver to follow the vehicle in front safely, while giving himself or herself time to gather more information. Once in this position, the driver needs to consider what he or she can see, what he or she cannot see and what the driver can reasonably expect to happen, in the near, middle and far distances as well as behind and at the sides.

[44] A decent following or waiting distance dramatically increases visibility, an essential component of safe overtaking, especially at night or in inclement weather. As a general rule the larger the vehicle in front, the further back the driver intending to overtake should be so that his or her vision doesn't become restricted. Being too close to the obstacle or vehicle ahead prevents the driver from seeing ahead, and when the driver changes lanes, he or she will have little chance to change his or her mind should something take the driver by surprise. The driver will not have enough time and space to move back to his or her lane when he or she is too close.

[45] Driving requires effective coordination of visual, motor, and cognitive skills. Vision is the most critical sense of all when it comes to driving a vehicle. Visual skills though are pushed to their limit at night by decreased illumination and by disabling glare from oncoming headlights. High beam headlights give off a bright glow that goes as far as 100 - 400 feet (106 - 121 metres) in front of the vehicle. Projecting light farther down roads improves driving safety by increasing the time available for reaction to potential problems. By providing more light and further illumination, car headlights allow drivers to detect road hazards, signage, and pedestrians at greater distances. While high beams are designed to maximise the driver's seeing distance, low beams only go as far as 200 feet. This means high beams reach twice as far as low beams. A headlamp whose main-beam is

incapable of adequately illuminating an area ahead of the motor vehicle concerned, enabling the driver to see any person, vehicle or substantial object at a distance of at least 100 metres ahead is either defective or requires adjustment. The dipped-beam of light too should be capable of adequately illuminating an area ahead of the motor vehicle concerned enabling the driver to see any person, vehicle or substantial object at a distance of at least 45 metres ahead of the motor vehicle.

[46] Headlights are to be distinguished from daytime running lights, spot lamps, taillights and fog lamps. Vehicles meant to be easily spotted when on the road, such as ambulance, rescue, fire-fighting, police, breakdown vehicles, or traffic-control vehicles, use spot lamps. On the other hand, fog lights are helpful in inclement weather, and help to cut through fog, smoke and driving rain or even dust storms. They are useful when the normal head lights and high beams or driving lights do not cut through the weather hazards. Taillights and rear fog lights in red help to alert other drivers of a vehicle's presence on the road and significantly reduce the chances of a rear-end collision. Headlight flashing attracts attention and can let other drivers know of one's presence or signal acknowledgement of the presence or actions of other drivers. headlights in their secondary use though may be highly effective when used as a means of increasing conspicuousness to other drivers as a warning to motorists of the presence of a vehicle on or near the roadway. Even though visibility is normally clear during daytime hours, cars with daytime running lights are easier to spot than cars without them.

[47] Although the lights of oncoming vehicles improve on their conspicuousness and visibility, motor vehicle headlights are primarily meant to aid a motorist's vision rather than serve as beacon or warning lights. Although other lights on the vehicle may be used to define the shape and size of the vehicle and to convey the intent of the motorist, headlights are meant to allow the driver to detect a hazard in a roadway environment that may be visually cluttered, recognize the

hazard or its threat potential, select an appropriate speed and path, and initiate and complete the required manoeuvre safely. They help the motorist to see further down the road to avoid hitting un-illuminated objects like animals, pedestrians, and debris.

- [48] The detection and recognition of objects on the road is context dependent. Drivers tend to scan the roadway by looking in the direction they expect to see an object of importance. A hazard is any object, condition, or situation that tends to produce a crash when drivers fail to respond successfully. Successful driving is accomplished by drivers detecting a hazard, recognizing it as a threat, deciding on an appropriate speed and path, and acting on that decision. Detection of a hazard refers to the first stage of information processing in which an object is perceived by one's senses. The recognition of a hazard refers to a later stage of information processing in which drivers use their memories to relate the object to previous experiences.
- [49] There are two types of conspicuousness: attention conspicuousness and search conspicuousness. Attention conspicuousness refers to an object capturing a person's attention, when the observer is not actually looking for it, owing to its characteristics (such as proximity, colour, and movement). An example of attention conspicuousness would be a warning light mounted on a roadway maintenance vehicle alerting oncoming motorists that the vehicle is stationary.
- [50] Search conspicuousness refers to an object's ability to capture one's attention when the observer is specifically or actively searching for it. An example of search conspicuousness would be a retroreflective street sign with large letters placed in a consistent location at an intersection. The observation of an object not actively being searched for is determined by its conspicuousness, while visibility is the ease with which an object can be detected when the observer is looking for it, which may depend on the experience of the viewer. Hence the

conspicuousness of an object remains a constant property, while its visibility may change with different observers.

[51] Motorists operate with a set of expectancies, predisposing them to believe that things will happen in a certain way. The presence of oncoming vehicles on public roads is more probable than their absence. Viewers learn to tune their attention to relevant objects and locations where they expect to find needed information for the task at hand. Given that their presence is likely, an encounter with oncoming vehicles is expected since motorists are actively searching for one. Oncoming vehicles, even those that have poor attention conspicuousness are, therefore, more likely to be detected at a safe distance. There is an increase in driver perception-response time when these expectancies are violated. Consequently, reaction time to uncertain events is longer than reaction time to certain events.

[52] From the testimony of the various witnesses, it is established that by aid of the bus headlights, visibility that night was estimated as follows; the plaintiff testified that he saw the broken down trailer at a distance of about 200 metres. D.W.1 Acaye Ivan too testified that that he saw it from a distance of about 200 metres. The bus driver D.W.3 Ojok Christopher saw the obstacle when it was about 150 metres away, while D.W.4 Okello stated that he saw it when it was about 200 metres ahead. I therefore find as a fact that under the conditions that prevailed that night, visibility was between 150 metres and 200 metres. Since motorists are ordinarily actively searching for oncoming vehicles given that their presence is likely, the question then is what prevented the bus driver from seeing the oncoming truck until it was barely ten metres away. According to the plaintiff, it is because the driver was driving fairly fast and swerved into the truck's lane before ascertaining that it was safe to do so while the driver states it is because the oncoming truck had switched off its headlights at the material time.

[53] Perception distance is difficult to measure since it involves looking into the driver's mind, which is obviously impossible. Instead, studies usually measure

"response distance", the distance at which the driver responds. In his research relating to pedestrians, Green, M. (2000). "*How long does it take to stop? Analysis of brake reaction times,*" *Transportation Human Factors*, 2, 195-216 found as follows;

A Driver can only avoid an accident if he sees the pedestrian relatively far ahead. The driver must detect the pedestrian, recognize the impending collision, and then react by pressing the brakes. Suppose a driver is travelling at 60 mph (88 feet per second) and suddenly sees a pedestrian. "Normal" perception-reaction time for a lane incursion by a pedestrian is about 1.5 seconds. During this time, the car will have moved forward 132 feet (1.5 x 88). Cars don't stop instantaneously, however, so the vehicle continues forward after brake depression until friction halts all motion. This would require another 150 feet and take about 3.4 seconds. As a result, the driver must see the pedestrian 280 feet and 4.9 seconds in advance. At city driving speeds of 35 mph, the stopping distance is still 138 feet and the stopping time is 3.6 seconds. These calculations also assume good conditions and ignore brake lag, the time from touching the pedal to full depression and lock up, which is likely .25-.50 sec. The requirements increase when the road is wet, the vehicle is heavier (a fully loaded tractor trailer can take 400 feet or more), the terrain slopes downhill or the driver's reaction time is slowed by age, alcohol, fatigue or distraction.

- [54] Although detection distances under poor weather conditions will be shorter than under clear weather conditions, there is nothing in this case to suggest that the weather conditions were poor. On basis of that research relating to pedestrians, who ordinarily are not illuminated, it is deduced that had he been more prudent, the defendant's driver's had enough time and a sufficient distance to avoid the collision. The defendant's driver's failure to see the truck despite visibility having been about 150 - 200 metres cannot be attributed to the claim that its headlights were off until it was only ten meters away. The driver and the rest of the witnesses were able to see the broken down truck from that distance, yet there is no evidence that it had its headlights on.

[55] The estimate of credibility of a witness will be inexplicably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If, however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false. The claim by the bus driver D.W.3 Ojok Christopher that the truck suddenly flashed its lights when it was only ten meters from him but had no lights on before that is incredible. It is not clear to me why the truck driver would have chosen to drive at night with his headlights off at the speed described by D.W.3. Moreover, the damage to the defendant's bus is not consistent with the version that the bus driver was not travelling at high speed. The defendant's version is therefore rejected as it does not accord with the probabilities.

[56] There are two more plausible explanations, the first of which is distraction. Attention is usually allocated to more than one information source because people are invariably performing multiple tasks simultaneously. Some attention may be allocated without awareness to a task that is using capacity. This occurs in behaviours that have become automatic through over-learning, the learning of a skill well past the point of mastery, for example drivers have little or no conscious awareness of steering, using the foot pedals, etc. However, persons do not consciously perceive an object that has not engaged attention. People attend to some things to the exclusion of others as there is too little mental resource to attend to everything. It is trite that the more attention allocated to an unlikely event, the less that is available for the likely event and this slows response when the likely even occurs. Novel and complex tasks may suffer from lack of attention while highly over-learned and automatic tasks may suffer from too much attention. Directing attention to automatic behaviours can be highly disruptive.



[57] Reaction time depends to some extent on the distance to the obstacle and whether it is approaching from the side and is first seen in peripheral vision. The best estimate is 1.5 seconds for side incursions and perhaps a few tenths of a second faster for straight-ahead obstacles. Studies have shown that perception time is 1.2 seconds while movement time lengthens to 0.3 seconds (see Marc Green, "*How Long Does It Take to Stop?*" *Methodological Analysis of Driver Perception-Brake Times*, a journal article in *Transportation human factors*, (2000) 2 (3) page 195-216). These times are modulated somewhat by other factors, including driver age and gender, cognitive load, and urgency. The increased reaction time is due to several factors, including the need to interpret the novel situation and possibly to decide whether there is time to brake or whether steering is a better response. Moreover, drivers encountering another vehicle or pedestrian that violates traffic regulations tend to hesitate, expecting the vehicle or pedestrian to eventually halt. This possibility cannot be ruled out as having influenced the behaviour of the oncoming truck upon the sudden emergence of the defendant's driver on that lane, from behind the trailer. What is clear though is that had D.W.2 taken a proper look-out before changing lanes, he had enough time and space to avoid the collision.

[58] The accusation that someone failed to pay attention can never literally be correct. People are always paying attention to something. The accusation really means that the person was not paying attention to some specific piece of sensory input. Since attention is limited, its allocation reflects a choice. A reasonable driver in the position of the defendant's driver and paying full attention to the road ahead, would foresee the reasonable possibility that if he undertook that manoeuvre from so short a distance from the stationary truck he would be unable to avoid a collision should an oncoming vehicle emerge suddenly, and would take reasonable steps to guard against such occurrence. The defendant failed to take such steps.

- [59] The second plausible explanation is that the defendant's driver, through human error, undertook the manoeuvre in a manner that considerably reduced his reaction time by either beginning to change lanes when he was too close to the obstacle, or at an angle that prevented him from being able to see up to the full distance of the headlights, or by misjudging the speed and distance of the oncoming truck. In many cases, the speed with which a person can respond, "reaction time," is the key to assigning liability. Reaction times are greatly affected by whether the driver is alert to the need to brake. Drivers are expected to drive at a speed that will allow them to stop safely within the distance available to them. The recommended stopping distance measured in time is at least two seconds. It is also important that the reaction time of the driver remains uninhibited and non-distracted as this could further extend the stopping distance.
- [60] Judging from the sketch plan and the evidence as a whole, I am of the opinion that the plaintiff's version of events is more probable, for the following reasons;- the defendant's driver did not have the right of way; the point of impact, as pointed out by the witnesses not both sides and in the sketch plan, the positions of the vehicles after the collision and the damage to the respective motor vehicles confirm that the defendant's driver was in the way or obstructed an oncoming vehicle and prevented it from continuing in its right of way; by reason of the partial obstruction of his lane, he could not see far enough ahead to be sure it was safe to change lanes; he changed lanes when it was not safe to do so; he undertook the manoeuvre without first escorting that he would be able to pull back to his own side of the road in plenty of time after completing the manoeuvre without affecting any oncoming vehicles' position or speed; he undertook the manoeuvre without ascertaining that he would be able to abandon the overtaking manoeuvre if another hazard came into view; he did not have enough space and time to overtake safely; he ended up making a third line of vehicles abreast during the manoeuvre on a road with only two lanes

[61] The more probable cause of this collision is that with his view partially blocked by the trailer, the defendant's bus driver D.W.3 Ojok Christopher failed to properly gauge the distance and rate of approach of the oncoming truck. I am of the view that if the defendant's bus driver was driving at a speed above 20km per hour that he claimed, there was adequate reaction time considering that visibility was good. That the collision happened before he could react is indicative of the fact that he was not keeping a proper lookout. Had he done so, he would have observed the oncoming truck in good time and taken steps to avoid colliding with it. That he placed himself in a position where he was incapable of taking any evasive steps when he saw the oncoming truck for the first time at approximately ten meters before it collided into him, is an indication of not having had a proper lookout at the time. Had kept a proper lookout, applied his brakes and taken steps to avoid the collision when he was in a position to do so, then the collision would not have occurred.

[62] The defendant's driver testified that he did not see the oncoming truck right up until the moment of collision. I am mindful of his evidence that his view was obscured by the broken down trailer which was to his left. The fact that he was unable to notice the oncoming vehicle until it was too late, is in my view indicative of a failure to keep a proper lookout. Although he took some evasive action, to avoid a head on collision, it was too little too late as he did not have enough space to manoeuvre in order to avoid the collision altogether.

[63] Where the circumstances of the accident give rise to the inference of negligence or recklessness, then the defendant has a duty to prove there was a probable cause of the accident which does not connote negligence (see *Embu Public Road Services Ltd v. Rimmi [1968] E.A 22*). After considering the facts, I find that the defendant's driver's behaviour cannot be explained in terms of the normal limitations or predispositions imposed by the human mind, I therefore conclude that the collision occurred by reason of the defendants' driver not acting reasonably. I find that the defendant's driver caused the accident through

"inattention." Whether the driver attempted to respond at all prior to the collision in this case does not matter because there was insufficient time for avoidance given the needed perception-response time, brake pedal depression and physical stopping distance.

[64] I am satisfied that the collision occurred in the manner as testified to by the plaintiff. He gave his evidence in a clear and satisfactory manner and did not try to exaggerate the defendant's negligent driving. The impression I gained was that he was a truthful witness and that being so there is no reason to reject his version regarding the occurrence of the collision. The defendant's driver, by failing to keep a proper look-out when he changed his lane, and by driving into an oncoming vehicle, is entirely responsible for the accident. I hold the view that the plaintiff has discharged the onus resting on him to prove on a balance of probabilities that the defendant was negligent, since the driver was at all material time acting within the scope and in the course of his employment as the defendant's authorised bus driver.

**Second issue;**     Whether the plaintiff is entitled to the reliefs sought.

[65] The plaintiff claims general and special damages for negligence, interest and costs. During cross-examination of the plaintiff and in the final submissions of defence counsel, it was suggested that the damages to be awarded to the plaintiff should be reduced as the plaintiff was contributorily negligent in relation to the occurrence of the injuries, because he had his leg up on the rails.

[66] The defendant's contention must be considered in light of the case that was pleaded by the parties. Order 6 rule 1 and Order 8 rule 3 of *The Civil Procedure Rules* require defendants, in their written statements of defence, to make a brief statement of the material facts on which they rely for their defence. The defendant in the instant suit did not plead the plaintiff's alleged contributory negligence, yet it is a material fact to its defence. As a result., the plaintiff's fault

in causing the accident was not put in issue. Consequently there is no factual basis pleaded for the contention that the plaintiff was contributorily negligent in the occurrence of the collision leading to the injuries he sustained. It is not among the issues that were agreed upon at the scheduling conference. The defence itself is generally misplaced since the plaintiff's sitting posture cannot on the evidence available be held to be the cause or to have contributed to the cause of the collision.

[67] In order to successfully establish contributory negligence, a defendant must prove that the plaintiff, through his or her own negligence, contributed to the accident. Every person using the road, pedestrian, motorist, and car passenger, is required to use reasonable care to protect his or her own safety as well as the safety of others. If a car accident victim fails to protect his or her own safety and the safety of others, he or she is being negligent and will be considered partly at fault for his or her own injuries. To succeed in a defence of this nature, a defendant has to show that the plaintiff's negligence contributed to the causation of the accident. If the plaintiff's behaviour simply made his or her injuries worse, but did not actually cause or contribute to the causation of the accident, the defence is not available. The defendant has not proved the claim that any of the alleged plaintiff's negligent acts or omissions caused or materially contributed to the harm giving rise to the claim.

[68] By raising that argument, the defendant is instead more or less raising a defence of avoidable consequence, in which the question is not whether the plaintiff's negligence contributed to the cause of the accident but, rather, whether it contributed to the gravity of the injuries. Where the plaintiff's negligence was passive and not a cause of the accident but only of his or her own harm, that would be a case for the application of the doctrine of avoidable consequences. This defence is generally allowed when the plaintiff's negligence has been a substantial factor in causing his or her injury, where but for the plaintiff's negligence, the injury would have been prevented or significantly less severe.

However, where the nature of the accident is such that the injury would not have been prevented, the defence of avoidable consequence will not be available.

[69] Although this too was not pleaded, a trial court is entitled to consider an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision. On the facts of this case, the issue was left for decision by the court as the defendant's advocate, without any objection from the plaintiff's counsel, led evidence and addressed the court on it (see *Odd Jobs v. Mubia* [1970] E.A. 476; *Nkalubo v. Kibirige* [1973] E.A. 102 and *Railways Corporation v. East African Road Services Ltd.* [1975] E.A. 128). I will accordingly consider the question of avoidable consequences as a possible defence.

[70] The rule of avoidable consequences comes into play after a legal wrong has occurred, but while some damage may still be averted, and bars recovery only for such damage. Considering the fact that in some automobile accidents the sitting posture of a passenger would have had no effect on diminishing the injuries, expert testimony would be needed in order to establish both the fact of that sitting posture and the degree to which it was a cause of the injuries enumerated by the plaintiff. The testimony of an expert in the study and reconstruction of traffic accidents would be needed in order to establish that the injuries sustained by the plaintiff were directly attributable to motion and impact which his sitting posture would have restrained. The defendant had not shown, except by conjecture, that had the plaintiff not taken that posture, he would have prevented the injury complained of.

[71] No evidence was presented during the trial to establish the causal connection between the injuries sustained and that specific sitting posture. Consequently, there is no evidence to establish that the injuries complained of could have been prevented or reduced by a specific sitting posture. I find that from the evidence available that it is not plausible that the driver saw the plaintiff in that posture and

chose to turn a blind eye. Even if it were proved that the plaintiff assumed that posture and that it was contributory, the extent of aggravation cannot be determined with any reasonable degree of certainty. I find therefore that the defendant bears full responsibility for the accident and its effect on the plaintiff.

[72] That being the case, General damages are such as the law will presume to be the natural and probable consequences of the defendant's words or conduct. They arise by inference of law and need not, therefore be proved by evidence. In the instant case, the plaintiff suffer pain, underwent several surgical operations, lost amenities of life and was unable to work for a considerable period of time. I have made comparisons with awards made in similar cases such as; *Kabunga Grace v. Kisambira Sentamu Ismail, H.C. Civil Suit No. 12 of 2009*; where the plaintiff suffered multiple injuries including a broken right leg, fractured left leg which left him severely disabled. He was awarded shs. 100,000,000/= for pain and suffering and loss of amenities. In *ECTA (U) Ltd v. Geraldine S. Namurimu and another, S.C. Civil Suit No. 29 of 1994*; the plaintiff suffered multiple lacerated wounds all over the body the biggest being in the forehead elbow; a crush injury of the left foot, compound fracture of the left tibia and fibula; compound fracture of the right tibia with dislocation of the proximal tibia fibula joint, and dislocation of the right sterno claviclar joint; she sustained grave injuries, which seriously incapacitated her; The amount of shs. 16,000,000/= though was considered to have been on the higher side and was reduced to shs. 12,000,000/= for pain and suffering and loss of amenities.

[73] General damages will ordinarily include anticipated future loss as well as damages for pain and suffering and loss of amenity (see *Uganda Commercial Bank v. Deo Kigozi [2002] 1 EA 293*). I have for that reason taken into account the plaintiff's entire circumstances and in my assessment of general damages for the impact of the injury or pain, suffering and loss of amenity (impact the injury on his quality of life), a sum of shs. 90,000,000/= is adequate as general damages.

[74] As regards the claim for special damages, the law is that 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*). In personal injuries claims, special damages encompass past expenses and loss of earnings. In his testimony, the plaintiff stated that he spent over shs. 20,000,000/= on transport using special hire all the time. He had four caretakers constantly and he had to sustain them. Kumi being an expensive town, he would spend 12,000/= to 15,000/= daily. He claimed to have spent; shs.19,217,300/= on medical treatment; shs. 29,652,750/= was spent on transport costs; shs. 18,810,000/= was spent on feeding; shs. 82,500/= was spent on securing the police traffic accident report; shs. 800,000/= was spent on photocopying and communication, hence a total of shs. 69,748,650/=

[75] 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 tabulation of the various items on which expenditure is said to have been incurred. None of the items listed can be categorised as unnecessary. For those items the nature which in the ordinary conduct of affairs of this nature, receipts or other documentary proof of expenditure would be expected, receipts have been provided. For those where receipts have not been produced, the amounts do not appear to be exaggerated in any way. I am therefore satisfied the evidence before court is cogent and sufficiently proves to the required standard that the plaintiffs incurred that expense. I have however reduced the award for subsistence costs by half since the plaintiff would have had meals, even without the injury and he was never placed on a special diet.



Order:

[76] In the final result, judgment is entered for the plaintiff against the defendant for;

- a) General damages of shs. 90,000,000/=
- b) Special damages of shs. shs. 40,505,100/= constituted as follows;
  - i. shs. 37,404,600/= to transport costs during treatment
  - ii. shs. 2,368,000/= half the subsistence costs.
  - iii. shs. 570,000/= Hotel accommodation.
  - iv. shs. 162,500/= police report.Total shs. 40,505,100/=
- Grand total shs. 130,505,100/=
- c) Interest on both general and special damages at the rate of 8% per annum from the date of judgment until payment in full.
- d) The costs of the suit.

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Stephen Mubiru  
Resident Judge, Gulu

Appearances

For the plaintiff : Ms. Kunihira Roselyn.  
For the defendant : Mr. Opwonya Charles Dalton.