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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[CIVIL DIVISION

CIVIL SUIT No. 271 OF 2011

AKWARE CAROLINE OSILO ::::::::::::::::::::::::::::::::::::::

10

PLAINTIFF

VERSUS

GAAGA ENTERPRISES LTD :::::::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW.

JUDGMENT.

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Akware Caroline Osilo (*hereinafter referred to as the “plaintiff”*) brought this suit against Gaaga Enterprises Ltd (*hereinafter referred to as the “defendant”*) allegedly for defendant being vicarious liable for the tortious acts of the defendant’s servant/ agent/ employee, in the course of employment. The plaintiff thus, claims special and general damages resulting from the alleged negligent acts of the defendant for its servant/ agent/ employee; and costs of the suit.

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The defendant filed a written statement of defence denying any liability. However, thereafter, it never appeared in court for hearing

5 either by itself or through its lawyers. The suit proceeded *ex parte*
pursuant to Order 9 r. 20 of the Civil Procedure Rules (CPR) after
court was satisfied that the defendant was duly served with the
hearing notices, the case was set down for formal proof and a date
for judgment fixed. However, while the case was still pending
10 judgment, the defendant, on 22/10/2019, filed HCMA No. 732 of
2019 seeking, among others, an order of what they termed as
“arresting judgment” in HCCS No. 271 of 2019, and the setting
aside of the *ex parte* order issued on 29/08/2019, so that the
defendant may be heard in the main suit. On the date fixed for
15 hearing of the application, the Applicant/defendant still did not
appear in court, either by itself or through its lawyers to prosecute
its application. Court thus dismissed the application with costs and
the main suit proceeded *ex parte* for determination and hence this
judgment.

20 ***Brief facts:***

The plaintiff's case is that, on 18/11/2010, she was travelling to
from Kampala to Bujumbura as a fare-paying passenger on the
defendant's bus Reg. No.UAL 377H. At about 2:00 pm at Lyantonde,

5 the said bus got involved in a terrible accident and the plaintiff
sustained serious injuries and fractures. The plaintiff avers that the
accident was due to defendant's bus being driven negligently by the
driver; an employee of the defendant. After the accident, the plaintiff
was first taken to Mbarara hospital where she was diagnosed with
10 injuries to her body and fractures of the pelvis and was later
transferred to Mulago hospital where it was further established that
she had suffered blunt chest trauma, multiple rib fractures of the
left 4th and 7th ribs, lung contusion in the left lung and pelvic
fractures of the right interior, and superior pubic rami. The plaintiff
15 also suffered from intense pain in the areas where the injuries were
sustained, and after being discharged from hospital, she continued
to receive constant treatment. Even after resuming work as a
private legal practitioner, expected to sit on her desk and stand for
long periods in court, she experienced intense pain because these
20 postures exacerbated the pain. The plaintiff avers that she lost
income and suffered continuous monetary loss, reduced earnings,
and heavy expenditures on treatment.

5 At the hearing, Mr. Kato Ali Hassan represented the plaintiff. The
plaintiff adduced evidence of two witnesses to wit; herself as PW1
and Dr. Michael Oketch as PW2. Both filed sworn witness states
which were adopted by court as their respective evidence in chief.
Counsel for the plaintiff also filed written submissions, which on
10 court record and this court will take them into account the
resolution of the issues. The issues for determination are as follows;

***1. Whether the defendant is vicariously liable for acts/
negligence of its agent and/or driver.***

2. Whether the defendant's agent/driver was negligent

15 ***3. Whether the plaintiff is entitled to the remedies sought.***

Resolution of Issues:

***Issue No1: Whether the defendant is vicariously liable for
acts/ negligence of its agent and/or driver.***

Black's Law Dictionary, 9th Edition, at page 998, defines
20 vicarious liability as the liability that a supervisory party, such as
an employer bears for the actionable conduct of a subordinate or
associate, such as an employee, based on the relationship between

5 the two parties. Therefore, for a party to be vicariously liable for the
acts of another, there should exist a relationship between the party
and the person who did the negligent act, and the act ought to have
been done in the course of the employment, and not when the
person who did it was acting on a frolic of his own. In **Paul**
10 **Byekwaso vs. Attorney General, Civil Appeal No. 10 of 2002,**
court held that a master is liable for tortuous acts committed by
his/her servant in the course of the servant's employment. In
Bagenda Byabe Tommy vs. Pioneer Easy Bus Limited HHCS No.
36 of 2016, the court found the defendant vicariously liable for the
15 negligent acts of the driver.

In the instant case, the plaintiff (PW1) adduced that on 17/11/
2010, she was a fare-paying passenger on the defendant's bus
heading to Bujumbura from Kampala. She was issued with a
receipt/ticket upon payment. The bus set off from the Arua bus
20 park/terminal, the known passenger loading area for the
defendant's buses. According to *Exhibit P6* -the Police Accident
Report, otherwise known as Police Form 37, the abstract of the
particulars of an accident involving a motor vehicle, clearly shows

5 that the bus in which the plaintiff was traveling at that material
time belonged to the defendant as the owner. It was being driven by
a person employed by the defendant. Therefore, that particular
evidence has duly established that there existed a relationship
between the driver and the defendant, which renders the defendant
10 vicariously liable for the acts of its driver. Issue No.1 is answered in
the affirmative.

Issue No.2: Whether the defendant's agent/driver was negligent

For the tort of negligence to be properly established, it must be
15 shown that the defendant owed a legal duty of care and that duty
was breached thus causing injury to the plaintiff. "Negligence" is
defined as the act of doing something or an omission by a
reasonable man, guided upon considerations which regulate the
conduct of human affairs. Further, in case of negligence there
20 should be a duty of care owed, a breach of that duty and damage
suffered by the person to whom the duty was owed. The tort of
negligence is well established in the *locus classicus case* of
Donoghue vs. Stevenson in which the test as articulated by Lord

5 Atkin, is the duty to take care when relating with people who are so likely to be affected by the defendant's acts or omissions and breach of which duty gives rise to liability in negligence.

In the instant case, evidence adduced shows that the plaintiff was a fare paying passenger on a vehicle licensed to carry passengers.

10 The defendant, an employer of the driver and owner of the vehicle, was vicariously responsible for the safe travel and arrival of the plaintiff to her destination. The failure to observe that duty owed results in a breach of right of the plaintiff which gives rise to liability in negligence.

15 The plaintiff adduced evidence that at about 2.00a.m. on 18/11/2010, she was travelling in the defendant's bus being driven recklessly by the defendant's employee. The bus was involved in an accident when it had a head-on collision with another motor vehicle Reg. No. UAK 232N Nissan Hard Body, causing her the serious
20 injuries. According to the plaintiff's evidence, the driver was negligent while in the course of his employment. The plaintiff avers that the driver was driving the vehicle at an excessive speed in the circumstances, and failing to have a proper look out on the road,

5 yet the weather was clear and the road was in good condition and
the surface was dry. The plaintiff particularized the negligence of
the driver in her plaint, in paragraph 7. These include failing to
have a proper look out on the road so as to avoid the accident,
failure to provide any/ adequate protective facilities or emergency
10 equipment in case of accidents, and driving at excessive speed. The
plaintiff tendered in evidence a Police Accident Report as *Exhibit P6*,
which also corroborates the occurrence of the accident, and the
plaintiff's name appears in the report as No. 2 as a person who
sustained the very serious injuries as a result.

15 In ***Alice Wanjiru Karangi vs. Mash East Services Limited T/a
Mash Bus Services Limited Civil Suit No. 283 of 2016***, the court
noted as follows:

20 ***“As a fare paying passenger the driver of the defendant
was under a duty to drive carefully and take the plaintiff
safely to her destination. The fact that an accident
happened and the plaintiff suffered injuries is evidence
ipso facto that the driver breached that duty. No defence
was filed by the defendant neither was there an***

5 ***appearance on the day the case was fixed for hearing in
spite of effective service.... On the basis of the principle of
res ipsa loquitur, I find that the driver of the bus was
negligent and therefore the defendant as owner and
employer is vicariously liable for the injuries suffered by
10 the plaintiff as well as consequential damages.”***

The above holding and facts appear to be on all fours with the instant case. The driver of the defendant in the present case was under a duty to drive carefully and take the plaintiff, as a fare paying passenger, safely to her destination. The fact that an
15 accident happened and the plaintiff suffered injuries is evidence *ipso facto* that the driver breached that duty. The driver of the defendant was thus negligent and reckless and hence the defendant is found vicariously liable for the injuries sustained by the plaintiff.

It should be added, based on the evidence, that the driver of the
20 defendant was negligent for driving at an excessive speed in the circumstances. According to the evidence, the weather was clear and the road was in good condition and the surface was dry. Ordinarily, under such conditions, accidents are not a normal

5 occurrence unless other factors intervene. In this case, the only
evidence of such other intervening factors is that of driving of the
vehicle at excessive speed in the circumstances and of the failure to
have a proper look out on the road for the oncoming other vehicle.
This was no doubt negligence on part of the driver, for which the
10 defendant is also vicariously liable. *Issue No.2* is answered in the
affirmative.

Issue No.3: Whether the plaintiff is entitled to the remedies sought.

The plaintiff prayed for the award of special damages. The plaintiff
15 tendered in court medical bills and all other receipts as evidence of
the costs incurred. She tendered in court *Exhibit "P2", "P.3A", "P3B",*
"P4", "4A", "4B" and "4C", respectively the payment receipts, as
proof of expenditure. She also testified that not all special damages
were supported by receipts because some expenses were at the spar
20 of the moment and also not all expenses are receipted by the service
providers like the daily food, drinking water, toilet paper, commuter
taxi, special hire drives and other personal effect expenditure.

5 The established general position of the law is that special damages must be pleaded. However, in ***Vallabhudas Vithaldas & Sons Ltd Mawangala Estate vs. Francis Mateeka [2001-2 - 5] HCB 68***, it was held, inter alia, that;

10 ***“The law is that special damages must be specifically pleaded and strictly proved. However, this does not mean that they must be proved by documentary evidence in all cases. In the instant case, the Respondent and his attendant’s expenditure on food were found to be reasonable though no receipts were produced.”***

15 Also, in the case of ***John Eletu vs. Uganda Airlines Corporation, [1984] HCB 44***, it was held that,

“... production of receipts or documentary evidence is not the only way/method of proof of special damages. Witness oral evidence may suffice.”

20 Premised on the above position of the law and the evidence adduced, the plaintiff satisfactorily proved her claim for special damages for

5 the sum total of UGX.2,200,000/=; for which the defendant is found liable to pay.

The plaintiff also prayed for general damages. The settled position is that the award of general damages is in the discretion of the court, and is always as the law will presume to be the natural and
10 probable consequence of the defendant's act or omission. See: **James Fredrick Nsubuga vs. Attorney General, HCCS No. 13 of 1993; Erukan Kuwe vs. Isaac Patrick Matovu & A'nor HCCS No. 177 of 2003** per Tuhaise J., (as she then was).

In the assessment of the quantum of damages, courts are mainly
15 guided by the value of the subject matter, the economic inconvenience that a party may have been put through, the nature and extent of the breach. See: **Uganda Commercial Band vs. Kigozi [2002] 1 EA. 305**. A plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she
20 would have been in had she or he not suffered the wrong. See: **Charles Acire vs. Myaana Engola, H.C.C.S No. 143 of 1993; Kibimba Rice Ltd. vs. Umar Salim, SCCA No.17 of 1992**. Also instructive is the case cited by counsel for the plaintiff of **Bagenda**

5 ***Byabe Tommy vs. Pioneer Easy Bus Limited*** (supra) where the court held that;

10 ***“General damages are a monetary recovery in a lawsuit for injuries suffered such as pain, suffering, inability to perform certain functions for which there is no exact value which can be calculated. These damages are traceable to and are the probable and necessary result of the injury complained of or which are presumed by or implied in law to have resulted therefrom.”***

15 Furthermore, it is also the established position that general damages need not be specifically pleaded.

In arriving at the appropriate damages to be awarded to the plaintiff in this case, this court has, among other factors, taken into account what the plaintiff has, by her evidence, proved to this court as having been her status of life. The plaintiff is an Advocate of the High Court of Uganda and courts suburbanite thereto, the extent of her lost earnings and loss of his business prospects owing to the accident and time she was getting treatment and not working, the pain and suffering from the injuries are all factors taken into

5 account. In the circumstances, court considers UGX.100,000,000/= as fair and adequate and awards the same as general damages to the plaintiff.

On the issue of costs, the law under Section 27(2) Civil Procedure Act Cap 71, provides to effect that costs are awarded in the
10 discretion of court, but shall follow the event, unless for good reasons court directs otherwise. See: **Jennifer Rwanyindo Aurelia & A'nor vs. School Outfitters (U) Ltd. CACA No.53 of 1999; National Pharmacy Ltd. vs. Kampala City Council [1979] HCB25.** In the instant case, the plaintiff has succeeded on all the
15 issues, and there is no compelling and/or justifiable reason to deny her the costs. The plaintiff is accordingly awarded costs of this suit.

BASHAIJA K. ANDREW

JUDGE

15/05/2020.

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