

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA KAMPALA**  
**(CIVIL DIVISION)**

**CIVIL SUIT NO. 053 OF 2016**

**SOLOMON SAMBAGA (Suing through next friend  
Patrick Sambaga and Jenephar Sambaga (Parents)-----PLAINTIFF**

**VERSUS**

**NATIONAL HOUSING AND CONSTRUCTION CORPORATION -----DEFENDANT**

**BEFORE HON. JUSTICE SSEKAANA MUSA**

**JUDGMENT**

The plaintiff on the 30<sup>th</sup> August 2015, while the plaintiff was riding a bicycle near the excavation site, slipped, fell into it and suffered severe injuries he could not attend school and help himself.

The defendant carried out an excavating project in Naalya, which stretches about half a kilometer, with a height of storied building negligently and carelessly abandoned it and failed to fence.

The defendant contended that the suit excavation site has at all material times been adequately fenced and guarded against unauthorized intrusion by members of the public.

The alleged accident suffered by the plaintiff was wholly caused and contributed to by the negligence of the plaintiff by riding his bicycle near the excavation site.

## **AGREED FACTS**

1. The plaintiff is suing through a next friends being parents.
2. The plaintiff was injured in an accident.
3. The plaintiff duly issued and served a notice of intention to sue upon defendant.

## **AGREED ISSUES.**

1. Whether the Defendant is liable for the injury suffered by the plaintiff?
2. Whether the plaintiff is liable in contributory negligence for the accident suffered?
3. Whether there are any remedies available in the circumstances?

At the trial the plaintiff led 2 witnesses who testified through witness statements that were admitted as his evidence in chief and the defendant led evidence of one witness.

The plaintiff was represented by *Ms Okumu Ringa Patricia* while the defendant was represented by *Ms Kisakye Ruth (Senior Legal Officer)*

## **ISSUE ONE**

### ***Whether the Defendant is liable for the injury suffered by the plaintiff?***

PW 1, Solomon Sambaga in his evidence testified that on 30<sup>th</sup> August 2015 together with his friend went riding along a road that led to the construction site of the defendant. The same site had been excavated and left without any barricade.

The plaintiff stated that he endeavoured not to ride close to the site but when he lost control of the bicycle and failed to maneuver it, it overpowered him and he went down a slope and ended up falling into the excavated site.

The plaintiff was badly injured and had broken arms and could not lift them and could not see clearly as well because his optical nerves were damaged in the said incident.

PW II who is the mother of the plaintiff testified that the scene of the accident is comprised of a road of about 3 kilometres which runs from a hill sloping down and along the road there is a pit that was excavated. There is a sharp corner and the person sloping down the road would directly face the excavated pit when they reach the sharp corner. The pit is about 15feet deep.

The defendant witness testified that their Naalya Pride site has never been abandoned and there were always security guards and construction has always been going on at the said site. The same site was condoned off with iron sheets hoarding in compliance with health and safety requirements and with barricaded culverts casted with concrete at selected areas, all these are intended to create barriers and prevent the public against construction hazards, ward of trespassers and also protect the site from encroachers.

The project is surrounded by residential developments in which there are families with young children. In the past 10 years of the project site existence, the plaintiff's incident is the first of its kind due to neighbour's awareness that the land is a construction site and they exercise caution. It cannot be said that the defendant is negligent in its site management in relation to the surrounding neighbourhood.

The witness stated that he had internalized photo advanced by the plaintiff and looking at the impact on the hoarding, the plaintiff did not slip as he alleged but rather rammed into the hoarding causing excessive force. The impact could have been caused by a mechanically unsound bicycle.

The defendant's submission is that they did not break the duty of care and they took reasonable care to protect the public. The injury did not occur out of negligence of the defendant rather the plaintiff. They contended that the plaintiff had failed to establish the case of negligence and the court should exonerate the defendant.

### ***Determination***

#### **NEGLIGENCE**

Negligence is essentially a question of fact and it must depend upon the circumstances of each case. The standard of care expected is that a reasonable person proving breach of a duty is usually achieved by adducing evidence of unreasonable conduct in light of foreseeable risks.

Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Before the liability of a Defendant to pay damages for the tort of negligence can be established, it must be proved that

- a) **The defendant owed to the injured man a duty to exercise due care;**
- b) **The Defendant failed to exercise the due care and**
- c) **The defendant's failure was the cause of the injury or damage suffered by that man.**(See **H.KATERALWIRE vs PAUL LWANGA [1989-90] HCB 56**)

*"Negligence is conduct, not state of mind- conduct which involves an unreasonably great risk of causing damage.....negligence is the omission to do something much a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something, which a prudent and reasonable man would not do". See **Salmond and Heuston on The Law of Torts (19<sup>th</sup> Edition)***

A person is neither expected to act like a super human nor like an insane or unreasonable or imprudent person. The law requires that standard and degree of care on the part of a person which should have been taken by a reasonable and prudent person in the like circumstances. Although the standard is uniform, the degree of care is not, it varies in different circumstances.

The third ingredient of negligence is that the plaintiff's damage must have been caused by the defendant's breach of duty and not due to any other cause. The plaintiff in this case indeed suffered damage when the bullet lodged in her body and she was accordingly injured.

### **STANDARD OF CARE**

The standard is reasonableness. But in considering what a reasonable man would realize or do in a particular situation, we must have regard to human nature as we know it, and if one thinks that in a particular situation the great majority would have behaved in one way, it would not be right to say that a reasonable man would or should have behaved in a different way. A reasonable man does not mean a paragon of circumspection. The duty being a general duty to use reasonable care, reasonableness is the test of the steps to be taken.

The degree of care required varies directly with the risk involved. The greater the risk, the greater the care. The defendant company was carrying out construction and had excavated a 15 feet deep pit in a partly residential area. This would have required them to put extra measures or reinforcement just in case any person had knocked the barricade. The barricade that was used was one which would have stopped mere trespassers/encroachers and not one that would have stopped any danger if a person at such a spot had hit over the barricade.

### **FORESEEABILITY OF DANGER**

It is not enough that the event should be such as can reasonably be foreseen. There must be sufficient probability to lead a reasonable man to anticipate danger or injury. The existence of some risk is an ordinary incident of life, even when all due care has been, as it must be, taken. The defendant should have foreseen a danger if the such an incident happened at such a spot due to the depth of the pit that had been excavated at the construction sight. Probably it would have invited reinforced barricades of steel poles or reinforcement and not one which would easily be run over in case of an accident of the nature that happened.

### **ANTICIPATION OF GRAVITY OF INJURY**

In considering whether some precaution should be taken against a foreseeable risk, there is a duty to weigh on the one hand, the magnitude of the risk, the likelihood of an accident happening, and the possible seriousness of the consequences if an accident does happen, and on the other the difficulty and expense and any other disadvantage of taking the precaution.

*The gravity of possible consequences is a major factor in considering precautions. The more serious the likely damage, the greater the precaution required and this is considered in determining the level of fulfillment of the duty of care.* - **Paris –v- Stepney B.C. [1951] A.C. 367.**

It is true for the last 10 years such an incident had never happened but that is not to say that the precautionary measures taken were good enough to stop any such foreseeable risk and danger if it happened.

If the defendant that taken extra care because of the gravity of injury that would have occurred if it happened it would have been averted. As stated earlier a

barricade of 15feet deep should be more reinforced than merely iron sheets. More reinforcements in addition to the iron sheets would have been put in place to stop grave injury like that which happened to the plaintiff.

### **STANDARD OF PROOF NEGLIGENCE**

If the evidence in a civil case is such that the tribunal can say: We think it more probable than not, the burden is discharged, but if the probabilities are equal, it is not. Thus the standard of proof is on a balance of probabilities.

The defendant company had a legal duty to care towards all the people residing in the project area (Naalya) since it was residential and therefore had different types of people from adults to teenagers and then minors below the age of 9 years. The law requires that the standard and degree of care on the part of the defendant would have been that which would have been taken by a reasonable and prudent contractor in like circumstances. Any construction site with an excavation which is very deep, ought to have reinforced or concrete barricade in case of an accident and not merely iron sheets around such a deep excavation.

The omission was the proximate cause of the damage/injury of the plaintiff. The plaintiff has discharged the initial burden of making out a prima facie case of negligence against the defendant. Then the burden will now be upon the defendant to prove contributory negligence.

### ***Whether the plaintiff is liable in contributory negligence for the accident suffered?***

Contributory negligence is negligence in not avoiding the consequences arising from the defendant's negligence, when the plaintiff has means and opportunity to do so. In fact, it is the non-exercise by the plaintiff of such ordinary care, diligence, and skill, as would have avoided the consequences of the defendant's negligence.

The rule of contributory negligence is based on the maxim '***in pari delicto potior est conditio defendantis***' which means where both parties are equally to blame, neither can hold the other liable. But the question arises where both the parties are not equally at fault then what is the criteria of holding the defendant liable?

The doctrine of contributory negligence serves only as a partial defence to reduce the plaintiff's claim for damages and must be specifically pleaded. See ***Pitts v Hunt [1991] 1 QB 24***

#### **THE LAW AND THE STANDARD**

“In order to establish contributory negligence the defendant has to prove that the claimant's negligence was a cause of the harm which he has suffered in consequence of the defendant's negligence. The question is not who had the last opportunity of avoiding mischief but whose act caused the harm.”

**Halsbury's Laws of England/NEGLIGENCE (Volume 78) (2010) 5th Edition) Paragraph 76**

“The existence of contributory negligence does not depend on any duty owed by the claimant to the defendant and all that is necessary to establish a plea of contributory negligence is for the defendant to prove that the claimant did not in his own interest take reasonable care of himself and contributed by this want of care to his injury.”

**Halsbury's Laws of England/NEGLIGENCE (Volume 78 ) (2010) 5th Edition) paragraph 77**

“The standard of care in contributory negligence is what is reasonable in the circumstances and this usually corresponds to the standard of care in negligence. The standard of care depends upon foreseeability. Just as negligence requires foreseeability to harm others, contributory negligence requires the foreseeability to harm oneself.”

**Halsbury's Laws of England/NEGLIGENCE (Volume 78) (2010) 5th Edition) Paragraph 7**

The defendant pleaded the particulars of contributory negligence in the written statement of defence in paragraph 6(c) and stated that “ *the alleged accident suffered by the plaintiff was wholly caused and or contributed to by the negligence of the plaintiff*”.

In the case of ***Gaaga Enterprises Ltd v SBI International Holdings & 2 others HCCS No. 19 of 2005 Justice Nyanzi Yasin*** held that; “ *A person is guilty of contributory negligence if he ought reasonably to have foreseen that if he did not act as a reasonable prudent man, he might hurt himself and must take into account that others may be careless*”

### ***Contributory Negligence of Children.***

The doctrine of contributory negligence does not always apply to children. It is no defence to say that the child itself was negligent, for, negligence is a state of mind and children have not sufficient mind to judge quickly as an adult.

The rule of contributory negligence will, therefore, not inflexibly apply in cases where the young children are concerned. The rule is more difficult to make out in case of a child than in the case of an adult. When the plaintiff is a child, allowance must be made for his inexperience and infirmity of judgment. The category of the minor will be a major factor in applying the principle of contributory negligence. An infant cannot be negligent but a minor of tender years may be able to exercise a sense of judgment and thus be liable for contributory negligence.

The plaintiff at the time of the accident was aged 13-14 years. During cross examination he stated that he was not a perfect rider and he was not riding oftenly. The bicycle brakes were not functioning properly and the plaintiff could easily apply his mind and could appreciate the nature of the road being bumpy and thus not good for bicycle riding.

PWII testified that she never allowed her children to ride the bicycle outside their gate and she had cautioned her children against riding outside the compound.

It can be deduced from the evidence on court record that there is a partial contributory negligence on the part of the plaintiff and by virtue of his age, he could determine consequences of his actions. The sense of judgment doing what is right and wrong. He went against the actions of his mother against riding the bicycle outside the compound.

### ***Whether there are any remedies available in the circumstances?***

#### **Special damages**

The plaintiff sought special damages of 186,421,980/= but the evidence adduced is far less and the rest of the claims are repeated for purposes of making something extra through a 'quick buck scheme' out of the case. The court is satisfied that the plaintiff has proved only 8,363,070/= and \$450. The other claims are futuristic and speculative and would not be categorized as special damages.

### General damages

General damages are awarded at 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.

In other words the whole process of assessing damages where they are “at large” is essentially a matter of impression and not addition. Per Lord Hailsham, LC in ***Cassell v Broome [1972] 1 All ER 801 at 825***

Secondly, general damages for personal injuries do not take into account the possibility that the plaintiff may suffer further harm in future as a result of the incident which gave rise to his action.

Since the plaintiff has been found to have contributed to the accident, this court declines to award any general damages against the defendant.

### Interest

The court award will attract an interest of the date of filing the suit.

### Costs

The plaintiff is awarded costs of the suit.

It is so ordered.

***Dated, signed and delivered by email & WhatsApp at Kampala this 22<sup>nd</sup> day of May 2020***

**SSEKAANA MUSA  
JUDGE**

