

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[CIVIL DIVISION]

CIVIL SUIT No. 0010 OF 2017

SSEKUBWA WILBERFORCE ::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

CHINA RAILWAY SEVENTH GROUP LTD. ::::::::::::::::::: DEFENDANT

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

JUDGMENT

Ssekubwa Wilberforce (*hereinafter referred to as the “plaintiff”*) brought this suit against China Railway Seventh Group Ltd (*hereinafter referred to as the “defendant”*) seeking for an order directing the defendant to compensate the plaintiff for the damage occasioned to the plaintiff’s motor vehicle Mercedes Benz Reg. No. UAS 880G, worth UGX.70 million, payment of special damages of UGX.40.2 million being money spent by plaintiff hiring alternative means of transport from the 02/07/2016 to-date, towage charges of UGX.400,000/=, payment to the plaintiff alternative means of transport per day from 03/07/2017 till judgment and payment in

full, aggravated and general damages for the negligence and breach of duty of care, interest and costs of the suit.

Background:

On 01/07/2016, the plaintiff, was driving his motor vehicle, Mercedes Benz Reg. No.UAS 880G, along Yusuf Lule road towards Garden City, when he rammed into a concrete barrier that had been abandoned thereon by the defendant during the construction works on the road, without any warning signs as to the barrier's presence, hence causing extensive damage to the said motor vehicle.

The damaged motor vehicle, though registered in the names of Sembera Ivan, at time of the accident, had been purchased by the plaintiff and subsequently transferred into his names. As a result of the accident, the motor vehicle was written off completely. Upon inspection of the plaintiff's vehicle, it was shown that it was robust and in good condition before the accident occurred, but was written off and its number plates surrendered to Uganda Revenue Authority (URA) owing to the extensive damage occasioned to it.

The plaintiff contends that the accident and the motor vehicle being written off were occasioned due to the reckless, carelessness and negligent conduct of the defendant, who breached its duty of care towards other road users including the plaintiff and hence the accident.

The defendant filed a defence denying the plaintiff's claim. However, on the scheduled date for hearing, neither the defendant nor its counsel turned up despite the fact that the date was agreed upon and consented to by both counsel for the parties. The consent is on court record and the date was duly marked on the Court Diary. The matter thus proceeded *ex parte* pursuant to order 9 Rule 20 (1) (a) of the Civil Procedure Rules (CPR) which provides as follows;

“(1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing—

(a) if the court is satisfied that the summons or notice of hearing was duly served, it may proceed ex parte;...”

At the hearing, Ms. Salaama Nakasi, holding brief for Mr. B. Mutyaba, represented the plaintiff. Counsel for the plaintiff made

submissions to argue the case. The plaintiff adduced evidence as PW1 and closed his case. The issues determination are as follows;

- 1. Whether the defendant company owed the duty of care as regards to the use and safety of road.**
- 2. If so, whether there was a breach of duty of care by the defendant.**
- 3. What remedies are available to the parties?**

Resolution of the Issues:

Issue No.1: Whether the defendant company owed the duty of care as regards to the use and safety of road.

The principles that underpin the concept of “duty of care” were laid down in the *locus classicus* case of **Donoghue vs. Stevenson [1882]8UKHL 100**, where it was held, inter alia, that;

“The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being

so affected when I am directing my mind to the acts or omissions which are called in question.”

The essential elements of duty of care were elaborated in the case of ***Caparo vs. Dickman [1990] 2 AC 605***, where it was held that;

“What emerges is that in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the law as one of proximity or neighborhood, and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.”

Specifically, to road users, they owe a duty of care to one another in relation to the likely injuries that may occur as a result of being negligent. In the case of ***Jane Nakawungu vs. Kafureka H.C.C.S No. 19 of 1993***, the court observed that;

“A prudent man will guard against the possible negligence of others when experience shows such negligence to be common.”

As these principles apply to the instant case, it is averred by the plaintiff that defendant placed concrete blocks/barriers in middle of a busy road along Yusuf Lule Road towards Garden City. This particular fact was not controverted in the defence filed by the defendant. The plaintiff further led evidence to prove that the barriers were indeed left in the middle of the road without any notice or warning as to their existence. Therefore, any reasonable person acting in the place of the defendant ought to have reasonably foreseen that any road user in the plaintiff's stead might be injured by the presence of the road barriers the defendant had abandoned in the middle of such a very busy road in the manner the defendant did. Issue No.1 is, accordingly, answered in the affirmative.

Issue No.2: Whether there was a breach of duty of care by the defendant.

As already noted above, the defendant did not appear at the hearing of the case either by itself or by its lawyers. It follows that the evidence adduced by the plaintiff is unchallenged. The established position under such circumstances was restated in ***Uganda Revenue Authority vs. Stephen Mabosi S.C.C.A No. 29***

of 1995, which cited with approval the case of *Mate Bilhwangero Enos vs. Muhindo Oniz H.C.C.A No. 49 of 2016*, and held that unchallenged evidence should be taken to be the truth. That is indeed the position which binds this court. It can only be added that such unchallenged evidence is accepted as the truth subject to it not being inherently incredible or not cogent.

In the instant case, the plaintiff adduced evidence of sketch maps of the area where the accident occurred, which were admitted as *Exhibit P1*. It shows the position of the accident and the road barrier abandoned by the defendant in the middle of the road. The plaintiff also led evidence of the motor vehicle inspection report which shows that the motor vehicle was under good mechanic condition prior to the accident. The evidence on record further shows that the defendant, a construction company, abandoned road barriers in the middle of the busy road and even then, failed to place any warning signs or reflectors to warn other road users, as the defendant undertook the construction works on the Yusuf Lule road. Such conduct of the defendant was, no doubt, negligent. The standard of care in this particular case, required the defendant

construction company to place warning signs or reflectors so as to alert road users of the presence of the road barriers during day light and at night; which the defendant failed and/ or neglected to do.

The standard principle in cases of negligence, is that a reasonable person is expected and ought to take precaution against foreseeable risk although not every conceivable danger. The defendant is expected to take reasonable precaution in guarding against harm to others. In this case, the evidence adduced shows that the defendant fell below the standard of care appropriate to that particular duty, by failing to perform its duty towards the plaintiff as reasonably required in the circumstances. As a result of the defendant's negligent conduct, the plaintiff rammed into the concrete barriers which extensively damaged his motor vehicle beyond repair. Evidence shows that the motor vehicle was so badly damaged and written off that its number plates had to be surrendered to URA, yet prior to the accident the vehicle was in a good shape. This is clear from the *statement of particulars of the accident* on court record.

It is also noted from its pleadings that the defendant attached some photographs which appear to show some warning signs on the road. However, on closer scrutiny, it is noted that they cannot be relied upon for a number of reasons. Firstly, whereas the date on which the accident occurred was 01/07/2016, the photographs bear the dates of 11/07/2016 and 20/07/2016, respectively, which were subsequent to the accident. Evidently, the warning signs could have been placed on the road after the accident occurred. It leaves doubt that the warning signs could have been put up as an afterthought in order to defeat any claim that would ensue against them as a result of the damage that occurred due to the accident.

Secondly, from their appearance in the photographs, the warning signs appear to be so light without any reflective material in them and are of paper thin content; which could easily be blown away thus totally not helpful, especially in the dark conditions. All that the defendant was reasonably required to do in the circumstances, was to remove the road barriers from the middle of the road to the side, but it neglected to do so. The alternative was for the

defendant to put up clearly visible warning signs of the barriers or reflectors to warn road users of the danger, or cordon off the road. Even then, the defendant failed to do that yet knew or ought to have reasonably known that the area was dark without security lights. The defendant thus breached of its duty of care to the plaintiff as a road user in the circumstances.

Owing to the negligent conduct of the defendant, the plaintiff's motor vehicle was damaged. It had to be towed away at a cost and expense to the plaintiff, to and from the different places. The plaintiff has shown by his evidence, that he is business man whose movements have been greatly hampered as a result of, and since the accident. As was observed in ***Uganda Revenue Authority vs. Stephen Mabosi case*** (supra) the unchallenged evidence of the plaintiff as PW1, is taken to be the truth and therefore, believed as such. *Issue No.2* is answered in the affirmative.

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

As previously noted, the above is undisputed evidence that the defendant exhibited negligent conduct when it failed to take

reasonable precaution while undertraining a road construction on Yusuf Lule road, which caused the plaintiff loss and inconvenience. The plaintiff has adduced cogent and credible evidence to prove the same. In particular, the plaintiff prayed for special damages. In ***Hajji Asuman Mutekanga vs. Equator Growers (U) Ltd S.C.C.A No. 07 of 1992***, the court held that special damages must be specifically pleaded and strictly proved.

In the instant case, under paragraph 5 of the plaint, the plaintiff specifically pleaded, and strictly proved the special damages by adducing in evidence copies of hire agreement and towage receipts. These were admitted in as evidence showing that the sums spent both in hiring alternative means of transport from 02/07/2016 amounting to UGX.40,200,000/= and towing charges of UGX.400,000/=. Accordingly, the plaintiff has met the criteria for the award of special damages, which is awarded to him in the sums of UGX.40,200,000/= and UGX.400,000/= respectively, all totaling to UGX.40,600,000/=.

The plaintiff also prayed for compensation for the loss of his motor

vehicle which got damaged beyond repair and was written off and its number plates surrendered to the URA. The value, according to the plaintiff's uncontroverted evidence, was UGX.70,000,000/= which is awarded to the plaintiff .

The plaintiff also prayed for aggravated and general damages. In the case of ***Superior Construction Engineering Ltd vs. Notay Engineering Ltd H.C.C.S No. 24 of 1994***, it was held that the award of general damages is in the discretion of court which should be exercised judicially taking into account the circumstances of the case, and that general damages are compulsory in nature and they should offer some satisfaction to the infringed plaintiff. It is also noted that general damages are direct probable consequences of the act complained of. Such consequence may be loss of use, loss of profit, or physical inconvenience.

In the instant case, the plaintiff testified as how, as a business man, he has been greatly inconvenience and his businesses greatly hampered and suffered due to the negligent conduct of the defendant of breach of its duty of care. Whereas in this case court

is reluctant to award aggravated damages, however, court is inclined to award general damages to atone for the injury the plaintiff suffered at the instance of the defendant's conduct. Given the particular circumstances of the case, UGX 15 Million is appropriate and fair and awarded as general damages to the plaintiff.

The plaintiff also prayed for interest. Section 26 (2) of the Civil Procedure Act, provides to the effect that interest shall be in the discretion of court. This provision is fortified in the case of ***Crescent Transportation Co. Ltd vs. B.M. Technical Services Ltd C.A.C.A No.25 of 2000***, where it was held that where no interest rate is provided, the rate is fixed at the discretion of the trial judge.

The plaintiff, we prayed for 25% interest per annum on general damages. However, court considers this rate inapplicable to the instant case given that no commercial transaction was involved to attract such a rate. It was an accident as a result of breach of the duty of care owed by the defendant to the plaintiff. Therefore, the

amount of general damages and special damages shall attract interest at a rate of 8% per annum from the date of this judgment till payment in full.

Regarding the issue of costs, Section 27 (2) of the Civil Procedure Act, provides to the effect that costs shall follow the event unless for good reasons court directs otherwise. See also: ***Oketha Dafala Valentine vs. The Attorney General of Uganda H.C.C.S No. 0069 of 2004.***

In the instant case, the plaintiff has succeeded in his claim and is, therefore, awarded costs of the suit.

**BASHAIJA K. ANDREW
JUDGE
29/05/2010**