

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

CIVIL SUIT NO. 328 OF 2012

TUSUBIRA ROBERT:.....:PLAINTIFF

VERSUS

1. ANGUMA COLLINS

2. NEW UGANDA SECURIKO SERVICES LTD :.....:DEFENDANTS

BEFORE HON. JUSTICE MUSA SSEKAANA

JUDGMENT

BACKGROUND

The plaintiff brought this suit against the defendants claiming special and general damage arising out of injuries sustained/ caused by the sole negligence.

On 24th November 2008 at about 5:15am, the plaintiff was shot by the 1st defendant while on his way to work. At the time of the incident, the 1st defendant was deployed by the 2nd defendant to guard Cheap Hardware at Kasubi Zone 3, Kampala District where the incident took place. The plaintiff reported the matter to Kawala police post under SD Ref: 04/24/11/2008. On the same day, the plaintiff was admitted at Mulago hospital where he underwent surgical toilette. The 1st defendant was arrested, charged and convicted of attempted murder in Criminal Case No.1423 of 2008, where Her Worship Flavia Nasuuna Matovu sentenced him to five years imprisonment. The 1st defendant passed away in M/Bay hospital on the 18th November, 2011 while serving his sentence. At all material times, the 2nd defendant employed the 1st defendant as a security guard.

The 2nd defendant in its defence alleges that at the time the 1st defendant allegedly committed the tortuous acts, he was acting on the frolic of his own and therefore the 2nd defendant cannot be vicariously liable for his actions. It was further contended that the 1st defendant was at the time not on deployment at the alleged place of business and that if there was an injury/ies occasioned to the plaintiff which fact is strictly denied the same was caused by the sole negligence of the plaintiff.

The plaintiff was represented by Ms. Babirye Miriam Kagwa whereas the 2nd defendant was represented by Mr. Bwesigye Enock.

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

- 1. Whether the 2nd defendant is liable for the actions of the 1st defendant.*
- 2. What remedies are available to the parties?*

The parties were ordered to file written submissions; the both parties accordingly filed the same.

Both parties' submissions were considered by this court.

DETERMINATION OF ISSUES

Issue 1

Whether the 2nd defendant is liable for the actions of the 1st defendant.

Submissions

Counsel for the plaintiff submitted that for one to be held vicariously liable for the tort of another, there must be a particular relationship of employer and employee and the tort committed must be referable to the employment relationship. Counsel cited **Stevenson, Jordan and Harrison Ltd v McDonald and Evans (1952) 1 TLR** where Lord Denning held that “the justification of imposing vicarious liability is that the employer is in control of the behaviour of his employee. As the employer obtains a benefit from the employee’s work, he should also bear the costs of accidents arising out of it”

Counsel further relied on the case of **Paul Byekwaso v Attorney General CA No. 10 of 2002** where it was held that a master is liable for the tortuous acts committed by his servant in the course of his employment.

It was undisputed that the 1st defendant shot and injured the plaintiff on the said day and at the time of the tort; the 1st defendant was dressed in a blue uniform with the word “securico” and under the employment of the 2nd defendant to guard Cheap General hardware at Kasubi Zone 3 Kampala District. The plaintiff also adduced P Exh 2, the police report which stated that *“it was established that No. 1350 PTE Anguma Collins was employed by the New Uganda Securiko Ltd and the said gun used belongs to the said company”*.

Counsel stated that the magistrate court found it in order, convicted and sentenced the 1st defendant under Criminal Case No. 1423 of 2008. It was further stated that the 2nd defendant did not controvert the fact that the 1st defendant was not their employee and the argument that he was acting on the frolic of his own does not

hold. Counsel prayed that this court finds the 2nd defendant vicariously liable for the actions of the 1st defendant.

The foregoing being the case, and since the 2nd defendant adduced no evidence at trial, there is nothing to rebut the inference that the 1st defendant was its employee or that he was acting on the frolic of his own.

Counsel therefore submit that the Plaintiff's claim and evidence stand uncontroverted by the 2nd defendant, and prayed that court find that the 2nd defendant vicariously liable for the actions of the 1st defendant.

2nd Defendant's submissions

Counsel for the 2nd defendant submitted that the plaintiff failed to prove the employer-employee relationship. Counsel stated that the purported police report does not provide "legal proof" of an employer-employee relationship and that the circumstances surrounding the issuance of the police report render suspicion as to its credibility. It was also submitted that whereas the police report purports that the gun which shot belonged to the 2nd defendant, there is no evidence to prove so. Counsel argued that no "ballistic report" was availed and that the gun "shot" was never proved. Counsel also submitted that even if it is agreed that there was a shooting, the allegation that the 1st defendant was an employee of the 2nd defendant was a fabricated fact only intended to connect the 1st defendant to the 2nd defendant. Counsel submitted that PW3 was a coached witness and also presented hearsay evidence as regards to the employment status of the 1st defendant.

Determination

The Plaintiff led evidence to show that the 1st defendant was an employee of the 2nd defendant deployed to guard Cheap hardware at the time of the he was shot and did so while in due course of his employment. The plaintiff further led evidence to show that the gun used for the shooting belonged to the 2nd defendant at the time it was used. The 2nd defendant did not lead evidence before this court to contradict the plaintiff's testimony and neither was the evidence challenged during cross examination.

I concur with the submissions of counsel that the Plaintiff led evidence to show that the guard shot his during the course of his employment for the 2nd defendant as he was dressed in the 2nd defendant's uniform and used the gun belonging to the 2nd defendant. Since this evidence stands uncontroverted and clearly proves that the 1st defendant was operating within the scope of his duty, as such the 2nd Defendant is vicariously liable for their tortious actions.

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

An act may be done in the course of employment so as to make his master liable even though it is done contrary to the orders of the master, and even if the servant is acting deliberately, wantonly, negligently, or criminally, or for his own behalf, nevertheless if what he did is merely a manner of carrying out what he was employed to carry out, then his master is liable (see *Muwonge v. Attorney General* [1967] EA 17)

This issue is therefore answered in the affirmative.

Issue 3

What remedies are available to the parties?

The plaintiff in his pleadings prayed for; Special Damages, General damages, Exemplary damages, Costs of the suit, Interest on the damages at 25% from the date of filing the suit.

Special Damages

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

The plaintiff led evidence to show that he incurred expenses for his treatment and further needs to receive surgery. He testifies that he received treatment from numerous hospitals for the injuries sustained. The Plaintiff tendered documentary evidence in the form of receipts, as proof of his expenses (**See also Plaintiff's exhibits "P Ex.5)**

The sum total of expenses for the Plaintiff's treatment being **UGX 50,540,000/= (Uganda Shillings Fifty Million Five Hundred Forty Thousand)**

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

However I have perused all the records adduced by the plaintiff and I am satisfied that the plaintiff has proved the special damages.

The plaintiff is awarded special damages to the tune of **UGX 50,540,000** as prayed for and proved.

General and Exemplary damages

The plaintiff pleaded for general damages which consist all, items of normal loss which the plaintiff is not required to specify in his pleadings which include damage of pain and suffering, loss of amenities, loss of expectation of life , future loss of earning and future expenses. It was submitted that the plaintiff's suffering is classified under general damages. The plaintiff adduced evidence during cross examination that he is still incapacitated in the right arm and cannot carry or operate heavy material due to the injuries sustained as a result of the actions of the 2nd defendant's employee.

For exemplary damages, it was submitted that the plaintiff could have easily lost his life at the hands of the reckless employee of the 2nd defendant who ordered him to sit down with justification and shot him at close range. That the 2nd defendant has shown no contrition or remorse for the acts of their employee as its officials visited the plaintiff at hospital for the sole purpose of absolving them from any liability. It would therefore be just and in the interest of fairness that the Plaintiff be awarded exemplary damages.

As far as damages are concerned, it is trite law that general damages are awarded in the discretion of court. Damages are awarded to compensate the aggrieved,

fairly for the inconveniences accrued as a result of the actions of the defendant. It is the duty of the claimant to plead and prove that there were damages losses or injuries suffered as a result of the defendant's actions.

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

The plaintiff is awarded **UGX 20,000,000** as general damages.

Exemplary damages

Counsel submitted that it is clear from the Plaintiff's evidence that the acts and conduct of the Plaintiff were wanton, "oppressive, arbitrary and unconstitutional," and therefore an award of Exemplary Damages would serve not only as a punitive measure but also as a deterrent the commission of similar wanton and negligent acts in the future.

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

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

Bearing those principles in mind I find that an award of **UGX 5,000,000** sufficient as exemplary damages.

The plaintiff is awarded interest at a rate of 10% on special damages from the date of filing the suit until payment in full.

Costs to the plaintiff.

I so order.

SSEKAANA MUSA
JUDGE
13th March 2020