

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
CIVIL SUIT NO 223 OF 2015

NABWAMI GRACE:.....PLAINTIFF
VERSUS
ATTORNEY GENERAL:.....DEFENDANT

BEFORE HON. JUSTICE SSEKAANA MUSA

JUDGMENT

On the 2nd of day of November 2013 at around the Plaintiff while at her home in Central Zone, Makindye Division, Kabalagala-Kampala the play was hit by a stray bullet in the right neck area. The bullet got stuck in the plaintiff's shoulder.

The said bullet was fired by a police officer of Uganda Police attached to Kabalagala Police Station while in pursuit of a suspected offender with his ordinary course of duty.

The plaintiff was rushed to Nsambya hospital where she received treatment and medical attention and she sustained grievous injuries including a perforated oesophagus, being numb in her right upper limb and has remained incapacitated as result of the grievous harm caused by the bullet.

ISSUES FOR DETERMINATION

The parties filed a joint scheduling memorandum wherein she raised 2 issues to be determined by this court;

- 1. Whether the injuries suffered by the plaintiff were caused by the negligence of the defendant's servant***

- 2. Whether the plaintiff is entitled to the remedies sought?***

The parties filed written submissions and this court has considered them in the determination of this dispute.

Court will therefore proceed to determine this matter basing on the abovementioned issues. The plaintiff presented four witnesses in this matter.

Preliminary Considerations

The defendant filed a written statement of defence of 3 paragraphs; 1) giving an address of service of the defendant and 3) submitting to the jurisdiction of this court.

Paragraph 2 stated; *“The defendant denies paragraphs 3,4,5,6,8 and 9 are denied in toto as the plaintiff shall be put to strict proof thereof”*

In courts view this is not a defence within the true meaning of the Civil procedure Rules since it discloses no answer to the allegations made against it.

The written statement of defence is accordingly struck out in accordance with **Order 6 rule 30** of the Civil Procedure Rules.

COURT’S DETERMINATION

Whether the injuries suffered by the plaintiff were caused by the negligence of the defendant’s servant

The plaintiff (**PW1**) testified stated in her Witness Statement that on the 2nd November 2013 while at her home heard gun shots and went out with her cousin sister to establish what was happening.

They found a scuffle outside opposite their building at the internet café across the road and police was attempting to arrest a man in possession of a knife and wanted to attack people who had locked themselves in the internet café.

There were more gun shots and she decided to enter their building, but later realized that she had been hit by a stray bullet and her arm became numb.

She realized that she had sustained a wound in the right side neck and was now bleeding profusely. She fell down and regained her consciousness while she was at Nsambya hospital.

The doctors informed her that they could not proceed to treat her before establishing through xray examination whether the bullet was still lodged inside or had exited. The wound was treated and she was told to go to Case Medical Centre for xray examination since the xray machine at Nsambya was slow.

It was established that the bullet had entered through the right hand side of the neck, perforated the right side of esophagus and lodged in the left supraclavicular region of the arm.

Pw2 testified through a witness statement as well and repeated the version as presented by the plaintiff save for the fact she called the plaintiff's father PW3 and informed him about the plaintiff being shot.

PW4 a medical doctor testified that he examined the plaintiff at his clinic at Forensic Consultation Clinic, Bombo Road and found that she had a bullet wound in the right front of the neck and the tip of the left shoulder.

The plaintiff's counsel submitted that, in law, the tort of negligence is committed when damage, which is too remote, is caused by the breach of a duty of care by the defendant to the plaintiff.

To succeed in an action for negligence, the plaintiff must prove;

- i) The defendant owed him or her a duty of care
- ii) That there was a breach of that duty of care
- iii) That damage which is not too remote resulted to him as a result of the breach.

The plaintiff's counsel contended that the standard of care expected is that of a reasonable person. See ***Omony v AG & Another HCCS No. 27 of 2002.***

A law enforcement officer may only use as much force as reasonable in the circumstances.

A law enforcement officer's conduct lacks reasonable care where the burden to take precaution to mitigate is less than the probability of the harm occurring combined with the probable severity of the harm. Therefore, the police officer

had a duty to take precautions to avoid injuring innocent civilians during the course of their actions.

Determination

Negligence implies absence of intention to cause the harm complained of. It means careless or unreasonable conduct. Therefore, the tort of negligence is, therefore, complex and fluid because in determining liability in negligence, issues like duty, care, breach, causation and remoteness of damage are to be analyzed in any given case.

Black's law Dictionary 11th Edition 2019 defines Negligence as follows;

The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregarding of others' rights; the doing of what a reasonable and prudent person would not do under the particular circumstances, or the failure to do what such a person would do under the circumstances.

Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property.

It can be deduced from the above definitions; the essential ingredients of negligence are;

- (1) The defendant was under a legal duty to take reasonable care towards the plaintiff to avoid the damage complained of;
- (2) That the defendant committed a breach of that duty;
- (3) That due to the breach of duty the plaintiff has suffered damage.

The burden of proof in an action for negligence is on the person who complains of negligence. The plaintiff had to show that she was injured by an act or omission for which the defendant is liable. There must be proof of some duty owed by the defendant, breach of that duty and consequent damage suffered by the plaintiff.

In the present case the policeman had an obligation to behave in such a manner that would not harm the plaintiff. It is his duty of reasonable police officer not to harm innocent civilians in the course of executing his duties of enforcing law and order. Prudent and reasonable police officers do not behave in such a manner of shooting aimlessly or randomly as to amount to carelessness. Such a police officer is liable for careless act since he is under a legal duty to take care towards other persons in the course of executing the constitutional mandate of enforcing law and order. As Lord Atkin in ***Donoghue v Stevenson [1932] AC 562*** stated that “*you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor*”

In addition, if a police officer owes a duty of care and commits a breach of that duty, he is said to have committed negligence. The standard of care expected is that of a reasonable person. See ***Omony v AG & Another HCCS No. 27 of 2002***.

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 degree of care required varies directly with the risk involved. The greater the risk, the greater the care. The police officer in this case armed with a very dangerous weapon (gun) requires greater skill and care than a person holding a baton. A person carrying a loaded gun is expected to take more precautions than a person carrying unloaded gun.

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.

The plaintiff has satisfied all the ingredients for negligence and the defendant is vicariously liable for the acts of the police officer.

Black's Law Dictionary 11th Edition (2019) defines vicarious liability as; Liability that a supervisory party (such as employer) bears for the actionable conduct of a

subordinate or associate (such as an employee) based on the relationship between the two parties

According to **the *East African Cases on the Law of Tort* by E. Veitch (1972 Edition) at page 78**, an employer is in general liable for the acts of his employees or agents while in the course of the employers business or within the scope of employment. This liability arises whether the acts are for the benefit of the employer or for the benefit of the agent. In deciding whether the employer is vicariously liable or not, the questions to be determined are: whether or not the employee or agent was acting within the scope of his employment; whether or not the employee or agent was going about the business of his employer at the time the damage was done to the plaintiff. When the employee or agent goes out to perform his or her purely private business, the employer will not be liable for any tort committed while the agent or employee was a frolic of his or her own.

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***)

In the instant case, the errant police officer shot randomly and carelessly and the stray bullet injured the plaintiff. This pointed towards wrongful or negligent use of the gun in performance of his duties in the course of his employment as a police officer.

Whether the plaintiff is entitled to the remedies sought?

Special Damages

*Plaintiffs must understand that if they bring actions for damages, it is for them to prove their damage; it is not enough to write down particulars and so to speak, throw them at the head of the court, saying, "This is what I have lost, I ask you to give these damages" They have to prove it. See ***Benedicto Musisi vs Attorney General HCCS No. 622 of 1989 [1996] 1 KALR 164 & Rosemary Nalwadda vs Uganda Aids Commission HCCS No.67 of 2011****

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 did not give any particulars of special damages and only stated that ***“special damages as may be assessed by the Honourable court.”*** At the trial she tried to introduce a specific sum of 31,902,600/= as the special damages and went ahead to set out the particulars thereof.

This court will not accept this mode of presenting special damages when it is not specifically pleaded to enable the defence be on notice and be able to challenge the same in time. In courts view this is an afterthought and the same is rejected. The plaintiffs’ claim for special damages fails.

General 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.

General damages are such as the law will presume to be direct natural probable consequence of the act complained of. In quantification of damages, the court must bear in mind the fact that the plaintiff must be put in the position he would have been had he not suffered the wrong. The basic measure of damage is restitution. See ***Dr. Denis Lwamafa vs Attorney General HCCS No. 79 of 1983 [1992] 1 KALR 21***

The character of the acts themselves, which produce the damage, the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstance and nature of the acts themselves by which the damage is done. See ***Ouma vs Nairobi City Council [1976] KLR 298.***

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***

The awards reflect society’s discomfiture of the wrongdoer’s deprivation of the man’s liberty and society’s sympathy to the plight of the innocent victim. The awards, therefore are based on impression.

In the circumstances of this case, it is clear that the defendant admitted liability when they visited the plaintiff and when she went to make a statement at Kabalagala Police Station. They ignored or refused to give any medical care or financial support to mitigate the damage.

The plaintiff has sought general damages of 200,000,000/= for mental anguish, physical suffering and pain, body incapacity and inconvenience. This claim is on a higher side and considering the nature of suffering, the plaintiff went through and expenses she failed to prove as special damages, the plaintiff is awarded a sum of 75,000,000/= as general damages.

The plaintiff has not made out a case for award of exemplary and aggravated damages. There was nothing aggravating.

The plaintiff is awarded costs of the suit.

I so order.

Dated, signed and delivered by email & WhatsApp at Kampala this 15th day of May 2020

**SSEKAANA MUSA
JUDGE**