

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
CIVIL SUIT NO: 104 OF 2017**

**1. ISAAC MAWANDA
2. NAKASALIRWE ROBINAH
3. KATO JOHNSON
4. WASSWA JOHNSON
(SUING THROUGH THEIR NEXT FRIEND
NAKITO MARY (GRAND MOTHER)..... PLAINTIFFS**

VERSUS

**1. TUGUMISIRIZE ABEL
2. NEW UGANDA SECURIKO LTD.....DEFENDANTS**

BEFORE: HON. JUSTICE SSEKAANA MUSA

JUDGMENT

This suit was brought Section 5 & 6 of the Law Reform (Miscellaneous Provisions) Act, Cap 79. That on the 12th day of October 2016 the deceased was moving along Kasenge Nakawuka Road near Gaz Petro Station, the 1st defendant an employee of the 2nd defendant the due course of his employment shot Kibubbu Johnson who was on the side of the road and killed him on the spot.

As a result of the death of late Kibubbu Johnson, the plaintiffs suffered loss of support and dependency, loss of life expectancy, inconvenience, anguish, pain and mental suffering occasioned to the family, living behind 4 issues namely; Mawanda Isaac aged 8 years, Nakasalirwa Robinah aged 3 years, a pregnant wife who later gave birth to twins at the time of filing this suit who are now aged 3 months, directly dependent relatives who include; Nakito Mary (Mother to the deceased), Samuel Mawanda (Father to the deceased) and Nakayange Edith (Sister to the deceased)

The defendants' filed a written statement of defence, contending that they did not owe the deceased any duty of care as he voluntarily brought himself in a riotous place either as one of the rowdy people or stranger who had come to see what was happening in the area at GAZ petrol station.

The 1st defendant's act of shooting in the air was reasonable and justified in the circumstances in which the whole petrol station was on the verge of being burnt by rowdy boda boda cyclists and the shooting was intended to disperse the crowd.

The rowdy crowd of boda boda riders had wanted to attack the police vehicle which was taking a suspect who was accused of stealing their boda boda and killing their colleague.

The parties filed a joint scheduling memorandum wherein they agreed to one fact and issues for determination.

Agreed Fact

The 1st defendant shot the late Kibubu.

Agreed Issues

1. Whether the actions of the defendants jointly and /or severally are/were unlawful in the circumstances?
2. Whether the plaintiffs are entitled to the remedies sought?

The matter proceeded ex parte after the defendant's counsel failed to turn up at the time of the hearing.

The plaintiff was represented by ***Ssemanda David*** while the Defendants were represented by ***Bwesigye Enock***

Whether the actions of the defendants jointly and /or severally are/were unlawful in the circumstances?

The plaintiffs' counsel in his submission cited **Section 5 of the Law Reforms (Miscellaneous Provision) Act** which provides that *"if the death of any person is caused by any wrongful act, neglect or default of any person, and the act, neglect or default is such as would, if death had not ensued, have entitled the person injured by it maintain an action and recover damages in respect of it, the person who would have been liable if death had not ensued shall be liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under such circumstances as amount in law to a felony"*

Counsel further submitted in **Section 6(1) of the law reforms (miscellaneous provisions) Act** providing *"that every action brought under section 5 shall be for the benefit of the members of the family of the person whose death has been so caused, and shall be brought either by and in the name of the executor or administrator of the person deceased or by and in the name or names of all or any of the members (if more than one) of the family of the person deceased."*

Counsel cited the case of **Stevenson Jordan & Harison Ltd v. Mcdonald & Evans (1952)1 TLR**, where Lord Denning held that the employer in the control of the behavior of his employee obtains a benefit from him and that a master is liable for the tortious actions committed by his servant in the course of his employment **(see Paul Byekwaso v. Attorney General CA No.10/2002)** and inter alia that *"an employer is still liable for the tortious acts of his servant if the servant acted dangerously, recklessly or for his own benefit as long as he was on his master's duty when he inflicted the tort"* **(see Ketayomba v. Uganda Securiko Limited [1977] HCB 170)**

Counsel submitted that it is an admitted fact by both parties that the 1st defendant is an employee of the 2nd defendant working as a security guard at Gaz Petro Station attached are Exhibits PE3 and PE4, and that it is not in contention that the late Kibubbu Johnson's life was ended by the violent negligent acts of the 1st defendant by shooting at him as proved in PE1 and PE2.

Counsel also submitted that the defendants contended in their written statement of defence that there was contributory negligence under paragraph 5, however failed to adduce evidence thus the allegation cannot hold. The law provides that the burden of proof lies on the defendant to prove that there was contributory

negligence and were the same is absent; it should be answered in negative as was in the case of **Wayuu & Another v. Sugar Corporation & Another [1998] 11 KLR**

Counsel further cited **Article 50 of the Constitution of Uganda** as it entitles a person who claims that his/her fundamental rights have been violated to file an action in a competent court and also provides that court may award redress to the applicant which may include compensation, thus praying for the following damages.

Analysis

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 plaintiffs had to show that the deceased was shot and killed by an act or omission for which the defendants are liable. There must be proof of some duty owed by the defendants, breach of that duty and consequent damage suffered by the plaintiffs.

In the present case the security guard had an obligation to behave in such a manner that would not harm the late Kibbubu father of plaintiffs. It is the duty of a reasonable security guard not to harm innocent civilians in the course of executing his duties of providing security. Prudent and reasonable security guards do not behave in such a manner of shooting aimlessly or randomly as to amount to carelessness. Such a security guard is liable for a careless act since he is under a legal duty to take care towards other persons in the course of executing the employment mandate of providing security. 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 security guard owes a duty of care and commits a breach of that duty, he is said to have committed an act of 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 security guard 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 an unloaded gun.

The third ingredient of negligence is that the plaintiff's death must have been caused by the defendant's breach of duty and not due to any other cause. The

plaintiff in this case indeed was killed by the bullet that was fired from the 1st defendant's gun as an admitted fact.

The plaintiff has satisfied all the ingredients for negligent cause of death and the 2nd defendant is vicariously liable for the acts of the security guard-1st defendant.

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 security guard shot randomly and carelessly and the stray bullet hit and killed the late Kibubbu the father of the plaintiffs. This pointed towards wrongful or negligent use of the gun in performance of his duties in the course of his employment as a security guard.

I agree with the submissions of counsel for the plaintiffs that the defendant is liable for the death of Kibubbu Johnson. This is because they have adduced evidence to show that Kibubbu Johnson was negligently killed by Tugumisirize

Abel a security guard working with New Uganda Securiko Ltd in the course of his employment.

This issue is determined in the affirmative

Whether the plaintiffs are entitled to the remedies sought?

Special damages

The plaintiff in this regard paid UGX. 2,250,000 as expenses incurred for burial expenses to a refund of the same attaching Exhibit PE4 as proof of payment. The plaintiff also incurred UGX. 500,000 as expenses incurred to purchase cement, bricks and iron sheets for the construction of the grave of the late Kibubbu Johnson and also incurred UGX 10,000 for attaining a death certificate to which they are entitled to a refund of the same. However in this regard no evidence was attached though Counsel cited the case of **Kyambadde v. Mpigi District Administration [1983] HCB 44** where court held *that failure to attach expenses excusable because at the time of bereavement, it may not be possible to attend to details such as asking for receipt.*

I agree that special damages should be specifically pleaded and strictly proved, which the plaintiffs have taken the liberty to prove.

I, therefore, grant special damages amounting to UGX. 2,760,000 to compensate for the loss suffered by the family in the preparation of the deceased's burial.

General damages

I have also taken the liberty to review the evidence adduced in regards to general damages, and in assessing the claim of the dependants, the relationship between the deceased and the dependants, the personal circumstances of the deceased and the dependents, such as age, financial means and needs have had to be considered in order to determine what would be reasonable, just and fair compensation.

The damages to be awarded to the dependants under the Law Reform Miscellaneous Provisions Act must take into account any pecuniary benefit accruing to the dependants in consequence of the death of the deceased. The general principle is that the pecuniary loss can be ascertained only by balancing on the one hand, the loss to the claimants of the future pecuniary benefit and on

the other any pecuniary advantage which from whatever source comes to them by reason of the death, that is, the balance of loss and gain to a dependant by the death, must be ascertained. See ***Davies v Powell D.A Collieries Ltd [1942] AC 601***

The Late Kibubbu at the time of his death was the sole bread winner of his family. PW1 stated in her witness statement that the deceased left behind minors; Mawanda Isaac aged 8 years, Nakasalirwa Robinah aged 3 years, a pregnant wife who later gave birth to twins at the time of filling this suit who are now aged 3 months, directly dependent relatives who include; Nakito Mary (Mother to the deceased), Samuel Mawanda (Father to the deceased) and Nakayange Edith (Sister to the deceased)

The deceased died at the age of 32 years thus was expected to live for more 28 years had not the 1st defendant's action of ending his life negligently. Counsel relied on the case of **Solomon Nsereko Anthony & another HCCS 275 OF 2014**, where court held that the life expectancy in Uganda is 60 years.

The plaintiffs' are awarded general damages amounting to UGX. 180,000,000/= to compensate for the damage and pecuniary loss of a father.

Interest

I award interest at the rate of 10% on all the damages awards from the date of judgment until payment in full and costs of the suit are awarded to the plaintiff.

I so order.

SSEKAANA MUSA

JUDGE

30th June 2021