

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

CIVIL SUIT NO. 210 OF 2018

- 1. MASINDE STEPHEN**
- 2. BWIRE EDDY LWANDE:.....:PLAINTIFFS**
(Administrators of the Estate of the Lwande Henry Haddu)

VERSUS

KAMPALA CAPITAL CITY AUTHORITY-----DEFENDANT

BEFORE: HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The plaintiffs brought this suit for recovery of special and general damages for the loss of financial support, dependence and expectation of life due to the defendant's negligence and breach of statutory duty in failing to ensure that the open Kanywankoko drainage channel along the shoulders of Kinawataka road at Bugolobi, Kampala was covered and made safe and fit for public use, which omission caused the death of Lwande Henry Haddu.

On the night of 16th December 2017, the said Lwande Henry Haddu, while walking along the shoulders of Kinawataka Road, Bugolobi fell into Kanywankooko drainage channel which was close to the shoulders of the road and which had been left open by the defendant.

The plaintiff contended that the defendant was negligently liable for causing death of the said Lwande Henry Haddu. Further that the defendant was in breach of statutory duty because there were no signs to alert the public of the potential danger.

The defendant contends the drainage channel in which the plaintiff alleged to have fallen was formed as result of soil erosion. The drainage channel has a 1.5 meter shoulder from the edge of the road which provides enough usable pedestrian space.

The deceased fell into the outfall of the said drainage channel as a result of a reckless run away driver who swerved into the shoulder designed for non-motorized traffic. The motor vehicle startled the deceased and caused him to fall into the said drainage channel.

The defendant contended that the deceased was negligent while walking along the open drainage channel and therefore solely caused or contributed to his death when he jumped into the drainage channel.

AGREED FACTS

1. The deceased, fell in Kanywankooko Drainage Channel on the night of 16th December 2017 and died.
2. The defendant contributed a sum of UGX 3,100,000/= towards the burial expenses of the deceased
3. The defendant is a legal entity established by an Act of Parliament with full capacity to sue or be sued.

AGREED ISSUES.

1. *Whether the death of Lwande Henry Haddu was caused by the negligence of the defendant?*
2. *Whether the defendant was in breach of her statutory duty in leaving Kanywankooko drainage channel uncovered?*
3. *Whether there was contributory negligence on the part of the deceased.*
4. *Whether there are any remedies available in the circumstances?*

At the trial the plaintiff led 3 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 *Mr Bwire Aggrey* while the defendant was represented by *Ms Jackie Atugonza*

Determination

Whether the death of Lwande Henry Haddu was caused by the negligence of the defendant?

PW III, Mugeni Robert Sande in his evidence testified that on 16th/12/2017 while he was with the deceased at night with a group of other four friends while walking along the shoulders of kinawataka road near the soap factory a speeding vehicle flashed floodlights towards them and they all ran towards the shoulders of the road in order to avoid or dodge the speeding vehicle. They discovered that the deceased had fallen in the drainage channel.

The plaintiffs' counsel submitted that the falling into the said drainage channel and his eventual injury and death in the said channel was a foreseeable act which the defendant ought to have avoided but she wantonly ignored to the detriment of the deceased and his family because he fell in the category of the public who would directly be affected in such an omission.

It was the plaintiffs' counsel contention that it was reasonably foreseeable that the defendant's carelessness would have inflicted on the deceased the kind of harm of which the deceased met his death.

The defendant's counsel submitted before the liability of a defendant is established in negligence the court must establish the ingredients of negligence and that the duty is upon the plaintiff who sues in negligence to prove that his injury was occasioned as a result of the defendant's negligence.

DWI testified that Kanywankooko drain is a shallow section created by nature and it has a shoulder of 1.5 meters and that the drainage channel was 3.5 meters deep. The deceased fell in the channel after vehicle flashed lights.

The defendant's counsel submitted that the causation and proximate cause in the matter was the speeding vehicle that flashed the lights towards the deceased who was walking with others on a road shoulder that was wide enough for them not to fall off.

Analysis

The tort of negligence requires more than heedless or careless conduct: 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** (19th 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.

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 is required to have a minimum road shoulder of 1.2 meters and in this case there was 1.5 meters of the road shoulder which in my view was adequate and sufficient to cater for all the pedestrian road users to avoid being knocked by speeding vehicles.

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 but not all the danger can be foreseen in order to mitigate against it. The deceased was walking with a group of friends at night which may not have been foreseen that people would be walking along such a spot in the middle of the night and a vehicle would flash lights to blur their sight and they jump into the channel.

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 may be true or it may be exaggerated by the Mayor that this was a black spot but this would indeed mean that the public should not have equally been careful about. The plaintiffs' counsel argument is that it should never have been a dark spot or that the same should have been worked on cannot be used as the basis of imputing or inferring liability of the defendant. In this case it was the swerving vehicle that caused the deceased to jump off the road shoulder and he fell in the drainage channel. It was the deceased calculated risk of jumping off the shoulder which caused him to fall in the drainage channel

There was adequate road shoulder to facilitate the pedestrians to walk along the road and the drainage channel as stated by defence witness the channel is as result of soil erosion and that earth channels which are naturally created are not normally worked on by the defendant.

STANDARD OF PROOF OF 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 had a legal duty to care towards all the people using the road to be availed a walking space for the pedestrians and could never have foreseen errant or reckless drivers running off pedestrians off the road into the drainage channels. The drainage channels are not necessarily supposed to be covered as the plaintiff's counsel has argued. Indeed DWI testified that open drainage channels are allowed on the side of the roads.

The deceased cause of death or the immediate resultant cause of death was the jumping off the road into the drainage channel after the speeding vehicle swerved and flashed the lights into them and they scampered for their safety. It was this unfortunate incident that caused the death otherwise the other members of the group with whom walking on the road shoulders never got any injuries. The

plaintiffs have failed to discharge the burden of making out a prima facie case of negligence against the defendant.

In order to arrive at the conclusion that a defendant owes a duty of care to the plaintiff or deceased person, it is material to take into consideration whether it is just and reasonable that it should be so. What is not clear beyond doubt is that foreseeability of harm alone is not enough to create a duty of care. Some further ingredient is invariably needed to establish the requisite proximate relationship between the deceased and the plaintiff, and all the circumstances of the case must be considered and analysed in order to ascertain whether such ingredient is present.

This issue therefore fails.

Whether the defendant was in breach of her statutory duty in leaving Kanywankooko drainage channel uncovered?

The plaintiffs' counsel submitted that the defendant under section 7 of Kampala Capital City Act has a duty to construct and maintain roads, construct and maintain major drains and install and maintain street lights. Therefore, the defendant in counsels' view failed in its duty to maintain the drainage and it left it uncovered and further that the road was unfit for public use.

The plaintiffs' counsel further submitted that the fact that there was a belated repair of the said channel is collaborative of the fact that they had failed in their responsibility of maintaining the channel.

The defendant's counsel submitted that the said channel was a gorge that was 3.5 meters deep that had been formed as a result of soil erosion and was not constructed by the defendant. The defendant does not construct earth channels.

Analysis

Whether the plaintiff is entitled to sue for breach of statutory duty will depend on whether a private right of civil action arises under the statute. Such a private action would arise where:

- (a) The statutory duty imposed for the protection of a limited class of the public; and

(b) Parliament intended to confer on that class a private right of action for a breach of the statutory duty.

Lord Denning in *Ex Parte Island Records Ltd [1978] Ch 122 at 135* stated that: *“The dividing line between pro-cases and the contra-cases is so blurred and so ill-defined that you may as well toss a coin to decide it”* Though this statement may appear somewhat facetious or exaggerated, it reflects, to a considerable extent, the general uncertainty pervading this area. Indeed this ambiguity has led some courts to call for the abolition of the tort of breach of statutory duty. **See *The Queen in Right of Canada v Sackatchewan Wheat Pool (1980) 143 DLR (3d) 9***

The plaintiffs’ counsel was required to show that the deceased falls within the limited class that the statute seeks to protect. If he was outside the limited class, he will not enjoy a private right of action. The plaintiffs’ counsel seems to argue that since the Kampala Capital City Act provides for a duty to construct and maintain roads, construct and maintain major drains and install and maintain street lights then there was a breach of a statutory duty.

The statutory duty created under the Kampala Capital City Act to construct and maintain roads, construct and maintain major drains and install and maintain street lights is not intended to provide any protection of any class of persons but rather a general duty of responsibility without any specific right of private action to any Ugandan like the deceased. Otherwise it would be an absurd situation that every person would be dragging every government agency to court in tort for failure to construct roads, install street lights or cleaning trenches or channels simply because the law has enjoined them to work on them in the entire city.

The defendant has a duty to work on such things listed in the Act but this is dependent on the available resources (resource envelop) and this should never be interpreted as a breach of statutory duty to invite the tortious action. The Parliament’s intention was not to confer rights to any Ugandan to found a cause of action in tort where what is listed is not worked on. Where the parliamentary intention is not evident from the statutory provision or the extrinsic materials, judges may refer to a few indicators or guidelines, though by no means conclusive, to ascertain whether Parliament intended the breach of statute to give rise to a private right of action or otherwise.

Whether there was contributory negligence on the part of the deceased?

Contributory negligence is negligence in not avoiding the consequences arising from the defendant's negligence, when the deceased has means and opportunity to do so. In fact, it is the non-exercise by the deceased 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***

Since the 1st issue was resolved against the plaintiffs or that they failed to prove that the death was caused by the negligence of the defendant, automatically this issue fell by the wayside and cannot be resolved since no negligence was proved against the defendant.

Whether there are any remedies available in the circumstances?

This suit fails and the same is dismissed with no order as to costs.

I so Order

SSEKAANA MUSA

JUDGE

5th May 2023