

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
CIVIL SUIT NO. 270 OF 2017

KAGUTA SALIM=====PLAINTIFF
VERSUS

1.KYABAGGU JOSEPH

2.OMEGA CONSTRUCTION LTD=====DEFENDANTS

BEFORE: HON. MR. JUSTICE PHILLIP ODOKI

JUDGMENT

Introduction:

[1] Kaguta Salim (hereinafter referred to as “the Plaintiff”) instituted this suit against Kyabaggu Joseph (hereinafter referred to as “the 1st Defendant”) and Omega construction Ltd (hereinafter referred to as “the 2nd Defendant”) in which he sought for special, general and aggravated damages arising from injuries he suffered as a result of a motor accident, which according to him was caused by the negligence of the 1st Defendant who at the material time was in the course his employment with the 2nd Defendant.

The Plaintiff’s case:

[2] The Plaintiff pleaded that on the 28th December 2016 he was riding Motorcycle Registration Number UDW 290F. The 1st Defendant was driving Motor Vehicle Registration Number UAD 546N belonging to the 2nd Defendant. At around 8.00pm, the 1st Defendant knocked him thereby causing him physical injuries. The Plaintiff contended that the injuries he suffered were as a result of the 1st Defendant driving Motor Vehicle Registration Number UAD 546N negligently. The Plaintiff further contended that at the time of the accident, the 1st Defendant was in the course of his employment with the 2nd Defendant and therefore the 2nd Defendant is vicariously liable for the 1st Defendant’s negligence.

The 1st Defendant's case:

[3] The 1st Defendant denied all the allegations of the Plaintiff. He pleaded that it was instead the Plaintiff who failed to control his Motor Cycle and knocked the side mirror of the 2nd Defendant's car which he the (1st Defendant) was driving.

The 2nd Defendant's case:

[4] The 2nd Defendant also denied all the allegations of the Plaintiff. It pleaded that the 1st Defendant was not employed by the 2nd Defendant as a driver. The 1st Defendant had no responsibility and was not permitted to drive any of the 2nd Defendant's vehicles at the time the accident took place. In addition, at the time the accident took place, it was beyond the working hours of the 1st Defendant. According to the 2nd Defendant, it is not liable for any negligent acts of the 1st Defendant.

Issues:

[5] The issues for the determination of the determination of the court are;

- i. Whether the 1st Defendant negligently caused the accident.
- ii. Whether the 2nd Defendant is vicariously liable for the acts or omission of the 1st Defendant.
- iii. Whether the Plaintiff was contributorily negligent.
- iv. Whether the Plaintiff suffered any loss as a result of the accident and if so, what is the quantum.
- v. What remedies are available to the parties.

The evidence presented:

[6] The 1st Plaintiff testified as PW1. He adduced Hellen Kansiime, with whom he was cohabiting at the time, who testified as PW2. In addition, the Plaintiff adduced 8 documents which were admitted in evidence. The 1st Defendant testified as DW1. He did not adduce any documents to the Court. The 2nd Defendant did not adduce any witness. However, it tendered in evidence one document through PW1.

Legal representation and submissions:

[7] At the hearing, the Plaintiff was represented by Mr. Ramathan Lutaaya of M/s Lubega, Wandera & Co. Advocates. The 1st Defendant was represented by Mr. Isaac Sekabanja of M/s Kalenge, Bwanika, Ssawa and Company Advocates. The 2nd Defendant was represented by Mr. Hamir Kakooza of M/s JM Musisi Advocates & Legal Consultants. At the close of the hearing, the Court gave counsel directives to file written submission. Counsel for the Plaintiff and counsel for the 1st Defendant filed their written submissions as directed by the Court. Counsel for the 2nd Defendant did not file any submissions. I have given the submissions the requisite consideration in the determination of the issues before the Court.

Burden and standard of proof:

[8] The burden of proof in civil matters lies upon the person who asserts or alleges. Any person who, wishes the court to believe the existence of any particular fact or desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts, must prove that those facts exist. (**See section 101, 102 and 103 of the Evidence Act Cap 6 of the laws of Uganda**). The opposite party can only be called to dispute or rebut what has been proved by the other party (**See Sebuliba versus Co-operative Bank (1982) HCB 129**). The standard of proof required is on the balance of probabilities. In **Miller versus Minister of Pensions (1947) 2 ALL ER 372** Lord Denning stated;

“That the degree is well settled. It must carry a reasonable degree of probability but not too high as is required in a criminal case. If the evidence is such that the tribunal can say, we think it is more probable than not, the burden of proof is discharged but if the probabilities are equal, it is not.”

Consideration and determination of the Court:

Issue 1: Whether the 1st Defendant negligently caused the accident.

[9] In order for the Plaintiff to succeed in this case which is founded on the tort of negligence, she must prove three elements. First, that the 1st Defendant owed him a duty

of care. Secondly, that the Defendant breached that duty of care. Thirdly, that he suffered damage as a result of the breach of duty care by the 1st Defendant.

Whether the 1st Defendant owed the Plaintiff a duty of care.

[12] In the much-celebrated English case of **Donoghue v Stevenson [1932] AC 562** the House of Lords succinctly stated the duty of care required to be proved in the tort negligence. At page 580, Lord Atkinson stated that:

“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.”

[13] In the instant case, it is common ground that the Plaintiff was riding Motorcycle Registration Number UDW 290F on the same road where the 1st Defendant was driving Motor Vehicle Registration Number UAD 546N. They were moving in the opposite direction. As drivers on the same road, they were both under a duty to take reasonable care to ensure the safety of other traffic on the road and to avoid collision (See: **Paulo Kato versus Uganda Transport Corporation (1975) HCB 119**). The 1st Defendant owed a duty of care to all road users at the material, including the Plaintiff, not to do any act or to fail to do any act, while driving on the road, that he could reasonably foresee would cause injury to them.

Whether the Defendant breached its duty of care to the late Godfrey Mutumba.

[14] A breach of duty of care occurs when one party, who owes the other a duty of care, does something or fails to do something which he or she reasonably foresee would be likely to injure the other party. In order to be deemed as breaching the duty of care, the Defendant’s actions must be proven to fall below the standard of care likely to be taken by a reasonable man having regard to all the circumstances of the case.

[15] In the instant case, the particulars of the negligence were stated in the plaint to be;

- i. Driving at a high speed on a murram road.
- ii. Driving a vehicle which was in a dangerous mechanical condition.
- iii. Failure to apply the brakes before the accident.
- iv. Driving a vehicle with one head lamp.
- v. Recklessly and negligently operating the motor vehicle on the road without considering other road users.

[16] The Plaintiff testified that on the 28th December 2016 at around 8.00pm, while he was riding from Wajjala via Lwampaga to Lukooage, he saw Motor Vehicle Registration Number UAD 546N, which he later came to learn was being driven by the 1st Defendant, speeding coming from the opposite direction. Motor Vehicle Registration Number UAD 546N had only one head lamp. He (the Plaintiff) stopped and waited for the 1st Defendant to bypass him. According to the Plaintiff, the 1st Defendant did not apply the brakes, he lost control and rammed into him. The Plaintiff testified that the police investigated the matter and found that Motor Vehicle Registration Number UAD 546N was in a dangerous mechanical condition. He made reference to the Police Report, Accident Sketch Plan and Motor Vehicle Inspection Report.

[17] The Defendant on the other hand testified that it is the Plaintiff who was riding at a very high speed and rammed into the side mirror of Motor Vehicle Registration Number UAD 546N. He testified that all the front lights of Motor Vehicle Registration Number UAD 546N were working properly. The 1st Defendant denied that the Plaintiff stopped to wait for Motor Vehicle Registration Number UAD 546N to bypass him. According to the 1st Defendant, the Plaintiff rode straight towards him and hit his (1st Defendant's) driver's mirror from the right-hand side. The Plaintiff fell on the right-hand side of the road.

[18] I note that the Plaintiff did not adduce any other evidence to prove that 1st Defendant, was over speeding; was driving a vehicle with only one head lamp; did not apply the brakes; and was driving a vehicle in a dangerous mechanical condition. The

Plaintiff failed to tender in evidence the Motor Vehicle Inspection Report which he referred to and the Inspector of Motor vehicle to testify. The Inspection Report and the Inspector of Motor Vehicles would have indicated whether Motor Vehicle Registration Number UAD 546N only had one head lump and was in a dangerous mechanical condition. The Inspection Report and the Inspector of Motor Vehicles would have also shown the court the impact of the accident on Motor Vehicle Registration Number UAD 546N which would have proved that the 1st Defendant was indeed driving at a high speed. The Plaintiff also failed to adduce in evidence the Sketch Map and the Police officer who visited the scene and drew the Sketch map. They would have indicated the position of the Motor Vehicle Registration Number UAD 546N and Motorcycle Registration Number UDW 290F before and after the accident. This would have assisted the court in determining whether there were any skid marks to prove over speeding. The Sketch map would have also assisted the court in determining the point of impact and the position of the vehicles after the accident to prove who was negligent.

[19] Given that the 1st Defendant gave contrary evidence that it is instead the Plaintiff who was over speeding, that all the front lights of the vehicle he was driving were working, that it is the 1st Defendant who rode towards him and hit his car and denied that the Plaintiff stopped to wait for Motor Vehicle Registration Number UAD 546N to pass, I find the evidence of the plaintiff to prove that the 1st Defendant breached his duty of care and caused the accident extremely lacking. My finding is that the Plaintiff failed to prove that the 1st Defendant breached his duty of care to him and caused the accident.

Whether the Plaintiff suffered any damage as a result of the breach of duty care by the 1st Defendant.

[20] Having found that the Plaintiff failed to prove that the 1st Defendant breached its duty of care. It cannot therefore be said that the damage the Plaintiff suffered was caused by the negligence of the 1st Defendant.

[21] Issue 1 is accordingly determined in the negative. It is pointless to determine issue 2, 3 and 4 since it would only be necessary to do so if issue 1 was answered in the affirmative.

Issue 5: What remedies are available to the parties.

[22] Given that the Plaintiff failed to prove that the accident was caused by the negligence of the 1st Defendant, this suit is accordingly dismissed with costs to the Defendants.

I so order.

Dated and delivered by email this 7th day of September 2023.

A handwritten signature in blue ink, appearing to read 'P. Odoki', with a long horizontal stroke extending to the right.

Phillip Odoki

JUDGE