

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

**CIVIL SUIT NO. 371 OF 2016**

**(FORMERLY NAKAWA HIGH COURT CIVIL SUIT NO. 408 OF 2014)**

**1. KYAKUWA JOSEPH**  
**2. SEMUJJU DAVID**  
**3. MUSISI MOSES**  
**4. SEMWANGA GODFREY ::: PLAINTIFFS**

**VERSUS**

**ATTORNEY GENERAL ::: DEFENDANT**

**BEFORE: HON. JUSTICE BONIFACE WAMALA**

**JUDGMENT**

**Introduction**

[1] This suit was brought by the Plaintiffs above named against the Defendant seeking special, general and aggravated damages for assault and financial loss, with interest and the costs of the suit.

[2] The brief facts according to the Plaintiffs are that on 3<sup>rd</sup> April 2011 at around 12:00 noon, a police officer called Njala Moses in company of three other policemen in uniform, while trying to disperse a crowd of people that was trying to arrest a suspected thief, negligently opened fire randomly killing two persons on spot and injuring 5 others including the Plaintiffs. The Plaintiffs were rushed to Mulago Hospital in critical condition and were admitted for treatment of gunshot wounds. The 1<sup>st</sup> Plaintiff underwent surgery that led to removal of his spleen and cutting off part of his intestines. The Plaintiffs were visited in hospital by the DPC of Kira Police Station and the then Spokesperson of Police Ms. Nabakooba Judith who gave each of them UGX 60,000/= as police

contribution towards their treatment. Upon discharge from hospital, they were informed that the officer who shot them was arrested and charged with eight counts including attempted murder and remanded to Luzira prison. The Plaintiffs thus brought this suit for recovery of the reliefs claimed. The Plaintiffs explained the circumstances that led to the suit being filed belatedly.

[3] The Defendant filed a written statement of defence in which they denied the Plaintiffs' claims and particularly stated that none of its officers indiscriminately and/or negligently shot at the Plaintiffs. The Defendant further denied the particulars of negligence pleaded by the Plaintiffs and contended that the Plaintiffs had no valid reason for failure to institute the suit within the required time frame. The Defendant concluded that the Plaintiffs are not entitled to the reliefs sought and prayed to court to dismiss the suit with costs.

### **Representation and Hearing**

[4] At the hearing, the Plaintiff were represented by **Mr. Bruno Sserunkuma** from M/s Ssemwanga, Muwazi & Co. Advocates while the Defendant was represented by **Mr. Richard Adrole** and **Ms. Akello Susan**, State Attorneys from the Attorney General's Chambers. Both counsel concluded and filed a joint scheduling memorandum and were directed to file their trial bundle and witness statements. Counsel for the Defendant neither filed their trial bundle or any witness statements nor appeared in Court when the case came up for final scheduling and commencement of hearing. Counsel applied to Court to proceed with the hearing of the Plaintiffs' case ex parte which the Court allowed under Order 9 rule 20(1)(a) of the Civil Procedure Rules. The Plaintiff led evidence of four witnesses by way of witness statements which were adopted by the Court. Counsel for the Plaintiffs made and filed written submissions which I have reviewed and considered in the determination of the matter before Court.

## **Propriety and Competence of the Suit**

[5] Although Counsel for the Defendant did not raise a preliminary objection before the Court, it was hinted upon in the WSD that they intended to raise an issue as to the legal bar of the suit on account of time limitation. The position of the law is that once a claim is caught up by time limitation, the same is barred by law and cannot be entertained by the court except where the claimant establishes that he/she is able to take advantage of any of the exceptions set out under the limitation statute. In such a case, the party has to bring the action itself and therein plead that they are relying on a particular exception. To that effect, the provision under Order 7 rule 6 of the CPR provides as follows;

### ***“Grounds of exemption from limitations.***

*When a suit is instituted after the expiration of the period of limitation prescribed by the law of limitation, the plaint shall show grounds upon which exemption from such law is claimed”.*

[6] Section 3(1) of the Civil Procedure and Limitation (Miscellaneous Provisions) Act cap 72 provides as follows;

### ***“Limitation of certain actions***

*(1) No action founded on tort shall be brought against –*

*(a) the Government*

*(b) a local authority; or*

*(c) a scheduled corporation,*

*after the expiration of two years from the date on which the cause of action arose”.*

[7] Section 5 and 6 of the Act (Cap 72) provide exemptions to the above limitation provision. Under section 5 thereof, a party gets exempted to the application of section 3 above if he or she can prove that they were prevented

from bringing the suit within time on grounds of disability. Section 5 of the Act states as follows;

***“Extension of limitation period in case of disability***

*If on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of twelve months from the date when the person ceased to be under a disability or died, whichever event first occurred, notwithstanding that the period of limitation has expired”.*

[8] In the instant case, it is clear from the facts that the incident allegedly occurred on 3<sup>rd</sup> April 2011. The suit was originally filed in the High Court of Uganda at Nakawa as Civil Suit No. 408 of 2014 on 22<sup>nd</sup> October 2014. When the case file was transferred to the High Court Civil Division, the Plaintiffs filed an amended plaint on 11<sup>th</sup> September 2018. In both the original and amended complaints, it was highlighted by the Plaintiffs’ Counsel that in the event of objection as to the time within which the suit was filed, the Plaintiffs would rely on the ground of exemption to the effect that after the shooting, they were admitted in various hospitals and remained incapacitated under treatment for at least a year and were not in touch with their lawyer who had been embroiled in the KCCA tribunal. As such, they were unable to give him instructions to file the suit. The Defendant in paragraph 10 of the amended WSD contended that no valid reason had been disclosed by the Plaintiffs for the late filing of the suit.

[9] The incident having allegedly occurred on 3<sup>rd</sup> April 2011 and the suit having been instituted on 22<sup>nd</sup> October 2014, the first two years expired on 2<sup>nd</sup> April 2013 and the next 12 months expired on 1<sup>st</sup> April 2014. This would show that by the time the suit was filed, the period of extension granted by statute had also elapsed. Nevertheless, the reasons advanced for the Plaintiffs’ disability

have not been rebutted by the Defendant. There is evidence that the Plaintiffs suffered prolonged hospitalization and it is claimed that their lawyer was embroiled in some matters that made it difficult for them to access him for purpose of giving him instructions. In view of these facts, I find that the disability suffered by the Plaintiffs had not ceased by the end of the 12 months. I am therefore prepared to apply the principle of substantive justice under Article 126(2)(e) of the Constitution of Uganda and consider the Plaintiffs as having established an exemption to the time limitation on the suit before me. I will therefore proceed to determine the suit on its merits.

### **Issues for Determination by the Court**

[10] Three issues are up for determination by the Court, namely;

- a) Whether the police officer, Njala Moses, was negligent in shooting and injuring the Plaintiffs?**
- b) Whether the said police officer was acting in the course of his employment and, if so, whether the Defendant is vicariously liable for the actions of the police officer?**
- c) Whether the Plaintiffs are entitled to the remedies claimed?**

### **Burden and Standard of Proof**

[11] In civil proceedings, the burden of proof lies upon he who alleges. Section 101 of the Evidence Act, Cap 6 provides that;

*“(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.*

*(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person”.*

[12] Section 103 of the Evidence Act provides that;

*“The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.*

[13] As such, the burden of proof in civil proceedings normally lies upon the plaintiff or claimant. The standard of proof is on a balance of probabilities. The law however goes further to classify between a legal burden and an evidential burden. When a plaintiff has led evidence establishing his/her claim, he/she is said to have executed the legal burden. The evidential burden thus shifts to the defendant to rebut the plaintiff's claims.

### **Resolution of the Issues**

#### **Issue 1: Whether the police officer, Njala Moses, was negligent in shooting and injuring the Plaintiffs?**

#### **Submissions by the Plaintiffs' Counsel**

[14] Counsel for the Plaintiffs submitted that the Plaintiffs had averred in the plaint and led evidence showing the circumstances under which they were shot and injured by the police officer. The Plaintiffs had in paragraph 6 of the plaint laid out the particulars of negligence by the police officer including the failure to shoot in the air to disperse the crowd, going into the crowd with a cocked gun, shooting randomly and wantonly into the crowd, shooting the Plaintiffs who were travelling freely on the road. The Plaintiffs also relied on the principle of *res ipsa loquitor*. Counsel submitted that the Plaintiffs were among persons that were at the material time using the road with unconnected to the activities of arresting a suspected thief. Counsel argued that the police officers would have decided to shoot in the air or used tear gas to disperse the crowd or effect arrests but not just shoot randomly. Counsel relied on the cases of *Omony Rogers v Attorney General & URA*, HC Civil Suit No. 0027 of 2002 and *Donoghue*

*v Stevenson (1932) AC 362* to support his argument that the police officer owed a duty of care to the Plaintiffs which he breached.

### **Determination by the Court**

[15] Negligence as a tort has been defined as the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. See: *Blyth v Birmingham Water Works (1856) II EX 78*. The test for determining the tort of negligence was stated in the case of *Donoghue v Stevenson (1932) AC 362* where it was stated that in order to establish negligence, the plaintiff must establish that;

- a) The defendant owed the plaintiff a duty of care.
- b) The defendant breached the duty resulting in damage or injury against the plaintiff.
- c) The defendant is liable for the breach of duty.

[16] In the present case, it is shown on the facts and in evidence that the police officer shot randomly and injured the Plaintiffs among other persons. The police officer in issue was with three others, in police uniform and were attempting to disperse a crowd that was purporting to arrest a suspected thief. It is shown that the police officer shot wantonly, in disregard of presence of persons at the scene and in the vicinity. It is stated that the Plaintiffs were not among the crowd that was attempting to arrest the suspected thief but were persons lawfully moving on the road. The police officer clearly owed a duty to the Plaintiffs, among other persons at the scene or in the vicinity, to use the gun in his possession with care and not injure innocent victims.

[17] I am able to reach a conclusion that it was reasonably foreseeable on the part of the police officer that if he shot randomly, as he did, he would injure innocent victims. A reasonable police officer, in such circumstances, would not

have shot at the Plaintiffs wantonly as he could have contemplated that such conduct posed a great risk to the public. He clearly had the option of shooting in the air to disperse the crowd or take such other reasonable means, especially so since he was not alone at the scene. The police officer thus breached his duty of care resulting into injury to the Plaintiffs. The Plaintiffs have therefore proved on a balance of probabilities that the police officer acted negligently and that the severe gunshot injuries suffered by them were a direct consequence of the police officer's negligent actions. The tort of negligence has, therefore, been proved against the police officer and issue one is answered in the affirmative.

**Issue 2: Whether the said police officer was acting in the course of his employment and, if so, whether the Defendant is vicariously liable for the actions of the police officer?**

[18] The facts and evidence before the Court sufficiently show that the police officer that shot the Plaintiffs was in company of three others, in police uniform, and were attempting to disperse a crowd that was purporting to arrest a suspected thief. This is sufficient evidence that the police officer was acting in the course of his employment.

[19] It is not disputed that police officers are servants, employees or agents of Government and therefore the Attorney General is responsible for their actions provided the same were done in ordinary course of their employment. The position of the law is that a master is vicariously liable for the tortious acts committed by his servant in the course of his employment. See: *Paul Byekwaso v Attorney General*, CACA No. 10 of 2002 and *Bagenda Dyabe Tommy v Pioneer Easy Bus Limited*, HCCS No. 36 of 2016. An act may be done in the course of employment so as to make a principal or master liable even though it is done contrary to the orders of the master, and even if the servant or agent 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; *AG v Hajji Adam Farajara* [1977] HCB 29; *Uganda Commercial Bank v Kigozi* [2002] EA 305 at 306 and *Kaggwa Vincent vs Attorney General* HCCS No. 391 of 2014.

[20] In the instant case, I have already found that the police officer was acting in the course of his employment when he shot and injured the Plaintiffs. The Defendant is therefore vicariously liable for the tortious acts of the said police officer who was an employee or servant of Government. The second issue is also answered in the affirmative.

### **Issue 3: Whether the Plaintiffs are entitled to the remedies claimed?**

[21] The Plaintiffs sought for a number of reliefs which I will consider below under separate heads.

#### **Special damages**

[22] The Plaintiffs claimed for an award of the sum of UGX 5,300,000/= as special damages being medical expenses incurred by the 1<sup>st</sup> Plaintiff. The law requires that special damages are specifically pleaded and strictly proved in evidence. See: *Uganda Telecom Ltd v Tanzanite Corporation* [2005] 2 EA 331 at P. 341. In this case, the sum of UGX 5,300,000/= was specifically claimed in the plaint and also proved by way of medical receipts, on record as Annexure PE4 collectively. I find this head of damages proved on a balance of probabilities and I award the said sum of UGX 5,300,000/= to the 1<sup>st</sup> Plaintiff as special damages.

#### **Loss of Income or financial loss**

[23] The Plaintiffs claimed for certain sums respectively as loss of income they would have earned had it not been for the incident and injuries suffered by

them. The sums claimed were UGX 67,000,000/= for the 1<sup>st</sup> Plaintiff and UGX 26,880,000/= for the 3<sup>rd</sup> Plaintiff. The 2<sup>nd</sup> and 4<sup>th</sup> Plaintiffs did not appear in Court to own their witness statements and their statements were accordingly disregarded. In respect to the 2<sup>nd</sup> and 4<sup>th</sup> Plaintiffs, I have only relied on the evidence adduced by the other witnesses to their benefit. The question is whether this category of damages was supposed to be claimed as special or general damages.

[24] The position of the law concerning damages for loss of income or earnings was aptly set out by **Oder JSC** in *Robert Cuossens v Attorney General*, (SCCA No. 8 of 1999) 2000 UGSC 2 (2 March 2000) thus;

*“In cases of pecuniary loss ... it is easy enough to apply [the rule that the court should award the injured party such a sum of money as will put him in the same position as he would have been if he had not sustained the injuries] in the case of earnings which have actually been lost, or expenses which have actually been incurred up to the date of the trial. The exact or approximate amount can be proved and, if proved, will be awarded as special damages. In this category falls income or earning lost between the time of injury and the time of trial. But in the case of future financial loss whether it is future loss of earnings or expenses to be incurred in the future, assessment is not easy. This prospective loss cannot be claimed as special damages because it has not been sustained at the date of the trial. It is therefore, awarded as part of the general damages. The plaintiff no doubt would be entitled in theory to the exact amount of his prospective loss if it could be proved to its present value at the date of the trial. But in practice since future loss cannot usually be proved, the Court has to make a broad estimate taking into account all the proved facts and the probabilities of the particular case”. Also See: *British Transport Commission v Gourley* (1956) AC 185 at p. 212; (1955) 3 All ER 796 at p. 808 to which the Court relied.*

[25] In the present case, the sums claimed by the Plaintiffs as loss of income consist of anticipated future loss between the time of the occurrence and the time they resumed work. The 1<sup>st</sup> Plaintiff claimed lost income for a period of five years from 2011 to 2016 while the 3<sup>rd</sup> Plaintiff claimed lost income for a period of two and a half years from 2011. These damages were neither pleaded specifically nor were they strictly proved as special damages. Going by the principle set out in the above cited case, they are to be better treated as general damages.

### **General damages**

[26] The law is that the general damages are a direct natural or probable consequence of the act complained of and are awarded at the discretion of the court. The purpose of the damages is to restore the aggrieved person to the position they would have been in had the breach or wrong not occurred. See: *Hadley v Baxendale* (1894) 9 Exch 341; *Kibimba Rice Ltd v Umar Salim*, SC Civil Appeal No. 17 of 1992; and *Robert Cuossens v Attorney General* (SCCA No. 8 of 1999) 2000 UGSC 2 (2 March 2000). In the assessment of general damages, the court should be guided by the value of the subject matter, the economic inconvenience that the plaintiff may have been put through and the nature and extent of the injury suffered. See: *Uganda Commercial Bank v Kigozi* [2002] 1 EA 305). Under the law, general damages are implied in every breach of contract and every infringement of a given right. In a personal injuries claim, general damages will include anticipated future loss as well as damages for pain and suffering, inconvenience and loss of amenity.

[27] In this case, the Court has to consider the claims made by the Plaintiffs for lost income on the one hand and for injuries, pain and suffering on the other hand. In reaching a decision on a sum that constitutes fair and reasonable compensation, I take cognisance of the fact that damages for future loss, injuries, pain and suffering present serious difficulty in assessment with

precision. I am equally aware that comparing the magnitude of pain and suffering in concrete terms with comparable past cases is sometimes difficult to assess on the strength of monetary awards.

[28] On the case before me, the Plaintiffs showed in evidence that they suffered variously, received different types of treatment over different periods of time and were incapacitated for different periods of time. Because the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiffs established claims for loss of income in addition to the injuries, pain and suffering sustained by them, I will award each of them a sum of UGX 50,000,000/= in general damages. For the 2<sup>nd</sup> and 4<sup>th</sup> Plaintiffs, I have considered the injuries, pain and suffering sustained by them and I award a sum of UGX 30,000,000/= to each of them as general damages.

### **Exemplary and aggravated damages**

[29] The Plaintiffs also made a claim for aggravated damages; although in submissions, Counsel for the Plaintiffs turned the claim into that of exemplary damages. The two categories of damages are different. While exemplary damages are punitive in nature, aggravated damages consist of an extra compensation to a wronged individual on account of arrogant or malicious conduct of the defendant.

[30] According to Lord Devlin in the land mark case of *Rookes v Barnard* [1946] ALLER 367 at 410, 411 there are only three categories of cases in which exemplary damages are awarded namely;

- a) Where there has been oppressive, arbitrary, or unconstitutional action by the servants of the government;
- b) Where the defendant's conduct has been calculated by him to make a profit which may well exceed the compensation payable to the plaintiff; or
- c) Where some law for the time being in force authorizes the award of exemplary damages.

[31] On the other hand, aggravated damages are awarded by the court in form of extra compensation to a plaintiff for injury to his feelings and dignity caused by the manner in which the defendant acted. In *Obongo v Kisumu Municipal Council* [1971] EA 91, at page 96, **SPRY, V.P** made the following statement regarding aggravated damages;

*“It is well established that when damages are at large and a court is making a general award, it may take into account factors such as malice or arrogance on the part of the defendant and the injury suffered by the plaintiff, as, for example, by causing him humiliation or distress. Damages enhanced on account of such aggravation are regarded as still being essentially compensatory in nature.”* Also see: *Fredrick J.K. Zaabwe v Orient Bank & Others*, SCCA No.4 of 2006.

[32] On the case before me, I have seen neither evidence of oppressive, arbitrary or unconstitutional conduct on the part of the servants of the Defendant nor arrogant or malicious conduct on their part. The wanton conduct apparent in the present case was evidently on account of negligence rather than on impunity, arbitrariness, arrogance or malice as to occasion an award of either exemplary or aggravated damages. This claim is therefore not made out by the Plaintiffs and I make no award in that regard.

### **Interest and Costs**

[33] The Plaintiffs claimed for interest on the awarded sums in damages. In accordance with Section 26 of the Civil Procedure Act, the Plaintiffs are entitled to interest on the sums awarded. I accordingly award interest on the special damages at the rate of 18% per annum from the date of filing the suit (22<sup>nd</sup> October 2014) to the date of full payment; and on general damages at the rate of 8% per annum from the date of judgement until payment in full. Finally, in accordance with Section 27 of the CPA, costs follow the event unless the court decides otherwise. The Plaintiffs are accordingly awarded the costs of the suit.

[34] In all, therefore, judgement is entered for the Plaintiffs against the Defendant for payment of;

- a) The sum of UGX 5,300,000/= to the 1<sup>st</sup> Plaintiff as special damages.
- b) General damages in the sum of UGX 50,000,000/= to each of the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiffs and UGX 30,000,000/= to each of the 2<sup>nd</sup> and 4<sup>th</sup> Plaintiffs.
- c) Interest on (a) above at the rate of 18% per annum from the date of filing the suit (22<sup>nd</sup> October 2014) until full payment; and on (b) above at the rate of 8% per annum from the date of judgement till payment in full.
- d) The taxed costs of the suit to the Plaintiffs.

It is so ordered.

Dated, signed and delivered by email this 17<sup>th</sup> day of January, 2024.



**Boniface Wamala**  
**JUDGE**