IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: MANYINDO - DCJ, ODOKI - JSC, ODER - JSC)

CIVIL APPEAL NO. 12/93

BETWEEN

JAMES KATENDE……..……. 1ST APPELLANT
YONA KATO…….. 2ND APPELLANT

AND

UGANDA RAILWAYS CORPORATION: ..... RESPONDENT

(Appeal from the Judgment and decree of the High Court (lady Justice Byamugisha) at Kampala dated 23/2/93, in Civil Suit No. 1464 of 1986).

IN

HIGH COURT CIVIL SUIT NO. 1464 OF 1986

JUDGMENT OF ODER, J.S.C

This is the second time this appeal has been heard by this Court. On the first occasion, the appeal was heard ex-parte, in the absence of the respondent on 27/7/1993. In the Judgment which followed, the appeal was allowed, but on the subsequent successful application by the Respondent that Judgment was set aside and the appeal restored for hearing

. The case arose out of a train accident. On 7/7/1986, two of the respondents trains collided somewhere near Banda, which is a few miles East of Kampala. One of the trains was a passenger train known as “Kayola”, because it was a kind of commuter which plied for passengers between Kampala and a few miles outside. The other was a goods train.

In an action based on negligence the Appellants sued the Respondent for general and special damages, alleging that as fare-paying passengers, they sustained serious personal injuries in

the accident. It was alleged in the plaint that the first Appellant suffered amputation of both legs, and the second Appellant multiple fractures. In its written statement of defence, the Respondent admitted the occurrence of the accident and the injuries to the Appellants. In the alternative, it denied negligence and the alleged injuries to the Appellants. It averred that the same was caused by unforeseen circumstances beyond the Respondents' control, and act of God or an intervening act of a third party not reasonably anticipated by the Respondent.

At the trial, four issues were framed:

1. Whether the accident happened;

2. Whether the Appellants were lawful passengers;

3. Whether the Respondent was negligent;

4. Reliefs, if any.

In support of their respective cases, the Appellants testified on their own behalf and adduced medial evidence concerning their injuries arid treatment. Professor James Sekabunge (P.W.3) was the medical witness. The Respondent did not adduce any evidence in support of its defence.

In her Judgment, the learned trial Judge found for the Respondent, dismissing the suit with costs. She held that the accident had occurred due to negligence on the part of the Respondent, and that the Appellants were not fare-paying passengers on the train, adding that the possibility that they were trespassers or might not have been on the train at all could not be ruled out. She rejected the Professor's medical evidence as false and the Appellants' claim as fictitious.

On assessment of damages, she made awards of what the Appellants would have been entitled to receive had their suit been successful. For the first Appellant, she awarded shs.8 million for pain and suffering and loss of amenities; and for the second Appellant shs. 500,000/= as general damages.

Six grounds were set out in the memorandum of appeal. In essence, they attacked the learned trial Judge's findings of facts above-mentioned. Her assessment of damages was also criticised as being inordinately low.

In his submission on the grounds of appeal, Mr. Mugabi, learned Counsel for the Appellant, contended first that the Respondent having admitted in its written statement of defence that the Appellants were traveling on its train when the collision occurred, the learned trial Judge erred to have held that the Appellants were not passengers on the train. That finding was based on the wrong reasons, such as the Appellants' failure to produce fare tickets, medical forms and police accident reports. It was unreasonable to accept production of such documents five years after the accident. In any case the Appellants' evidence on these matters were not controverted. Secondly, it was contended that the findings that the medical evidence was false and Appellants' claim fictitious were not supported by any evidence. On the contrary, the medical evidence from the Professor ought to have been accepted because it was based on reports of examination by him of the Appellants. Moreover, it was not put to the Appellants in cross-examination that they had lied to the Professor. Thirdly, it was argued that the Appellants had proved their case on the balance of probabilities.

With respect, the criticism that the learned trial Judge made a finding that the Appellants were not passengers on the train is misplaced. This is what she said on the point:

"After the submission, I turn to the evidence of the Plaintiffs. Both of them testified that they boarded the train at Banda and bought tickets which got lost as a result of the accident. The first Plaintiff, James Katende claimed to have paid Shs. 100/= while the Kato claimed to have paid between Shs. 200/= — 300/= on the same journey from Banda to Kampala. I find the testimony of these two witnesses remarkable for the following reasons. The first is that both of them claim to have lost their tickets as a result of the accident; second, they had no medical forms; and third they contradicted each other how much they paid for the journey covering the same distance. Moreover there are no police accident reports which could have clearly shown the people (victims) of the accident. In absence of cogent evidence, to prove on the balance of probabilities, the contractual relationship between the Plaintiffs and the Defendant, I am unable to hold that the Plaintiffs were fare-paying passengers on the Defendant's train on the day of the alleged accident. The Court cannot rule out the possibility that the Plaintiffs were trespassers or may not have been on the train at all".

In this part of her Judgment the learned Judge must, I think, be taken to have made a definite finding that the Appellants were on the train, but not as fare-paying passengers but possibly as trespassers. That was the point framed as an issue for the Court's decision at the trial. Whether the Appellants were or were not passengers on the train was not an issue. This must have been so because of the Respondent's admission in its w.s.d. that the Appellants were traveling on its train. In the circumstances I think that the learned trial Judge's remark that the possibility that the Appellants were not passengers on the train could not be ruled out was obiter and not a finding of fact.

In view of the Respondent's admission and the point not having been made an issue at the trial. I think that the learned trial Judge was justified in holding that the Appellants were passengers on the train. As such passengers the Respondent's liability to them depended on whether they were lawful passengers or trespassers and whether they sustained the injuries alleged. These, I think, are the main points in this appeal, which I shall now proceed to consider.

It is clear from the pleadings and evidence, that the Respondent is a public statutory corporation which provides railway transport service to the public. It does so as a carrier of goods and passengers on its trains. As such a carrier, it owes a duty to its passengers. Under common law, it has long been established since the case of CROFTS vs. WATERHOUSE (1825) 3, BING 319,' that a person who undertakes either for reward or gratuitously to carry another person in a vehicle is liable to that other if he causes him damage by negligence.

As carriers, Railway authorities are under a duty to use reasonable care and skill in the provision of their service so as to prevent accidents. They are also liable for the negligence of their signalmen, others operating the system, and of drivers in the driving and management of their trains. The nature of the duty is well discussed by the learned Authors of CHARLESWORTH AND PERCY ON NEGLIGENCE, Seventh Edition, in paragraphs 10-54, from page 630. Briefly, it is that the carrier must use reasonable care and skill for the safety of the passengers during such carriage, but he is not an insurer of the safety of his passengers. This common duty of care is owed to every person accepted as a passenger, who is a lawful visitor. Sometime, difficulty arises in determining who is such a passenger. To be one, it is not necessary that the person in question should have a contract with the carrier, although that is usually the case. A passenger who has not paid the fare may still be an accepted passenger, for instance if the passenger has got on to the train fraudulently,

intending not to pay his fare, or intending to pay only part of his fare or only a lower classfare while traveling first class. Such a passenger has been held to be entitled to sue for injuries caused by negligence.

In VOSPER vs. G.W. RY (1928) 1, KB, ATKIN, L.J. said at page 349:

"A third class passenger is not an out—law when he travels in a first class carriage. When he does so, the Railway Company is still under a duty to him personally".

What is the position of a trespasser on a vehicle or a train?

A trespasser is one who wrongfully enters on the land or property in the possession of another and has neither the right nor permission to be there. LORD DUNEDIN described him as one:

•"who goes on the land without invitation of any sort and whose presence is either unknown to the proprietor or, if known, is practically objected to." See ROBERT ADDIE & SONS (COLLIERERES) LTD. vs. DAMBRECK (1924). A.C., 358 at 371. The definition, no doubt, equally applies to a trespasser on a train.

There is a difference between the position of a passenger who gets accepted as a passenger even by fraud by boarding the vehicle in the usual way, since he is traveling with the knowledge or acquiescence of the carrier, and one who is not accepted and of whose presence the carrier is unaware. So, where a person, in breach of a by—law and without the permission of the Railway Company, traveled on a train which, to his knowledge was not then in use as a passenger train, and was injured in a collision negligently caused, it was held that he was a trespasser. - TRANK RY OF CANADA vs. BARNETT (1911) A.C. 202.

In the instant case, the position of the Appellants as passengers on the Respondent's train and the Respondent's liability to them, if any, was subject to proof by their evidence. The 1st Appellant testified the he boarded the train, paying a fare of Shs. 100/=, for which he was given a receipt. The receipt allegedly got lost in the accident. He claimed to have sustained injuries on both the legs, but did not describe the nature of the injuries, other than saying that he purchased two artificial legs, for which he was given a receipt which, again was not produced at the trial allegedly because it had remained at behind at home. He also said that he was hospitalised at Mulago for five months, but no medical treatment notes were produced at the trial; nor was any explanation offered for their non-production.

The 2nd Appellant's evidence was that he paid Shs. *3001=* as fare, apparently for the same distance for which the 1st Appellant paid Shs. *100/=*. The plaint stated that he sustained multiple fractures but he testified that he was injured in the eye, arms and legs, but without describing how the arms and legs were injured. He was hospitalised for two months and was given an artificial eye in 1988 for which a friend paid for him. Neither medical treatment notes nor a receipt for payment of the artificial eye were produced.

Professor Sekabunge (P.W.3) testified that he examined the 1st Appellant on 24.2.1990, about four years after the accident. He compiled a report dated 27.2.1990 which was produced as exhibit P.1 at the trial. The report was based on information given to the Professor by Katende (the 1st Appellant), and not on treatment notes. That report stated that the 1st Appellant (Katende) had an above-knee fracture of the right leg, and a below—knee fracture of the left leg, as a result of which both legs were amputated. This Appellant was discharged on 28.8.1988 with artificial legs fitted. When the Professor saw him on 24.2.1990 both limbs had healed and the Appellant was walking on artificial legs with the assistance of a stick.

In his testimony, the Professor made no mention that he had compiled two reports on Katende (the 1st Appellant) and yet he had done so. The second report, dated 21.1.1987, was tendered in by the defence without objection as exhibit D.1. It did riot tally with the report of 27.2.1990 in certain material particulars. It stated that Katende " was admitted at Mulago Hospital where the leg was noted as having been damaged seriously. After resuscitating the left leg was amputated under the knee. He had an uneventful recovery and was discharged in a wheel chair". According to this report only the left leg appears to have been injured and amputated, not both legs. Secondly, Katende was discharged on a wheel chair. This is inconsistent with the report of 24.2,1990, according to which both legs were injured and amputated; and Katende walked on artificial legs assisted by a stick.

Regarding Kato (the second appellant) Professor Sekabunge testified that he examined him on 8.6.1992 and wrote a report of his examination dated 12.6.1992, which was admitted in evidence as exhibit P.2. In cross-examination, the Professor said that he had not seen any of the two Appellants before and they did not mention to him that they had seen him before. Yet in another report dated 12.1.1987 and admitted as exhibit D.2 the Professor said that he had seen Kato on 5.1.1987. Exhibit P.2 stated that Kato (the second Appellant) had a fracture of

the medial malleolus of the right ankle, loss of four upper incisors teeth and complete loss of the right eye. The other report on Kato, exhibit D.2, dated 12.1.1987 was in identical terms with exhibit P.2, except in two aspects. According to it (exh. 0.2), the Professor examined Kato on 5.1.1987 and assessed his permanent disability at 60%; but according to exhibit P.2, Kato was reexamined on 8.6.1992 and his disability was assessed at 40%. Contrary to what was stated in the two medical reports, the plaint stated Kato's injury only as "multiple fractures". It made no mention of an eye injury. Further, while Kato said the he had an artificial eye fitted in 1988, the medical report dated 12.6.1992 (exhibit P.2), according to which he was re-examined on 8.6.1992, the eye was treated with antibiotic eye drops but there was no improvement. When he was examined, there was a complete loss of the eye. The report made no mention of an artificial eye having been fitted.

In my view the numerous contradictions and inconsistencies I have above—referred to in the evidence of the two Appellants and that of Professor Sekabunga are serious, clearly indicating that the three of them were not witnesses of truth. They could not be relied on as credible witnesses on matters that were material in the Appellants' case. Consequently, there is serious doubt as regards whether they were not trespassers on the train and whether they sustained the injuries which they claimed to have suffered in the accident.

In the circumstances, I think that the learned trial Judge was justified in holding that the Appellants were not lawful passengers on the Respondent's train, and in rejecting the medical evidence as false and the Appellants' claim as fictitious. Grounds one to four inclusive of the appeal must, therefore fail

The grounds concerning liability having failed, I think that it is unnecessary to consider grounds five and six concerning assessment of damages.

In the result, I would dismiss this appeal with costs.

Dated at Mengo this 6th day of May, 1994

A.H, ODER.
JUSTICE OF THE SUPREME COURT

JUDGEMENT OF ODOKI, J.S.C:

I have had the benefit of reading in draft the Judgement prepared by Oder JSC and I agree with him that the appeal must be dismissed with costs.

DATED at Mengo this 6th day of . May.... 1993.

B.J. ODOKI.
JUSTICE OF THE SUPREME COURT

JUDGEMENT OF MANYINDO - DCJ:

I have read the Judgement of Oder, JSC. I agree that the appeal must be dismissed.

The appellants did not prove that they were there on the respondents train, let alone that they were lawfully. It is also doubtful whether they sustained the alleged injuries.

As Odoki JSC, also agrees the appeal is dismissed with costs.

Dated at Mengo this 6th day of May 1994.

S.T. MANYINDO

DEPUTY CHIEF JUSTICE