THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM:

HON.LADY JUSTICE L.E.M.MUKASA-KIKONYOGO,DCJ

HON.LADY JUSTICE CN.B.KITUMBA JA;

HON.LADY JUSTICE C.K.BYAMUGISHA

CIVIL APPEAL NO.10 OF 2002

BETWEEN

PAUL BYEKWASO:: APPELLANT

AND

ATTORNEY GENERAL:::::::::::::::::::::::::::::::::::: RESPONDENT

(Appeal from the judgment and orders of the High Court of Uganda sitting at Kampala

(*Akiiki-Kiiza J) *dated 05/09/2001 in HCCS NO.1057/2000)

JUDGMENT OF BYAMUGISHA,JA

This is an appeal from the judgment and orders of the High Court dated 05/09/01wherein the plaintiff's claim was dismissed.

The facts in this appeal are not in dispute. The appellant filed the suit against the Attorney General of Uganda in his representative capacity under the provisions of the **Government Proceedings Act** (Cap 77 Laws of Uganda)(hereinafter called the Act). He was seeking special and general damages arising out of an accident involving his motor vehicle registration no. UBS 170 Toyota Hiace minibus and the respondent's motor vehicle registration no. H4DF O34 belonging to the Ministry of Defence. The accident occurred on the 17th October 1999 at Bwaise along Bombo road. The appellant's vehicle was being driven by its driver Vincent Kamoga (P.W.2) while Lt. Colonel Joram Tumwine was driving the respondent's vehicle attached to the Ministry of Defence Bombo

After being served with summons to file a defence, the respondent did not do so. Consequently, the appellant successfully applied under **section 26(2)** of the Act and **rule 6** of the **Civil Procedure (Government Proceedings) Rules S.I 69-1** for an *ex parte* judgement, which was entered on the 24th January 2001. The suit was later set down for formal proof and assessment of damages. At the trial the following issues were framed for court's determination:

i. whether m/v registration H4DF O34 driven by Colonel Tumwine was in the course of his employment

ii. whether m/vehicle H4D.F 034 was driven negligently by driver Colone Joram Tumwine.

iii. Whether the defendant is liable for the accident.

iv. Whether the plaintiff is entitled to remedies prayed for.

The learned trial Judge dismissed the suit mainly on the ground that there was no evidence to prove that the Ministry of Defence employed a Lt. Colonel as a driver.

The memorandum of appeal filed on his behalf contains the following grounds

1. **The learned trial Judge erred in law when he failed to evaluate the evidence before him and came to a wrong conclusion.**
2. **The trial judge erred in law and fact when he held that Lt Col. Joram Tumwine could not have been employed by the respondent as a driver and therefore was not in the course of his employment.**
3. **The trial judge erred in law and fact when he held that Lt Col. Joram Tumwine was not in the course of his employment without evidence from the respondent.**
4. **The trial judge's judgment was bad in law and against the weight of evidence and it constituted a miscarriage of justice on the part of the appellant**

The appellant made the following prayers:

1. Judgment of the High Court be set aside and the appeal be allowed.
2. The respondent pays the costs of the appeal and of the High Court.

The appellant filed written submissions. The respondent did not. In submitting on the first ground of appeal, counsel for the appellant, stated that this court as the first appellate court is entitled to re-evaluate the evidence that was before the lower court and determine for itself whether the decision of the trial judge should be upheld. He relied on the case of **Selle & Another vs Associated Motor Boat Company Ltd**

[1968] EA 123 wherein the role of the first appellate court was re-stated. It was his submission that the trial judge's reasons for dismissing the appellant's claim was that he failed to prove that Colonel Joram Tumwine was employed as a driver of motor vehicle No.H4DF 034. He further submitted that the trial judge contradicted himself when he stated that there was no evidence from the respondent to show that Lt Colonel Joram Tumwine was on a frolic of his own. Learned counsel stated that since there was no evidence from the respondent to the contrary, there was no reason why the trial Judge cast doubt on the appellant's evidence.

I agree with the submissions of counsel for the appellant that this court has a duty to evaluate the evidence on record and come to its own conclusions bearing in mind that it neither saw nor heard the witnesses testifying. The appellant adduced the evidence of Omoding John Augustine (P.W.5) an Inspector of Police in charge of traffic at Kawempe police station. He testified that he prepared a police abstract report in respect of an accident that occurred on 17/10/99 involving the appellant's vehicle and that of the Ministry of Defence. Lt Colonel Joram Tumwine was driving the vehicle of the Ministry of Defence. The accident occurred at about 11 p.m at night. The report was tendered in evidence as exhibit P. 5E.

The legal principles which govern the liability of the Attorney General in respect of members of the armed forces are the same as those which govern the liability of a master for the acts of his servant: See **Muwonge vs Attorney General [1967] EA 17.** Both at common law and statute law a master is liable for the tortious acts committed by his servant within the course of his employment. The expression "within the course of employment" has been a subject of judicial and legal interpretation over many years. **Halsbury's Statute 4th Edition** defines it in these words:

"In the course of employment does not mean during the currency of engagement but means in the course of the work which the workman is employed to do and what is incidental to it".

The above definition was adopted in the case of **R vs Industrial Injuries Commissioner Ex. P. AEU [1966] 2 Q.B 31** by Solomon L.J. when he said:

" ***I assume that in law a man is working in the course of his employment not only when he is doing that what he is employed to do but also when is doing something for purposes of his own which is reasonably incidental to his employment".***

In the case of **Virani vs Dharamsi [1967] EA 132** the defunct Court of Appeal for East Africa stated that an action arises out and in the course of employment if it results from an act which the employee is employed to do even if the employee is adopting a wrong method of doing the act or doing the act in the wrong manner.

Over the years, no simple test has been laid down which can be used to determine the circumstances in which it can be said that a servant was acting in the course of his employment. This is so because it is not every act done by a servant in the currency of engagement that will make the master liable. A master remains liable for those acts which the employee/servant is employed to do or those which are said to be incidental to what he is employed to do even when he adopts wrong methods of doing them. Each case remains essentially a question of fact depending on the circumstances.

In the case of a motor vehicle, in order to fix the owner with liability, it is necessary to show either that the driver was the owner's servant or that at the material time, the driver was acting on the owner's behalf as his agent. In order to establish the existence of the agency relationship it was necessary to show that the driver was using the car at the owner's request, express or implied or in the performance of the task or duty delegated to him by the owner. See **Morgans vs Launchbury and Others [1972] 2 All ER 606; Uganda American Insurance Co. Ltd vs Phocas Ruganzu (SCCA No.10/92)** reported in 1992 III Kampala Law Reports.

In the instant appeal, the facts and evidence that were before the trial court were that the vehicle that caused the accident and damage to the appellant's motor vehicle bore registration No. H4 DF 034. It belonged to the Ministry of Defence and was being driven by Lt Colonel Joram Tumwine who worked for the said Ministry. It is possible this vehicle was given to the said officer to use on official as well as personal business. The accident occurred at night when in normal circumstances Government offices are closed. Nevertheless, the Lt Colonel was driving a vehicle belonging to the

Ministry of Defence and it must be presumed that he was driving on Government business or his own private business and therefore within the scope of his employment. If it were so, then under the general doctrine of vicarious liability, the respondent would be liable as the employer of the Lt Colonel Tumwine. The employer so as to show that Lt Colonel Tumwine was not acting within the scope of his employment can rebut this presumption. There was no such evidence.

The learned trial Judge in dealing with this matter appears to have taken a position that the Ministry of Defence could not have employed a Lt Colonel as a driver. He stated thus:

"***Now the question to ask in this case is, was Colonel Joram Tumwine employed as a driver m/vehicle Reg.No.H4DF 034?***
It appears from the record, such evidence is lacking. I do not think the Ministry of Defence employed a Lt Colonel as a driver. Although there is no evidence from the defendant to show that Lt Col. Joram Tumwine was on a frolic of his own, the plaintiff has not proved on a balance of probabilities to my satisfaction that, the Ministry of defence employed him as <u>a driver</u> and that at the time of the accident, he was driving in the course of his employment. This evidence has not been forthcoming from the plaintiff at all".

With the greatest respect, I think the learned trial Judge misdirected himself on the law and the facts that were before him. The appellant's case was set out in paragraph 6 of the plaint, which stated as follows:
"At all material times the motor vehicle Toyota Hilux No. H4DF 034 was the property of the Ministry of Defence and at the time of the accident it was being driven, managed and controlled by a one Lt Col. Tumwine Joram attached to Bombo Military Barracks P.O Box 132, Bombo in his capacity as an officer, agent. servant, and/or authorised driver of the Ministry of Defence.

The respondent did not rebut the above averments. The issue at hand was not whether the Ministry of Defence employed a Lt Colonel as a DRIVER but whether the said Lt Colonel was a servant/employee of the Ministry of Defence at the time of the

accident. It was not the duty of the appellant to know how the Ministry of Defence selected, and assigned duties to its employees as these were matters especially within its knowledge. Furthermore, the appellant had no duty to prove matters that were not disputed by the opposite party.

I agree with the submissions of counsel for the appellant that the trial Judge was wrong to find and hold as he did that the Ministry of Defence could not have employed a Lt Colonel as a driver. There was sufficient evidence to show that the vehicle in question belonged to the Ministry of Defence. An employee of that Ministry was driving it and therefore the relationship of master and servant was established so as to make the master liable for the accident and the damage caused by the negligent driving of the motor vehicle by the servant. I would, therefore, allow this ground of appeal.

The next issue to consider is one of damages. There is no doubt in my mind that in view of my findings above, the appellant would be entitled to the reliefs he claimed in the plaint. The issue is one of quantum. The learned trial judge did not assess the damages he would have awarded to the plaintiff had his case succeeded. He stated that such an exercise would be for academic purposes. With respect I do not agree. The defunct Court of Appeal for East Africa in the case of **Selle vs. Associated Motor Boat Co. (**supra) and **Mute vs Elikana [1975] EA 201** had occasion to comment on the need to assess damages even though judgment is given in favour of the defendant. Law Ag. P. (as he then was) in **Mute's** case at page 202 said:

" ***Where the judgment is, with respect, less satisfactory, is in the almost complete lack of specific findings on the allegations of negligence pleaded on both sides, and in the judge's failure to make a finding as to damages to which the appellant would have been entitled, had he been successful. <u>This should always be done, in a suit for damages, even though judgment is given for the defendant,…".</u>***

In **Selle's** case the Court of Appeal counselled that it is advisable for a Judge of first instance to decide all issues raised in the case before him/her so that further expense to the parties are avoided and further delay may be avoided in the event of the Court of Appeal having to adopt a course of remitting the file to the High Court. In both

cases the files were remitted to the trial court for assessment of the damages. It should be noted however that the observation made in those two cases were orbiter. But the practice must be observed.

In the instant appeal, **section 11** of the **Judicature Act** gives this court the same powers as the High Court. The section provides as follows:

"***For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated".***

I think the provisions of this section are clear in themselves. I shall therefore use its provisions to determine the damages the appellant is entitled to. In the lower court the appellant had claimed both special and general damages. The general rule with regard to special damages is that they must be pleaded and strictly proved by the party claiming them as being the direct result of the wrong committed by the defendant. They usually include out of pocket expenses incurred by the party who is claiming them. The appellant claimed the following special damages:

(1) Cost of police accident report. There was oral evidence from the appellant that he paid the sum of *shs* 20,000/= for the report. He did not have the receipt. However, the report was tendered in evidence as exhibit P.E.5. The defence did not challenge the amount. It would be awarded.

(2) The cost of motor vehicle accident survey and condition report- a sum of shs 200,000/= was claimed and there was evidence in the form of a receipt issued by Messers Ntende Associates. The receipt was put in evidence as exhibit PE 2. The report was tendered in evidence as exhibit P.E.4. Iam satisfied that this item was strictly proved as the law requires and it would be allowed.

(3) Loss of income. Computation for loss of income is usually made on the following principle: the computation time begins from the date of the collision up to the time when with due diligence the repairs ought to have been completed. But the court has to take into account so

much money as would be in the ordinary course of business be disbursed on an account of expenses on servicing the vehicle, buying tyres and other uncertainties of life. In the matter now before us, the accident occurred on 17 October 1999. The vehicle was apparently not repaired. Therefore there was no evidence of how long it took to repair it. The damage assessment report made on 21/08/2000 put the number of days it would take to repair the vehicle at 10. The number of days would have been reasonable in the circumstances of this appeal. The appellant did not repair the vehicle apparently he could not raise the amount needed to carry out the repairs. Therefore the amount of *shs* 50,000/= claimed in the plaint as loss of income per day would give a sum of *shs* 500,000/=. This sum would be awarded.

(4) Valuation report. The appellant had claimed the sum of *shs* 50,000/=. He had no receipt to prove this item and therefore the sum would not be awarded.

The total amount of special damages that was strictly proved by the appellant is *shs* 220,000/=. It would be awarded.

Lastly there was a claim for general damages. These do not need strict proof. They are within the discretion of the court although the plaintiff has to adduce evidence that will enable the court to assess the amount awardable. The appellant did not adduce such evidence. But working on the assumption that the he was inconvenienced as a result of the accident, I would award him the sum of *shs* 5,000,000/= as general damages.

I would allow the appeal by setting aside the judgment of the High Court and substituting it with a judgment in favour of the appellant in the sum of *shs* 220,000/= as special damages. The appellant had claimed interest rate of 45 % p.a on the decretal sums. This rate is on a higher scale I would reduce it to 12 % p.a. I would apply this rate on special damages to run from the date of filing the suit till payment in full. I would also award the sum of *shs* 5,000,000/= as general damages that will carry the same interest rate from the date of this judgment till payment in full. Loss of income as awarded will also carry the same interest rate from the date of

this judgment till payment in full. He would be awarded costs of the suit both here and in the court below.

Dated at Kampala this…03rd ..day of…March…..2004.

C.K.Byamugisha

Justice of Appeal

JUDGEMENT OF HON. JUSTICE L.E.M. MUKASA-KIKONYOGO,DCJ

I have read in draft the judgement prepared by Hon. Lady Justice C.K. Byamugisha J.A and I agree with her that this appeal must succeed.

As Hon. Justice C.N.B. Kitumba J.A holds a similar view, this appeal is allowed with the orders proposed by Hon. Lady Justice C.K. Byamugisha J.A.

DATED At Kampala, this…3rd day of ……March ….2004

HON. LADY JUSTICE L.E.M. MUKASA-KIKONYOGO

DEPUTY CHIEF JUSTICE