

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
CIVIL SUIT NO. 19 OF 1993

JANE NAKAWUNGU:..... PLAINTIFF

VERSUS

H.K. KAFUREKA:..... DEFENDANT

BEFORE: THE HON.MR.JUSTICE G.M. OKELLO

JUDGMENT:

In this action the plaintiff Jane Nakawungu claims against the defendant general and special damages for personal injuries and losses inflicted on her when she knocked by the Defendant's motor vehicle No. UPP 247 which was allegedly being driven by the defendant's servant or agent. The plaintiff also claims cost of the suit.

As a background, the plaintiff was on 23/3/92 in company of her father going to Mulago Hospital for her usual ante natal check-up. She was eight months pregnant. Between Wandegeya and Mulago round about along Kira Road, the plaintiff was knocked by the defendant's said motor vehicle which came from behind her. She thereby sustained multiple injuries causing the loss of her pregnancy. Hence this suit.

In paragraph 3 of her plaint, the plaintiff alleged that the accident was caused by the negligence of the defendant's servant who drove the said M/V without due care and attention; failed to see the plaintiff who was carefully working on her proper side of the road etc. The plaintiff further alleged that as a result of the accident, she sustained multiple injuries:-

- (a) An injury on the right iliac fossa that healed leaving a scar.
- (b) The injury on the left hemi thorax that also healed leaving a scar.
- (c) Diffuse tenderness on the lumbar spine.
- (d) Closed abdominal injuries with raptural ultrine membrane
- (e) Closed head injury and
- (f) Severe pain, shock and suffering.

The defendant in paragraph 4 of his W.S.D. admits the occurrence of the accident but denied that it was caused by his motor vehicle or by him or his servant or Agent. He also denied that the plaintiff suffered any injury as a result of the accident. He thus put the plaintiff to strict proof of her claims.

At the beginning of the hearing of the case, five issues were agreed upon and were framed as under:-

- (1) Whether the accident occurred involving the defendants motor vehicle on the date and place stated in the plaint.
- (2) Whether the defendant or his agent or servant was negligent.
- (3) Whether the defendant is liable to the plaintiff.
- (4) Whether the plaintiff suffered the alleged or any injuries as a result of the said accident;
- (5) What is the quantum of damages recoverable if any by the plaintiff from the defendant?

The plaintiff called three other witnesses besides herself.

In the course of his examination in Chief of PW4- Dr. Emmanuel Moro, counsel for the plaintiff sought to tender in evidence the medical Report prepared by the doctor after examining the victim. This move was opposed by Mr. Mark Bwengye for the defendant, on the ground that the report was not annexed to the plaintiff as required by 07 r 14 of the CPR. I over ruled that objection and admitted the document in evidence. I reserved my reasons for that decision to be incorporated in my judgment. I now propose to give my reasons:-

Mr Bwengye objected as stated earlier to admissibility of the medical Report in evidence on the sole ground that it was not annexed to the plaint at the time of filing the plaint as required by 07 r 14 of the CPR. Mr. Kajubi replied that paragraph 5 of the plaint talk of a medical report. That the medical Report was anticipated.

07r 14 (1) requires a plaintiff to produces in court at the time of filing the plaint and to deliver a copy thereof to be filed with the plaint a document upon which his claim is closed.

07 r 14 (2) requires a plaintiff to enter on the list or annexed to the plaint all documents he relies on as evidence in support of his claim.

07 r 18 (1) prohibits the admissibility in evidence at the hearing those document which are required to be produced in court at the time of filing the plain or to be annexed to the plaint and which were not produced or annexed without leave of the court.

“The plaintiff in this case did not sue on the medical Report in question. But she relies on the medical Report as evidence to support her claim. Authorities available show that the object of 07 r 14 and 18 of the CPR is to provide against false documents being set up after the institution of the suit. In those cases, therefore where there is no doubt of existence of a document at the time of filing the suit court should as a general rule admit

the document is evidence though it was not produced with the plaint or entered in the list of documents annexed to the plaint as required by R 14.”

See MM DATTANI Vs. AHMAD (1959) EA 218 at 220; LUKYAMUZI vs. HOUSE & TENANT AGENCIES LTD. (1983) HCB 74. The general rule is that where there is no doubt of existence of document at the time of filing the suit, it should be admitted in evidence even though it was not produced with the plaint entered in the list of document annexed to the plaint as required by r 14.

In this case, the evidence of Dr. Moro PW4 shows that he re-examined the victim of the medical Report in question. It is clear from the above evidence that the medical Report was in existence on 12/1/93 when this suit was filed. It was also referred to in paragraph 5 of the plaint. For that reason, I admitted it in evidence though it was not annexed as required by r 14 (2).

At the close of the case for the plaintiff the case was adjourned to enable the defendant to assemble his witnesses for the opening of his case. On the adjourned date, I was hearing another part heard case. By consent the case was then adjourned to 19/7/94. This date was suggested by the defendant himself who said that the date was convenient to him. However, on this date the defendant did not appear. He offered no explanation for his absence. His lawyer informed court from the bar that he had contacted the defendant and advised him to appear but he did not. There being no good reason to justify adjourning the case I refused the request of Mr. Bwengye to adjourn the case. Upon that refusal Bwengye decided unilaterally to walk away. He did, I shall now decide the issues on the evidence before me.

As regards issues No.1 – whether the accident occurred involving the defendant’s motor vehicle on the date and place as stated in the plaint, Mr. Kajubi contended that it was so. He relied on the evidence of the plaintiff (pw1), of her father (PW2) and of the traffic police officer (PW3). Counsel urged me to believe these witnesses and to find that the accident did occur involving the defendant’s motor vehicle at the date and place stated in the plaint.

According to PW1, on 25/3/92 she was walking on the pavement on the left hand side of the road from Wandegeya towards Mulago Roundabout along Kira Road. She was going to Mulago Hospital for her routine ante-natal check up. She was eight months pregnant.

She was with her father (PW2). On reaching opposite the Ministry of public service (now), she saw a saloon car which was from the nearby nursery school and was trying to join the main Wandegeya/Mulago Road. (Kira-Road) she stopped to give way to that vehicle to pass. The vehicle had stopped to see if it was clear to join the main road. It was at this time, that she was knocked by another motor car and so became unconscious. When she regained her consciousness, she was already in Mulago Hospital. She had

already been operated upon and her eight months pregnancy had already been removed. She realised that she was feeling backache. She remained hospitalized for 10 days.

The above evidence was corroborated by the evidence of Wilson Musoke (PW2) in all material particulars. According to Musoke, PW1 is his daughter. He was accompanying her to Mulago Hospital where she was going for her ante natal check up. She was pregnant. She was walking in front of him. Both were walking on the pavement on the left hand side of the road from Wandegeya towards Mulago Roundabout. Then he saw a Land Rover Registration No. UPP 247 which came from the garage near the nursery school on the left hand side of the Road. It came straight towards the pavement where people walk. As he continued to walk behind PW1, he suddenly heard the vehicle passed and knocked PW1 pushing her forward on a saloon car which had come from the nursery school. PW1 fell down and collapsed. People gathered and a police man also came. He organised transport which took the plaintiff to the hospital. The witness went with her.

The traffic police Sgt, James Rwamubona (PW3) who visited the scene of the accident confirmed that the plaintiff was knocked while on the pavement along Mulago hill Road by motor vehicle No. UPP 247 which was being driven towards Mulago. That he visited the scene of the accident on 23/3/92 at 9.45 a.m.

The above evidence is clear. It shows that the accident did occur on the 23/3/92 along Wandegeya Mulago Road. That road is called Kira Road. The culprit motor vehicle is No.UPP 247.

It knocked the plaintiff who was on the pavement. According to PW2, the owner of the motor vehicle UPP 247 is Kafureka the Defendant. There is no evidence to controvert the above. In those circumstances I agree with Mr. Kajubi and do find that the answer to issue NO.1 is in the affirmative.

The next is issue No.2. It is whether the defendant or his agent or servant was negligent. On this issue, Mr. Kajubi contended that the servant of the defendant was negligent in that he drove without due care and attention. Counsel relied on the evidence of PW1, PW2 and PW3. According to Pw1 she was knocked when she was on the pavement. That evidence was corroborated by the evidence of PW2 who testified that the motor vehicle NO.UPP 247 knocked the plaintiff who was on the pavement on then left hand side of the road from Wandegeya to Mulago Round about. This version was supported by the traffic police Sgt. James Rwomusana PW3.

A driver owes duty of care to other road users. He is expected to drive his motor vehicle on the road with due care and attention with sufficient regards for other road users. It was stated in Grant vs. Sun shipping Co. Ltd. (1948) 2 alier 238 at 2477.parag. D. thus,

“A prudent man will guard against the possible negligence of others when experience shows such negligence to be common”.

Per lord Uthward:-

“it is well established law that, that fact that a motor vehicle turns to the wrong side is not by itself negligence. But if a motor vehicle on the wrong side of the road collides with a pedestrian, the driver must explain how his position is consistent with the exercise of reasonable care on his part”.

Richley vs. Faul (1965) 1 WLR 1454.

In the instant case, the evidence established that the motor vehicle No. UPP 247 knocked the plaintiff when she was on the pavement. The motor vehicles are not ordinarily driven on pavements. I think this calls for explanation from the driver of that motor vehicle No. UPP 247 how his position in driving on the pavement where pedestrians walk is consistent with the exercise of his duty of reasonable care. Unfortunately, there is no such explanation. In the absence of such explanation, I have no alternative but to find that the driver of that motor vehicle No. UPP 247 did not exercise reasonable care to other road users when he drove his motor vehicle on the pavement and thereby knocked the plaintiff. He was therefore negligent. This answers issue No. 2 in the affirmative.

As regards issue No.3 which is whether the defendant is liable to the plaintiff, Mr. Kajubi contended that the defendant is liable to the plaintiff. He argued that there was no evidence that Taban Alfred the driver of the motor vehicle No. UPP 247 was not acting as agent of the defendant at the material time.

With respect to the learned counsel, I think that it is a misdirection on the burden of proof. It attempts to shift the burden of proving the existence of the fact alleged by the plaintiff onto the defendant. This contravenes section 102 of the evidence Act. The section reads,

“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 law that the proof of that fact shall lie on any particular person”

The plaintiff alleged in paragraph 3 of his plaint that the driver of the said motor vehicle was “servant or agent of the defendant”. It is therefore the duty of the plaintiff to prove that the driver of motor vehicle No. UPP247 at the material time was the servant or agent of the defendant.

There is no evidence not only of the identity of the driver of M/V No. UPP 247 at the material time, but also of his connection with the defendant. It was counsel for the

plaintiff who named the driver from the bar as Alfred Taban. There was no evidence to support that claim. According to PW2 shows that he and the husband of the plaintiff (PW1) tried to trace the particulars of the owner as somebody called Kafureka. The evidence did not mention who the driver was PW2 states.

“then I and the husband of PW1 tried to get the particulars of the those owners and drivers of the motor vehicles. We did. The owner was somebody called Kafureka.”

The police Report was not rendered in court and the particulars of the drivers are not known.

It is trite law that a master is vicariously liable for the tort committed by his servant/Agent in the course of his employment. The scope of the “course of duty” is wide. “An act may be done in the course of a servant’s employment so as to make his master liable even though it is done contrary to the orders of the master; and even if the servant acting deliberately, wantonly, negligently or even criminally, or for his own benefits nevertheless if what she did is merely a manner of carrying out what he was employed to carry out, then his master is liable”

(Muwonge v. AG (1967) EA 617)

As we have seen above, the evidence of PW2 and PW3 did not identify the driver of M/V No. UPP247, at the material time. It did not also connect the driver with the defendant. In other words there was no evidence to show that that person who was driving that M/V No. UPP 247 at the material time was the servant/Agent of the defendant and that he was driving in the course of his duty. It is not enough to establish that the vehicle belongs to 2 “A” and then infer that the driver thereof must at all times be a servant or agent of A. That the driver is the servant of the defendant must be proved. This answers issue No.3 in the negative.

On issue No.4 – which is whether the plaintiff suffered the alleged or any injury as a result of the accident, I say yes. There is over whelming evidence to show that the plaintiff suffered injuries as a result of the accident. According to PW1, on 23/3/92 she was knocked by a motor vehicle which came from behind her. She fell down and became unconscious. She gained her consciousness when she was in Mulago Hospital. On regaining her consciousness, she realised that she had been operated upon and that her 8 months pregnancy had been removed. She realised also that she had backache.

According to (PW2) he is the father of the plaintiff. At the material time he was accompanying the plaintiff who was going to Mulago Hospital for her usual ante-natal check-up. Between Wandegeya and Mulago Round about along Kira Road, the plaintiff was knocked by a motor vehicle which came from behind her. She fell down become unconscious and was rushed to the Hospital. He accompanied her to the Hospital. According to Dr. Moro (PW4) he is a surgeon in Mulago Hospital, on 23/3/92 he was in charge of ward 2B which covered casualty in

New Mulago. He examined the plaintiff who was brought to the casualty following a tragic accident. She was unconscious and was bleeding through her vagina. He observed that she had two laceration wounds: - one on the chest and the other on the right lower abdomen. She was about 8 months pregnant.

Upon examination, he found that the victim had severe tenderness in the abdomen and lower spine. Her uterus membrane has been ruptured. He concluded that she had a closed abdominal injury with threatened abortion. She also had brain concussion. Then she was prepared for emergency operation.

Upon operation, it was found that the victim had perforated small intestine. The intestine had burst and there was leakage. The uterus membrane was also completely ruptured. Because of the bleeding from the uterus, it was decided that the foetus be delivered surgically as there was a threatened abortion. Operation was performed to deliver the foetus. Upon operation, it was found that the foetus was dead. It had injury on the head. This was the cause of its death. The injury on the mother's lower abdomen was the one which transferred to the baby and caused its head injury.

According to the traffic police (PW3) who visited the scene of the accident, he found M/V UPP 247 off the road.

“In view of the serious condition of the victim, I could not take the particulars of the victim. I had to push the victim to hospital.”

From of the above evidence, which I believe, I find that the plaintiff suffered the injuries stated in the plaint as a result of the accident. This answers issues No.4 in the affirmative.

This now leads me to the question of damages recoverable by the plaintiff from the defendant. As I have stated earlier in this judgment, a master is vicariously liable for the tort of his servant only when the tort is committed by the servant in course of his employment. In this case, there was no evidence to establish that the motor vehicle No. UPP 247 was at the time of the accident being driven by the servant or agent of the defendant. In the absence of that proof, the defendant cannot be held liable merely because his motor vehicle was involved.

However, in case I am wrong (which I am sure I am not). I would award damages as under:-

In paragraph 5 of the plaint, the plaintiff loaded special Damages to the tune of shs. 34,500/= she prayed that, that amount be awarded to her as special damages.

The law regarding claim for special Damages is well established. It is that such claim must be pleaded and then strictly proved.

In this case, no evidence was led to attempt to prove that the plaintiff spent the amount claimed for police accident Report and for medical Report. Mr. Kajubi conceded that there was no specific evidence led to strictly prove the amount claimed as special damages. He however argued that there is a fee to be paid for police accident report and for medical Report as a matter of law. He prayed that despite the absence of evidence in that regard, the amount claimed should be awarded.

I do not find the above argument satisfactory. It is a requirement of law that special damages must be strictly proved. Failure to adduce evidence to prove such a claim is failure to comply with the requirement of the law. In any case, there was no even police Accident Report produced in court. This failure was probably because such a Report was never obtained. The claim for special damages would fail for want of proof.

As for the general damages, the medical Report put the permanent disability at 40%. Yet the most serious injury was that on the lumbar spine. I am told this reduces her capability to lift heavy object. The rest of the injuries were of cosmetic nature. Considering the time the plaintiff took in the hospital and the surgical operations she went, I would have awarded general damages of Uganda shs. 1,000,000/=. But as it is the suit is dismissed with cost.

G.M. OKELLO

JUDGE

7/9/94

Mr. Kajubi for plaintiff

Mr. Bwengye for Defendant

Mr. Ekwanya court Interpreter.

Judgment delivered in court.

G.M. OKELLO

JUDGE

7/9/94.