THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO.1149 OF 1978

LUBATON NSUBUGA & 2 OTHERS……PLAINTIFF

VERSUS

ATTORNEY GENERAL……..DEFENDANT

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

JUDGMENT

The Plaintiff's claim against both defendants are for general and special Damages for personal injuries arising out of a Meter accident which occurred on or about the 15th day of June 1978 along Hoima/Kampala road involving a lorry registration No. UWL.047 and a Land Rover of Registration No. UP 0134 which was allegedly traveling from the opposite direction. The Plaintiff alleged in paragraph 4 of their plaint that:-

> *"The Plaintiffs aver that the said accident was caused solely by the negligence of the defendants' said servants/drivers or Agents and hold the defendants liable therefore."*

The particulars of the alleged negligence were given. The plaintiffs further alleged that as a result of that accident, the 3rd plaintiff who was lawfully walking along the side of the road and the 1st and 2nd plaintiffs who were passengers on M/V No. UWL 047 suffered personal 25 injuries. Particulars of the injuries were listed down. The Plaintiffs also alleged that resulting from that accident the plaintiffs incurred financial losses (special damages) to the tune of shs.1520/= consequently they claim General and special damages as stated above 30 interest on the decretal amount at the rate of 10% and cost of the suit.

In their W.S.D both defendants denied that their respective Servants were negligent arid therefore denied liability. When the suit was called for hearing, no representative of the 2nd Defendant appeared but there was evidence of due Service on the 2nd Defendant as show by affidavit of service of James B. Nkonge of M/s Nsambu and Co. Advocates dated 24/9/93. As there was no explanation for the absence, I allowed the hearing to proceed in the absence of the 2nd Defendant. The following four issues were framed at the commencement of the hearing:-

(1) Whether the defendants servants/Agents were negligent and to what extent.

(2) Whether the plaintiffs suffered any injuries as a result of the accident.

(3) If so whether the defendants are liable.

(4) If so what is the quantum of damages.

Only the plaintiff's No. 1 and. 2 testified and called one common witness. The 3rd plaintiff abandoned the case. The case was then closed for submission of counsels. The 1st defendant who participated in the trial did not call any evidence.

On the let issues whether the defendant's servants/Agents were negligent and to what extent, Ms. Musoke counsel for the Attorney General submitted that the let defendant a servant, the driver of M/V UP 0134 was not negligent. She pointed out that the evidence of both PW1 and PW2 indicated that before the accident, the driver of the lorry of Registration No. UWL 047 on which they were passenger had stopped at some point in the course of their journey and went out for 30 minutes and that when he returned, he was smelling alcohol and started to drive fast and in the middle of the road. Counsel submitted that there was no evidence of the driver of UP 0134 driving at the time under the influence of alcohol.

However, Ms. Musoke invited court not be believe these two witnesses on how the accident happened because they collaborated to tell lie on that point. She pointed out that the PW1's police statement (Exh.D1) conducted the evidence of these witnesses on how the accident happened. She pointed out that according to the testimonies of these two witnesses, there was a head—on collision because both M/V were traveling at a high speed, in the middle of the road

and from opposite directions. Yet in his police statement Exh.D1, PW1 stated that the accident happened when the lorry driver was trying to overtake the Land Rover which was also traveling towards Kampala. Counsel submitted that the police statement (Exh.D1) was the correct version of how the accident happened because it was supported by the sketch plan attached to the police accident Report Exh.P3. In counsel's view the sketch plan indicated that the two M/Vs were traveling in the same direction before the accident.

Hon. Nsambu replied that court should believe the evidence given by PW1 and PW2 in court as to how the accident happened but not the police statement (Exh.D1) of PW1 because the evidence was given on oath. He further submitted that the police accident Report together with the attached sketch plan made by the police were suspect since a police M/V was a party to the accident.

It should be pointed out at this juncture, that driving under the influence of alcohol is itself evidence of negligence. In the instant case the evidence of PW1 and PW2 indicated that the driver of the lorry of Registration No. UWL 047 on which they were both passengers had stopped at some point in the course of their journey and went out for 30 minutes. When he returned, he smelt alcohol and then started not only to drive fast but also in the middle of the road. Then on reaching between Namungona and Nasana they saw a Land Rover of Registration No. UP 0134 infront of them also traveling not only at a high speed but also in the middle of the road. It was coming the opposite direction. According to the testimonies of those witnesses, none of these motor vehicles gave way to the other and there was a head-on collusion.

Ms. Musoke counsel for the let defendant attack the credibility of these two witnesses as being liars who connived to lie as to how the accident happened in order to implicate the otherwise innocent driver of UP 0134.

Authorities available indicate that grave inconsistency in the evidence of a witness unless satisfactorily explained may lead to the evidence of the witness being rejected. Even, minor discrepancy shown to have been deliberately made to mislead court way also lead to the evidence being reacted. Previous statement. (e.g. police statement) made by a witness on the same matter is relevant to test if the consistency and honest credibility of the witness.

In the instant case a statement made by PW1 to the police (Exh.D1) five days after the accident was received in evidence. It contradicts the evidence made by PW1 in court as to how the accident happened. According to the police statement the accident happened when the lorry was trying to overtake the land Rover when both motor vehicles were traveling in the same direction. This was a sharp contradiction from what the witness told court in his evidence. Hon. Nsambu suggested that court should believe the evidence because it was made on oath. I think a statement such as the police statement can*n*ot be ignored. It helps to show consistency and hence credibility of the witness. In this case there was no attempt to explain the discrepancy.

It is interesting to note that the sketch plan which was annexed to the police accident report Exh. P3 supports the version stated in the police statement. The sketch plan indicated that the two motor vehicles were traveling in the same direction. Yet the police accident Report Exh.P3 and tendered in evidence by the plaintiff as depicting the correct position of what happened. This contradiction is in my view a grave one. As there was no explanation to resolve that contradiction, I am more inclined to believe that the accident happened when the two motor vehicles were traveling in the same direction and when the lorry driver tried to overtake. To drive a motor vehicle when under the influence of alcohol and to attempt to overtake another vehicle when it was not safe to do so were evidence of negligence. The evidence on record showed that the lorry driver did all the above. For those reasons I find that the driver of the lorry Reg. UWL 047 was the negligent one.

On whether the Plaintiffs suffered any injures as a result of the accident, Ms. Musoke submitted that there was no medical evidence to prove the alleged injuries of the plaintiffs. She dismissed the medical Reports Exh.P4 and Exh.P5 as insufficient to prove the previous injuries. According to her, the Reports did not disclose the medical chits by which the plaintiffs were treated shortly after the accident should have been produced.

Hon. Nsambu submitted that those medical chits were not necessary since the medical Reports (Exh.P4 and Exh.P5) corroborated the evidence Of PW1 and PW2.

It is pertinent to point out at this juncture that the fact of injuries cannot only be proved by medical evidence though proof of the extent of such injuries requires medical evidence. Any

cogent evidence can prove the feet of injuries. In the instant case PW1 testified that after the accident he was unconscious. When he regained his consciousness he was in Mulago Hospital and felt pains on his legs, back and chest. His knee was injured. He was later discharged. Then in 1992 he returned to Mulago Hospital and was examined by Prof. Sekabunga.

PW2 also testified that after the accident he became unconscious. When he regained his consciousness, he was in Mulago Hospital and realised that he had double fractures on his legs and high. His tongue too was injured. He was hospitalised for 3 months. His both legs were put in plaster. On the left leg, the plaster was from leg to thigh. Later in 1992, he saw Prof. Sekabunga who examined him.

The evidence of Prof. Sekabunga (PW3) indicated that he examined the two plaintiffs and compiled his reports (Exh.P4 and Exh.P5) on them from their History. According to the professor, both plaintiffs sustained injuries involving fractures

It is interesting to note that the above evidence of injuries had not been controverted. There was no evidence showing otherwise. I do therefore believe the evidence and from it, find that the two plaintiffs (PW1 and PW2) did sustain injuries as a result of the accident.

The next issue is if the Plaintiff suffered injuries as a result of the accident whether the defendants are liable. Ms. Musoke submitted that the 1st defendant was not liable because his servant, the driver of UP 0134 was negligent in the accident. According to her, the evidence on record indicated that the driver of the lorry Reg. UWL 047 was the negligent one.

Hon. Nsambu submitted that since the accident happened in the middle of the road, the drivers of both motor vehicles were equally to blame.

It is instructive to bear in mind that liability is based on the blameworthiness in the cause of the tort. In the instant case, my finding in issue No.1 above was that the driver of the lorry UWL 047 was to blame for the accident. The police accident Report Exh.P3 indicated the owner of the lorry as the 2nd Defendant Hotel Equatorial. Consequentially the 2nd Defendant is vicariously liable for the negligence of their driver.

What then is the quantum of damages to which the plaintiffs are entitled?

The principle governing the measure of damages is the doctrine of “restitutio in intergrum”. The essence of this is that the plaintiff should as far as money can do be put to the position he would have been if the tort was not committed. The money that he might have spent in his attempt to reduce or mitigate the damages or loss (pecuniary loss) had to be refunded if proved. This is special Damages. As for personal injuries reasonable compensation is to be made to the Plaintiff since lost parts of the body cannot be replaced.

Hon. Nsambu counsel for the Plaintiff prayed for 10m/=, general damages for the 1st Plaintiff and 15m/= in respect of the 2nd Plaintiff. He relied on the case of Marion Akankwasa vs. The A.G. (1982) HCB 62 whose permanent disability of the plaintiff was put at 25% end, was awarded 70,000/= in 1982. Counsel used a multiplier of 2 because the percentage of permanent disability of the instant plaintiffs doubled that of Akankwasa. So he multiplied 70,000/= by 2 to bring 140,000/=. Then be converted that figure into US Dollar to become 14,000 Dollar. Then he multiplied that by the current exchange rate which is 940/= to 1 US Dollar. That came to 14000x 940/= 13,160,000/= which he scaled down to l0, 000,000/= for what he called imponderables. He asked for 10m/= for the 1st plaintiff.

As for the 2nd plaintiff when be described to have suffered mere severe injuries, counsel asked for 15m/=.

Counsel for the Plaintiff did not cite any authority in support of the principle on which the above calculations were based. For that I am reluctant to follow it. But it is needless to emphasize the importance of previous decisions for comparative approach to assess damages for personal injuries. It provides uniformity.

In Charles Kyasanku and Others vs. UTC (1981) HCB 88, the 5th Plaintiff sustained a crush injury of the right log which was ultimately amputated. He now walks with an artificial leg. His permanent disability was assessed at 70%. He was awarded 100,000/=.The 6th Plaintiff had sustained even a more severe injury. He was 28 years old and a driver. Ho sustained a fracture of his right hand which made it difficult for him to do his job with his right hand. Due to loss of

tissue in the fractured right hand, the function of that hand had also been lost. His permanent physical incapacity was also assessed at 70%. He was awarded. 130,000/= as General Damages.

In the instant case the 1st plaintiff Lubato Nsubuga sustained the following injuries:-

(1) Fracture of the mid shaft of the right humerus associated with bruise over the right elbow.

(2) Fracture of the lower 3rd of the left femur associated with fracture of the left petella.

After treatment, he was on 9/11/92 still complaining of:-

(1) Pain stiffness and infirmity of the left knee joint.

(2) Chest pain and backache with inability to lift heavy objects.

(3) Weakness of the right arm.

(4) Intermittent headache and dizziness.

His permanent disability was assessed at 45%.

The 2nd plaintiff Kalanima Luwandaga appeared to have suffered several injuries.

He sustained:—

(1) Haematoma on the forehead.

(2) Fracture of the left femur.

(3) Supracondylor fracture of the right femur.

(4) Fracture of the distal left tibia and fibula. He was treated but by 9/7/87 he still complained of:-

(1) Headaches

(2) Deformity of both legs with restriction of knee movements.

(3) Left tibia and fibula were united with acceptable angulation.

(4)The right supracondylor fracture united with a marked deformity giving the plaintiff shortening of 2 of the leg.

(5) The distal one third of the left femur also united with marked angulation giving the knee valgus of 20 degrees.

His permanent disability was put at 50%. Looking at the injuries of the 5th Plaintiff in Kyasanku's a case above whose leg had to be amputated, there is no doubt that he suffered more injuries than any of the Plaintiffs in the instant case. Taking into account the inflation which be devilled, our currency I consider the followings reasonable compensation for the personal injuries sustained by the two plaintiff in this case.

(1) Lubato Nsubuga - 200,000/= general damages

(2) Kulunima Luwandaga – 250,000/= general damages.

The plaintiffs also pleaded, and claimed special Damages arising from cost of medical and police Accident Reports to the tune of Shs. 1,520/=. I consider this was adequately proved and it is allowed. I also allow cost of this suit against the 2nd Defendant. The claim against the 1st defendant dismissed for reasons given therein.

G.M OKELLO

JUDGE

7/6/95