

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**CIVIL SUIT NO 197 OF 1990**

**AGNES MUKASA :::PLAINTIFF**

**VERSUS**

**AKAMBA (U) LIMITED:::DEFENDANT**

**Before; The Honourable Justice Kireju**

**Judgment**

This action is brought by the plaintiff Agnes Mukasa against the defendant Akamba (U) Limited for general and special damages arising out of the injuries she sustained in a motor accident which occurred on 10/10/1989 on Kampala/Masaka road. The plaintiff alleges that the accident was caused by the negligence of the defendant's driver in the course of his employment. In its defence, the defendant admitted that it was the registered owner of motor vehicle UXS 106 but denied all claims by the plaintiff and also denied that the vehicle was driven or managed by its servant as alleged or

That the said driver was in course of the defendant's employment. At the hearing, Mr. Mpungu of Mpungu and Company Advocates appeared for the plaintiff and Ms Irene Mulyagonja of Mulira & Co. Advocates appeared for the defendant company.

**At the hearing of the case following issues were framed:-**

- (1) Whether there is any cause of action against the defendant.
- (2) Whether the defendant was negligent.
- (3) What damages is the plaintiff entitled to if any.

The plaintiff 42 years old teacher at Kako Senior Secondary testified that she was involved in an accident on 10/10/89 around 7p.m. On that day she had come to Kampala to buy books for the school with her husband one Francis Mukasa P.W4. In the evening they boarded a bus UXS 106 and she paid shs.800/= and left for Masaka at around 6.00 p.m. together with her husband. The driver of the bus was driving very fast and she became very worried and even feared to look out of the window. Her husband however, assured her that they would arrive safely. It became very dark before they reached mitala maria and the driver put on very dim lights, as he did not have proper lights. By the time they reached Lwera it was already dark but the driver continued to drive recklessly. When they were a mile from Lukaya in a swampy area, she saw a lorry parked on the left side of the road. The next thing she heard were people screaming. The bus had fallen on the left side of the road in a swamp. Her husband lifted her out of the bus as she could not stand because her left leg had been smashed and she was bleeding. He carried her to the side of the road where she managed to get a lorry which took her to Kitovu Missionary Hospital. She was hospitalized for two months. Her left leg was amputated. She is now using an artificial limb purchased from Mulago at Shs. 50,000. The limb has to be changed every year as it wears away. She has so far bought two limbs since the accident. She paid shs.150, 000/= for treatment but he did not have the hospital bill, she was only issued with a discharge form. She testified that the accident has affected her career and she fears she may be retrenched. She used to teach 24 lessons a week but she can now teach only 12. She cannot stand for a long time and she is no longer efficient as a teacher. She cannot do all her house work she has had to employ someone whom she pays Shs. 20,000/= per month, before the accident she was only paying Shs. 3000/= for domestic help. She used to grow food for her family but she cannot do that now. The accident has disfigured her as a woman and she is no longer confident as a woman. In cross examination, she said that she was not sure about the owner of the bus, but that she boarded at Gasso parking place. The receipt on which she paid the fare got, lost in the accident, the plaintiff also called Dr. Mary Lynch P.W.2 of Kitovu hospital, who testified that she treated the plaintiff who was brought to the hospital on 10/4/89 in a very shocked condition. She had broken the left leg and she had several cuts on her face and neck for about two months and paid about Shs. 200,000/=. PW2 estimated the plaintiff's incapacity at 30%. She referred the plaintiff to Kampala to be fitted with an artificial leg. The next witness to testify for the plaintiff was P.W3 corporal Javuru No. 10919 who testified that on 10/10/89 at around 8.00 p.m. He

learned of an accident on 38 Km. Masaka Kampala Road. It was Mr. Kamuyu, Managing Director Gasso Transport Services who reported the accident and provided them with transport to the scene. The witnesses proceeded to the scene of the accident with Sgt. Oria. The place is called Lwera and they arrived there around 9.00p.m. They found the bus UXS 106 and a Bedford lorry UWU 171 in a swamp. Both vehicles were facing Masaka 11 bodies were removed from the bus and taken to Masaka mortuary. He returned to the scene and spent the night there, the following morning he drew a sketch plan which was exhibited as. P.2 From his investigation he found that the lorry had broken down and had been, parked facing Masaka. He also concluded from the skid marks that motor vehicle UXS 106 was over speeding. The abstract police report was also exhibited. In cross examination he further testified that he concluded that the bus belonged to Akamba (U) Ltd because that is the name which appeared in the log book. He said that Mr. Kamuru was concerned about the accident because most of the businessmen who died were from Masaka and were known to him. He said the driver of the Isuzu bus was not prosecuted because he had died in the accident. The last witness to be called in support of the plaintiff's case was Dr. Francis Mukasa P.W.4 and husband to the plaintiff. He testified that on 10/10/89 he travelled in a bus from Kampala at around 6.00p.m with his wife headed for Masaka. The driver of the bus was driving too fast between 60 and 70 miles per hour and the bus did not have proper lights he was using indicators. When they reached Lwera after a vehicle had passed them he had a bang, then he found himself in the muddy swamp water outside the bus. He then heard his wife calling, he went back into the bus found her there with her leg smashed, and he carried her out of the swamp to the road with help of another man. She was taken to Kitovu hospital where she had her leg amputated. She stayed in hospital for 2 months and he paid Shs. 200,000/= hospital bill. He further testified that because of the leg which was amputated she cannot do the things she used to do in the home and had to employ a helper whom he pays shs. 20,000/=. They have 7 children who need to be cared for, he said that they bought an artificial leg for her and paid shs. 50,000/=.

In cross-examination he further testified that he thought the bus belonged to Gasso because it was written on the bus but later he learned from Masaka Police Station that vehicle belonged to Akamba (U) Ltd. according to the log book.

The defendant called 3 witnesses, D.WI Tobi Kabasomba testified that he was a sales

representative with Akamba, he had worked with the company for 8 years. He was responsible for looking for customers who were interested in buying vehicles. Akamba are agents of Mersey Ferguson tractors and vehicles. He testified that Joy Kusiima DW2 bought an Isuzu bus UXS 106 from the company. He exhibited an invoice Exh. D.1 where Joy Kusima was being asked to pay an outstanding balance on the bus, it was dated 29/10/87. Kusima later sold the bus to Gasso Transport Services as per her letter dated 27/11/87, exh.D.2. The bus was delivered to Kusima in 1987 but he did not remember the exact date. He said that the bus could not be transferred from Akamba to Kusima initially because she had not finished paying for it. He said that some documents were handed to Fred Kijambu of Gaso namely a receipt and licence certificate Exh. D.3. He said that he had never heard of Wilson Kanya.

DW.2 Joy Kusiima, testified that she bought a bus from Akamba (U) Ltd in March,1987, she paid shs. 22 M (cash) when the bus arrived she had to pay about extra she. 400,000/= (N.C.), this amount he paid in November 1987. She used the, bus for a few months and decided to sell it a receipt, on which she bought the operator's license dated 9/6/87 was exhibited as Exh. D.4. She used the bus for a few months and decided to sell it to Gasso, she admitted writing Exh. D.2 where she requested Akamba to transfer, the bus to Gasso Transport Services. In cross-examination she said that she paid for the bus in 2 installments, the original shs. 22M and the extra shs. 400,000/=. She never asked for the bus to be transferred in her names because she never wanted to keep it but to sell it. She said that the vehicle was released to her after paying the second installment.

The last defence witness was Ali Asghar Khan DW.3 who testified that he was the General Manager of Akamba (U) Ltd. He started working with the company in 1984 as a sales Manager. He said that Isuzu bus UXS 106 was imported in 1987 for the order of Joy Kusima she was to pay she. 220m/= for the bus as per invoice issued to her on 19/3/87 Exh. D.5. He said that the bus was registered in the names of Akamba as an importer. in November, 1987 Joy Kusima paid the balance exh,D.1 and the transaction was completed. He further testified that Kusiima took the bus in June 1987 before paying the balance in November, 1987. He said that the terms were cash sale and they can give credit sale but they do not deal in hire purchase. He said that he was aware of Exh.D.2 but Gasso never approached them for transfer. He said that his company was not involved in transport business and they do not even have a licence to operate public transport. He

learned about the accident through the press. He said that the person who was driving the bus was not an employee of Akamba. In cross-examination he testified that Fred Kijambu of Gasso collected the registration Card on 24/2/88 but the question of transfer was not discussed. He said that at the of the accident the bus was not the property of Akamba although it was still registered in the names of Akamba. According to D.2 the company was to wait for Kamuru to effect transfer. Gasso as a buyer was supposed to pay for the transfer but it has never done so. At the close of the defence case, both counsel addressed me on the issues and I shall consider their submissions when considering the issues. The first issue is whether there is any cause of action against the defendant. There appeared to be no dispute about the fact that the plaintiff was a lawful passenger on a bus UXS 106 which got involved in an accident on 10/10/89. miss Mulyagonja, counsel for the defendant submitted that although the defendant company appeared as the registered owner of motor vehicle UXS 106 in the registration book, the defendant company was not the owner of the vehicle as the vehicle had been sold to Joy Kusiima who later sold it to Gasso Transport Services. She submitted that the provisions of S.49 of Traffic and Road Safety Act 1970 had been rebutted by the defence evidence. Counsel further submitted that the driver of the bus was not a servant or agent of the defendant company and therefore the company can not be held vicariously liable for his acts. Counsel submitted that the plaintiff has failed to prove a duty of care owed to her by the defendant company and counsel prayed that the suit be dismissed. on the same issue Mr. Mpungu submitted that the vehicle belonged to the defendant company because it was registered in the names of the company Joy Kusiima and Gasso Transport services had only equitable interest in the bus. According to counsel the sale to Kusiima was hire purchase and that the defendant remained the legal owner until all the installments were paid. Counsel submitted that it was wrong for the defendant company not to have transferred the vehicle as directed by Kusiima's letter dated 27/11/87 Exh.D.2. Counsel submitted that s.50 of traffic and Road Safety Act requires that a vendor notifies the licencing officer of the sale within 7 days. Counsel submitted that Akamba was in breach of this provision of the law. Counsel further submitted that a party to a civil litigation is not supposed to depart from his pleadings by adducing evidence to contradict his pleadings. He referred to the case of HCCS No.1010/90 Nçses Bulenzi vs. Serunjogi & Anr. (Unreported) in support of his submission. He said that the defendant having stated that it was the registered owner of the motor vehicle in issue should not be allowed to adduce evidence to contradict that pleading.

Before a cause of action can lay against the defendant, the plaintiff has to prove that at the time of the accident the motor vehicle belonged to the defendant and was being driven by his its servant or agent in the course of employment or for its benefit. There is evidence from the defence witnesses to show that by November, 1987 the defendant company had sold the bus to Joy Kusiima DW2 who later sold it to Gasso Transport Services. D2 informed the defendant company through her letter dated 27/11/87 which I shall produce here for clarity

“November 27, 1987,

The General Manager,

Akamba (U) Ltd., KAMPALA.

ISUZU BUS UXS 106

This is to inform you that I sold off my Isuzu Bus Registration number UXS 106 to Gasso Transport Services. Haji Kamru of Gasso Transport Services will one of these day call on you for purposes of transfer of the above mentioned bus. By this letter I am requesting you to issue me with a receipt for shs. 432,000/= which I paid to your company.

Yours faithfully Joy Kusiima (Mrs.)

What happened after this letter is that one Fred Kijjambu of Gasso Transport Services came on 24/2/88 and took the receipt and licence certificate n respect of the vehicle.

Haji Kamru never went to the defendant company to process the transfer up to the time the vehicle got involved in the accident in 1989. I agree with counsel for the plaintiff that the defendant violated the provisions of 50(1) of the Traffic and Road Safety Act 1970 which requires the seller of a motor vehicle to report to the licensing officer within 7 days of the sale, Punishment is provided for under g. 52(1) of the same Act. Another important provision concerning this case is S.49 which is as follows:-

“The person in whose name a motor vehicle ,trailer or engineering plant is registered shall unless to the contrary be proved, be presumed to be the owner of the motor vehicle ,trailer or engineering plant” Having found that that the bus in this case was registered in the names of the defendant company, the question now is whether this ownership has been rebutted by evidence on record. However, before dealing with this issue I should respond to counsel for the plaintiffs’ submission that the defendant should not be allowed to depart from his pleadings. In paragraph 2 of the defendant’s defence it was stated as follows: “Save as herein before admitted and save that the defendant is the registered owner of motor vehicle Registration No. UXS 106 the defendant denies

(1) the plaintiff’s claims

(2) knowledge of the plaintiff’s alleged travel as alleged

(3) that the said Bus was driven or managed by its servants as alleged that the said driver was in course of the defendant’s employment”.

In paragraph 6 the defendant denied any cause of action against it and said that the suit was bad in law and ought to be rejected or struck out. It is clear from the defence that the defendant did not plead that it was not the actual owner of the bus although the bus was still registered in its names. The defendant company violated the provisions of Or. 6 r. 5 which is partly as follows:-

“The defendant or plaintiff, as the case may be, shall raise by his pleading all matters which show the action or counterclaim not to be maintains ...”

I am of the considered opinion that the defendant company failed to comply with the cited rules. I am also of the view, that Order. 6 r.6 was violated in a way by the defendant. It is necessary that in pleading a certain amount of detail is given to ensure clearness and to prevent the other party from being taken by surprise. The case of Bulenzi may not assist us in this case as it was based on a breach of contract where different ingredients are needed for proving a case, different from those of a case based on tort as in the instant case. The defendant’s failure to comply with the rules will therefore be considered later when considering costs.

I have also found from the evidence on record that the sale of the bus to Kusiima was not on hire purchase as claimed by the plaintiff's counsel but on credit sale and by the time of the accident the sale had been completed.

Turning to the main issue again I am of the considered view that registration of someone's name in a log book under 3.49 TRS Act is not conclusive evidence that the person registered is the owner of the vehicle. The presumption of ownership can be rebutted by evidence, I refer to the case of Matayo Musoke vs. Alibhai Garage Limited [1960] 4 EA 31 where it was held that a motor car registration book is not a document of title, the presumption of ownership can be rebutted.

From the evidence on record I am convinced that at the time of the accident the bus in question had been sold to Joy Kusiima who also sold it to Gasso Transport Services. The presumption of ownership under S. 49 of TRS Act has been rebutted. The defendant may have violated the provisions of the Traffic Road Safety Act but it cannot be said that it's the owner of the bus.

From the above finding it is clear that the plaintiff brought this action against the wrong party. Tied up with liability is the issue of vicarious liability. In order to fix liability on an employer for the negligence of his employee it must be shown that the employee was, when he committed the negligent act, acting in course of his employment and the question whether or not an employee was acting in the course of his employment will normally depend on all the surrounding circumstances of the case. In the present case we have to first find out whether the driver of UXS 106 was at the time of the accident employed by the defendant company. From the evidence of DWI and DW3 the driver Wilson Kamyia was not an employee of the defendant company. No evidence was offered by the plaintiff to prove that Kamyia was an employee of the defendant. In the abstract accident report Exh.P2 Wilson Kamyia who was the driver is stated to be of Gasso Transport Services. The plaintiff has also not proved on balance of probability that the driver was an agent of the defendant company and the vehicle was being driven for the benefit of the defendant.

Having found that the driver was not an employee/servant/agent of the defendant company, in the course of employment. I have found that the plaintiff has failed to prove the relationship of master and servant or principal and agent between the owner of the bus and the driver or to prove



in anyway that the bus was being driven for the benefit of the defendants In the absence of evidence to show that the bus belonged to the defendant at the time of the accident and was being driven by an employee of the defendant in the course of employment, I have found that the defendant did not owe the plaintiff any duty of care and the plaintiff has no cause of action against the defendant company. The next issue was whether the defendant was negligent. Having found that the plaintiff had no cause of action against the defendant it follow that the defendant was negligent. The defendant did not owe a duty of care to the plaintiff. This case would have been saved if Gasso Transport Services had been joined as a co-defendant, as they were some indication that it could be responsible. For example the bus was written on Gasso the abstract police report indicated that the driver of the bus was from Gasso Transport Services. However, in case I am found to be wrong I would like to consider, whether the driver of the bus was negligent. We have on record the evidence of PW1 and PW4 who testified that the driver of the bus was over speeding from the time he left Kampala around 6.p.m. When it became dark instead of using proper lights he just switched on indicators.

The accident happened when the bus hit a stationary lorry parked on the side of the road. From the evidence, of P.W.3 the' police officer who drew the sketch plan one can tell that the bus was traveling at a high speed, because after hitting the stationary lorry, it traveled for quite a distance before it fell into a swamp living the lorry behind No evidence was called by the defendant to show how this accident happened.

Counsel for the plaintiff invited court to invoke the doctrine of res ipsa loquitor and find that the driver was negligent. a person who puts his vehicle on the road to be used as a passenger vehicle owes a duty of care to the passengers to see that the vehicle is driven carefully for the safety of the passengers. The plaintiff who alleges negligence on the part of the defendant must show that the accident would not have occurred if there was no negligence. From the evidence of the plaintiff's witnesses it is clear that the driver of the bus was over speeding and did not have proper lights, because vehicles do not normally go crushing into a stationary vehicle properly parked on the side of the road and on a straight road. I have therefore found that the driver of the bus was negligent. With regard to the alternative cause of action of res ipsa loquitor I would have also found the driver liable as no explanation was offered by the defendant as to the cause of the accident in the light of the plaintiff's case, refer to the cases of Mrs. Mkaidaga vs. Asgaralli

Gulam Hussen 1922 UL R107, Bikwatinzo vs. Railway corporation 1971 E.A 82. However, the defendant in this case cannot be held negligent as I have already ruled that the driver was not an employee of the defendant company.

Last I shall consider the issue of damages which should have been awarded to the plaintiff. .The plaintiff testified that after the accident she was hospitalized for 2 months. She paid Shs. 150,000/ for the hospital bill. Her left leg was amputated below the knee, she now walks with aid of an artificial leg which has to be replaced every year, and it costs shs. 50,000/=. As a teacher she cannot stand for a long she fears that she may even be retrenched, She cannot carry out her house work, she had to employ a servant whom she pays shs. 20,000/= per month. She has also lost confidence in herself as a woman. PW2 Dr. Mary Lynch of Kitovu Hospital corroborated the evidence of the plaintiff, she confirmed that the plaintiff was hospitalized for about 2 months and paid about shs. 200,000/= for treatment. Her left leg was amputated and she had to be fitted with an artificial leg. The doctor estimated her incapacity at 30%. PW4 , Mukasa also confirmed what PW1 had already testified, that 200,000/=was paid for the hospital bill. Shs50,000/=for the artificial leg. Shs. 20,000/= for the domestic help. . The law with regard to special damages is very clear they should not only be pleaded but also proved: Kampala City Council vs. Nakaye 1972EA 446. Kananura Melvin Engineers v Connie Kabanda Civil Appeal 31 1992.

No receipt was produced by the plaintiff to prove how much she paid in the hospital but she said she paid Shs. 150,000/= and the doctor P3 said she paid about shs. 200,000/ and PW4 said she paid Shs. 200,000/=. In circumstances of this case I shall take shs. 150,000/= as the money paid by the plaintiff to hospital since she was in a better position to know. I would therefore have awarded her special damages of shs. 150,000/. The money being paid to the domestic help is not very certain as this figure bound to change, and also the money for the artificial leg is not certain and these two matters were not pleaded by the plaintiff. I shall therefore remember when considering general damages.

With regard to general damages it Mr. Mpungu submitted that the plaintiff has suffered irreparable damages. He referred to the oases in Wilkinson's book on quantum damages where

similar injuries were incurred and the award by the court. In the case of (i) Joseph Kayanja vs.G.G.A Holdges and Anor. HCB 58/66 HCCS 833/64. The plaintiff aged 24 and salesman suffered loss of leg below the knee. For loss of amenities and future income damages awarded Shs. 75,000/=, (2) Solomon. Nyerema & p.r v Kilembe mines ltd HCCS 467/72, The second plaintiff, aged 30, sustained injuries to both legs and spent 9 months in the hospital and the lower part of his leg was amputated. He also sustained double fractures on his right leg. He had now to walk with crutches and could no longer, carry out his former job of selling barrels. The medical report assessed permanent incapacity at 50% and general damages of shs. 90,000/= was awarded. Counsel for the plaintiff submitted that if the plaintiff in the cited case was awarded shs. 90,000/= in 1972 and the rate a of dollar was at shs. 8 that if you divide shs 90,000/= by shs, 8/= you get about shs.10,000 and the rate dollar in a forex bureau is about 1200/= . So the award would now be 10,000/= 1200/= making shs. 12 million. Counsel also referred me to the case of HCCS 695/70 Fredrick Nswemu v Attorney General, The plaintiff in that case was aged 51years, his leg was amputated above the knee, he also lost his job. he was awarded 1 million shillings for loss of salary and general damages of shs. 4 million.

Counsel submitted that although the plaintiff in this case has not lost her job yet but that she may lose it in future he invited court to award shs. 12 million. Counsel for the defendant invited court not to use a dollar formula proposed by the plaintiff counsel but to be guided by recent decisions of this court. I am of the considered opinion that the value of a dollar could be used as a guiding factor but not the only determining factor, The dollar itself has changed in value so it would be wrong to take it as if it has been constant over the years. at the time when the dollar was about shs. 8/= one could earn a living wage but now this is not possible for the vast majority of the wage earning population and the salary one earns has to be supplemented. The value of other things like food, transport rent., petrol have changed value at varying percentages, it would therefore be wrong to determine damages basing only on the value of the dollar. I am of the view that it is better to look at the present situation and assess what could be considered adequate compensation because of the inflation which has eaten in our money and the drastic 1987 currency Reform Statute. It is not safe and just to use the dollar formula. Looking at the some recent decisions of this court, in the HCCS1464/86 James Katende and 2 others vs. Uganda Railways corporation Justice

Byamugisha awarded Shs. 8million to the 1st plaintiff who had his both legs amputated. Taking into account all the injuries suffered by the plaintiff in this case, pain, and suffering lose of amenities the fact that the plaintiff has to keep buying an artificial leg annually and hire domestic help. I would have awarded shs 5 million as general damages. For the reasons I have already given in this judgment, the plaintiff's case stand dismissed. However, because the defendant violated some of the civil procedure rules, it will not be awarded any costs. Each party will bare its own costs.

M. Kireju

Judge

30/4/1999

Mr. Mukasa for the defendant.

Mr. Mpungu for the plaintiff absent. (appeared later)

The plaintiff in court. Mr. Oburu Court clerk.

Judgement delivered before the above.

M. Kireju

30/4/1999