

**THE REPUBLIC OF UGANDA**

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

**HCCS NO.595 OF 1997**

**PASTORI TUMWEBAZE..... PLAINTIFF**

**VERSUS**

**EDISON KANYABWERA..... DEFENDANT**

**BEFORE: THE HON. MR. JUSTICE E.S. LUGAYIZI**

**JUDGMENT**

The plaintiff sued the defendant for negligence and claimed both special and general damages on account of the loss he sustained. In his WSD the defendant denied the plaintiff's claim. The suit was fixed for hearing. However, despite the fact that the defendant was served, he did not show up for the hearing. As a result, the hearing proceeded on an ex parte basis. The plaintiff called four witnesses in support of his case. They were Tumwebaze Pastori (PW1); No. 400 Sergeant Namisano (PW2); Herbert Barungi (PW3); and Wilson Katurebe (PW4). In brief terms those witnesses testified as follows. That Tumwebeze Pastori was the owner of a Toyota Hilux pick-up registration No. UPP 482. His driver for that pick-up was Wilson Katurebe. On 10<sup>th</sup> August 1995, the driver of the plaintiff's pick-up left Kabale and headed for Buhinda on Kabale-Mbarara road to fetch bananas. When he reached Buhinda the defendant's driver who was driving a Toyota Hilux pick-up registration No. 854 UAQ overtook him. He then stopped somewhere ahead of him. At this point, the plaintiff's driver proceeded to overtake the defendant's driver. However, as he was doing so, the defendant's driver returned to the road and endeavoured to drive off once again. The plaintiff's driver rammed into the back part of the defendant's pick-up. One of the tyres of the plaintiff's pickup broke off and the pick-up fell into a ditch on the right hand side of the road. The defendant's pick-up remained on the left hand side of the road. The plaintiff's pick-up was severely damaged all over. Eventually, the police visited the scene of the accident and

took away the two pick-ups. Subsequently, the plaintiff did not repair his pick-up because it was not economical to do so.

The issues for determination are as follows.

1. Whether the plaintiff's pick-up registration No. UPP 482 was involved in an accident with the defendant's pick-up registration No. 854 UAQ on 10<sup>th</sup> August 1995?
2. Whether the defendant's driver was negligent?
3. Whether the defendant is vicariously liable for his driver's negligence?
4. Whether the plaintiff is entitled to the remedies he prayed for in the plaint?

Court will resolve the above issues in that order.

With regard to the first issue, Wilson Katurebe testified that on 10<sup>th</sup> August 1995 as he drove the plaintiff's pick-up registration No: UPP 482 on kabale— Mbarara road near Buhinda, the defendant's driver over took him. He was driving the defendant's pick-up registration No. 854 UAQ. However, after overtaking him the defendant's driver stopped somewhere ahead. At this point, Katurebe endeavoured to drive past the defendant's pick-up, but the defendant's driver drove it back into the road. Katurebe then collided with the defendant's pick-up. The plaintiff's pick-up ended up in a ditch on the right hand side of the road. It was severely damaged. The plaintiff and No. 400 Sergeant Namisano the police officer who visited the scene of the accident that day confirmed the occurrence of the accident between the plaintiff's pick-up registration No. UPP 482 and the defendant's pick-up registration No. 854 UAQ. All that evidence was not challenged or contradicted. For that reason, Court is willing to rely on it and find that the plaintiff proved, on a balance of probabilities, that his pick-up registration No. UPP 482 was involved in a motor accident with the defendant's pick-up registration No. 854 UAQ on 10<sup>th</sup> August 1995. The first issue is therefore resolved in favour of the plaintiff.

With regard to the second issue, it is the plaintiff's case that the accident in question was caused by the defendant's driver's negligence. Negligence as a tort is generally defined as "the breach of a legal duty to take care which results in damage ... to the plaintiff" (See **Winfield and Jolowicz**

on Tort Ninth Edition at page 45). It goes without saying, therefore, that a driver of a motor-vehicle is under a duty of care to ensure that he drives his motor vehicle safely on the road without knocking or running into other road users. He breaches that duty, if he does the opposite and ends up knocking other road users and causing them injury. In paragraph 6 of the plaint the plaintiff spelt out the following as the acts of negligence that resulted in the accident in question.

“(a) the defendant’s driver drove at an excessive speed and without any due regard for other road users or traffic.

(b) the defendant’s driver failed to apply brakes sufficiently or in time or at all so as to avoid the accident.

(c) the defendant’s driver failed to steer, control, maneuver or otherwise avoid knocking the plaintiff’s vehicle.

(d) the defendant’s driver failed to exercise sufficient care and skill in driving the said vehicle.

(e) the defendant failed to keep and maintain the said vehicle in good mechanical state and road worthy condition.”

Did the plaintiff prove those acts of negligence or any one of them? In essence, Katurebe testified as follows. That on 10th August 1995 as he was overtaking the defendant’s pick-up which had stopped a head of the plaintiff’s pick-up on Kabale-Mbarara road near Buhinda, the defendant’s driver suddenly returned to the road. At that point, Katurebe rammed the plaintiff’s pick-up into the defendant’s pick-up. Going by that evidence, which is not challenged, it appears that when the defendant’s driver returned to the road all of a sudden he left Katurebe with no other choice but to collide with him. For that reason, the manner in which the defendant’s driver drove the defendant’s pick-up at that time fits the particulars of negligence in paragraphs (a), (b), (c) and (d) above. Consequently, Court is satisfied that the plaintiff proved, on a balance of probabilities, that the defendant’s driver was negligent. The second issue is also resolved in favour of the plaintiff.

With regard to the third issue, Exh.P1 (i.e. the accident report) shows that the registered owner of a Toyota Hilux (pick-up) registration No. 854 UAQ is Edison Kanyabwera (the defendant). Whether the defendant is vicariously liable for the negligence of his driver depends on whether that driver caused the accident in question in the course of his employment with the defendant. In the case of **Muwonge v Attorney General I1967 E.A. 17** the East African Court of Appeal had this to say on that subject,

*“A master is liable for the acts of his servant committed ... within the exercise of his duty... The master remains liable whether the acts of he servant are negligent or deliberate or wanton or criminal. The test is, were the acts done in the course of his employment... The acts may be so done even though they are done contrary to the orders of the master”.*

Exh.P1 further shows that at the time of the accident Mugisha Benon was driving the defendant's pick-up. In the absence of evidence to the contrary, that fact implies that Mugisha

Benon had authority from the defendant to drive the said pick-up. That aside, if the defendant was to escape liability he bore the burden of proving that his driver was driving his pick-up on a frolic of his won at the time of the accident. However, the defendant failed to bring such evidence. In Court's opinion, therefore, that too implies that the defendant acknowledged the fact that his driver caused the accident in question in the course of his employment. In view of all the above facts and presumptions, Court is satisfied that the plaintiff proved, on a balance of probabilities, that the defendant is vicariously liable for the negligence of his driver. The third issue is also resolved in favour of the plaintiff.

With regard to the fourth issue, the law is that the defendant must compensate the plaintiff for loss or injury that is the proximate result of the breach of duty by the defendant. **Donoghue v Stevenson [19321 A.C. 562)**. In paragraph 15 of the plaint the plaintiff prayed for the following remedies,

(a) Special damages;

(b) Alternatively, the replacement value of his pick-up;

(c) General damages;

(d) Costs of the suit;

(e) Interest at the rate of 25% per annum from the date of judgment till payment in full.

There is no doubt that the damage that is covered under the above heads was the proximate result of the defendant's driver's negligence. However, the important question to answer is whether the plaintiff led evidence to prove the loss he claims to have suffered under those heads. Court will discuss below the contents of each head in turn.

Under the head of special damages the plaintiff made two separate claims. The first claim is in respect of the cost of repairs which are needed to replace the damaged parts of his pick-up. The second claim is for loss of income in respect of the said pick-up from the day of the accident until now. For the first claim, Herbert Barungi (PW3 who is a valuer of motor vehicle from the Ministry of Works at Kabale) introduced in evidence an inspection report (i.e. Exh.P5) to show that the spare parts and labour which were required to replace the damaged parts of the pick-up were worth shs. 9,049,500/=. In addition, the plaintiff testified that he paid shs. 4,500/= for the accident report. He produced a Uganda Revenue Authority receipt serial No. BSI 028592 (Exh.P2) to support that claim. In all, therefore, under that area of special damages the plaintiff claimed shs.9,054,000/=. That evidence was neither challenged nor contradicted. In the circumstances, Court would have been willing to grant the plaintiff that aspect of special damages. However, Herbert Barungi also testified that the value of the plaintiff's pick-up after the accident was only Shs. 1 .8m/=. For that reason (he thought that) it was not economical to spend shs. 9,049,500/= in a bid to repair the said pickup. He, therefore, suggested that the better option was to replace it. He gave the pre-accident value of the plaintiff's pick-up as shs. 12m1=. That evidence was not challenged or contradicted. Court agrees with Barungi that it is always better to do what is wiser. Consequently, instead of awarding the plaintiff shs.9,054,000/= to enable him to buy the necessary spares to replace the damaged parts of his pick-up, it is better to order the replacement of the plaintiff's pick-up at shs.12m/=. That takes care of the first part of the plaintiff's claim for special damages.

The second part of the plaintiff's claim for special damages is in respect of lost income since the time of the accident until today; and it is as follows. The plaintiff testified that each day his pick-up was on the road it brought in an average of shs.30,000/ as net profit. That was after deducting costs of repairs and service. The pick-up was on the road for 5 days each week. Therefore, in a month the plaintiff claimed that he earned, at least, Shs.600,000/= from it. However, that evidence was not backed up by any document, such as receipts, books of accounts or anything to show the plaintiff paid tax on those earnings. To make matters worse, even the plaintiff's driver (Wilson Katurebe) did not say a word concerning the daily earnings from the pick-up. For those reasons, court is not satisfied that the plaintiff was earning a net amount of Shs.600,000/= per month from his pick-up before the accident in question; and that since then the plaintiff has lost such earnings. That aspect of special damages will, therefore, not be granted.

That takes court to the head of general damages. There is no doubt that the plaintiff has suffered a lot of inconvenience and stress since his pick-up was involved in the accident in question. Considering that fact court is willing to award him a sum of Shs.2m/= as general damages.

The plaintiff will also be paid the costs of this suit; and interest on the special damages and general damages at court rate. However, the interest on special damages will run from the date of filing the suit till payment in full; and that on general damages will run from the date of judgment till payment in full.

All in all, the plaintiff's suit has succeeded; and court hereby enters judgment in the plaintiff's favour in the following terms.

1. The defendant shall pay the plaintiff Shs.12m/= as the replacement value for his pick-up.
2. The defendant shall further pay the plaintiff a sum of shs.2m/= as general damages.
3. The defendant shall also pay interest in respect of the amounts awarded in paragraphs 1 and 2 above at court rate as follows,
  - (a) in respect of the amount awarded in paragraph 1- from the date of filling the suit till payment in full;

(b) in respect of the amount awarded in paragraph 2- from the date of judgment until payment in full.

4. The defendant shall also bear the costs of this suit.

**E.S LUGAYIZI**

**JUDGE**

**27/10/2001**