

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL SUIT NO. 1422 OF 2000

JOSEPH SERWADDA ::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

THE ATTORNEY GENERAL ::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE MOSES MUKIIBI

JUDGMENT

The plaintiff's action against the defendant is for special and general damages for loss, personal injuries, pain and suffering arising out of a road traffic accident which was caused by the negligence of the defendant's servant, agent and/or authorised driver. The defendant is sued in his representative capacity as the Attorney General of the Republic of Uganda. The plaintiff brought this action as the conductor in a Taxi Motor Vehicle Toyota Hiace Minibus Registration No. UBS 170 which, at the time of accident, was owned by one Nkalubo Jackson and was being driven by one Kawooya Vicent, its driver. The defendant is made vicariously liable for the negligence of one Lt. Col. Tumwine Joram who was driving Motor Vehicle Toyota Hilux Registration No. H4 DF 034 belonging to the Ministry of Defence. The plaintiff prayed Court to grant him the following remedies:

- (a) General damages;
- (b) Special damages;
- (c) Loss of earnings;
- (d) Interest on (a), (b) and (c) at the rate of 45% per annum from the date of Judgment till payment in full;
- (e) Costs of this suit;
- (f) Any other relief as this Honourable Court may deem fit and just.

The plaintiff's case is as follows:-

On the 17th day of October, 1999 Motor Vehicle No. UBS 170 was being driven from Bwaise to Kampala City via Sir Apolo Kagga Highway when at a junction near Caltex Petrol Station it was knocked by a speeding Motor Vehicle No. H4 DF 034 which was coming from Wandegeya

side. In this Judgment I will refer to Motor Vehicle No. UBS 170 as the “Taxi Vehicle” and Motor Vehicle No. H4 DF 034 as the “Army vehicle”.

The driver of the Army Vehicle Lt. Col. Tumwine Joram, the authorised driver and/or servant of the defendant, was negligent in that he drove the said vehicle at a speed which was excessive in the circumstances, carelessly and/or recklessly without due care and attention, and, as a result, he failed to observe the stop sign upon approaching a junction, or to stop, slow down, swerve or in any other way so to manage or control the Army vehicle as to avoid the accident. The driver of the Army Vehicle was acting within the scope of his employment as the servant agent and/or authorised driver of the defendant.

The plaintiff has incurred financial loss, sustained severe personal injuries and suffered general and special damages. The plaintiff relies on the doctrine of *res ipsa Loquitur*, in the alternative.

The plaintiff prayed for judgment to be entered in his favour against the defendant.

In his defence the defendant denied all the plaintiff’s claims and allegations. In the alternative and without prejudice to the above the defendant avers that if the alleged accident occurred the driver of the Taxi Vehicle, in which the plaintiff was traveling, contributed to its occurrence. The driver of the Taxi Vehicle was contributorily negligent when he:

- (a) failed to keep a proper look out for other vehicles on the road;
- (b) failed to slow down and take precaution while approaching a road junction;
- (c) Failed to take all measures to avoid the collision.

The defendant prayed this court to dismiss the suit with costs.

At the commencement of the hearing five issues were framed namely:

- (1) Whether the driver of the Army Vehicle was negligent.
- (2) Whether the said driver was acting in the course of his employment.
- (3) Whether the defendant is vicariously liable for the accident.

- (4) Whether the plaintiff suffered any injury, loss or damage.
- (5) Whether the plaintiff is entitled to the reliefs prayed for.

Arising upon the amendment to the written statement of defence is the issue whether or not the driver of the Taxi vehicle was contributorily negligent. This should be the sixth issue.

I will deal with the first and sixth issues together. These are:

Whether the driver of the Army vehicle was negligent, and whether or not the driver of the Taxi Vehicle was contributorily negligent.

Serwadda Joseph (PW3), the plaintiff testified as follows:-

He used to be a conductor in a Taxi Vehicle Reg. No. 170 UBS which belonged to Paul Byekwaso, and was being driven by Kawooya Vincent. On 17/10/1999, at night, the Taxi vehicle was coming from Bwaise and heading for Sir Apolo Kagwa Road. The Taxi vehicle was at a junction near Caltex Petrol Station, joining Wandegeya Road, Sir Apolo Kagwa Road and Bwaise Road. The witness was seated, facing in front. The Taxi vehicle had gone past the junction when a motor vehicle moving from Wandegeya side knocked the Taxi vehicle. The witness saw the vehicle from Wandegeya side whose head lights were flashed directly where he was. He heard noise and a bang. He felt the Taxi vehicle pushed by the impact. He got shocked.

In response to cross examination the witness testified as follows:-

The accident occurred before the Taxi Vehicle passed the junction. He saw a vehicle approaching from Wandegeya side, with its headlights directed to the Taxi vehicle. That vehicle knocked the Taxi vehicle at the junction. The Taxi vehicle was moving slowly towards Sir Apollo Kaggwa Road. The witness looked at the side to see the vehicles which were coming from Wandegeya side. The vehicle from Wandegeya side was moving very fast. He had no chance to alert the driver of the Taxi Vehicle. As the Taxi vehicle approached the junction the witness did not warn the driver in any way. Vehicles moving from Bwaise towards Sir Apollo Kaggwa Road go straight on, without stopping, at the junction.

Kakooza Lameck (PW4) testified as follows: - He is a motor cyclist (Boda boda) residing at Bwaise. He could not recall the date. He was on a Boda boda, waiting for passengers at about 9.00 – 9.30 pm at 3 miles at Bwaise near Caltex Petrol Station. This is the place where the road from Wandegeya joins the direct road from Sir Apollo Kaggwa to Bombo Road. He saw a double Cabin Vehicle moving at high speed from Wandegeya; it had full head lights and sport lights on. There was a minibus vehicle moving from Bwaise, taking the direct road, Sir Apollo Kaggwa Road. The minibus vehicle was knocked by the Double Cabin Vehicle. The Minibus over turned. The double cabin vehicle stopped at a distance. The minibus vehicle was hit on the passenger side, at the door. The witness saw three soldiers come out of the double cabin vehicle. They were wearing Army Combat uniform. One of the soldiers had decorations indicating a high rank. He was carrying a stick. He was harsh and quarreled a lot. The other two soldiers in uniform carried guns. Passengers who were in the minibus cried. The witness and other persons ran and lifted the minibus. The passengers were crying out for help. The witness and others removed the passengers who were injured.

A police patrol vehicle arrived. The injured passengers were put on the police vehicle. One of the soldiers remained behind guarding the double cabin vehicle. After sometime traffic policemen arrived at the scene. They took measurements. The witness narrated the story to a traffic policeman. The witness used to park at Kawala Road which starts at the junction where the accident occurred. He had been there since 1995. There is a sign post along Wandegeya road, it signals motorists to stop upon reaching the junction. The witness used to see vehicles from Wandegeya stopping. Vehicles from Wandegeya have to give way to vehicles moving along Sir Apollo Kagwa Road.

The witness was cross-examined and he stated as follows:-

The spot of the accident was at the road junction itself. From where he was standing he could see the speed of the minibus. He could not tell if the driver of the minibus tried to brake. He saw the double Cabin off the road and ran for cover. The driver of the minibus tried to swerve to the area where the witness and others were. The double Cabin vehicle was moving at high speed, and the minibus had no time to clear the way.

No. 14349 Sgt. Opolot Michael (PW2) testified as follows:-

He is a police officer attached to Kawempe Police Station, working in the Traffic section. On Sunday, 17/10/1999 he was on duty as the In-charge counter, in the Traffic office. At around 11.20 pm he received information of an accident having occurred at the junction of Sir Apolo Kagwa Road and Bombo Road. It is a Y- junction. He proceeded to the scene. He found there two motor vehicles which had been involved in the accident. They were:

- (i) Motor Vehicle Registration No. H4 DF 034, a Toyota Hilux Double Cabin, white in colour; and
- (ii) Motor vehicle Registration No. 170 UBS, a Toyota Hiace, Omnibus, white in colour.

The passenger sliding door of the Taxi Vehicle had been ripped off and was lying at a distance. He took measurements. He observed that the Army Vehicle was traveling from Wandegeya side towards Bombo. The Taxi vehicle was traveling from Bombo side towards Sir Apolo Kaggwa Road. There was a road sign post at the scene which required the driver of the Army Vehicle to stop and give way to the Taxi Vehicle. The road is not marked. He saw a lot of debris comprising broken glass, dry soil and colour from both vehicles, and he marked this as the point of impact. The point of impact was beyond the stop line and Bombo Road, into Sir Apolo Kaggwa Road. He drew a sketch plan and a key to it. [The two documents were admitted in evidence as Exhibit P.2] Mark "A" on the sketch plan represents the stop sign on an island. The black dots in the middle of Sir Apolo Kaggwa road represent the broken glass. Mark "X" represents the point of impact which is at the centre of the road. The driver of the Army Vehicle should have stopped adjacent to the stop sign island to give way to vehicles traveling from Bombo side going to join Sir Apolo Kaggwa road.

He saw both vehicles in standing positions. Both vehicles had been damaged. The sliding door had been ripped off the Taxi vehicle. Its front wind screen had been shattered, and its body generally damaged. The army vehicle had a damaged front: the front mud guard and bonnet had been damaged.

The witness did not find any injured person at the scene. He caused the two vehicles to be towed to Kawempe Police Station.

In response to cross-examination the witness testified that he did not find any skid marks of either of the two vehicles.

Learned Counsel for the Defence, Ms. Margaret Kaddu, did not call any evidence for defence. Counsel for the plaintiff, in his written submission, reiterated the evidence of PW2 Sgt. Opolot Michael. He also referred to the sketch plan (Exhibit P.2).

Relying on the evidence of PW2 Counsel submitted that at the scene there was a sign post requiring all vehicles coming from Wandegeya side to stop. He submitted that the driver of the Army vehicle did not, or failed, or refused to, stop. He submitted that the point of impact, according to PW2, was for inside Sir Apolo Kaggwa Road, beyond the stop line on Bombo road. Counsel for the plaintiff submitted that the evidence of PW2 Sgt. Opolot Michael was corroborated by the evidence of PW4, Kakooza Lameck. Counsel pointed out that PW4 Kakooza Lameck was an eye witness to the accident. Counsel reiterated the evidence of PW4. He (PW4) testified that the Army vehicle was moving at a terrific speed with its head and sports lights on and in full beam; that it knocked the stop sign post; and then rammed into the Taxi vehicle which was coming from Bwaise side.

Counsel cited *ANDEREYA SINZIMUSI V. GOMBA BUS SERVICE*, Court of Appeal Civil Appeal No. 8 of 1979 (Unreported), particularly the leading judgment of *NYAMUCHONCHO, J.A.* The learned Justice of Appeal had quoted a passage in *Tart v. Chilty and Co. (1931) AU.E.R. Rep. 826 at P. 829.*

Counsel submitted that Sir. Apollo Kaggwa road is the main road while the road from Wandegeya is a side or feeder road. He submitted that the driver of the Army vehicle which was moving from Wandegeya side had a duty to stop and give way to motorists using the Bwaise/Sir Apollo Kagwa Road. He submitted that the driver of the Army Vehicle did not comply with the sign requiring all vehicles from Wandegeya side to stop, and he rammed into the Taxi vehicle

which was coming from Bwaise side. Counsel submitted that the defendant's driver was therefore, negligent, careless and/or reckless.

Counsel submitted, in the alternative, that the Doctrine of Res ipsa Loquitur applies to this case. He cited: JUMA ASILE V. NYANZA TEXTILES LTD (1975) HCB 292. In that case the court held that Res Ipsa Loquitur is a maximum applicable to situations where all facts leading to the accident are unknown and helps the plaintiff thereby to discharge the onus upon him to prove negligence.

For the conditions for the application of this Maxim Counsel Cited:

SCOTT V. LONDON & KATHERINE DOCK (1865) 3 H & C 596 at page 601, per Sir William Erle, CJ.

Learned Counsel for the Defendant Ms. Kaddu Margaret submitted that negligence on the part of the defendant was denied. She contended that it was the driver of the Taxi vehicle who was negligent or contributed to the occurrence of the accident. Counsel submitted that the driver of the Taxi vehicle failed to keep a proper look out for other vehicles on the road; failed to slow down and take precaution while approaching a road junction; and failing to take all measures to avoid the collision.

I have carefully examined the sketch plan (Exhibit P.2). It showed the point of impact as being at the Centre of Sir Apollo Kaggwa Road. According to Sgt. Opolot Michael (PW2) the black dots in the middle of Sir Apolo Kaggwa road represented broken glass. The witness put Mark "X", the point of impact", at the centre of the road. The driver of the Taxi Vehicle should have kept to the left of Sir Apolo Kaggwa Road, in his proper lane. Why did he move to the centre of the road? The answer to this question is found in the testimony of Kakooza Lameck (PW4).

In answer to cross examination he testified that the driver of the minibus tried to swerve to the area where the witness and others were. [The witness used to park at Kawaala road which starts at the junction where the accident occurred]. He further testified that the double cabin vehicle was moving at high speed, and the minibus had no time to clear the way. I find the evidence of

Sgt. Opolot Michael (PW2) and Kakooza Lameck (PW4) consistent and credible, and I do believe it.

Learned Counsel for the defendant did not call any evidence to prove the allegations in the amended written statement of defence that:-

- (a) The driver of the Taxi vehicle failed to keep a proper look out for other vehicles on the road; and
- (b) That he failed to slow down and take precaution while approaching a road junction.

Learned Counsel for the defendant did not assist this court by drawing any necessary inferences from the evidence on record to help establish the defendant's said allegations.

The defendant also alleged that the driver of the Taxi vehicle failed to take all measures to avoid the collision. I have found some evidence to rebut this allegation. Both Sgt. Opolot Michael (PW2) and Kakooza Lameck (PW4) told Court that the driver of the Taxi vehicle moved away from the left side of Sir Apolo Kagwa Road and swerved to the centre of the road. According to Kakooza Lameck (PW4) it appeared to him as though the driver of the Taxi vehicle was trying to clear the way.

I find no evidence to show that the possibility of danger emerging was apparent to the driver of the Taxi vehicle. So I am unable to apply to this case the statement of SEKANDI, Ag. J. (as he then was) in PAULO KATO v. Uganda Transport Co. (1975) HCB 120.

I have carefully considered the facts in DAR ES SALAAM MOTOR TRANSPORT CO. Ltd. v. MARTIN DESA, Civil Appeal No. 47 of 1975, as stated in Counsel's written submission.

I entirely respectfully agree with the statement of the general principles contained in the judgment of MUSOKE, J.A. The learned justice of Appeal said:

“..... the general principal is that a driver of a motor vehicle is under a duty to take care at cross roads. Where a major road and a minor road intersect a driver on the major road has

a right of way, but he is not entitled to assume that a driver on the minor road will comply with the traffic sign, if any”.

However, that case may be distinguished on the facts from the present one. The learned Justice of Appeal gave the basis for his decision as follows:-

“On his own evidence he was driving above the city speed limit and he did absolutely nothing to avoid the accident when he saw the bus approaching the intersection “in a very speedy manner”, but just drove on expecting the bus to stop, because he was driving on the major road”.

In the instant case such evidence is not available concerning the driver of the Taxi vehicle. For this reason I am unable to come to a decision similar to the one MUSOKE, J.A. reached in the Dar es Salaam Motor Transport Co. case.

Learned Counsel for the defendant submitted, in conclusion, that the driver of the Taxi vehicle saw a potential danger, close to ignore it, took no evasive action whatsoever and the accident did happen. She submitted that in these circumstances he contributed to the accident. With due respect to learned Counsel I am unable to agree with her. I have found no evidence at all to support Counsel’s statement of facts. I, therefore, find no basis for saying that the driver of the Taxi vehicle failed to guard against the possibility of danger which was reasonably apparent. I cannot say in the circumstances of this case that the driver of the Taxi vehicle contributed to the accident.

Kakooza Lameck (PW4) testified that there is a sign post along Wandegeya road which signals motorists to stop upon reaching the junction. He told court that he used to see vehicles from Wandegeya stopping to give way to vehicles moving along Sir Apollo Kagwa road.

Sgt. Opolot Michael (PW2) testified that there was a road sign post at the scene which required the driver of the Army Vehicle to stop and give way to the Taxi Vehicle. He told court that the driver of the Army vehicle should have stopped adjacent to the stop sign island to give way to

vehicles traveling from Bombo side going to join Sir Apolo Kaggwa road. He testified that he did not find any skid marks of either of the two vehicles.

The absence of skid marks on the part of the driver of the Army Vehicle was explained by Kakooza Lameck (PW4) who testified that he saw a double Cabin vehicle moving at high speed from Wandegeya; it had full head lights and sport lights on. He also saw the minibus vehicle being knocked by the double Cabin vehicle on the passenger side, at the door, forcing the minibus to over turn.

Serwadda Joseph (PW3) testified that the Taxi vehicle had moved past the junction when a motor vehicle moving from Wandegeya side, whose headlights flashed directly where he was seated, knocked the Taxi vehicle.

During cross examination Serwadda (PW3) clarified that the accident occurred before the Taxi vehicle passed the junction. He told court that the Taxi vehicle was moving slowly towards Sir Apollo Kaggwa road. He saw the vehicle from Wandegeya side moving very fast. He had no chance to alert the driver of the Taxi vehicle.

I find the evidence of Kakooza Lameck (PW4), Sgt. Opolot Michael (PW2) and Serwadda Joseph (PW3) consistent and credible, and I do believe it. On the evidence on record I find as a fact that there was a stop sign on the road from Wandegeya requiring the driver to give way to vehicles on Sir Apollo Kaggwa road, the main road. I also find as a fact that the driver of the Army vehicle emerged from Wandegeya road at high speed and without stopping collided with the Taxi vehicle, which had a right of way, on Sir Apollo Kaggwa Road. I find as a fact that the driver of the Army vehicle failed and/or refused to comply with the stop/yield sign on Wandegeya road. In the circumstances of this case I find that the driver of the Army vehicle was negligent, and wholly to blame for the accident which occurred.

I will now deal with the 2nd and 3rd issues together, namely:

Whether the driver of the Army vehicle was acting in the course of his employment, and whether the defendant is vicariously liable for the accident. Sgt. Opolot Michael (PW2) testified that he

saw two motor vehicles which had been involved in the accident, and one of them had Registration No. H4 DF 034, a Toyota Hilux Double Cabin.

Kakooza Lameck (PW4) testified that he saw three soldiers come out of the double Cabin vehicle. They were wearing Army Combat Uniform. One of the soldiers had decorations indicating a high rank. He was carrying a stick. The other two soldiers carried guns. One of the soldiers remained behind guarding the double Cabin vehicle.

Sgt. Opolot Michael (PW2) told court that the officer – In –Charge Traffic Inspector OMODING prepared an Abstract of Particulars of the accident. The witness told court that the said O/C Traffic was still attached to Kawempe Police Station. The said O/C was not called as a witness and, apparently, the Accident Report was not tendered in evidence. It was alleged in Parag. 5 of the plaint that the Army vehicle was being driven by and/or under the control and management of Lt. Col. Tumwine Joram, the authorized driver and/or servant of the Defendant. A copy of the Accident Report was annexed to the plaint. These allegations of fact were not specifically denied by the defendant. There was no averment in the written statement of Defence stating anything to the contrary. The defendant put up a general denial contained in Parag. 3 of the defence.

Rule 7 of Order 6 of the Civil Procedure Rules, so far as is relevant, provides as follows:

“It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the statement of claim, or _____ but each party must deal specifically with each allegation of fact of which he does not admit the truth, except damages”.

Rule 9 of order 6 prohibits evasive denials, and prescribes that a party pleading in response to a previous pleading of the opposite party must answer the point of substance.

I, therefore, find that it was not contested by the defendant that Motor Vehicle Reg. No. H4 DF 034 was an Army Vehicle, belonging to the Ministry of Defence and that its driver Lt. Col. Tumwine Joram, was an Army officer and a servant of the defendant.

Learned Counsel for the defendant submitted that the burden was on the plaintiff to prove that the defendant's servant was acting in the course of his employment at the time of the accident.

Sgt. Opolot Michael (PW2) told court that 17/10/1999, the date of the accident, was a Sunday. He told court that he received communication from the controller Information Room at CPS, Kampala about the accident at 11. 20 pm.

Kakooza Lameck (PW4), an eye witness, stated the time of the accident to have been between 9.00 and 9.30 pm. Sgt. Opolot Michael (PW2) told Court that he did not find any injured person at the scene. He saw both vehicles in standing (up right) positions. Yet Kakooza Lameck (PW4) testified about lifting the minibus and removing the passengers who were injured. He testified that the injured passengers were put on a police patrol vehicle. He told court that after some time traffic policemen arrived at the scene.

In my view the evidence of Kakooza Lameck (PW4) shows that traffic police officers from Kawempe police station arrived at the scene of the accident long after the time of the collision.

The question to consider here is whether the driver of the Army Vehicle, a senior Army officer with two other soldiers, on a Sunday evening, between 9.00 and 9.30 pm, wearing Army combat Uniforms and carrying guns, driving along Kampala to Bombo Road, was not in the course of his employment with the Ministry of Defence, and hence, the defendant.

Learned Counsel for the defendant alluded to a situation where an employee temporarily goes outside the scope of his employment for the purpose of accomplishing some act of his own private business. With due respect to learned Counsel I must say that there was no evidence of any diversion by the driver of the Army Vehicle to attend to his own private business.

In the case of *STANLEY SMOLEN v. HENRY LUBOWA* Civil Appeal for East Africa at Kampala Law, Ag. P. said:

“In a case such as this, where the plaintiff has pleaded and proved that at the time of the accident the driver was driving the car which he was employed to drive, a prima-facie case has been

established that he was acting within the scope of his employment, and the burden of proving the opposite shifts to the employer”.

In the instant case the fact of whether or not the driver of the Army Vehicle was acting in the course of his employment at the time of the accident was especially within the knowledge of the defendant.

Section 106 of the Evidence Act (Cap. 6) provides:

“In civil proceedings, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon that person”.

In the case of EAST AFRICAN ROAD SERVICES Ltd V.J.S. DAVIS & Co. Ltd (1965) E.A. 676 at P. 678, Counsel for the defendant prayed in aid the provisions of S. 112 of the Kenya Evidence Act, which are in all material respects similar to Section 106 of the Uganda Evidence Act. In that case FARDEL, J. Said:

“The commentaries on S. 106, the equivalent Section of the Indian Evidence Act, do not suggest that there is any essential difference between the English and the Indian Law on the point, and indicate that in general some prima facie evidence must be given by the complainant in order to cast the burden on his adversary”.

The question whether or not an employee was acting in the course of his employment will depend on all the surrounding circumstances of the case.

See: ASADI MUGUMUZA V. AGIP PETROL STATION (1975) H.C.B. 288, Ssekandi Ag. J. (as he then was).

In the instant case the Ministry of Defence, and hence the defendant, exercised control over the way the driver of the Army Vehicle used it. Lt. Col. Tumwine Joram was a servant of the defendant. In his Amended Written Statement of Defence the defendant did not specifically aver that the said Senior Army officer was not acting in the course of his employment at the time of the accident. This was so despite very clear allegations of fact contained in Parag. 10 of the plaint. It was alleged in the said Parag. That Lt. Col. Tumwine Joram was in the scope of his employment as servant, agent and/or authorised driver of the defendant. The defendant did not

specifically answer this allegation. In my view it should be considered as admitted that the Ministry of Defence, and hence the defendant, authorised Lt. Col. Tumwine Joram to drive the Army vehicle. It is my view that the defendant is responsible not merely for what he authorised his said servant to do, but also for the way in which he did it.

If a servant does negligently that which he was authorised to do carefully his Master will answer for that negligence.

See: YONASANI MUNDU SERWANGA V. ATTORNEY GENERAL (1980) H.C.B. 60, Mayindo, J. (as he then was).

In that case the learned Judge quoted the test of Vicarious liability stated in SALMOND ON TORTS 17TH Edn. At P. 465.

It is my view that the plaintiff in this case has established a prima-facie case that Lt. Col. Tumwine Joram was acting within the scope of his employment, and the burden of proving the opposite shifted to the defendant.

During the hearing of this case the defendant did nothing to discharge the burden cast on him. So I find that the driver of the Army Vehicle was acting in the course of his employment at the time of the accident. It follows, therefore, that the defendant is vicariously liable for the said accident, and I so hold.

The fourth issue is whether the plaintiff suffered any injury, loss or damage.

Serwadda Joseph (PW3), the plaintiff, testified as follows:-

He was 26 years old. He was working as a Taxi conductor. His employer was Paul Byekwaso (PW5) who used to pay him Shs. 25,000/= per week. The witness used to earn shs. 5000/- per day as his share of the left over income after deducting the share of his employer.

When the Taxi Vehicle, in which he was seated as a conductor, was knocked by the Army vehicle he was shocked and lost consciousness until 18/10/1999 the next day, at about 6.00 pm. He found himself admitted in Ward 3C in New Mulago Hospital. His right leg had been plastered. He had been opened up below the navel and a Catheter had been inserted. His Urethra had blocked and he could not urinate through the penis. He felt back pain and could not sit. He felt general bodily pain. He was in hospital for three weeks. Upon being discharged he had to be

lifted. He started attending Mulago Hospital as an out patient. He was given crutches. The hole for the Catheter used to leak urine.

He was operated on 4/12/2001. He was operated below the testicles and at the sides of the penis. The Catheter was removed. He has to apply pressure to pass out urine. He feels some irritation as he passes out urine. After taking a drink he feels the urge to pass urine after about 10 minutes. At home he has to sit next to a bucket into which to urinate. The hole in the Pubic area for the Catheter has healed after treatment. He has to attend hospital twice a week for the Doctors to insert tubes through the Urethra. Sometimes a gadget is used to open the way. There after he passes out urine with blood. The Doctor prescribes medicine for treatment which he buys.

He walks with a limp and with the support of a stick. He feels pain in the right leg. When he sits for more than 30 minutes he feels pain in the back. He feels pain in the abdomen when he is passing urine or stool. He feels pain on touching the penis. He cannot sustain an erection. He has no feelings for sex. He cannot try sex. He has a wife but he sent her to the village, to the home of his parents. He now stays with his brother who is married. He (the witness) and his wife had been blessed with two children.

Since he got involved in the accident he has incurred expenses. He spent money on transport to hospital. Soon after his discharge from hospital he used to hire Taxis at a cost of shs. 8000/= for a return Journey. He hired Taxis during the period from November, 1999 to June, 2000. He used to go to hospital once a week, every Wednesday, because of the Catheter. In June, 2000 he started hiring “boda boda” Motor cycles for transport. He used to spend shs. 3000/= on each return journey. He used to go to hospital once a week until he was operated on 4/12/2001. After the operation he stayed at home for two weeks. Then he started going to hospital twice a week for the Doctors to insert the tubes. After the operation he used special hire vehicles for two months at a coast of shs. 8000/- per return journey. Thereafter he started hiring “boda boda” Motor cycles at a cost of shs. 3000/= per return journey.

He has been spending money on buying drugs. Sometimes he is not issued receipts for buying drugs. [some original receipts stapled together in a bundle were admitted in evidence and marked Exh. P.3. Their total figure is shs. 122,200/=].

During cross-examination he testified that since he was operated he has noticed some change. The pain has reduced, and he can sleep on all sides. Before the operation he used to sleep on one side and could not turn over. With every day which passes he gets better.

DR. MARTIN KALYEMENYA (PWI) testified as follows:-

He is a medical officer special grade, a Pathologist and Police Surgeon. He carries out police surgery work at M.K. Medical centre, Bwaise. He holds a Masters of Medicine Degree of Makerere University. Which he obtained in 1997. He teaches Pathology in the Medical School of Makerere University. The police sent to him Joseph Serwadda, the plaintiff, who had been involved in a road traffic accident on 17/10/1999. The plaintiff came to the witness after he had been discharged from Mulago Hospital.

He examined the plaintiff and found that he had the following injuries:

- (i) A closed (simple) fracture of the right tibia and fibula in the mid-shaft (a fracture of the two bones of the leg);
- (ii) A urinary bladder contusion and a urethral rupture;
- (iii) Soft tissue injuries on most of his body.

He classified those injuries as grievous harm. The tibia and fibula bones were completely broken, but the bone fragments did not penetrate the skin.

The Urinary bladder contusion was caused by pressure to the pelvis which resulted in inflammation of the bladder. There was a hole in the plaintiff's Urethra at the posterior end, the Prostatic region. He got urinary retention because of the bladder and Urethra injuries. He had suffered a complete rupture of the Urethra with a floating prostate gland. He had an SPC (Supra Pubic Cystectomy) operation. He was opened in the pubic space (symphysis pubic), and a self retaining Catheter was inserted for passing urine. The plaintiff was attending New Mulago Urology Clinic [this was on 13/6/2001].

The prostate is found below the bladder. Because the Urethra had been ruptured urine used to settle there and the gland was in urine. So a Urethral Plasty (repair) had to be done. However, the patient had to wait for scar tissue to form around the ruptured zone which could take about six months. The plaintiff suffered a lot of Psychological trauma because of the Supra Pubic Catheter. He could end up impotent due to the floating Prostate gland and ruptured Urethra. Where the Prostate was damaged and the Urethra was not repaired an erection was not possible. [An initial Medical report dated 26/4/2001 prepared by the witness was admitted in evidence as Exhibit P.I].

On 25/6/2003 this Court granted leave to the plaintiff to recall Dr. Martin Kalyemenya (PWI).

Dr. Martin Kalyemenya (PWI) testified as follows:

He had examined the plaintiff on 24/6/2003. He found that Urethral Plasty had been done. The Catheter had been removed. In January, 2002 after the repair of the Urethra plaintiff still had leakage of urine at the Supra Pubic Cystotomy (SPC) site. He was unable to fully empty the urinary bladder. On 27/11/2002 the Doctors started enlarging the Urethra (Urethral calibration) because the tube had narrowed (stenosis). The Stenosis is a permanent feature and calibration has to be done after every two or three months. Every time Calibration is done some bacteria is introduced into the Urethra. The plaintiff is given broad spectrum antibiotics.

The plaintiff's psychological trauma improved when the Catheter was removed. He passes urine through the normal channel. He sometimes complains of painful passing of urine. He moves with a limp due to a shortening of the leg. This is a permanent injury.

The Prostate gland remained floating. The Prostatic tubes and those from the testicles ooze their contents into the bladder. Upon ejaculation the secretion goes into the bladder. There are sympathetic nerves which control erection which were injured. There is no repair for them. So the plaintiff can neither erect nor ejaculate. There is no leakage at the SPC site. The problem of the Prostatic tubes secreting their contents into the bladder is permanent, and cannot be rectified. The plaintiff's disability is assessed at 60%. [An additional Medical Report dated 24/06/2003 on the plaintiff was admitted in evidence as Exhibit P.4].

PAUL BYEKWASO (PW5) testified as follows:-

Joseph Serwadda (the plaintiff) was his employee. He was a conductor in his vehicle Reg. No. UBS 170 (the Taxi Vehicle). The vehicle was knocked on 17/10/1999. It was being driven by one Vicent Kawooya, who later died. He (the witness) used to pay the plaintiff shs. 100,000/= per month. He also paid to the plaintiff a daily allowance of shs. 5000/=. The plaintiff used to earn shs. 240,000/= per month, free of any deductions. Since the accident the plaintiff has not been working. The witness has been looking after him. The vehicle had been working from Monday to Sunday.

I find the evidence adduced by the plaintiff's witnesses credible, and I do believe it. Counsel for the defendant conceded that the plaintiff suffered injuries, loss and damage. The plaintiff has been able to prove on a balance of probabilities that he suffered as follows:-

- (i) Soft tissue injuries and general bodily pain.
- (ii) Psychological trauma because of the Supra pubic Catheter and leaking urine through the Catheter hole;
- (iii) A closed fracture of the right tibia and fibula in the Mid shafts;
 - (iv) A urinary bladder contusion (inflammation);
 - (v) A Urethral rupture with a floating prostate gland.
 - (vi) Pain in the penis.

It has established on the evidence that the plaintiff had two operations:

- (a) A supra pubic cystetomy (SPC); and
- (b) A urethral plasty.

It has been proved on the evidence that after the first operation the plaintiff suffered inconvenience because he could only sleep on one side. On the evidence on record I find that:

- (i) The plaintiff suffered a narrowing of the urethral tube (stenosis) leading to failure to empty the urinary bladder. He suffered psychological trauma because of passing out urine too frequently.
- (ii) The plaintiff suffered pain due to inserting tubes into the Urethra.

It has been established on the evidence that the plaintiff:-

- (a) Suffers pain in the shortened right leg, and walks with a limp.
- (b) Needs urethra calibration (enlarging of the urethra) after every two or three months.
- (c) Will suffer recurrent bacterial infection following urethral calibration.
- (d) Has injured sympathetic nerves responsible for erection, resulting in failure of erection or ejaculation, and loss of a sex life.
- (e) Has a floating prostate gland.

The medical Doctor assessed the plaintiff's disability at 60%.

It has also been established by evidence that the plaintiff incurred expenses on transport to and from hospital. By simple calculation based on the evidence the expenses incurred were as follows:

- (i) Hiring a Taxi once a week for a period of 6 months (from Nov. 1999 to June, 2000) (24 weeks) at a cost of shs. 8000/= for a return journey _____ Total __ 192,000/=.
 - (ii) Hiring a Boda boda Motor cycle once a week for a period of 17 months (from June, 2000 to 4/12/2001) (68 weeks) at a cost of shs. 3,000/= for a return journey _____ Total __ 204,000/=.
 - (iii) Hiring of a Taxi twice a week for a period of two months (From Mid December, 2001 to Mid February, 2002) (8 weeks) at a cost of shs. 8,000/= for a return journey _____
- Total _____ 128,000/=**

The plaintiff produced receipts to prove some of his expenditure on Medical drugs and the total figure was shs. 122,200/=.

The plaintiff called evidence to show that he lost earnings because of the injuries he had suffered and the resultant incapacity. According to the evidence it appears to me that the plaintiff was unable to work to earn a living from around 1st November, 1999 to June, 2002. It is my view that by 30th June, 2002 the plaintiff had completely recovered from the urethral plasty operation. It has been established on the evidence that the plaintiff lost earnings at the rate of shs. 100,000/= per month for 32 months (from 1st November, 1999 to 30th June, 2002) making a total of shs. 3,200,000/=.

The final issue this Court to consider is whether the plaintiff is entitled to the reliefs he prayed for.

In the plaint the plaintiff prayed for general damages. In Parag. 9 particulars of general damages were pleaded.

Learned Counsel for the plaintiff submitted that the guiding principle in awarding damages is to put the plaintiff in the same position as he would have been if the injury complained of had not taken place. Counsel cited: HALSBURY'S LAWS OF ENGLAND 3rd Edn. at page 233. After citing and discussing several authorities Counsel submitted that given the inflation rate the sum of shs. 30,000,000/= would suffice as general damages.

On the other hand learned Counsel for the defendant considered the nature of the injuries suffered by the plaintiff, the past awards, and inflation and proposed a figure not more than shs. 18,000,000/= as adequate compensation in the form of general damages. In the instant case the plaintiff sustained serious injuries, and suffered pain, psychological trauma and inconvenience. He will continue to experience pain every time he gets Urethral Calibration, and also be exposed to infection. He is handicapped by a shortened right leg which often gives him pain. Because of pain in the back after sitting for over 30 minutes the plaintiff may experience difficulty in doing certain types of work. The plaintiff has lost his sex life. In light of his disability assessed at 60%, and after a careful consideration of the facts and circumstances of this case I find a sum of shs. 24,000,000/= fair, reasonable and adequate compensation to the plaintiff for personal injuries, pain and suffering.

The plaintiff claimed loss of earnings under the particulars of general damages. Loss of earnings should be claimed as special damages and should be proved strictly.

See: Christopher Kiggundu v. Uganda Transport Co. Supreme Court Civil Appeal No. 71/93. In my view loss of profits consequent upon loss of use of an article for a specific period should be considered differently from loss of earnings due to incapacity to render services where the plaintiff was earning a monthly salary. It appears to me relatively easier to prove

the latter than the former. In both cases the claim must be specifically pleaded, but the particulars required to be furnished would be less elaborate where the plaintiff is claiming loss of monthly salary.

In the instant case from the evidence on record I have been able to calculate what the plaintiff lost as earnings. I arrived at a figure of shs. 3,200,000/= after very strict consideration. I am inclined to award shs. 3,200,000/= as general damages for incapacity to work and earn income.

The plaintiff claimed special damages for various items.

It is settled law that special damages must be specifically pleaded and strictly proved.

Special damages must not only be particularized under a specific subheading in the plaint, but evidence should be adduced proving each head as well.

See: KAGOYE V. ATTORNEY GENERAL (1967) E.A. 11.

JOHN ELETU V. UGANDA AIRLINES CORPORATION [1984] HCB. 39.

Special damages are best proved by the production of receipts relating to the transaction in which they are incurred. However, they can also be strictly proved if the transaction in which they are incurred can be vividly described.

In KYAMBADDE V. MPIGI DISTRICT ADMINISTRATION (1983) HCB 44 (MASIKA, C.J.) it was held that special damages must be strictly proved but they need not be supported by documentary evidence in all cases.

The plaintiff claimed the sum of shs. 20,000/= as the cost of the police accident report and a sketch plan. I have seen a photocopy of an Accident Report issued to Serwadda Joseph annexed to the plaint. I have seen the sketch plan (Exhibit P.2). The plaintiff did not produce a general receipt as evidence of payment for the accident report and the sketch plan.

In JOHN TENYWA Vs. MULTIPLE HAULIERS (EA) LTD, HCCS. NO. 26 OF 1998 (Unreported) this court took Judicial notice of the practice that these documents are prepared by police and issued for a fee. I find that approach reasonable and persuasive. I do adopt it here, and allow this claim.

The plaintiff included under the particulars of special damages acclaim for Hospital/Medical expenses. However, he did not put a figure against this item. He also claimed the money spent on the Doctor's Medical Report. Again he omitted to state the figure claimed. I have seen admitted as Exhibit P.3 some receipts produced as a bundle as evidence of expenditure on making x-ray and Ultra Sound Report, Medical Services at Mulago Hospital, and purchase of materials for the operation. The said receipts give a total figure of shs. 122,200/=.

It is my view that the claim for Hospital/Medical expenses was strictly proved by production of documentary evidence. These receipts were not challenged by learned Counsel for the defendant. It is my view that the authenticity of the receipts was never in doubt. I consider the claim legitimate and strictly proved, and I do allow it.

I have seen two Medical Reports: Exhibits P.I and P.4. Both of them were prepared by Dr. M.M. W. KALYEMENYA, a Pathologist and a Police Surgeon. The plaintiff did not claim any specific sum as special damages. Nor did he, at the trial, adduce any evidence that the said reports had been paid for. Dr. Martin Kalyemenya (PWI) did not tell court how much money, if any, he charged the plaintiff for furnishing the Medical Reports. So, in my view this claim fails because it was neither pleaded with sufficient particularity, nor strictly proved.

The plaintiff claimed interest on the general damages, Special damages and loss of earnings at the rate of 45% per annum from the date of judgment till payment in full.

Learned Counsel for the defendant submitted that the rate of 45% is excessive, and that the plaintiff did not lead any evidence to support the claim. Counsel urged court to consider awarding interest at the court rate. In my view interest at the rates of 8% per annum on special damages and 6% per annum on general damages and loss of earnings will meet the justice of this case.

The plaintiff is entitled to the costs of this suit.

I therefore enter Judgment for the plaintiff against the defendant and make the following awards:-

(a) As general damages _____ shs. 24,000,000/=, for personal injuries, pain and suffering.

(b) As general damages for incapacity to work and earn income (Loss of earnings) _____ shs. 3,200,000/=.

(c) As special damages _____ shs. 142,200/=.

(d) Interest at the rate of 6% per annum on (a) and (b) above, and at the rate of 8% per annum on (c) above, from the date of Judgment until payment in full.

(e) Costs of this suit.

(f) Interest at court rate (6 % per annum) on (e) above from the date of judgment until payment in full.

MOSES MUKIIBI

JUDGE

22/12/2005.

22/12/2005 at 2.55 pm.

Mr. Sebuta Hamuza for plaintiff.

Mr. Kaddu Nabakooza Margaret for the Attorney General.

Plaintiff is absent.

Ngobi: Court Clerk/Interpreter.

Court: - Judgment is delivered in open Court.

MOSES MUKIIBI

JUDGE

22/12/2005.

