

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

**CIVIL SUIT NO. 1312 OF 1997**

DR. CHARLES MUGENYI KIZZA ::::::::::::::: PLAINTIFF

**VERSUS**

ACTION AID ::::::::::::::: DEFENDANT

**BEFORE: JUSTICE J.P.M. TABARO**

**JUDGEMENT**

The claim for general damages was filed after an accident that occurred on 7-3-1997 at Namukozi near Mityana in what was then known as Mubende District. Since then Mityana has acquired a district status but this is not an issue in the case. The incident involved a motor vehicle belonging to Action Aid Uganda, a registered non-governmental organisation and a motor cycle owned by the

Plaintiff, Dr. Charles Mugenyi Kizza. At the material time, around 10.00a.m., the defendant's vehicle was being driven by one Rose Namuyomba DW1 when it collided with the Plaintiff's motorcycle as he (plaintiff) rode the motorcycle. Both motorists sustained injuries. Rose Namuyomba complained of pain in the neck. Defendant's vehicle, double cabin pick-up is registered as No.UPZ.327 while the motorcycle is described in the plaint as No. UV 1469. The police officer who visited the scene of the accident and drew its sketch plan recorded the

registration number of the motor vehicle as No. UV 1460. This discrepancy will be evaluated in this judgment so as to determine whether or not it affects the merits of the case.

The plaintiff, alleges negligence as the basis of his claim. In the plaint it is averred that the defendant's driver, Rose Namuyomba, negligently drove the vehicle in question by pulling from the left hand side of Nambale - Mityana Road, and attempting to turn to the defendant's offices where it was not safe to do so. It is asserted, in the pleadings that she did not pay due regard to the users of the road, especially the Plaintiff who was approaching from the opposite direction on the motorcycle in question. Other particulars of alleged negligence are stated to be:-

- (a) failing to brake, swerve or in any other way try to avoid the accident,
- (b) failing to continue driving to the defendant's premises after realising that she turned towards the premises in the wrong manner and at the wrong moment.

The defendant denies liability and instead filed a counter-claim in the proceedings and attributes the accident to alleged negligence on the part of the Plaintiff. It is alleged in the statement of defence/counter-claim that the defendant rode the motorcycle at the time in issue at excessively high speed. It is alleged by defendant that:-

- (a) Plaintiff diverted from the straight course and crossed to confront the defendant's vehicle which had slowed down in preparation for making a turn to traverse the road after the expected passage of the motorcycle.
- (b) At the time the event took place the defendant's vehicle was being driven at a very slow speed.

There is no report on the damage occasioned to the defendant's vehicle but from the photographs of the vehicle it is clear that it was damaged. According to the pleadings:-

- (a) the headlamp needs replacement together with the corner lamp with one sealed beam 12 V, and front lamp,

- (b) cost of panel beating and spraying assessed at 180,000/=
- (c) replacing of the main lamp requires shs.117,000/=
- (d) the total cost is stated to be shs.382,000/= including the cost for replacement of the headlamp, corner lamp, the sealed beam 12V and front lamp.

In the counter-claim, in addition to the claim for the above special damages, there is a prayer for general damages.

From the plaintiff's gait or manner of walking with a limp, it is fairly clear that he sustained injuries as a result of the accident. They were testified to by Dr. E. Naddumba (PW1). According to the doctor's testimony and the report compiled by the doctor after, assessing the plaintiff, the sustained injuries appear to be;

- (1) a head fracture of the left side and ulna bones
- (2) a closed fracture of the right femur
- (3) a fracture of the right tibia
- (4) abrasions of the right knee
- (5) a closed head injury

After the plaintiff received first aid treatment in Mityana hospital, he was referred to Mulago Hospital, for further management, where Dr. Naddumba performed the examination. The disability suffered by the plaintiff consequent upon the accident was assessed at 60%. Dr. Nadumba (PW1) is a trained orthopaedic surgeon, holding a masters degree in medicine awarded by Makerere University in 1984. Initial treatment by operative method was unsuccessful, resulting in broken implants and failure of healing of the right femoral and left ulna fractures. Plaintiff was recommended to undertake active exercise for the right knee and quadriceps muscles and ambulatory exercises and partial weight bearing on the right leg with the help of crutches, court may also note that as hearing of the case progressed the plaintiff appeared to be responding to treatment and improving a little.

A number of persons witnessed the accident or circumstances surrounding it. Some of them testified for either the Plaintiff or the defendant. They are Ponsiano Sengonzi (PWII). William

Gajule (PWIV) and Margaret Kibuuka (PWV), Rose Namuyomba DW1. As already indicated, Geoffrey Serugo (DW3) and finally, the police officer, who visited the scene (as before) that is, Patrick Bingi (DWIII).

The evidence of Ponsiano Sengonzi shows that shortly before the accident took place he was driving his own motor vehicle a pick-up, Reg. No.UDA 149 when Dr. Charles Mugenyi the Plaintiff, was ahead of him using Mityana Nambale Road. He described the plaintiff's speed as normal and asserted that the road was dusty. Plaintiff had a passenger on the carrier. In fact the passenger was Rose Kibuuka who was a student of agriculture under going industrial training in the plaintiff's department.

As he proceeded, shortly after, he found that the plaintiff's motorcycle had got involved in an accident with the defendant's vehicle. The motorcycle was partially under the motor vehicle in that its tyre was under the mud guard of, the motor vehicle.

Dr. Mugenyi and Margaret Kibuuka were lying down on the road but Rose Namuyomba was not at the scene. Sengonzi (PW11) stated that the scene of the accident was near the gate of the defendant, Action Aid Uganda.

At the time he arrived at the scene both Dr. Mugenyi and Rose Kibuuka were unconscious but as the two were being taken to hospital the Plaintiff (Dr. Mugenyi) regained consciousness. According to Ponsiano Segonzi the point of impact was almost directly opposite the gate of Action Aid offices.

It would appear, Margaret Kibuuka was seated on her lap on the carrier of the motorcycle as Dr. Mugenyi rode the motorcycle. She claims to have witnessed the manner in which the accident occurred. According to her, as the defendant's vehicle advanced from the opposite direction the plaintiff slowed down and she (PWV) hit her head on his shoulders. There he (plaintiff) swerved to the right hand side when the motor vehicle had also turned and so the collision in question took place. She does not recall which of the two vehicles hit the other.

The accident, that is, collision took place in front of Action Aid offices in the middle of the road. After the accident she was taken to hospital as plaintiff lay on the side of the road screaming.

In cross examination she asserted that she fell on Dr. Mugenyi and shortly after she fell off the motorcycle. At the same time, that is, on further cross examination she stated that when Dr. Mugenyi applied the brakes, the pick up, that is, the defendant's vehicle was beginning to turn to Action Aid offices and had head indicators on.

The plaintiff (PWIII) alleged that when he reached Namukozi at the offices of Action Aid, Uganda, he was riding on the left side of the road when he saw the pick up in question coming from the opposite direction, also on the same side of the road, that is on the side of the plaintiff. The indicators of the pick up showed that it was entering the offices of the Action Aid Uganda. As it was in front of him he (PW III) moved to the right so as to avoid collision. According to the witness the driver of the pick up swerved from the right to the left and then from the left to the right. As she (DW1) moved the two vehicles, that is, the pick up and the motor cycle collided in the middle of the road. As a result he (PW III) fell off the motor cycle, collapsed on the road, and became unconscious. When he regained consciousness he realised that some people were carrying him from the middle of the road to the left side of the road. He sustained injuries including fractures of the ulna and radius of the left arm, and many others as described by Dr. Nadumba such as fractured tibia. After treatment in Mityana he was transferred to Mulago for further arrangement. Treatment covered fixing of nails and an operation on the right leg. He was admitted twice, from 7-3-1977 to 4-4-1977, and from 19-5-1973 to 22-6-1998. He was advised to use crutches and reduce on field work duties because some of the bones had not fully united. He was given a medical report (exhibit P1). He alleged, in testimony, that he can no longer do because of the injuries he sustained on the arms and legs, and can no longer dance. He claimed that he could no longer carry out surgical operations and can only carry out one or two activities a day. He is worried that he might be retrenched from the Public Service since he does not carry out normal duties expected of Veterinary Surgeon. He is married with two children. During his sickness he was unable to have sexual intercourse. He asserted that the accident occurred due to the negligence of the driver of the pick up (Rose Namuyomba) because she indicated that she was entering the gate of the Action Aid and had moved to the left but

changed and moved from the left side of the road to the right. He further asserted that to enter Action Aid Uganda offices you turn to the left and the pickup's driver had turned to the left with indicators showing but changed and moved to the right. He prayed court to award him general damages, costs, and interest.

The version given by the defendant is different. According to Rose Namuyomba (PW1) she was travelling to Mityana for the Women's Day construction work (on some shelters) when the workman told her that he had forgotten his tools behind and so she drove back to collect the tools. As already pointed out she was driving motor vehicle Registration Number UPZ 327, double cabin Hilux pick up. As she approached Action Aid offices at the corner she was the Plaintiff's motorcycle with lights on, being ridden at a very high speed. Before she stopped she swerved to the left of the road in order to save the Plaintiff's life. Eventually she stopped on the extreme left of the road. She hid her face on the steering wheel but before doing so she saw the plaintiff fall off the motorcycle. The plaintiff continued and run into her vehicle, hitting the right hand side of the indicator. The pick up is a right hand drive vehicle. She first saw him when he was in the middle of the road but at the time of impact when the two vehicles collided, the plaintiff's motor cycle was on the left side of the road. She heard cracking noise and so she realised that her vehicle had been damaged. When she came out of her vehicle the plaintiff was rolling on the road, trying to stand up. The motor cycle had entered her vehicle. The police came to the scene some 30 minutes later, when the traffic policeman arrived at the scene. He (policeman) took measurements of the scene of the accident, after which both vehicles were taken to the police station at Mityana, with the motor cycle being carried on the pick up. On the way she DW1 visited the Plaintiff and the passenger (the student of Agriculture) in the hospital. As she was driving straight to Busubizi there was no need to switch on the lights. Her version is that the lights were not on. It will be recalled that the plaintiff alleged that the defendant's vehicle's lights were on at the time the collision took place. She asserted that the pleadings are not correct and the advocate who drafted them did not state what he was instructed to do. She was not turning and had no intention of turning. From Kirundi on the way to Busubizi she went ahead to turn to the right in order to branch off to the offices of Action Aid.

The workman who had forgotten his tools behind is Geoffrey Serugo (DWII). From his home at Kirundi one passes Action Aid offices on the way to Busubizi where construction of shelters for the Women's Day was going to be done. After picking the tools, the pick up on which he travelled with Rose Namuyomba (DW1) got involved in an accident with the Plaintiff's motor cycle which was coming from the opposite direction. He (DW II) was seated on the left in the hind cabin. As they moved, Rose Namuyomba told him that the motor cycle was moving too fast and so she would give way, and she moved to the left. The motor cycle knocked the pick up on the right hand side, at the lamps. Namuyomba (DW1) moved to the left so as to avoid the accident. The plaintiff fell off the motor cycle as did the girl who was being carried on the motor cycle. Both of them landed on the ground. According to Serugo the first person to arrive at the scene was Kaya, the gate keeper of Action Aid. Shortly after Gajule, the Mityana Bishop's driver followed. The motor cycle was moving at a very high speed. He could tell from his seat in the pick up. The plaintiff and the girl were taken to Mityana hospital, after the police arrived at the scene. Measurements of the scene were taken by the police. In cross examination, Serugo (DWII) noted that Rose Namuyomba parked the vehicle on the grass, away from the road as the accident took place.

The sketch plan of the scene of accident was drawn by Patrick Bingi (DWIII). The vehicles involved were UPZ 327, and motor cycle Reg. No. 1460 and they were still at the scene when he went there. According to his testimony, the motor cycle was lying down, across the road while the motor vehicle was facing Mityana side. From the tyre marks he could tell that the motor cycle was moving on the right side of the road. The motor vehicle was moving on the left side of the road, heading to Mityana.

He took measurements of the road and established that the motor cycle had encroached on the right side of the road. He (DWIII) did a traffic course for 7 months. His academic standard is 'A' level. He has undertaken traffic trainers course for two months and an international course, also for two (2) months. Action Aid offices were almost directly opposite the scene of accident. In cross examination he asserted that the pick up left no tyre marks on the road. He could not tell whether there was swerving. He accepted that the number of the motor cycle was 1460 and not 1469.

Since the versions given by the plaintiff and the defendant together with their witnesses differ substantially, the first task of the court is to evaluate the evidence so as to determine which account represents the truth, in the opinion of the court. From the evidence adduced by both sides it is clear that the question of credibility turns on which side accurately and truthfully monitored how Rose Namuyomba and Dr. Charles Kizza managed their vehicles in front of Action Aid offices immediately before the accident took place. Needless to emphasise the sketch plan of the scene and the report of the accident must be taken into account, contrasted and evaluated against the testimony of the eye witnesses in determining the accuracy of the versions relating to the manner to which the accident took place. As is well known court has discretion, to be exercised legally, whether or not the report and sketch plan, as expert evidence should be relied upon, or whether it should be rejected *Onyango Vs Republic* [1969] EA 362.

The case for the plaintiff is that when the two vehicles were near the offices of Action Aid the defendant's driver Rose Namuyomba (DW1) turned towards the offices so as to cross to the same. When the plaintiff realised the turning of the defendant's vehicle he (plaintiff) turned to the right in an attempt to avoid the collisions; but instead of continuing to turn Rose Namuyomba turned again towards the plaintiff's side hence that two vehicles collided in the middle of the road. Rose Namuyomba denied the account given by Charles Mugenyi and asserted that the two vehicles collided off the road. The accounts of other witnesses are crucial in order to determine who of the two witnesses, Rose Namuyomba and Charles Mugenyi, gave the true version of the matter leading to the collision.

Geoffrey Serugo (SWII) and Rose Namuyomba (DW1) contradicted each other on the important question of the point where Namuyomba stopped the car at the time of the collision. According to Serugo, she (DW1) stopped the car on the grass, off the road as the motor vehicle and the motor cycle collided. However, it is Rose Namuyomba's testimony that in fact the car never left the road. There are no significant contradictions in the evidence given by the plaintiff and his witnesses. If Geoffrey Serugo told the truth when he stated that Rose Namuyomba told him that the plaintiff was riding the motor cycle too fast and therefore she was giving way and thereafter mover to the right, then the rational thing to do was to swerve in order to avoid a collision but not to engage in exchange of words or conversation to the effect that she was going to give way.



I believe there was no time to talk to Geoffrey Serugo in the terms suggested by her (Namuyomba).

I find the story told by Dr. Mugenyi quite straight forward and well coordinated by the passenger on his motor cycle, that is the student undergoing apprenticeship, Margaret Kibuuka (PWV) when Dr. Mugenyi stated that he moved to the right because Namuyomba had turned there instead of continuing on the left where she appeared to be heading in order to turn to her place of work, Action Aid office. He, in my evaluation of the facts, was a witness who was honest and was ready to accept that he moved to the right instead of the left because Namuyomba had decided to go to the right, but changed her side and moved to the left. Margaret Kibuuka was seated on her lap but when the two vehicles moved close to one another there was cause to look in front, and could therefore witness the manner in which the accident took place. She asserted that the defendant's vehicle advanced from the opposite direction and then plaintiff slowed down as the defendant's driver (Namuyomba) swerved to the right where the motor cycle had moved in an attempt to avoid a collision, leading to the accident in question. The account given by Margaret Kibuuka corroborates the version given by Charles Mugenyi. The assertion made by Rose Namuyomba (DW1) to the effect that the plaintiff was moving at a very high speed is discounted by Ponsiano Sengonzi (DW1) who stated that the Plaintiff was riding at normal speed and not too fast. Ponsiano Sengonzi is an independent witness and on this point I accept his testimony in preference to that of Rose Namuyomba.

The police officer who took measurements of the scene of the accident testified that the pick up left no tyre marks on the road but could tell from the tyre marks of the motor cycle that the plaintiff was moving on the right side of the road. However, the plaintiff has explained away why he decided to move on the right. It was an attempt to avoid a collision because the Plaintiff had indicated she was turning to the left, although she changed her side and moved to the right again two causing the accident in question. The police officer, Bingi (DWII) did not explain a way why the police recorded the motor cycle's numbers as Reg. No. 1460 while in the Plaintiff it is described as No. UV 1467. If it was an honest mistake he would have said so. In any case, I do not find his evidence helpful to the defendant. The crucial question is whether the defendant's turn driver turned to the right after she had indicated she was turning on the left and actually did

move towards the left. As is well known drivers are supposed to drive on the left but to avoid accidents they are entitled to swerve to the right, in my opinion.

For the above reasons I accept the version given by the plaintiff and reject the defence and the counter-claim indicating that she (defendant's turn) was turning to the left but changed immediately to the right. She acted negligently and I find the defendant vicariously liable for her negligence. There is no suggestion from whether the plaintiff or the defendant that Rose Namuyomba was acting outside the scope of her employment as a servant of the defendant. All the indications and the evidence show that the accident occurred while she was on duty on behalf of her employer during the course of her work, within the scope of her employment. She was transporting a workman and tools for work for the defendant. With my finding that the plaintiff was entitled to swerve to the right and that his speed was normal no question of contributory negligence arises. On the first issue I find therefore, that the accident was caused by the defendant's driver. Consequently, I find that the plaintiff was not in any way contributorily negligent. These findings lead to the issue of quantum of damages available to the plaintiff.

As is well known damages are compensatory in nature and hence the task of the court in assessing damages is to put the plaintiff in the position he would have been as a veterinary surgeon working for Government, had this accident not taken place, in so far money can do it.

- VISRAM & KARSAN VS. BHATT [1965] EA 789.
- At the time of the accident in 1997 the plaintiff was aged 34 years and now he is of the age of around 43 years. I remarked that although the accident was grave he made considerable progress in recovering and he will be able to perform his duties, though not as efficiently as before the accident took place. I would agree with counsel for the defendant therefore that the plaintiff's counsel's claim of 1,000,000/= per month till the plaintiff's retirement age is highly exaggerated. There are some precedent, to go by without forgetting that no two accidents or injuries can be the same. Medical evidence put the plaintiff's incapacity at 60%.

But let us deal with the claim for special damages first. It is to be noted that no prayer for special damages, supported by documentary evidence was made although one of the paragraphs in the

plaintiff states that “the plaintiff’s claim against the defendant is for general and special damages.” Whereas documentary evidence is not a legal requirement special damages must be strictly proved. However, the cost of the repair of the motor cycle at Shs.980,000/= is in evidence and I award the same amount representing special damages. Plaintiff was admitted in Mulago Hospital run by Government and presumably this explains plaintiff’s little emphasis on claims for medical expenses such as drugs, medical fees and equipment.

In the case of Nzaramba Ndamba Magnifique Vs. Happy Trails (V) Ltd and Anor. HCCS No. 734 of 1997 (unreported) before this court, the plaintiff lost the right arm in a motor accident. He was an agricultural officer by profession. The capacity to perform his duties as an agricultural officer was greatly diminished. He was a young man aged 25 years at the time. He was awarded shs.35,000,000/= general damages. The present case is comparable in that the plaintiff’s capacity to work as a veterinary surgeon, who at times is required to handle difficult and aggressive animals has been effected. Since the decision in Magnifique’s case was made inflation has affected the purchasing power of the Uganda shilling. Considering all these factors and doing the

best I can of a difficult assessment, I award 80,000,000/= (eighty million shillings) in favour of the plaintiff as general damages and shs.980,000/= special damages at the usual court rate of interest, with costs.

**J.P.M Tabaro**

**Judge**

The deputy Registrar (Civil) is directed to read this judgement after giving notice to the parties.

**J.P.M. Tabaro**

**Judge**

**27-6-2006**

**20/9/06**

Mr. Augustine Nshimye for the Plaintiff

M/S Sebalu & Lule represent the defendant (absent)

The case is for Judgment.

**Court:**

Judgment is read.

Deputy Registrar Civil