

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO. 283 OF 2016

ALICE WANJIRU KARANGIPLAINTIFF

V

MASH EAST SERVICES LIMITED T/A MASH BUS SERVICES LIMITED

BEFORE HON. LADY JUSTICE H. WOLAYO

JUDGMENT

The plaintiff through her advocates Kabali Sebowa & Co. Advocates sued the defendant in tort of negligence and for vicarious liability , special damages, aggravated, punitive, exemplary and general damages and costs.

On 21st July 2016, the defendant company was served through its director by Tarwema Frank . Upon failure by the defendant to file a defence within time, an interlocutory judgment was entered by the deputy registrar on 16th August 2016 upon application by counsel for the plaintiff and the suit set down for formal proof.

On 4th October 2016, when this case came up for formal proof, the defendant was not in court in spite proof of service on it by Taremwa Frank on Mwaliro Stanley on 22nd September 2016.

The plaintiff relied on her witness statement and documents originals of which were submitted to court .

Counsel filed written submissions and filed authorities that I have carefully considered.

Two issues were framed for trial.

1. Whether the defendant was vicariously liable
2. Remedies.

Proof of negligence and whether the defendant was vicariously liable

The plaintiff had a legal duty to prove her claim on a balance of probabilities notwithstanding that the defendant did not appear to oppose the action.

For the tort of negligence to be established, the plaintiff must show that the defendant owed her a legal duty of care and that duty was breached causing injury to the plaintiff . The plaintiff was a fare paying passenger on a vehicle licensed to carry passengers. The defendant as employer of the driver and owner of the vehicle were vicariously responsible for the safe travel and arrival of the plaintiff to her destination .

The plaintiff in her witness statement testified that on 20th June 2015, she was a paying passenger aboard a bus reg. No. KCA 768M Scania travelling from Nairobi to Kampala.

It was her testimony that at about 5.30 a.m, the bus being driven by the defendant's employee was involved in an accident when it collided with motor vehicle reg. No. KAN 661X Mercedes benz Trailer owned by Road Tainers Ltd causing injury to the plaintiff. According to the plaintiff, the driver failed to swerve or brake to avoid the accident . Annexure B to the plaint is a passenger manifest for 19.6.2015 and the plaintiff is listed as the first passenger with ticket No. 68034 . The vehicle is identified as reg. No. KCA 768 M while the driver is named as George Njuguna.

The police accident report marked C shows the accident occurred on 20.6.2015 at Kitega along Jinja Highway and the plaintiff's name appears in the report as No.9 as one of those injured.

Annexure E is a police vehicle inspection report that shows the vehicle was in a sound mechanical condition prior to the accident. Although the accident report does not give the cause of accident, the sketch map attached to the scheduling memo indicates that vehicle KCA 768M was moving towards Kampala at Kitega while vehicle KAN 661X IZB was moving towards Jinja. After the collision, vehicle KAN 661 XIZB went off the road while motor vehicle ZB 4273(trailer) remained on the road with MV KCA768M.

It was counsel's submission that the driver of the defendant was reckless and hence the defendant is vicariously liable for the injuries.

As a fare paying passenger, the driver of the defendant was under a duty to drive carefully and take the plaintiff safely to her destination. The fact that an accident happened and the plaintiff suffered injuries is evidence ipso facto that the driver breached that duty. No defence was filed

by the defendant neither was there an appearance on the day the case was fixed for hearing in spite of effective service.

On the basis of the principle of *res ipsa loquitur*, I find that the driver of the bus was negligent and therefore the defendant as owner and employer is vicariously liable for the injuries suffered by the plaintiff as well as consequential damages.

Proof of injuries suffered.

On 20.6.2015, the day of the accident, the plaintiff received treatment at Kawolo hospital. It is not clear if she was admitted because the discharge form was not produced. At Kawolo, she paid 45,000/ for ex rays.

After some treatment at Kawolo hospital, the next medical attention was received at St. Francis Nsambya Hospital from where she was discharged on 22.6.2015 on request after paying 339,900/ hospital bill.

The injuries for which the plaintiff was treated at St. Francis Hospital were not disclosed .

The plaintiff was treated at Aga Khan Hospital where she paid 3,384/ Kenya shillings on 26.6.2015.

In all these medical forms, the injuries being treated are not disclosed yet plaintiff was under a duty to disclose the nature of injuries suffered to enable the court determine quantum of damages.

In her witness statement, the plaintiff affirms that she suffered physical injuries, nervous shock and psychiatric damage.

The only discharge form that discloses injuries is from Moi Teaching and Referral Hospital which shows she was admitted on 19.7.2015 and diagnosed with multiple trauma and discharged on 7.8.2015 .The bill incurred was 297,194/ Kenya shillings.

Earlier on 1.7.2015, the plaintiff attended Victoria Hospital Kisumu and she underwent open reduction and internal fixation for fracture of right femur. The bill paid was 61,450/ Kenya shillings.

From the foregoing analysis, the plaintiff suffered trauma and fracture of the right femur.

Proof of special damages

The plaintiff claimed special damages as follows:

1. Food and accommodation expenses and transport expenses while admitted in various hospitals worth 770,000/
2. Accommodation in various hospitals including Mulago private ward worth 310,000/.
3. Medical transportation costs in Uganda and Kenya 8,700,000/
4. Police report 81,000/
5. Auxiliary medical expenses 5,010,000/ .

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

From the foregoing analysis and from the documents adduced in evidence the following expenses incurred were proved.

1. Medical expenses incurred at Nsambya Hospital ...339,900/ Ug. shillings
2. Medical expenses at Kawolo hospital45,000/ Ug. shillings
3. Medical expenses at Aga Khan hospital.....3,384/ Kenya shillings
4. Victoria hospital Kisumu.....61,450/ Kenya shillings
5. Moi Teaching hospital.....297,194/ Kenya shillings.

The claim for 81,000/ fees for a police report is also allowed as it was proved.

The rest of the medical expenses claimed including 1,500,000/ special medication and physiotherapy by a specialized herbalist, and a medical report were not proved in evidence.

With respect to accommodation , transportation expenses, some receipts were produced but the information ought to have been better organized and clearly listed. I will therefore give 2,000,000/ to transport and accommodation expenses.

A total of Uganda shillings 2,465,000/ and Kenya shillings 362,028/ or equivalent in Uganda shillings is awarded as special damages for medical treatment.

Future earnings.

The plaintiff testified that she was an adult businesswoman employed by Jerny Trading (U) Ltd and earning 3,000,000/ per month which she used for upkeep, rent, and school fees for her children. Since the accident, she is unable to support her family as she cannot be engaged in any form of employment to support her children.

No evidence was called to support the claim that she earned 3,000,000/ per month. Nevertheless, she was a healthy woman before the accident and earned an income as a business woman. In the absence of proof that she earned 3,000,000/ from Jerny trading Ltd, I am unable to determine loss of future earnings.

General damages

For the suffering, pain, inconvenience and reduction in capacity to earn a living, I will consider the sums awarded in similar cases. **In HCCS No. 883 of 2000 George Constatine Ssentamu v Segawa** and others where the plaintiff was knocked down by a vehicle, he was awarded 10,000,000/ as general damages for pain, suffering, and reduced capacity to look after his family.

I saw the plaintiff and she walks with a limp. I shall award general damages of 20,000,000/ for pain and suffering, inconvenience and reduced earning capacity.

Exemplary and aggravated damages.

The plaintiff claimed for exemplary or aggravated damages.

Counsel stated the legal position of these damages correctly. They are awarded for wanton, wicked, deliberate oppressive, and violent conduct of the defendant.

No evidence has been led to show that the accident was deliberate or reckless. I will therefore disallow this claim.

In the final analysis, this suit succeeds and I make the following orders.

The plaintiff is awarded

1. Special damages of 2,465,000/ and Kenya shillings 362,028/ or equivalent in Uganda shillings for medical treatment ; and 2,000,000/ transport expenses.
2. 81,000/ refund of fees paid on police accident report
3. General damages 20,000,000/
4. Costs of the suit.
5. Interest at court rate of 8% p.a from date of judgment till payment in full.

DATED AT KAMPALA THIS 28TH DAY OF OCTOBER 2016.

HON. LADY JUSTICE H. WOLAYO