REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT MENGO

[CORAM: ODOKI, CJ; ODER, TSEKOOKO, MULENGA AND KANYEIHAMBA,JJ.S.C]

CIVIL APPEAL No.10 OF 2002

BETWEEN

A . K . P . M . LUTAYA ....APPELLANT

AND

ATTORNEY GENERAL ....RESPONDENT

[Appeal from the judgment of the Court of Appeal at Kampala (Kato, Okello & Mpagi-Bahigeine, JJ.A) dated 6th March, 2002 in Civil Appeal 49 of 2001].

JUDGMENT OF TSEKOOKO, JSC*:*

This appeal arises from the decision of the Court of Appeal which upheld the judgment of the Principal Judge dismissing the appellant's action.

There is a little confusion in the recording of evidence from witnesses and the numbering of witnesses in the trial court record. But the facts appear clear. A.K.P.M. Lutaya, the appellant, at all times material to these proceedings, was the registered proprietor of a piece of land comprised in Leasehold Register volume 1425 Folio 13 Block 97 Plot 1, Kyaggwe, in Mukono District. He established a farm in one part of the land, (hereinafter referred to as the "land"). He brought an action in trespass against the Respondent Attorney General in the High Court. In the action he claimed for general damages, special damages for trespass to the land and for a permanent injunction.

In the plaint, it was alleged that during February 1995, 600 Government soldiers, who were deployed at Mpoma Satellite Station, trespassed upon the appellant's land and caused substantial damage to his farm and his exclusive and demarcated forest. It was also alleged that the soldiers together with their families cut down trees and removed valuable timber for construction of houses to live in and for firewood and charcoal burning. In the process the soldiers ruined the appellant's hitherto well preserved and treasured forest cover. In his written defence, the respondent admitted the presence of some soldiers at the station, but denied they were 600. He also denied knowledge of the existence of a farm and the alleged damage to it by the soldiers. The Respondent stated further that if any soldiers trespassed, they did so on their own floric.

In the trial court, six issues were framed for determination. Issue No.4 which was key, both during trial and on appeal, was whether the Attorney General was liable for the acts of the soldiers belonging to UPDF. The learned Principal Judge held that the Attorney General was not liable. The appellant appealed to the Court of Appeal on six grounds. The fourth ground upon which the court decided the appeal and which was the same as issue No.4 in the trial court, was whether the Respondent was vicariously liable for the acts of the soldiers. The Court of Appeal answered this in the negative and so dismissed the appeal.

The appeal before us is on two grounds, the first of which was amended with leave of this court. The grounds are formulated as follows: -

1. The learned Justices of the Court of Appeal erred in law in holding that the Attorney General was not vicariously liable for the acts of the soldiers of NRA.
2. The learned Justices of the Court of Appeal erred in law and fact when they held that the crux of the case was vicarious liability of the Attorney General and refused to entertain other grounds of the appeal raised.

In substance these grounds are about the same thing. Submitting on the first ground, Mr. Semuyaba, for the appellant, argued that on the evidence available, the Court of Appeal erred in holding that the acts of he soldiers did not bind the Attorney General and that he Court misdirected itself and misinterpreted the evidence of Brigadier Nanyumba(PW6) when it held that his evidence was hearsay. Counsel contended that

the soldiers who cut the appellant's timber and trees did so in the course of their duty. He further contended that the Court wrongly applied the principle of vicarious liability as enunciated in the decision of **Muwonge Vs Attorney General** (1967) EA.7. In support of his contention that the Attorney General is liable, learned counsel relied on **Kafumbe-Mukasa Vs Attorney General** (1984) HCB 33, **J. Barugahare Vs Attorney General** Civil Appeal No.28/95 and **Mutyaba Leonard Sembatya Vs Attorney General** - Civil Appeal 21/94 (s.c) (both unreported) . Mr. Wamambe, State Attorney, supported the decision of the Court of Appeal, arguing that the court acted properly and relied on vicarious liability principles in Muwonge case to hold that the respondent was not liable for the alleged acts of the soldiers. Learned State Attorney also supported the view of the Principal Judge who had opined that Brigadier Nanyumba gave evidence to support the appellant as a friend, contending that the Brigadier's evidence as well as that of the appellant himself is hearsay. The State Attorney argued that the cases cited by appellant's counsel are distinguishable and that if the soldiers went to the land they were not officially ordered, employed or authorised to trespass on the appellant's land.

In his contentions, Mr. Semuyaba relied mainly on the evidence of four witnesses. These were the appellant himself (PW.1), Kibuuka Joseph (PW5) who was the appellant's worker and driver and Brigadier Nanyumba (PW6) .

In the Court of Appeal, Okello, J.A, delivered the lead judgment with which the other members of the court concurred. The learned Justice of Appeal first considered the fourth ground of appeal before he upheld the decision of the learned Principal Judge. I have already alluded to the fourth ground.

In this appeal I note that both the trial court and the first appellate court have made concurrent findings of fact that the evidence of the appellant did not prove vicarious liability against the respondent. In such a situation the practice has been that a second appellate court should not lightly interfere with

such concurrent findings of fact, particularly where a trial judge has made a finding on credibility of witnesses whose evidence is in conflict. It has been held by the Privy Council in ***Caldeira Vs Gray (1936) 1 ALL*** ER. 540 that: ***"Where a trial Judge has come to a conclusion upon a pure question of fact, the appellate tribunal cannot, merely because it has been decided in one way by the trial judge, abdicate their duty to review his decision, and to reverse it, if they deem it to be wrong."***

The Privy Council in that judgment cautioned that the functions of the appellate tribunal when dealing with a pure question of fact in which questions of credibility are involved are limited in their character and scope. In other words where a question of credibility of witnesses has been resolved by a trial Judge after proper evaluation of the facts, his findings should normally not be interefered with. But where evaluation of facts is erroneous, an appellate court can do the evaluation and come to its own conclusions. This is illustrated further by a decision of the House of Lords in ***Benmax Vs Austin Motor Co. Ltd*** (1955) 1 All E.R. 326, where the House of Lords held (on 2nd appeal) that

> ***"An appellate Court, on an appeal from a case tried before a judge alone, should not lightly differ from a finding of the trial judge on a question of fact, but a distinction in this respect must be drawn between the perception of facts and the evaluation of facts. Where there is no question of the credibility of witnesses, but the sole question is the proper inference to be drawn from specific facts, an appellate court is in as good a position to evaluate the evidence as the trial judge, and should form its own independent opinion, though it will give weight to the opinion of the trial judge."***

In this case at the trial in the High Court, only the appellant and his witnesses gave evidence. The respondent adduced no evidence. The appellant's counsel relied on **Muwonge Vs General** and argued that the acts of the army personnel who collected timber and crops from the appellant's farm to supplement their Government provisions were acts done in the course of their employment.

In his judgment the learned Principal Judge first disposed of the 3rd issue which was ***"whether NRA soldiers invaded the plaintiffs farm land and caused extensive damage to the crops thereon and forest cover"*** before he resolved the fourth issue which was on vicarious liability. The learned Principal Judge alluded to the relevant averments in paragraphs 2,3 and 4 of the plaint, to the evidence of the appellant, that of Semucho (PW4) of Dr. Alum (PW 3) and Brigadier Nanyumba before he concluded that the plunder of the farm was done from or prior to 1973 by soldiers of the pre-Nanyumba era as well as by ordinary people. He held that Nanyumba was a liar who was helping a friend, the appellant.

The learned Principal Judge went so far as to require that the appellant should have produced evidence of the places where the burning charcoal took place, the particulars of the soldiers, of trucks, of the market where the charcoal had been sold and even one or two customers to whom the soldiers had sold the charcoal. He concluded that ***"it was not only the NRA/UPDF who caused the extensive damage to the property".*** Consequently, he answered the 3rd issue in the negative thereby holding definitely that the respondents servants did not participate in the damage complained of. Having thus made that finding, the learned Principal Judge found it easier to answer the 4th issue also in the negative. With great respect these findings do not have a sound basis and in my view the inferences of the Principle Judge are wrong. Brigadier Nanyumba was not cross-examined on his evidence. There was no

other evidence to contradict him. To brand him a liar when his evidence was not challenged is unfair. The fact that he had known the appellant was not good enough for labelling him a liar and holding him unreliable. He testified that he was the Chief-of-Staff at the material time and continued: -

> *"Mr. Lutaya complained about his farm near Mukono. This is a copy of the communication (exhibit P.3). I received a copy of it. We as the army were occupying the area and that the army had destroyed Lutaya's property. When I received this communication it was my duty to task the commander. I do not remember what the response of the unit commander was. But he confirmed that UPDF was occupying the land near Mr. Lutayas and that they had damaged his crops. I was not informed of the number of the troops...*
>
> *The state sometimes may not be able to cater for the needs of the army. The local commander may take the initiative to secure provisions. So Mr. Lutaya's complaint is not unusual"*

This evidence appears to be that of a neutral witness who was doing his best to recollect what he could remember.

The appellant testified about the crops, the fruits and the trees planted on his farm. He also stated that there was a natural forest and that in 1995 soldiers who were guarding Mpoma satellite station were without provisions. According to him:

> *"From the day the soldiers arrived was the invasion of my managed forest to collect timber for the construction of their huts. They cut my forest by literally invading my forest and took it over. When they were challenged the soldiers said the commander had sent them. I went to complain to the commander.......... I complained*

that my workers were frightened out of their wits. The commander said they wanted shelter and the men were sent by orders from above. They needed huts and firewood; they needed water. , the cutting of the forest started around January 1995 or even earlier. Since then this has continued up to date. I established there were about 300 soldiers of NRA.

Eventually the population grew to about 600 people, including wives and children---

Those who are transferred they were destroying the old huts for health reasons---

Each time there is a reshuffle, there is new cutting. When I filed the suit the cutting had taken one year.

As a result my forest reserve has been severely depleted.---------It continues to be harvested at random without inventory, without remuneration and without any arrangement whatsoever. The soldiers have concentrated on natural forest and on the high and tall trees on the deliberately managed forest"

In his testimony Nanyumba implicitly supported this evidence.
The appellant was cross-examined at length and he substantially repeated what he stated in examination in chief about the destruction of the forest, charcoal burning and ferrying of poles.

Edward Semucho (PW4) had worked on the farm before 1994. His evidence shows that during the time he was at the farm, the soldiers were not very many. He also implied that the damage claimed by the appellant was rather exaggerated and that much of the farm had been neglected. According to his evidence, fruit trees (Avocados, bananas, mangoes jackfruits) were there and by 1994 they were bearing fruits. When he revisited the farm in

1996, Avocados, mangoes and jackfruits had been roughly handled and damaged. He did not say who damaged them because at the material time before his return in 1996 he was not at the farm. According to Semucho, soldiers went to the farm from 1992. By 1996 there were many huts of soldiers and "bush" from the farm had been cut to build these huts. The soldiers used to collect firewood from the farm. In my opinion this evidence tended to support the appellant as to trespass, cutting of tress and collection of firewood.

Ssewadde Sonko (PW3) an Agriculturist and one of the expert witnesses inspected the appellant's farm and produced his report (exhibitP.4) in which he assessed the value of the loss. His evidence and that of Moses Kayima who signed the said report was hardly challenged.

In April, 1997, the appellant engaged Dr. John Alum, a forest expert to value the damage to the farm. He and his assistants produced a report (exhibit P.2). At the time he saw no evidence of charcoal burning but trees had been harvested from the forest. He saw some huts. For security reasons, he could not photograph the huts occupied by soldiers.

In the Court of Appeal, as already pointed out, the appeal was disposed of after consideration of only one ground, namely ground 4 , which hinged on vicarious liability of the respondent because of the activities of the soldiers on the appellant's farm. In his lead judgment Okello, JA, cited passages from the **Muwonge** case (supra) in which ***Sir Charles Newbold,*** the President of the E.Africa Court of Appeal, set out the principles of vicarious liability. The learned Justice of Appeal then referred to a passage in the judgment of the Principal Judge from which the learned Justice of Appeal concluded that the Principal Judge ***"certainly tended to give a narrower interpretation***

to the principle of vicarious liability of a master than was stated in <u>Muwonge Vs Attorney General</u>"

Thereafter he stated the principle to be: -

> ***"Once the acts were done by the servant in the course of his employment, it is immaterial whether he did it contrary to his master's orders or deliberately, wantonly negligently or even criminally or did it for his (servant's) own benefit, the master is vicariously liable so long as what the servant did was merely a manner of carrying out what he was employed to carry out".***

In the Court of Appeal counsel for the appellant had argued that by cutting poles to construct huts to live in, the soldiers' conduct made the respondent liable vicariously.

According to Okello, JA, the crucial question to answer in the case was whether when the soldiers cut poles for making their huts or when the soldiers collected fire wood or burnt charcoal, those were acts which soldiers were employed to do or the manner of carrying out what they were employed to do or to carry out or whether they were ordered to carry out those acts. He then referred to the appellant's complaint to the local commander of NRA and the latter's reply that:

"The men were sent by order from above". He concluded strangely that this is not evidence that soldiers were ordered to carry out acts complained off and that there was insufficient evidence to establish vicarious liability. In my opinion this conclusion like that of the Principal Judge, is on the facts, erroneous.

It is common ground that soldiers camped next to the appellant's farm. They therefore, had opportunity for access to the farm. Appellant's unchallenged evidence that the soldiers trespassed on his land is supported by that of Edward Semucho. Further, Brigadier Nanyumba testified that soldiers were in the area and that the

appellant complained about the damage caused to his farm by those soldiers. Therefore the Brigadier tasked the local commander who informed him that soldiers had damaged the appellant's crops. I think that this was an acknowledgement of trespass. The Brigadier stated that the State sometimes may not be able to cater for the needs of the army. Therefore a local commander ***"may take initiative to secure provisions. So Mr. Lutaya's complaint is not unusual."***

Normally this statement would not mean much. However in the context of the facts of this case it does. The learned Principle Judge held that in his evidence the Brigadier in this regard was helping his friend, the appellant. In my view and with all due respect, this finding is without proper foundation. The Brigadier was not cross-examined about the motive for testifying as he did. He was not asked whether he was helping a friend or was simply telling the truth or falsehood. The record does not show that his demeanour as a witness showed that he was not a credible witness. That means that his evidence remained untainted and credible. This entitled the trial court to make such inferences as are reasonable within the context. In my opinion the most reasonable inference on the evidence as a whole is that normally in the Uganda army when soldiers lack provision for their needs, they help themselves. They can do this, for instance, as happened in this case, by invading a nearby forest to cut tress and get firewood. The appellant testified that soldiers cut his forest so as to construct huts for the soldiers and family to live in while performing official duty. This forced the appellant to raise his complaint directly with a local commander of the soldiers and who was in charge of the same soldiers. That commander was then obliged to tell the appellant, in effect, that what the soldiers were doing, e.g., cutting timber, was authorised from superiors. In the circumstances it was not incumbent upon the appellant to embark on the exercise of establishing the truth of that commander's statement that his superiors ordered soldiers to do what they did. He was entitled to assume and believe that the soldiers had been authorised to construct huts using materials from the appellant's forest. After all the soldiers were supposed to be housed by the state. Not enough houses appear to have been provided. The soldiers constructed the huts

while on official duty so as to be comfortable. They were therefore, performing official functions in a crude way.

Both the learned Principal Judge and the Court of Appeal appear to regard what the local commander told the appellant as hearsay. In this case that can not be hearsay. The soldiers had cut and continued to cut timber. Both the local commander and the appellant knew this as a fact. In that regard, the evidence of Kibuka Joseph (PW5) is important. He testified:

> ***"Between 1995-96 I saw soldiers coming to visit us. They would gather firewood and timber for building. They ate matoke tomatoes, fene, etc. Accompanied Lutaya to report to chairman RC1 Kiswera. He gave us a letter to take to Mpoma Satellite to report to the boss of the soldiers.***
>
> ***There were many soldiers coming. Some were sitting, others picking firewood, others moving out and out. Their uniports were more than 100. They continued despite our complaint. I know the environs of the farm. There is nowhere else they could have collected firewood."***

This witness was not challenged on this evidence which evidence showed that soldiers trespassed on the appellant's land and removed timber and crops therefrom. It is my view that if it was a question of one soldier or two soldiers doing the damage complained of by the appellant once or twice or stealthily, it could accord with the opinions of both the learned Principal Judge and the Court of Appeal that the soldiers acted on their own floric. But, where, as it is quite evident in this case, that soldiers made it routine to harvest timber and fruits from the appellant's farm for the purposes of enabling them to perform their functions, it ceases to be a floric of the soldiers. The matter appears to have been so routine and so apparently official that the appellant had to

complain not only to RCs but also to the Resident District Commissioner and to the commanding officer and eventually to the Chief-of-Staff of the army. The latter acknowledged the damage which he impliedly attributed to failure by the state to provide for soldiers.

The Ministry of defence deployed soldiers at Mpoma Satellite station to perform state security matters. The Ministry of defence was bound to provide accommodation for and food to the soldiers. Failure to make the provisions for the soldiers tempted the soldiers or their commanders to use initiative for the soldiers to survive in order to be able to perform state duties. Surely it can not lie in the mouth of the respondent to say that in those circumstances soldiers did what they did at their peril or that they should have slept in the open to face the vagaries of nature. I can not agree.

With great respect to both the learned Principal Judge and the Court of Appeal, both failed to appreciate that the facts proved in this case established vicarious liability.

In my opinion, the acts of the soldiers were official acts and they bound the respondent in terms of the vicarious liability principles enunciated in the Muwonge case. I therefore hold that both the learned Principal Judge and the Court of Appeal erred when each held that there was no vicarious liability for the respondent arising from the conduct of the soldiers. I think that vicarious liability was proved and therefore ground one must succeed. Vicarious liability was the basis upon which the Court below decided the appeal. The conclusions on ground one disposes of this appeal.

This means the appeal must succeed. What is the consequence of this success? In his plaint;

(a) The appellant prayed for damages arising from trespass to land.

(b) Damages for loss of property and business investment valued at shs 255,800,000/=.

(c) A permanent injunction restraining the defendant's soldiers from trespassing on the plaintiff's land.

(d) Costs.

The learned Principal Judge held that the loss claimed was speculative. He appears to have ignored prayers (a) and (c) and concentrated on prayer (b) . In his view:

> ***"As I have stated it cannot be said that only the soldiers of NRA/UPDF could have invaded the plaintiff's farmland and harvested crops, wood and timber. For anyone therefore making a claim of the loss, there must be apportionment of the cause of the loss. In particular it is now trite law that special damages must not only be specially pleaded but they must in addition, be specifically proved. I confess I have not found any proof of damage attributed wholly or even partially to the NRA/UPDF soldiers. The financial loss adduced is based on quantitative and market speculation".***

The appellant in this plaint pleaded special damages in his amended plaint. He adduced (exh.P.4) evidence to prove this. The learned Principal Judge said the evidence was ***"based on quantitative and market speculation."*** I guess that he means the loss was exaggerated. In the case of ***Kampala City Vs Nakaye*** (1972) E A 446 the respondent as plaintiff claimed special damages arising from her damaged house and properties. Trial court accepted her oral evidence (receipts were lost) as to her loss and her claim. The amount claimed was more than value of property lost. On appeal in the E.A. Court of Appeal it was found that there was an error in the value of the properties lost. That Court (page 449) corrected the amount and upheld the

award of special damages but reduced the amount. In principle I see no distinction between the claim in these proceedings and the claim in ***Nakaye case.***

Because of the holding which I have just quoted, the learned Principal Judge awarded no damages. He said nothing about the prayer for an injunction. It is a well established judicial practice that in this type of cases, a trial court should indicate what it would have awarded as damages if the plaintiff had established his claim: See ***National Enterprises Corporation &*** 2 ***others Vs Nile Bank Ltd.,*** Civil Appal No.17 of 1994 (unreported). If the learned Principal Judge had assessment the damages, I would have considered his estimate of the damages on the matter.

Evidence shows that the soldiers trespassed on the appellant's land. In that respect, he is entitled to some damages for trespass. Also he would be entitled to the grant of the prayer for a permanent injunction, if the soldiers are still trespassing on the land. I agree that damages for timber, charcoal and fruits may have been exaggerated. But since there is evidence of damage, and figures are given some amount should be awarded. This Court is not in a position to assess the damages now. This should be done by the trial court. Meantime I would grant a permanent injunction restraining the respondent's agents (soldiers) from trespassing on the appellant's land and harvesting timber, crops, and fruits therefrom.

For the foregoing reasons, I would allow the appeal and I would set aside the judgments and orders of the two courts below. I would remit the record to the trial judge to assess and award damages for:

(a) trespass to land and

(b) Special damages.

I would award the appellant the costs in this Court and in the two courts below. The taxed costs will carry interest at the rate of 6% p.a. from date of judgment till payment in full.

JUDGMENT OF ODOKI, CJ.

I have had the advantage of reading in draft the judgment prepared by my learned brother Tsekooko JSC, and I agree with him that this appeal should be allowed with the orders he has proposed.

The main issue in this appeal is whether the Court of Appeal erred in holding that the Attorney General was not vicariously liable for the acts of the solders of National Resistance Army (NRA) which forms the first ground of appeal.

I agree that there was sufficient evidence to prove that the soldiers who plundered the appellant's farm and forest were acting within the course of their employment because the trees, timber ad" firewood they removed from the appellants forests were used by them to facilitate the performance of their duties. The trees and grass they removed were used to build houses and huts for their barracks and the firewood was used to cook the food they had secured from his land. These activities were part of the manner in which they were enabled to carry out their duties. It was immaterial if the manner in which they carried out their duties was improper or unauthorized, so long as it was merely a manner of carrying out their duties. ***Muwonge v Attorney General*** (1967) E.A.7.

The soldiers' employer namely the Government benefited from the activities of soldiers since there was evidence from their supervisors that it was normal for soldiers to obtain these supplies for themselves when the Government failed to provide them. Therefore there was at least an implied authorization for the soldiers to help themselves on the appellants' property.

However, from the evidence of the officer in charge of the soldiers and Brigadier Nanyumba, who was the then Chief of Staff, it is clear that the authorities were

aware of what was happening and did nothing to stop it. On the contrary, it was alleged that the soldiers were doing so because of the orders from above.

In those circumstances, the Respondent was clearly vicariously liable for the actions of the soldiers which were committed in the course of their employment, and the Court of Appeal erred in holding otherwise.

In view of the fact that the learned Principal Judge did not, as he should have done, assess the damages he would have awarded had he found for the appellant, I agree that the case be remitted back to the trial judge to assess general and special damages payable to the appellant. I also agree that a permanent injunction be issued against the respondent to stop the soldiers from trespassing and plundering the appellant's land

As the other members of the court agree with the judgment and orders proposed by Tsekooko, JSC, this appeal is allowed with the orders as proposed by the learned Justice of the Supreme Court.

JUDGMENT OF MULENGA JSC

I had advantage of reading in draft the judgment prepared by my learned brother Tsekooko JSC and I agree that the appeal be allowed. I also concur with the orders he proposed.

JUDGMENT OF KANYEIHAMBA, J.S.C.

I have had the benefit of reading in draft the judgment of my learned brother. Tsekooko. J S C . 1 agree with him that the appeal should be allowed. I would set aside the judgments and orders of the Court of Appeal and of the High Court for assessment of general damages for trespass and special damages.

I would remit the case to the High Court for assessment of damages.

I also agree with the proposals and orders made by Tsekooko. J S C

Dated at Mengo this 9th day of March 2004.