THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA AND KATUREEBE, JJ.SC).

CIVIL APPEAL NO. 8 OF 2006

BETWEEN

ATTORNEY GENERAL:::::::::::::::::::::::::::::::::: APPELLANT

AND

SAM SEMANDA:: RESPONDENT

[Appeal from the decision of the Court of Appeal at Kampala, (Mukasa-Kikonyogo, DCJ, Kitumba and Kavuma, JJ.A) dated 23rd December, 2005 in Civil Appeal No. 22 of 2005]

JUDGMENT OF TSEKOOKO, JSC

This appeal arises from the decision of the Court of Appeal which reversed the judgment of the High Court by Mugamba, J, in which he dismissed a suit of the respondent, Sam Semanda.

Sam Semanda filed a suit against the Attorney General, the appellant, alleging that UPDF soldiers, as servants of the appellant, had shot at and damaged his omnibus registration No. 600 UCC on 26th October, 1999. He claimed for special and general damages and also for costs. The trial judge dismissed the suit with costs. The respondent appealed to the Court of Appeal, which set aside the decision and orders of the trial judge, and awarded to the respondent a sum of Shs. 127,420,000/= as special damages with interest at the rate of 45% p.a., from the date of filing the suit till payment in full. The Court also awarded

him general damages in the sum of Shs. 10,000,000/= with interest at the rate of 45% from the date of judgment till payment in full. The court further awarded to the respondent taxed costs in that court and in the trial court, the costs to bear interest at the rate of 6% p.a. from 23rd December, 2005. The appellant has now appealed against the decision and orders of the Court of Appeal.

At the commencement of the trial, the judge framed four issues for his decision. The respondent, as plaintiff, called four witnesses. He himself testified as PW1. The other three witnesses included Wasswa Khalid (PW4), the driver, and Patrick Sempiima, PW2, the conductor, of the respondent's Omnibus. At the close of the plaintiff's case, the appellant, for an unexplained reason, opted not to offer any evidence in his defence although he had filed a written statement of defence in which he denied liability and pleaded, an alternative averment in defence alleging that if the respondent's bus was shot at and destroyed by UPDF (soldiers), the soldiers were on a floric of their own when they shot at and destroyed the bus.

There is no dispute that PW4 was the driver of Omnibus registration No. 600 UCC and PW2 was its conductor. It is in evidence that PW4 had driven the bus along the same route from 1995 till the day the bus was shot at and damaged. According to the two witnesses, the bus plied between Kampala and Bwera Border Township which is in Kasese District. On the fateful day, the bus reached the place of the shooting between Kikorongo and Katunguru at 6:00 p.m. It was still day time. The two witnesses saw soldiers wearing UPDF uniforms. According to PW4:

> **"I know they were UPDF soldiers because I saw them clearly in their uniform. It was a clear day. I know their uniform. The soldiers used to be there in the area because there was a**

detatch nearby. The incident took place in October, 1999. I was leaving Kampala for Bwera. When I reached a place between Kikorongo and Katunguru, I saw soldiers ahead of us. When I approached them, I heard bullets hitting the bus. The soldiers were on the right side of the road, moving. The bus was running and the bus was later hit by a rocket propelled grenade. The bus was able to move until it reached Kikorongo at a military road block. That is where we stopped."

This evidence, which was not contradicted, was corroborated substantially by the testimony of PW2, the conductor of the bus. The only apparent contradiction between these two witnesses was the number of soldiers. The learned trial judge held that whereas PW2 saw only two soldiers, PW4 saw 50 soldiers. Further, the learned trial judge held that because PW4 said he had once seen ADF rebels in the area, it must have been the rebels who shot at the bus. He again opined that the respondent should have adduced independent evidence to prove that shooting was done by UPDF soldiers.

In the Court of Appeal, Kavuma, JA, who wrote the lead judgment, found that the ***"learned trial judge applied a higher standard than required by law in civil cases."***

He also found, correctly in my view, that the evidence of PW2 and PW4 established that it was UPDF soldiers who shot at and damaged the respondent's bus and that, therefore, the Government was vicariously liable for the acts of those soldiers. The other two members of the Court of Appeal concurred.

This appeal is based on four grounds. Counsel for both sides filed written arguments.

Although counsel for the appellant stated that they would argue grounds 1, 2 and 3 together, they actually argued them separately. I will consider them separately. Ground one was framed as follows:-

> *The learned Justices of Appeal erred in law and in fact in Holding that there was sufficient evidence to identify Those who shot at the bus as UPDF soldiers whereas not.*

I understand this ground to complain that the evidence available did not establish that UPDF soldiers shot at the bus.

In his written submissions, the appellant in effect, agrees that PW2 and PW4 are key witnesses as they were at the scene since they were in the bus.

The Attorney General referred to passages from the record of the evidence of the two witnesses to show apparent conflict between their evidence. He criticized the Court of Appeal for its findings and contended that there was no evidence on the record indicating that the bus slowed down at any one time during the shooting incident to enable the two witnesses observe the assailants at close range so as to identify them as UPDF soldiers.

For the respondents, Mrs. Basaza Wasswa supported the decision of the Court of Appeal contending that the court considered the evidence on the record, which evidence pointed at the UPDF soldiers as persons who shot at and damaged the bus. She submitted that the evidence of PW4, and of PW2, established that it is UPDF soldiers who shot at the bus.

A perusal of the record shows that the learned trial judge dismissed the suit after answering the first issue in the negative. That issue was framed in the words -

> ***"Whether the plaintiff's bus No. 600 UCC was shot at by the Uganda Peoples Defence Forces and or*** *their* ***agent, or authorized persons".***

The learned judge correctly found that PW2 and PW4 were the only persons who testified that they were present at the time the bus was shot at. The judge summarized the evidence of the two eye witnesses, and apparently believed PW2 and PW4 that the people who shot at the bus wore uniforms similar to uniforms worn by UPDF soldiers. The learned judge, however, concluded that it is not UPDF soldiers who shot at the bus, for the following reasons.

No independent evidence of who the persons who shot at the bus were because-

- There was no evidence that anybody was arrested in connection with the shooting.
- After the incident no effort was made to inquire from military authorities concerning who might have shot at the bus.
- There is no evidence of a formal report to whoever was in charge of the detach allegedly in the vicinity or any other military officer.

These three conclusions by the learned judge are a little surprising and in my view are speculative. There is evidence that immediately after the shooting, PW4 reported the shooting to the detach when he reached the road block manned by UPDF soldiers and Police implicating UPDF soldiers. The judge speculated that because PW4 testified that he had once seen ADF rebels in Bwera, some 28 miles away from the scene, therefore, it is possible there were other persons wearing uniforms similar to those of the UPDF who could have

shot at the bus. The Judge clearly ignored PW4's evidence about the appearance of rebels. He surmised that there must have been confusion at the time PW2 and PW4 were at the scene. According to the learned judge whereas PW2 testified that he saw two people shoot at the bus, PW4 stated that there were fifty people. The judge did not attempt to appreciate that PW4 was on the steering wheel in the front part of the bus observing clearly the general view ahead of him and, therefore, was in a better vantage point to observe the shooters. That is what his evidence shows.

As noted already, in the Court of Appeal, Kavuma, JA, wrote the leading judgment with which the other two members of the Court concurred. He found, and I respectfully agree with the findings, that the two witnesses, PW2 and PW4, were very familiar with the area where the shooting took place and that PW4 had been driving the bus along that route for 42 months and was familiar with the route. PW4 knew the uniform of UPDF soldiers and was able to describe it in detail. The learned Justice of Appeal opined that the evidence of PW4 **"clearly distinguished the attire of UPDF soldiers from that of rebels. In this area according to the uncontroverted evidence of these two witnesses, there was a UPDF detach on a Hillside not very far from the spot of the shooting. There was just metres away from the spot, a road block manned by UPDF and police personnel.**

There were also UPDF soldiers on constant patrol of the area including Katungulu junction where the bus was shot at. As the bus approached the spot of the shooting and when PW4 saw people in UPDF uniforms, he slowed down. This enabled him and PW2 early to observe the assailants at close range. It is **worthy noting that there is no evidence on record of the presence of rebels in the Katungulu junction area or anywhere nearby during the period the bus was shot at."**

The evidence of PW4 and PW2 supports the conclusions of the learned Justice of Appeal. As the learned Justice of Appeal correctly observed, it was only during cross-examination when PW4 answered that once in the past he had seen rebels in Bwera which was 28 miles away from the scene at which the bus was shot. This witness never testified that he had ever seen any rebels near or at the scene of the shooting. Nobody else said so, either. There is no evidence on the record upon which the trial judge based his assertion that other people wearing uniform similar to that of UPDF shot at the bus. This was speculative opinion.

On the basis of the evidence available the learned Justice of Appeal found, correctly in my opinion, that it was UPDF soldiers who shot at the bus and that they did the shooting in the course of their duty and, therefore, the appellant is vicariously liable as the soldiers were servants of the appellant. The first ground of appeal must therefore fail. That also disposes of the third ground. I think that my conclusions on the first ground disposes of the substance of the appeal. But I will briefly discuss the remaining grounds, namely 2 and 4.

The second ground states that the learned Justices of Appeal erred in law and misdirected themselves in holding that the evidential burden shifted to the Attorney General.

The Attorney General criticized the Justices of the Court of Appeal because of a passage found at page 15 of the judgment of Kavuma, JA in which he stated:-

> *In the instant case the burden of proof was on the (plaintiff) to adduce evidence to support his assertions that it was UPDF soldiers who shot at his bus. That in my view the appellant did through the evidence of PW2 and PW4. I am not persuaded by the contention of the*

learned counsel for the respondent that the appellant had to have some more evidence independent of PW2 and PW4 to establish his case on this point. In the same vein, I do not agree with the learned trial judge that the evidence of PW2 and PW4 was not conclusive enough to support the he appellant's assertions. By requiring evidence independent of that of PW2 and PW4 to conclusively establish the appellant's case, the learned trial judge..... applied a higher standard than that required by law in civil cases. This cannot be said to be free of error on the part of the learned trial judge. Once the appellant adduced evidence on the identity of who shot at his bus through the testimonies of PW2 and PW4, the evidential burden shifted to the respondent (Attorney General) to show that it was not UPDF soldiers who shot at the bus. As it were, no such evidence was called and there is none on the record.

In that court, counsel for present respondent (who was the appellant there), criticized the trial judge for the latter's opinion that the plaintiff should have called some extra evidence independent of PW2 and PW4 to establish the identity of the people who shot at the bus. Counsel submitted that the trial judge applied a higher standard of proof than required in civil matters. The Attorney General (as respondent in the Court of Appeal) relied on, inter alia, sections 101, 102 and 103 of the Evidence Act for the view that he who asserts must prove a particular fact in issue contending that the trial judge was right in asserting that the burden was on the plaintiff to adduce evidence that the assailants were UPDF soldiers.

It appears to me that counsel for the appellant as well as the trial judge must have had in mind the requirements of the old S.105 of Evidence Act rather than Ss. 101, 102 and 103 of the Act. According to that section,

> ***"In Civil Proceedings when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."***

This section specifies a special burden of proof and I think it was not relevant in these proceedings.

If I may repeat, PW4 told police and soldiers at the road block that it was UPDF soldiers, who had shot the bus. Those police personnel and the soldiers did not react to the report probably because either they just feared or wanted to take time before reacting. In any event they did not follow up to verify the report. PW4 insisted the shooting was done by UPDF soldiers. Like the Court of Appeal I believe him.

As the plaintiff asserted through PW2 and PW4 that the people who shot at his bus were soldiers of UPDF and as UPDF had soldiers in the vicinity of the scene, the Attorney General took a calculated risk of not calling any evidence to testify about how the security situation at the scene and within the vicinity of the scene was at the time, or call soldiers or policemen who were on duty at the road block to whom the incident was reported to deny such reporting. There was no evidence that at the material time rebels wearing uniforms similar to those worn by UPDF soldiers had been seen or were active in the area. I respectfully agree with the finding of the Court of Appeal that the evidence adduced by the plaintiff had, on a balance of probabilities, established the claim and it was upon the Attorney General to adduce evidence to challenge that of the plaintiff. Accordingly ground two must fail.

In ground four the complaint is that interest at the rate of 45% p.a. is excessive. I think that this ground has substance.

In the plaint, the plaintiff prayed for interest at 45% on special damages as well as on general damages.

During the trial the plaintiff, as PW1, testified and explained the cost of his bus. He claimed that he was unable to service his bank mortgage because of the destruction of the bus. Apparently he was not challenged on this. He however did not tell court what interest he was paying on the mortgage or why it was necessary to claim interest at the rate of 45% p.a.

In the Court of Appeal his counsel asked for judgment as prayed in the suit. She did not explain how interest at 45% is justifiable. Kavuma, JA awarded interest at 45% because the case had been dragging on in courts for the last five years, which aggravated the appellants continued loss and damage. So he found interest at the rate of 45% was appropriate. The appellant has justifiably criticized the learned Justice of Appeal for such reasoning since delay in court is beyond the control of the appellant. Before us the Attorney General simply asked the court to grant interest at court rates. Counsel for the respondent supported the decision of the Court of Appeal. Under section 26 of the Civil Procedure Act, unless interest is provided by agreement and is not harsh and unconscionable, courts exercise discretion in awarding interest. A court is guided by evidence to determine the rate of interest.

I must point out that counsel's contentions in submissions are not evidence. Clear evidence should have been adduced justifying such a very high rate of interest. I think that interest at 45% is too high. In the circumstances of this

appeal I think that the reasonable interest on special damages should be at the rate of 15% p.a. from date of filing the suit till payment in full. I would award 10% as rate of interest on general damages from 23rd December, 2005, the date of judgment in Court of Appeal, till date of payment in full. The ground thus partially succeeds.

In conclusion I would dismiss the appeal except as to rate of interest. I would award to the respondent ¾ of costs in this Court and in the Court of Appeal and full costs in the High Court. Taxed costs will carry interest at the rate of 6% till payment in full.

As the other members of the Court agree, it is ordered accordingly.

Delivered at Mengo this 10th day of July 2007.

J. W. N. Tsekooko
JUSTICE OF THE SUPREME COURT.

JUDGMENT OF KAROKORA, JSC.

I have read in draft, the judgment of my learned brother Justice Tsekooko, J.S.C. and I agree with him that this appeal ought to partially succeed. I also agree with the orders he has proposed.

Dated at Mengo, this 10th day of July 2007.

A.N. KAROKORA
JUSTICE OF SUPREME COURT

JUDGMENT OF MULENGA, JSC

I have had the benefit of reading in draft the judgment prepared by my learned brother, Tsekooko, JSC, and I agree that this appeal should be dismissed with costs.

Dated at Mengo this 10th day of July 2007.

J.N. Mulenga

Justice of the Supreme Court

JUDGMENT OF KANYEIHAMBA, JSC

I have had the benefit of reading in draft, the judgment of my learned brother, Tsekooko, J.S.C and for the reasons he has ably given, I agree with him that this appeal ought to be dismissed. I also agree with the orders he has proposed.

Dated at Mengo, this 10th day of July 2007.

G. W. Kanyeihamba
JUSTICE OF SUPREME COURT.

JUDGMENT OF KATUREEBE, JSC

I have had the benefit of reading in draft the Judgment of my brother, Tsekooko, JSC, and I concur.

DATED at Mengo this 10th Day of July 2007.

Bart M. Katureebe
Justice of the Supreme Court