

UGANDA / JUDGMENT

Akech v Attorney General

(CIVIL SUIT NO. 368 OF 2018)

[2020] UGHCCD 50 (8 April 2020)

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COURT

HC: Civil Division (Uganda)

BEFORE

Musa Ssekaana, J

CASE / FILE NUMBER

CIVIL SUIT NO. 368 OF 2018

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT KAMPALA****CIVIL SUIT NO 368 OF 2018****AKECH ROSE:.....PLAINTIFF VERSUS****ATTORNEY GENERAL:.....DEFENDANT****BEFORE HON. JUSTICE SSEKAANA MUSA****JUDGMENT**

On the 21st day of April 2018 the Plaintiff's son, the late OPIO JOHN TABAN aged 22 years was shot at and injured by BYAMUGISHA ROBERT No.65967 a policeman attached to Kakajjo policeman station.

BYAMUGISHA ROBERT was armed with an SMG Registration No. UG. Pol.19835- Ax17 1812293 with 17 (Seventeen) rounds belonging to the Government of Uganda.

According to the postmortem report the Late OPIO JOHN TABAN died from Intensive Care Unit of Mulago Hospital on the 21st day of April 2018 due to bullet wounds.

BYAMUGISHA ROBERT was acting in the course of his employment and the Defendant is vicariously liable for the acts of the said BYAMUGISHA ROBERT.

The Plaintiff brings this suit on her behalf as the biological mother of the late OPIO JOHN TABAN's and on behalf of 4 other Dependents of the Deceased.

The plaintiff claims that the actions of the police officers were wrongful, unlawful and a violation of human rights. It is the plaintiff's claim that the defendant is vicariously liable for the actions of the police officers since their actions were in the course of their employment.

The statutory notice of intention to sue was duly communicated to the defendant. The plaintiff prayed for judgment against the defendant for general damages, special damages, interest and costs of the suit as well as any other relief as this court may deem fit.

The defendant filed a written statement of defence denying plaintiff's claim and prayed that this court dismisses the same with costs.

ISSUES FOR DETERMINATION

The parties filed a joint scheduling memorandum wherein she raised 2 issues to be determined by this court;

- *1. Whether the defendant is variously liable for actions of Byamugisha Robert-a police officer*
- *2. Whether the plaintiff is entitled to the remedies sought?*

The parties filed written submissions and this court has considered them in the determination of this dispute.

Court will therefore proceed to determine this matter basing on the abovementioned issues.

COURT'S DETERMINATION

Whether the defendant is vicariously liable for the actions of the errant police officer?

MAFU JULIUS OKELLO (PW2) testified stated in his Witness Statement that on the 21st day of April 2018 he was at home watching a movie and his brother the late OPIO JOHN TABAN asked PW2 to change the channel so that the Deceased could watch a football match but he asked him to go watch the game at the neighbor's place.

The late OPIO JOHN TABAN left the house and 5 minutes later PW2 heard a gunshot and paused the movie and that PW2 then heard a second gunshot and rushed out of the house and opened the gate. He saw the late OPIO JOHN TABAN laying down on the ground and a police man called BYAMUGISHA ROBERT was holding a gun pointed to the Deceased's chest.

PW2 stated that he recognized BYAMUGISHA ROBERT since he already knew him as a police man working with Kakajjo police post that is in his neighborhood. He screamed calling for help and BYAMUGISHA ROBERT started shooting in the air as he fled away.

PW2 testified that he ran to his brother the late OPIO JOHN TABAN who was laying in a pool of blood and whose intestines had fallen out at the time. He removed his vest and tied the late OPIO JOHN TABAN's stomach and carried him to GWATIRO HOSPITAL that is very close to my home but the doctors could not handle his brother's condition and his brother was transferred to Mulago Hospital for treatment.

PW2 MAFU JULIUS OKELLO further testified that he talked to his brother who informed him that BYAMUGISHA ROBERT had shot him for nothing and he was in a lot of pain and that the late OPIO JOHN TABAN was taken into theatre and operated on the next morning and taken to intensive care unit where he died.

The Officer in Charge of Bweyogerere Police Station and other two police officers confirmed that BYAMUGISHA ROBERT had handed himself over to the police and the said BYAMUGISHA ROBERT No. 65967 was later charged with murder vide criminal Case No. 027 of 2018 and is awaiting trial. The Charge sheet was tendered in evidence as EXH P.4.

The Plaintiff further testified that the late OPIO JOHN TABAN died from the Intensive Care Unit of Mulago Hospital on the 21st day of April 2018 and the postmortem examination report revealed that the late OPIO JOHN TABAN died due to bullet wounds. The Postmortem Report was tendered in evidence as EXH P.2.

At the time when the cause of action arose, BYAMUGISHA ROBERT was attached to Kakajjo Police Post and was on duty working the night shift at that material time. A letter from the Crime Investigation Directorate of Kira Police Station was admitted in evidence as EXH. P.5.

This Honorable Court admitted in evidence EXH P.5, a letter to the Plaintiff from the Crime Investigation Directorate of Kira Police Station which acknowledges the

fact that on the night of the shooting, BYAMUGISHA ROBERT No. 65967 was deployed in the counter night shift at Kakajjo Police Post, Kira Municipality in Wakiso District where he was attached but only stealthly moved away from duty on pretence that he was going for a short call.

It was the submission of the plaintiff's counsel that the actions of BYAMUGISHA ROBERT amount to a tort in law for which the Defendant is vicariously liable.

Section 5 of the Law reform (Miscellaneous Provisions) Act provides that:-

"*If the death of any person is caused by any wrongful act, neglect or default of any person, and the act, neglect or default is such as would, if death had not ensued, have entitled the person injured by it to maintain an action and recover damages in respect of it, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under such circumstances as amount in law to a felony*".

Vicarious Liability was defined by BATEMA N. D. A J in the case **Okupa –v- Attorney General & 13 Ors MC No. 14 of 2005 [2018] UGHCCD 10** to mean "a legal doctrine where a person, himself blameless, is held liable for another person's conduct". Court further went on to state that "the rule is often justified by reference to the latin maxim "**qui facit per alium facit per se**" meaning that he who acts through another acts himself".

Court in Okupa's case further stated that under the doctrine of vicarious liability, an employer is liable for the acts of his/her employees done in the scope of that employee's duty.

In the case of **Okupa** Court further agreed with Counsel for the Plaintiff's submission that:-

*"*for the doctrine of vicarious liability to apply, there must be three essential ingredients;**

- **1. There must be a relationship of employer and employee;**
- **2. The Tort must be committed by the employee;**
- *3. *In the course of business*"*

The Honorable Judge in **Okupa's case** while quoting Newbold P. in **Muwonge –Vs-Attorney General [1967]1 EA 17** and stated that "**an act may be done in the course of a servant's employment so as to make his master liable even though it is done contrary to the orders of the master and even if the servant is acting deliberately, wantonly, negligently or criminally for his own benefit nevertheless if what he did is merely a manner to carrying out what he was employed to carry out, then his master is liable**".

It was their submission that No. 65967 BYAMUGISHA ROBERT's act of shooting the late OPIO JOHN TABAN was contrary to the vision and mission of the Uganda Police Force among which is to protect the life of citizens of Uganda and promote law and Order in the country and the defendant is vicariously liable for actions of its employee- BYAMUGISHA ROBERT, a Police Officer.

The defendant's counsel submitted that the said police officer-Byamugisha Robert 'stealthily moved out/away from duty on the pretense that he was going for a short call and did not return'. The CPL Ayamasi Philemon then got information that No. 65967 Byamugisha Robert had shot at someone injuring him seriously from Well Spring Kakajjo.

According to the counsel, the said police officer was not under any instruction to shoot anybody and he was not under any instruction to operate from the place where the shooting took place. Therefore he was on a frolic of his own and the decision to shot was his own.

Determination

Black's Law Dictionary 11th Edition (2019) defines vicarious liability as; Liability that a supervisory party (such as employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties

According to the **East African Cases on the Law of Tort* by E. Veitch (1972 Edition)* at page 78, an employer is in general liable for the acts of his employees or agents while in the course of the employers business or within the scope of employment. This liability arises whether the acts are for the benefit of the employer or for the benefit of the agent. In deciding whether the employer is vicariously liable or not, the questions to be determined are: whether or not the

employee or agent was acting within the scope of his employment; whether or not the employee or agent was going about the business of his employer at the time the damage was done to the plaintiff. When the employee or agent goes out to perform his or her purely private business, the employer will not be liable for any tort committed while the agent or employee was a frolic of his or her own.

An act may be done in the course of employment so as to make his master liable even though it is done contrary to the orders of the master, and even if the servant is acting deliberately, wantonly, negligently, or criminally, or for his own behalf, nevertheless if what he did is merely a manner of carrying out what he was employed to carry out, then his master is liable (see **Muwonge v. Attorney General [1967] EA 17**)

In the instant case, the errant police officer Byamugisha Robert shot at the late Opio John Taban and no reason has been advanced to justify the shooting. He was on duty at Kakajjo Police station. This pointed towards wrongful or negligent use of the gun in performance of his duties in the course of his employment as a police officer.

The defence put forward by the defendant that the police officer stealthily moved away from the police station cannot suffice and the fact remains he was on duty that night and had been allowed to have the gun on him in order to execute his night duties within the same area of Kakajjo.

Issue 3: Available remedies

The Constitution under Article 22 guarantees and protects the life of every citizen in this country. Death caused by reckless or negligent use of a firearm by persons in charge of protecting the citizenry is one of the worst crimes in civilized society governed by the rule of law.

According to **Wing Commander Danladi Angulu Kwasu vs Republic of Nigeria** (Community Court Of Justice Of The Economic Community Of West African States (Ecowas) Holden In Abuja, Nigeria) it was held that

"The right to life is protected in the core- regional and universal human rights instrument including the African Charter on Human and Peoples' Rights (Article 4). Disregard for civilian loss of life may also involve violations of the right to life. The right to life has been widely recognized as a fundamental right without which

other rights cannot be implemented or realized. It is the fulcrum of all other rights. It is non – derogable and applies to all persons at all times including institutions of Government. The Charter imposes responsibility on State parties to prevent arbitrary deprivations of life caused by its own agents as well as protect individuals and groups from such deprivation at the hands of others."

The reckless or negligent killing of citizens strikes a blow at the rule of law and therefore becomes a sacred duty of the court as the "custodian and protector of the fundamental and the basic human rights of persons" to deter violations through police cold blood killings and torture.

The court where infringement of fundamental right is established must give compensatory relief to the victim, not by way of damage only as in a civil action but by way of compensation under the public law jurisdiction for the wrong done, due to breach of public duty by the government of not protecting the fundamental right to life of the citizen. " To repair the wrong done and give judicial redress for legal injury is a compulsion of judicial conscience" *D. K Basu v State of West Bengal [1997] AIR SC 610*

This court has a duty to give a suitable monetary compensation to represent a solatium for the mental pain, distress, indignity, loss of liberty and death.

The special damages claimed in the plaint where not proved to the satisfaction of this court and the same could be considered in the general damages and I decline to award the same.

The plaintiff as the mother of the late Opio John Taban and the sole dependant would be entitled to compensation and the rest of the persons are not proper dependants and are not entitled to any awards. The late Opio had no legal obligation to look after nephews, nieces and brothers.

The court orders the Defendants to pay the Applicant compensation for the arbitrary and unlawful deprivation of the right to life of the plaintiff's son.

The plaintiff is therefore awarded compensation of UGX 90.000.000 for the unlawful deprivation of the life of her son.

The plaintiff is awarded costs.

I so order.

SSEKAANA MUSA JUDGE 08 th/04/2020

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