

UGANDA / JUDGMENT

Ayebale v Muttico Technical Services Limited and Another (Civil Suit No. 55 of 2017) [2023] UGHCCD 24 (22 February 2023)

[2023] UGHCCD 24

COURT

HC: Civil Division (Uganda)

BEFORE

Boniface Wamala, J

CASE / FILE NUMBER

Civil Suit No. 55 of 2017

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA (CIVIL DIVISION) CIVIL SUIT NO. 55 OF 2017 AYEBALE MARK

BOSCO ::: PLAINTIFF VERSUS 1. MUTTICO TECHNICAL SERVICES LTD

2. YIGA RICHARD ::: DEFENDANTS

BEFORE: HON JUSTICE BONIFACE WAMALA JUDGMENT

Introduction

- [1] The Plaintiff brought this suit against the Defendants jointly and severally for special and general damages arising out of injuries he sustained as a result of an accident that occurred owing to the negligence of the 2nd Defendant in the course of his employment with the 1st Defendant. The Plaintiff also sought for costs of the suit.
- [2] The brief facts of the Plaintiff's case are that on 21st September 2016, the Plaintiff while riding a Bajaj Motorcycle Reg. No. UDW 372N at Bweyogerere along Kampala – Jinja Highway was knocked by Motor Vehicle Reg. No. UAS 464F that was being driven by the 2nd Defendant an employee of the 1st Defendant in the course of his employment. The 2nd Defendant veered and swerved off his lane and rammed into oncoming traffic on the other side of the road knocking the Plaintiff. The Plaintiff sustained severe injuries including broken limbs and other internal injuries. The Plaintiff was hospitalized for a considerable period of time. The Plaintiff attributes all the injuries and losses sustained by him to the 2nd Defendant's negligence for which the 1st Defendant is vicariously liable.

- [3] The Defendants filed a Written Statement of Defence in which they denied the Plaintiff's claims and specifically averred that the Plaintiff was responsible for his own injuries because he was riding on the wrong side of the road which resulted into a collision with the Defendant's vehicle. The Defendants also averred that the Plaintiff was recklessly riding without a helmet and carrying two passengers. As such, no duty of care was owed to the Plaintiff since he was on the road illegally. It was also stated that the Plaintiff was requested to avail his credentials to the Defendant's insurance company for compensation but he failed to do so.

Representation and Hearing

- [4] At the hearing, the Plaintiff was represented by Mr. Tumwesige Francis while the Defendants were represented by Mr. Jagwe Benedict. Counsel made and filed a joint scheduling memorandum. Evidence was led by witness statements. The Plaintiff led evidence of four witnesses. Counsel for the Defendants filed two witness statements but when the matter came up for hearing, neither the Defendants nor Counsel appeared despite sufficient evidence of service of hearing notices and against the background of several adjournments at their request. The matter thus proceeded in the absence of the Defendants. Upon closure of the Plaintiff's case, Counsel for the Plaintiff filed written submissions which I have considered in the course of determination of the issues before the Court.

Issues for Determination by the Court

- [5] Three issues were agreed upon in the joint scheduling memorandum for determination by the Court, namely;
- (a) Whether the Defendants are liable in negligence?
 - (b) Whether the Plaintiff was negligent?
 - (c) What remedies are available to the parties?

Burden and Standard of Proof

- [6] In civil proceedings, the burden of proof lies upon he who alleges. *Section 101 of the Evidence Act, Cap 6* provides that;

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

- [7] *Section 103 of the Evidence Act* provides that;

The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

- [8] Accordingly, the burden of proof in civil proceedings normally lies upon the plaintiff or claimant. The standard of proof is on a balance of probabilities. The law however goes further to classify between a legal burden and an evidential burden. When a plaintiff has led evidence establishing his/her claim, he/she is said to have executed the legal burden. The evidential burden thus shifts to the defendant to rebut the plaintiff's claims.

The Evidence

- [9] The Plaintiff led evidence of four witnesses. **PW1** was Ayebale Mark Bosco, the Plaintiff, who stated that he was a 26-year old resident of Kyaruhuto village, Bugambe Sub-County in Kikuube District (formerly Hoima District) who used to work as a commercial motorcycle rider (commonly known as Boda Boda) until the accident that led to this case. He stated that on the 21st day of September 2016, while riding motorcycle Reg. No. UDW 372N towards Kampala from Mukono side, he was knocked by a double cabin pick up from the Kampala direction that lost control and swerved into the opposite direction hitting his motorcycle that led him to sustain several grievous injuries. He stated that he was admitted at Mulago Hospital and later taken to Kampala Imaging Centre where a full scan confirmed that he had sustained fractures and various injuries. He was consequently taken to Hoima where he continued receiving treatment for over a year. PW1 stated that he sustained permanent physical and mental incapacitation making it impossible for him to continue with his occupation and gain a livelihood to support his family of one wife and a four-year old son.
- [10] **PW2** was Kisoke Denis, an elder brother to the Plaintiff. He stated that he took care of the Plaintiff when he was first admitted at Mulago Hospital for five days and also continued doing so when the Plaintiff was transferred to Hoima. He stated that he bought medicine, made all payments for the expenses including one to the traditional bone and joint setting masseurs. He further stated that the 2nd Defendant visited them a couple of times at Mulago Hospital apologizing and promising that the 1st Defendant would pay the medical bills. He also stated that his brother (PW1) continues to depend on him and other relatives for livelihood.
- [11] **PW3** was Wamara Robert, a Senior Medical Clinical Officer with Hoima Local Government Hospital who also works with St. Mary's Clinic, among others, in Hoima District. He holds a Diploma in Clinical Medicine and Clinical Health from Gulu School of Clinical Officers which he obtained in 1997. He stated that he carried out medical examination of the Plaintiff who had done xrays from different medical units. He found out that the patient had fresh injuries to the limbs that were of a grievous nature. He confirmed that the victim had fractures of the femur and tibia of the right lower limb and on the left lower knee which could lead to permanent disability of both lower limbs. He recoded his findings on a police form (PF3). PW3 also stated that the Plaintiff was admitted at Family Care Lab and Medical

Services for 10 days on intensive treatment under his attention and thereafter continued reporting for further treatment and review of progress after being discharged.

[12] PW4 was No. 26191 Sgt. Mugisha Fred, a traffic officer in Uganda Police Force and resident of Nsambya Barracks. He testified that he was a stand by traffic officer at Bweyogerere Police Station when he received a call that there was an accident at Kazinga whereupon he proceeded to the scene together with Sgt. Begumisa. On arrival at the scene, the victims had already been taken to hospital. The accident involved M/V Reg. No. UAS 464F Toyota Hilux and Motorcycle Reg. No. UDW 372N Bajaj Boxer. Both the motor vehicle and the motorcycle were still at the scene. Ayebare Bosco (the Plaintiff) was one of the three victims. Iga Richard (the 2nd Defendant) was the driver of the motor vehicle. The two officers inspected the scene and Sgt. Begumisa drew the sketch plan. The sketch plan which was attached to the police report (PE8) indicated the various features at the scene. PW4 concluded that the sketch map shows that the motor vehicle left its lane and went to the opposite side of the road from where it knocked the motor cycle that was on its side of the road.

[13] As already stated above, the case closed without the Defendants leading any evidence.

Resolution of the Issues

Issue 1: Whether the Defendants are liable in negligence?

[14] It was an agreed fact in the joint scheduling memorandum that the 1st Defendant was the owner of Motor Vehicle Reg. No. UAS 464F and that the 2nd Defendant was an employee of the 1st Defendant at the time of the accident. It was further agreed that the accident occurred at Bweyogerere along Kampala-Jinja High way on 21st September 2016 involving motor vehicle Reg. No. UAS 464F that was being driven by the 2nd Defendant and motor cycle Reg. No. UDW 372N Bajaj Boxer that was being ridden by the Plaintiff.

[15] It was the submission of Counsel for the Plaintiff that according to the evidence adduced by the Plaintiff, the 2nd Defendant negligently caused the accident making the 1st Defendant, as his employer, vicariously liable. Counsel submitted that in a suit for negligence, the plaintiff must prove three ingredients to wit, that the defendant owed him a duty of care, that the defendant breached that duty and that the plaintiff suffered loss/damage. Counsel cited the case of **Ssekitoleko Joram vs Kato Edward & Another, HCCS No. 97 of 2017** (Civil Division) which cited **Paul Kato v Uganda Transport Corporation [1975] HCB 119** to the effect that a driver of a motor vehicle has a duty of care to other road users, which duty involves taking all measures to avoid a collision. Counsel also relied on **Marsh East Africa Limited vs Road Tainers (Mombasa) Limited, HCCS No. 20 /2016** (Jinja High Court) to the effect that the plaintiff is required to prove that such duty of care was breached and in doing so, the plaintiff is required to plead and prove particulars of negligence. Counsel submitted that in this case, the Plaintiff had pleaded and proved the particulars of negligence on the part of the 2nd Defendant as shown under paragraph 11 of the plaint. Counsel also referred to the accident sketch map and the testimony of PW4 which showed that the Plaintiff was

riding in his lane and that it was extremely unusual for a vehicle to end up causing a collision on the right side of the road which the witness indicated was 7.5 meters' wide. Counsel submitted that this evidence was not controverted by the Defendants.

- [16] Regarding the element of loss or damage suffered by the Plaintiff, Counsel for the Plaintiff submitted that the Plaintiff suffered multiple physical and mental injuries including two broken lower limbs leading to disability of a permanent nature and limited functionality. He referred to paragraph 5 of the plaint, paragraphs 10-14 of the Plaintiff's witness statement, the scan report from Kampala Imaging Centre (PE3) showing that he suffered comminuted fractures, as well as the testimony of PW3 (the clinical Officer) who confirmed in paragraph 6 of his witness statement that the Plaintiff had fractures of the femur and tibia of the right lower limb and knee which could lead to permanent disability of both lower limbs. Counsel concluded that the Plaintiff had discharged the burden and standard of proof showing that the 2nd Defendant owed him a duty of care, the duty of care was breached and the Plaintiff suffered loss and damage.

Determination by the Court

- [17] Negligence, as a tort, has been defined as the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do*. See: *Blyth v Birmingham Water Works (1856) II EX 78*. To establish the tort of negligence, the plaintiff must establish that there was a legal duty of care owed to him or her; that the duty of care was breached by the named defendant; and that damage or injury was suffered by the plaintiff. See: *Donoghue v Stevenson (1932) UKHL 100*.
- [18] In the present case, the evidence adduced shows that the 2nd Defendant swerved and veered off across the road into the way of the oncoming traffic thereby knocking the Plaintiff who was riding on a motorcycle. According to the particulars of negligence on the part of the 2nd Defendant as set out in the plaint, the 2nd Defendant failed to keep a proper look out, drove recklessly and dangerously in disregard of other road users, swerved off the road and rammed into oncoming traffic. The Plaintiff confirmed this occurrence in his testimony which is corroborated by the evidence of the police officer that visited the scene (PW4) and by the contents of the police report (PE8). I am in position to believe that the said evidence represents a correct account of what transpired.
- [19] According to the evidence, the accident happened in the morning hours and there is no evidence of anything that could have disrupted the 2nd Defendant who, after all, was expected to take precaution against foreseeable risks which he did not. The 2nd Defendant was bound to anticipate the possibility of colliding with oncoming traffic and was thus under duty to regulate the speed at which he was driving. PW4 told the Court that the road was wide enough at 7.5 meters wide which, if the 2nd Defendant was driving at a reasonable speed, would have accorded him the opportunity to find ways of controlling the motor vehicle. Failure by the 2nd Defendant to do so amounted to breach of duty of care that is

imposed on him under the law.

- [20] In law, a driver of a motor vehicle is under duty to take reasonable care for the safety of other traffic on the road to avoid a collision which duty involves taking all measures to avoid collision. In **Kato Paul vs Uganda Transport Corporation [1975] HCB 119**, it was stated that once a possibility of danger emerging is reasonably apparent, and no precautions are taken by the driver, then such driver is negligent, notwithstanding that the other driver or road user is in breach of some traffic regulations or even negligent. In the present case, where in Uganda, the High way code mandates drivers to keep left, the 2nd Defendant's collision with the Plaintiff's motorcycle on the extreme opposite side of the road is prima facie proof of negligence on the part of the 2nd Defendant. Such would also import the application of the principle of **res ipsa loquitor** (facts speak for themselves) which the Plaintiff pleaded in the alternative.
- [21] Having proved that the 2nd Defendant was liable in negligence, the Plaintiff has to prove further that the 1st Defendant, as the employer of the 2nd Defendant, is vicariously liable for the conduct of the 2nd Defendant. Counsel for the Plaintiff submitted that a master is liable for the tortious acts committed by his servant in the course of his employment. Counsel cited the cases of **Paul Byekwaso vs Attorney General, CA CA No.10 of 2002** and **Bagenda Dyabe Tommy vs Pioneer Easy Bus Limited, HCCS No. 36 of 2016**. I agree with the position of the law as cited by Counsel for the Plaintiff. As already shown above, the 2nd Defendant's employment with the 1st Defendant and the fact that the former was acting in the course of his employment are not in dispute. The evidence before the Court is sufficient to enable the Court reach a conclusion that the 1st Defendant is vicariously liable for the actions of the 2nd defendant. The Plaintiff has, therefore, satisfied the Court on a balance of probabilities that the Defendants are jointly and severally liable in negligence as alleged. The 1st issue is answered in the affirmative.

Issue 2: Whether the Plaintiff was negligent?

- [22] The Defendants averred in their Written Statement of Defence that the accident was caused by the Plaintiff's negligence because he was not wearing a helmet, lacked a driving permit, was carrying two passengers and was driving in the wrong lane and, as such, the Defendants owed him no duty of care. On the Plaintiff's part, it was submitted by Counsel for the Plaintiff that, to the contrary, evidence has shown that the Plaintiff was riding in his lane. Counsel stated that there was no evidence before the Court that the Plaintiff lacked a driving permit or was not wearing a helmet. Counsel cited the case of **Bagenda Dyabe v Pioneer Easy Bus Limited HCCS No. 36 of 16** where court stated that even if the plaintiff had won a helmet, it would not have prevented the injuries suffered on the facts of that case. Counsel argued that even in the present case, wearing a helmet would not have prevented the injuries sustained by the plaintiff which were in the lower limbs.

Determination by the Court

- [23] As submitted by Counsel for the Plaintiffs, this issue ought to have come before the Court as a plea of contributory negligence which, however, the Defendants did not prefer in their pleadings. Nevertheless, under the principle of contributory negligence, the defendant has to show that the plaintiff's negligence contributed to the causation of the accident. In the case of **Embu Public Road Services Ltd v Riimi [1968] EA 22,** the Court of Appeal held that where circumstances of the accident give rise to an inference of negligence, the defendant in order to escape liability has to show that there was another probable cause of the accident which does not connote negligence and that the explanation for the accident was consistent only with an absence of negligence on the part of the defendant. It follows, therefore, that if the explanation sought to be relied upon by the defendant is that the plaintiff was responsible for any negligent acts or omissions in the prevailing circumstances, the defendant had to expressly plead as such by way of a plea of contributory negligence.
- [24] Looking at the rules of pleading, specifically Order 6 rule 1 and Order 8 rule 3 of the CPR, their combined effect is that a defendant in the written statement of defence ought to make a brief statement of material facts on which he or she relies and every denial of a material fact must be specific and not evasive. In the present case, the Defendants did not make any plea of contributory negligence. As required in order to prove breach of duty of care, the Defendants had to set out particulars of negligence, which they did not. As such, the Defendants cannot set up a bare claim of negligence as a defence to a suit founded on negligence. The Defendants ought to have cited any of the known defences under the law of negligence. In the circumstances, having already found that the Defendants are liable in negligence on the evidence and facts before the Court, and in absence of a claim for contributory negligence or evidence thereof, the 2nd issue is answered in the negative.

Issue 3: What remedies are available to the parties?

- [25] The Plaintiff claimed for special damages of UGX 18,250,000/= being payment for lost and future income for the estimated hospitalization period of one year putting each day at UGX 50,000/=. The law on special damages is that they must be specifically pleaded and strictly proved in evidence. See: **Uganda Telecom Ltd Vs Tanzanite Corporation [2005] 2 EA 331 at P.341**. Although proof of such damages does not always have to come by way of documentary evidence, in order to prove special damages by oral evidence, the oral evidence adduced by the party has to be cogent. See: **Gapco (U) Ltd v A. S Transporters Ltd [2009] 1 HCB 6**. In **John Eletu v Uganda Air Lines Corporation [1984] HCB 44**, the court reiterated the position that production of receipts or documentary evidence is not the only way or method of proof of special damages; cogent oral evidence may suffice. Further, under the law, lost income or earnings have to be pleaded and proved as special damages.
- [26] On the facts before me, the Plaintiff was operating as a commercial motor cycle rider (boda boda). There is no specific formula for ascertaining earnings in an informal sector like the boda boda industry. Such earnings are usually variable and normally depend on a number of

factors such as the place of business, the weather conditions of the day, the type of motorcycle, the experience of the rider, among others. In evidence, it was stated that the Plaintiff was based at Bweyogerere Freedom City stage operating in Kampala and the surrounding areas. The Plaintiff made a claim that he was earning UGX 50,000/= per day. There is no evidence to controvert this assertion. The fact that the Plaintiff was earning as a boda boda rider is undisputed. The other fact that he stopped doing his work as a result of the accident and that he spent approximately a year under hospitalization before he could do any other work is equally uncontroverted. In the circumstances, I am in position to believe that the sum claimed by the Plaintiff of UGX 50,000/= per day in earnings is reasonable and the same is taken by the Court as proved by the Plaintiff. That translates to UGX 18,250,000/= for a period of one year as claimed by the Plaintiff. I accordingly award the sum of UGX 18,250,000/= as special damages to the Plaintiff.

- [27] The Plaintiff also prayed for the sum of UGX 5,000,000/= under another head of special damages being the total sum in medical expenses incurred by him. The Plaintiff exhibited six receipts in evidence totaling to a sum of UGX 1,540,000/=. It was further claimed that expenses were incurred on traditional bone setting attendants, and transport both in Kampala and Hoima which items were not and are usually not receipted. The law on special damages has already been stated above. In evidence, PW2 stated that several undocumented costs on transport, feeding and medical supplies were incurred and UGX 1,700,000/= was paid to traditional bone and joint setting masseurs who handled the patient. Although this evidence is unchallenged, I find it difficult to place any kind of certainty on the sums claimed. In the circumstances, I will only award the sum of UGX 1,540,000/= which has been specifically proved as special damages. The other unascertained expenses will be taken into consideration when assessing general damages. I therefore award a sum of UGX 1,540,000/= on this head of claim for special damages.
- [28] Regarding the claim for general damages, Counsel for the Plaintiff claimed for a sum of UGX 80,000,000/= for the pain, inconvenience, suffering and reduction in capacity to earn a living. The law on general damages is that the damages are awarded at the discretion of the court and the purpose is to restore the aggrieved person to the position they would have been in had the breach or wrong not occurred. See: **Hadley v. Baxendale (1894) 9 Exch 341*; *Charles Acire v. M. Engola, HC Civil Suit No. 143 of 1993** and **Kibimba Rice Ltd v. Umar Salim, SC Civil Appeal No. 17 of 1992.** In the assessment of general damages, the court should be guided by the value of the subject matter, the economic inconvenience that the plaintiff may have been put through and the nature and extent of the injury suffered. See: **Uganda Commercial Bank v. Kigozi [2002] 1 EA 305**. The damages available for breach of contract are measured in a similar way as loss due to personal injury.
- [29] In the present case, the Plaintiff has shown that he sustained fractures of the femur and tibia of the right lower limb and on the left lower knee which could lead to permanent disability of both lower limbs. The Plaintiff stated that as a result of the said injuries, he sustained permanent physical and mental incapacitation leading to extreme limitations in

his ability to perform physical and mental tasks which has made it impossible for him to continue with either his previous occupation or other commercial means of deriving livelihood. He has thus been rendered a beggar for his survival and that of his family. Considering the facts and circumstances of this case, and looking at some decided cases some of which have been reviewed by the Plaintiff's Counsel in their submissions, I am convinced that an award of UGX 80,000,000/= is appropriate and I award the same as general damages to the Plaintiff.

- [30] On interest, the discretion of the court on award of interest is provided for under Section 26(2) of the Civil Procedure Act. The basis of an award of interest is that the defendant has kept the plaintiff out of his money and the defendant has had the use of it himself and ought to compensate the plaintiff accordingly. See*: Premchandra Shenoï and Anor Vs Maximov Oleg Petrovich SCCA No. 9 of 2003* and *Harbutt's 'plasticine' Ltd V Wayne tank & pump Co. Ltd [1970] QB 447*. In determining a just and reasonable rate of interest, court takes into account the ever rising inflation and drastic depreciation of the currency. A plaintiff is entitled to such rate of interest as would not neglect the prevailing economic value of money, but at the same time one which would insulate him or her against any further economic vagaries and the inflation and depreciation of currency in the event that the money awarded is not promptly paid when it falls due. See *Kinyera v the Management Committee of Laroo Building Primary School HCCS 099 of 2013*.
- [31] In this case, the Plaintiff prayed for interest on all the sums awarded at the court rate. I accordingly award interest on the special damages at the rate of 10% p.a. from the date of filing the suit until full payment. I award interest on the general damages at the rate of 8% p.a. from the date of judgment until payment in full.
- [32] Regarding costs of the suit, under Section 27 of the Civil Procedure Act, costs follow the event unless the court upon good cause determines otherwise. Given the findings above, the Plaintiff is entitled to costs of the suit and the same are awarded to him.
- [33] In the result, judgment is entered for the Plaintiff against the Defendants jointly and severally for payment of;
- a) UGX 18,250,000/= being special damages for loss of earnings.
 - b) UGX 1,540,000/= as special damages for medical expenses.
 - c) UGX 80,000,000/= as general damages.
 - d) Interest on (a) and (b) above at the rate of 10% p.a. from the date of filing the suit until payment in full.
 - e) Interest on (c) above at the rate of 8% p.a. from the date of judgment until full payment.
 - f) The taxed costs of the suit.

It is so ordered.

Dated, signed and delivered by email this 22nd day of February, 2023.

Boniface Wamala JUDGE

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Prepared on 14 October 2026 · Esheria