THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT JINJA

CIVIL SUIT NO. 20 OF 2016

MASH EAST AFRICA LTD :::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

ROAD TAINERS (MOMBASA) LIMITED ::::::::::::::::::DEFENDANT

JUDGMENT

BEFORE: HONOURABLE JUSTICE EVA K. LUSWATA.

1.0 Introduction and brief background.

1.1 The plaintiff's claim in this suit is for special and general damages, arising from an accident that occurred on 20/6/15 at Kitega along Jinja Kampala High way between their motor vehicle Scania bus registration No. **KCA 768M** and motor vehicle **No.KAN 66IX/ZB4273 Mercedes Benz** trailer belonging to the defendant company and at the material time being driven by one Kasiimu Tom Wathome an employee of the defendant.

1.2 It is claimed that the defendant's driver was negligent and that as a result of the accident, the plaintiff's motor vehicle was extensively damaged, and required proportionate repairs in order to put it back on the road. That subsequent investigations revealed that the defendant's driver was responsible for the accident, for which he was prosecuted at the Lugazi Chief Magistrate's Court.

1.3 The defendant failed to file a defence on time and on 15/2/2016, the plaintiff represented by M/s Katende, Sempebwa & Co., Advocates & Consultants procured an order for *exparte* proceedings against them. The plaintiff presented four witnesses in all and hearing of the case was by witness statements and written submissions all of which shall be considered in my judgment.

2.0 Issues.

In their submissions, plaintiff's counsel raised the following issues for resolution:-

1. **Whether the defendant is liable in negligence for the loss and damage occasioned to the Plaintiff's vehicle.**
2. **What remedies are available for the plaintiff in the circumstances?**

RESOLUTION OF ISSUES.

3.0 ISSUE 1

3.1 Citing much authority, plaintiff's counsel argued that the defenant's driver owed a duty of care to other road users and was negligent because he failed to take reasonable care to avoid a collision with the plaintiff's motor vehicle. That by driving on the right hand side of the road, he breached that duty of care and the doctrine res ipsa liquitor would apply in the circumstances to prove that he was at fault and offered no explanation to rebut those facts. That the driver being employed by the defendant, and acting within the course of his employment, the defendant incurred a liability in respect of his negligent acts. They invited court to consider that negligence was pleaded and proved and that the plaintiff's motor vehicle which suffered extensive damages was repaired at a cost. They supported the claim for general and special damages and costs of the suit.

3.2 Negligence as a tort has been widely defined and understood. The definition given by the decision in **Blyth Vs Birmingham Water Works (1856) 11 EX.78,** comes to mind. It was held that:-

"Negligence'' is the omission to do something which a reasonable man, guided upon those considerations which ordinary regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

The court in the much celebrated decision of **Donoghue V Stevenson (1932) AC 562**providedwhat I can refer to as the ingredients of negligence, as follows;

i. The defendant owed the plaintiff, a duty care.
ii. The defendant breached that duty resulting into damage on or against the plaintiff.
iii. The defendant and no other, is liable for the breach of duty.

3.3 Closer to home, the High Court in the case of **Paulo Kato Vs Uganda Transport Corporation (1975) HCB** found that:-

A driver of a motor vehicle is under a duty to take reasonable care for the safety of other traffic on the road to avoid a collision. This duty involves taking all measures to avoid a Collison. Once a possibility of danger emerging is reasonably apparent, and no precautions are taken by that driver, then the driver is negligent, notwithstanding that the other driver or road user is in breach of some traffic regulations or even negligent.

3.4 Justice C. Byamugisha (as she then was) while evaluating a claim of negligence as a result of an accident, observed that a motor vehicle does not normally block others without some negligence on the part of the driver. She further held that, " in this particular case, it was incumbent upon the defendant to show either there was a probable cause on his part or the accident was due to circumstances beyond his control".See **F. J Ijala v Corporation Energo Project (1988-1990) at p. 123.** This is because, the law imposes a duty on a person who drives a vehicle on a road to use reasonable care to avoid colliding with other road users.

3.5 I do agree with plaintiff's counsel that it is also the position of our law that, in a cause of action based on negligence, the particulars of negligence must be pleaded, and that is the case even where the doctrine of res *ipsa loquitor* is invoked. See for example **Mukasa Vrs Singh & Ors (1969) EA 422.** It is a requirement that the plaintiff in their pleadings states the facts upon which the defendant's duty to the plaintiff is founded and also show the precise breach of duty complained of, as well particulars of the damage sustained. This was satisfied in paragraph 5 of the plaint where it was stated that Wathome drove his motor vehicle on the wrong side of the road and entered the road without due regard to other road users thereby causing an accident that extensively damaged the plaintiff's motor vehicle.

3.6 Again once the facts of negligence are established, the defendant is duty bound to rebut them. It was the decision of the Court of Appeal in **Embu Public Road Services Ltd Vrs Riimi (1968) EA 22** that *"where the circumstances of the accident give rise to the inference of negligence, then the defendant in order to escape liability has to show that "there was a probable cause of the accident which does not connote negligence" or that*

"that the explanation for the accident was consistent only with an absence of negligence" **Msuri Muhhiddin Vrs Nazzor Bin Sef (1960) EA 201 followed.**

3.5 PW2 was driving the plaintiff's motor vehicle at the material time. He stated that Wathome the defendant's driver caused the accident and was for that reason arrested and charged of careless and inconsiderate use of a motor vehicle. PW1 as the co-driver supported that evidence. He stated that the accident happened at about 4pm. He was woken up by a loud bang. He noted that the defendant's motor vehicle had left their side of the road and knocked their bus. That he did speak to Wathome after the accident and he confessed that just before the accident, he was trying to overtake a commuter taxi. PW3, the plaintiff's manager arrived at the accident scene at about 5.30am. He found the plaintiff's bus laying on the road with the defence motor vehicle on top of it. He noticed that the defendant's motor vehicle which had a trailer had swerved to the right when maneuvering a sharp corner thereby knocking the plaintiff's bus. He presented an accident abrastract report, vehicle inspection report and sketch plan obtained from the Lugazi Police, the latter who had been called and taken charge of the accident scene.

3.6 The evidence that Wathome swerved from his side of the road to cause the accident was well supported by the documentary evidence provided. It is shown in the Sketch plan (Exhibit 6) (drawn at around 6 am on 20/6/15) that after the accident, the plaintiff's bus remained in position on the right side of the road and with the trailer of the defendant's motor vehicle partly lying on top of it. The front side of the defendant's motor vehicle was lying on the opposite side of the road, nearly four meters from where it should have been. The suspected point of impact was on the side of the bus. It was shown in the Abstract report dated 22/6/15 (Exhibit 5) issued by the I.O.V. Lugazi Police that, Wathome was responsible for the accident. He was accordingly arraigned in Lugazi Court for prosecution under Criminal Case No. LGZ-CO-564-15 for a charge of careless and inconsiderate use of a motor vehicle. It was stated and not denied that he has since jumped bail, which would be a strong indication that he has no defence to the charge and cannot exonerate himself from causing the accident.

3.7 It would be fair to conclude that in the absence of an explanation why the defendant's motor vehicle was being driven on the right hand and not left hand side of the road, Wathome would be handling a motor vehicle in total disregard of other road users. As a

result he knocked the plaintiff's vehicle, resulting into extensive damage, death and injuries on the occupants of the bus. It was stated in the abstract report that at the time of the accident, the weather was clear and the road was found to be in good repair. Under such circumstances, I would agree with plaintiff's counsel that the doctrine of res ipsa would apply. Wathome must have driven the motor vehicle under his control in a reckless and negligent manner, attempted to overtake another vehicle at a place with a slight curve in the road (also mentioned in the abstract report) and by doing so, rammed into the plaintiff's bus.

3.8 As rightly pointed out by plaintiff's counsel, it is important in the case of this nature to show that the act complained of was done in the course of employment. Doing so is the only way by which the defendant can be held responsible for the negligence of Wathome, stated to be their employer. In the case of **Muwonge v Attorney General, 1967** EA It was held that a master is liable for the acts of their servant committed within the course of their employment. That the master remains so liable whether the acts of the servant are negligent or deliberate, wanton or criminal. The Court set a test: Where the acts done in the course of employment? If so, the acts may be so done even though they are done contrary to the orders of the master. Similarly, the High Court in the case of **Ketayomba v Uganda Securiko Limited [1977]HCB at 170,** held inter alia that *"an employer is still liable for the tortuous acts of his servant if the servant acted dangerously, recklessly or for his own benefit as long as he was on his master's duty when he inflicted the tort"* .

3.9 In the case of **John Imina v Arua Town Council [HCCS] No.01245 of 1973**, it was held that once the plaintiff pleaded and proved that at the time of the accident, the driver was driving the car and he was employed to drive, a *prima facie* case has been established that he was driving within the course of his employment and the burden of proving the opposite, shifts to the employer. In this case, going by the testimony of **PW1**, **PW2** and **PW3,** a *prima facie* case was already established as they both confirmed in their testimonies that Wathome was a driver of the defendant driving the defendant's vehicle at the time of the accident. The entries in Exhibits 5 and 7 confirmed the fact that Wathome was the driver in the motor vehicle that caused the accident and indeed he is being prosecuted for his negligence. It was also confirmed that the defendant was the owner of the erring motor vehicle and Wathome employer. The defendant who voluntarily did not

participate in the proceedings did not adduce any evidence to the contrary. I would conclude that the defendant is vicariously liable for the negligent acts of Tom Wathome Kasimu, his driver.

4.0 ISSUE NO.2

4.1 The plaintiff prayed for both special and general damages. The principle of the law is that "special damages must be specifically pleaded and proved. Strict proof is not restricted to documentary evidence only and in some cases, evidence of a person who received or paid certain monies or testimonies of experts conversant with matters of the claim can suffice." See **Stanbic Bank Uganda Ltd Vs Sekalega. (Civil Suit No. 18 of 2009).** Special damages were pleaded in the plaint as follows:-

Break down charges of **Kshs150,000/=,** Vehicle Repair costs of **Kshs 3,647,263/=,** Assessment costs of **Kshs 14,000/=, e**xpected bus revenue (less expenditure) of **Kshs 9,430,151/=; making a total of Kshs. 13,241,414/=.** Beyond the pleadings, the plaintiff would still be expected to prove their claim.

4.2 PW3 being the plaintiff's manager and PW4 being her workshop manager presented most of the evidence supporting the claim for special damages. Having seen the nature of damage on the plaintiff's vehicle and the fact that lives were lost in the accident, I am persuaded that it was a very serious accident and therefore the plaintiff's bus required proportionately extensive repairs. There was no contest to the fact that the damaged bus was involved in an accident, towed and then repaired in Nairobi, all at a cost. Even then, it would still be incumbent upon the plaintiff to strictly prove their damages.

4.3 PW3 testified that the plaintiff's bus was damaged to the point of being nearly written off. It is therefore conceivable that it had to be towed from the accident scene and taken to Nairobi for repairs. The claim for KES 174,000 in Exhibit 12 is allowed. PW4 stated that he received the bus in Nairobi in June 2015. This contradicts the claim in Exhibit 11 for towing charges paid in Jinja on 20/9/15, nearly three months after the damaged bus was received in Nairobi. That claim is denied. It is conceivable that the plaintiff needed an assessment of the damages before carrying out repairs. The claim for KES 14,000 as fee paid to Havilah Assessors Ltd in Exhibit 14 and 15 are accordingly allowed. The fact that the bus was repaired at a cost was also not controverted. Thus the claim in Exhibits

17-84 for the fabrication, spraying, redecoration and rebranding of the plaintiff's bus in the sum of KES 3,647,263 are also allowed.

4.4 The plaintiff also made a claim for lost revenue of 98 days, which would be the period that their bus was under repair. Going by the kind of damage and the fact that the bus had to be carried to Nairobi, that period would be realistic. The calculations were based on revenues earned during April to June 2015. Although no actual books of account were provided, Exhibit 13A gave a fair account of what was earned on a daily basis to make a total of **KES 2,233,200**. PW3 Wasswa explained that the bus made a return journey to and from Nairobi each day making a total of **KES 4,466,400** in one month. I would deduce that the bus earned a daily income of about **KES 148,880**. It would thus have earned an income of **KES 14,590,240** in 98 days. From that amount I would deduct **KES 5,160,089** that the plaintiff conceded accounted for expenses on the bus in 98 days. I would allow an award of **KES 9,430,151** for that item. I would as a result make an award of **KES13,265,414** as the total incurred as special damages.

4.5 In addition the Plaintiff prayed for general damages. No evidence was given by the plaintiff's witnesses to explain this claim but it was submitted by their counsel that it would atone for loss of business and inconvenience.

4.6 General damages are damages which the law implies or presumes naturally to flow or accrue from a wrongful act and may be recovered without proof of any amount. **(See Traill v Bowker, (1947) 14 EACA 20) and Patel and Amin (1955) 11 EACA 1 post 258,** cited in East African cases on the law of Tort by Veitchat page 253.

4.7 Measurement of quantum of damages is a matter for the discretion of the individual judge which of course has to be exercised judicially. It would be helpful for one claiming damages to guide court on the quantum and how it is arrived at. In the absence of such guidance, the Court's decision on a fair award may be aided by many considerations which could include, the nature of the business of the plaintiff, and extent of the injury to their operations and prior decisions that are relevant to the case in question. **See for example, Moses Ssali a.k.a Bebe Cool & Others Vs A.G and Others HCCS 86 2010.** The decision of the Court in **Uganda Commercial Bank Vs Deo Kigozi 2002 EA 293,** gave useful guidance on what to follow. It was held that:-

"…….in assessment of the quantum of damages, courts are mainly guided by the value of the subject matter, the economic inconvenience the party may have been put through and the nature and extent of the breach or injury suffered." General damages are those that the law presumes to arise from the direct, natural or probable consequences of the act complained of by the victim; they follow the ordinary course and relate to all other terms of damage, whether pecuniary or non-pecuniary. General damages would include future loss as well as damages for past loss and suffering.

4.8 When making a decision on the appropriate damages to award, I will thus take into consideration the fact that there was uncontroverted evidence that the defendant's agent was inexplicably negligent and there was injury to many people. Also, the defendant did not bother to meet the plaintiff's loss when notified. The plaintiff who was in the transport business, had to carry out repairs of their motor vehicle in order to mitigate their loss. I also take into consideration that this case has taken nearly three years to resolve and that in my decision, an award for special damages for the car repairs has been made. In the circumstances, I find an award of Shs. UGX 37,000,000/= (Uganda Shillings thirty seven Million) as appropriate in the circumstances. The award shall attract an annual interest at 15% from the filling of the suit until payment in full. The plaintiff is in addition awarded costs of the suit.

4.9 For the avoidance of doubt, judgment is entered exparte against the defendant in the following terms:

a) The claim in negligence against the defendant in respect of a motor accident that occurred on20/6/2015 succeeds

   The plaintiff is awarded **Kshs**. **13,265,414**(or its equivalent in Uganda currency at the prevailing forex bureau rates) in special damages

b) The plaintiff is awarded Ug shs. **50,000,000** in general damages

c) The award of damages attracts interest at 15% per annum from the date of judgment the until payment in full

d) The plaintiff is awarded costs of the suit

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EVA K. LUSWATA

JUDGE

05/09/2019