

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA**  
**HOLDEN AT KAMPALA**

**CORAM**     **HON. MR. JUSTICE S.T. MANYINDO, DCJ;**  
                  **HON. MR. JUSTICE G.M. OKELLO, J.A.;     AND**  
                  **HON. MR. JUSTICE S.G. ENGWAU, J.A**

**CIVIL APPEAL NO.44 OF 1997**

**BETWEEN**

[1) SUGAR CORPORATION OF UGANDA LTD.) :::::::::::APPFLANTIS

[2) KAGIRI RICHARD

AND

MILLY MASEMBE: :::::::::::RESPONDENT

*(Appeal from the decision of the High Court (C.M. Kato as he then was) dated 25th August 1997 in High Court Civil Suit No. 646 of 1995).*

**JUDGEMENT OF G.M.OKELLO.J.A**

This is an appeal against the decision of High Court (C.M. Kato as he then was) dated 25th August 1997 in High Court Civil Suit No. 646 of 1995.

The essential facts giving rise to the appeal are that on 28/12/93, the 1st appellant's Trailer drawn Tractor driver by the 2nd appellant was transporting sugar canes along Mukono/Jinja road when on reaching opposite Namagunga Secondary School it suddenly broke down covering part of its side of the road. A minibus in which the respondent, a business woman, was travelling at night from Kampala towards Jinja hit the back of the stationary Tractor. She sustained injuries and was rushed to Kawolo Hospital for treatment. She was hospitalised for two months and after discharge, she remained on crutches for a further three months. Her personal properties like cash

of Kenya

Shillings 100,000/= and 20 Films worth 600,000/= were lost in the accident.

The trial Judge found the driver of the tractor 80% to blame for ( the accident because he left the broken down Tractor on the road at night unguarded, unlit and without any warning that it was broken down. He found that the driver of the minibus was 20% to blame for his failure to see the stationary Tractor and to avoid the accident. The driver of the minibus was neither party to the suit nor a witness therein. The respondent did not want to go against him. The trial judge entered judgment for the respondent and made the following awards;

[1] 1,600,000/= equivalent of KShs 100,000/= lost by the respondent in the accident.

[2] 600,000/= value of 20 Films lost by the respondent in the accident.

[3] 407,000/= costs of Medical Treatment incurred by the respondent as a result of the accident.

[4] 3,000,000/= Loss of earnings by the respondent for two months when she was hospitalised.

[5] 7,000,000/= General Damages for pain and injuries suffered by the respondent as a result of the accident.

[6] Interest of 10% per annum on the decretal amount from the date of judgment till payment in full.

Hence this appeal.

There are four grounds of appeal namely:

[1] The learned trial Judge erred in his evaluation of the evidence and came to wrong findings.

[2] The learned trial Judge erred in his apportionment of liability between the appellants and the driver of Motor Vehicle Reg. No. UPS 847 in which the respondent was traveling.

[3] The trial Judge erred in holding the appellants responsible for the allegedly lost property.

[4] The trial Judge erred in his assessment in respect of loss of earnings by the

respondent.

Alternatively:

[51] The trial Judge erred by awarding general damages which were in the circumstances of the case excessive.

There was also a cross appeal by the respondent. It was based on six grounds but only the following three were argued: “[1] The learned trial Judge having found as a fact and held that the first defendant was vicariously liable for the negligent act of the second defendant, erred in law to order that the two defendants should pay the decreted (sic) amount in equal shares.

[4] The learned trial Judge erred in law and on the facts placed before him when he awarded the plaintiff a paltry Shs. 3,000,000/= (three million) as loss of earnings.

[5] The learned Judge exercised wrong principles and as such came to a wrong conclusion when he warded (sic) interest of 10% per annum from the date of Judgment till payment in full.”

The other grounds were abandoned. Counsel for the parties submitted written arguments on the cross appeal.

On the main appeal, the four grounds 1-4 were argued together. The appellant’s main criticism against the trial Judge’s judgment was on the Judge’s evaluation of the evidence on record. Mr. Serwanga, learned counsel for the appellant, contended that the trial Judge did not properly evaluate the evidence on record and that as a result he came to the wrong conclusion that the second appellant was mostly to blame for the accident. The trial Judge’s reason for that conclusion was that the second appellant abandoned the broken down Tractor on the high way at night unattended to, unlit and without any warning that it was broken down. Learned Counsel submitted that if the trial Judge had properly evaluated the evidence before him, he would have found from the evidence of Richard Kageru (PW1), and Charles Lukwago (PW4) that the second appellant was not at all responsible for the accident. He had put branches of trees on the road in front and at the rear of the stationary Tractor as a warning sign to other road users. He also submitted that the reflectors on the rear of the Tractor Trailer were not obstructed by sugar canes as Benjamin Namanya (PW3) and Juventine Apunyo (PW4) testified. In Counsel’s view, the testimonies of DW1 and DW4 were corroborated by Exh D1, the photographs of the scene of the accident

In response, Mr. Kiapi, learned Counsel for the respondent, submitted that the trial Judge's findings were supported by the evidence of PW3 and PW4 both of whom testified that the broken down Tractor was abandoned on the highway at night, unlit and without any warning that it was broken down

The trial Judge dealt with this issue in his judgment as follows: -

'The evidence outlined by the Plaintiff's side clearly shows that the vehicle (Tractor and its trailer) were abandoned on the road and at the time of the accident there was nothing to indicate that the vehicle had broken down. I do not believe the story as told by the driver and his turn-boy that at the time of the accident the vehicle had signs to show that it had broken down so as to warn other road users about the danger ahead. I accept the evidence of the Plaintiff and her witnesses to the effect that the vehicle was left on the road unlit and unattended to this leaving no sign warning other road users of the existence of the tractor on the road. The Police officer Mr. Benjamin Namanya who saw the vehicle when going to Mukono and who saw it on his way back at the time when the accident happened was an independent witness and had no reason for telling this Court a lie when he said that there were no signs to indicate that it had broken down, in the same way the evidence of his driver Apunyo also was evidence of an independent witness. He agreed also that the vehicle was parked on the road without anything to show that it had broken down and there were no reflectors on either the Tractor or its Trailer.

I also agree with Apunyo's evidence that the vehicle was dangerously parked almost in the middle of the road so that if anybody had to by pass it, he had to use the lane for the vehicle facing the opposite direction. This piece of evidence is supported by the evidence of the second defendant who said that the Tractor stopped abruptly and he left it at the place where he was driving it which means it was on the driving lane not off the road. There was no evidence from the defence side to show that after the vehicle had broken down it was pushed aside in order to clear the road for other traffic. The pictures Ex.D1 of the photograph (sic) taken by DW2 S. Ochieng do not show any object lying on the road showing that some branches had been placed on the road. The same pictures also do clearly show sugar canes dangling on the side of the Trailer No. UWV 469.

In these circumstances I find that Kagiri was negligent when he left both the Tractor and its Trailer parked on the road without being guarded and without any sign that it had broken down.” Clearly, the trial Judge based his finding that the second appellant was negligent on the evidence of Benjamin Namanya (PW3) and Apunyo Juventine (PW4) whom he described as independent witnesses.

As was stated by Court of Appeal for Eastern Africa in **SELLE AND ANOTHER VS ASSOCIATED MOTOR BOAT COMPANY LTD AND ANOTHER (1968) EA 123 AT P.126**

“An appeal to this Court from a trial by the High Court is by way of a retrial.”

The principles upon which this Court acts in such an appeal was spelt out in **SELLE AND ANOTHER (supra)** as follows:

“...the principles upon which this Court acts in such an appeal is well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this regard. In particular, this Court is not bound necessarily to follow the trial Judge’s findings of facts if it appears either that he has clearly failed on some points to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (**Abdul Hameed Saif Vs Au Mohamed Sholan [1955] 22 ECA 270.**)”

Rule 29 (1) (a) of the Court of Appeal Rules Directions, 1996, Legal Notice No. 11 of 1996 reinforces the above principles when it empowers this Court to reappraise the evidence on record and to draw inference of fact. The relevant rule says that:

“On any appeal from a decision of the High Court in the exercise of its original jurisdiction, the Court may,

(a) re-appraise the evidence and draw inference of fact,

and

(b).....”

This Court therefore has jurisdiction to review the evidence to determine whether or not the conclusions of the trial Judge can be supported. If not, to draw its own inference of fact.

In the instant case, the evidence of DW1 and DW4 gives the opposite version to that of PW3 and PW4 as to the situation at the scene of the accident. The evidence of DW1 and DW4 show that: -

[1] The Tractor stopped suddenly and it remained on the road where it was being driven. The Tractor was pulling a Trailer carrying sugar canes.

[2] The Tractor/Trailer was on the left hand side of the road as you go to Jinja.

[3] Tree branches were placed in front and at the rear of the place where the Tractor had broken down.

[4] The reflectors were on the Trailer and Tractor.

[5] The turn-boy (DW4) was left to guard the vehicle.

The trial Judge did not believe the above evidence. He also did not wholly believe the photographs of the scene of the accident Ex.D1. Firstly, Ex.D1 (No.39) shows objects (Tree branches) on the road. Secondly, Ex.D1 (No. 28 and 39) both show the position of the Tractor/Trailer as being on the left hand side of the road as you face Jinja side. It partially covered that side of the road. It was not dangerously parked almost in the middle of the road as the trial Judge found. Thirdly, Ex.D1 (No.22) shows the rear reflectors on the Trailer. From this photograph, the dangling sugar canes did not obstruct the reflectors on the rear of the Trailer. They can be seen clearly. The photographs (Ex.D1) therefore corroborated the evidence of DW1 and DW4 in material particulars. Photographs are more graphic evidence and in this case depicted more accurately and reliably the situation at the scene of the accident.

In view of the above, I am unable to agree with the trial Judge's findings of fact regarding the situation at the scene of the accident and consequently, the blameworthiness for the accident. It is plain from the above evidence that the second appellant was driving the Trailer - pulling Tractor diligently on the far left hand side of the road when it suddenly broke down. It is also plain that warning signs in the form of tree branches were placed on the road in front and at the rear of the

stationary vehicle. Further, the reflectors on the rear of the trailer were clearly visible. These were sufficient warnings to any vehicle or other road users approaching the stationary Tractor.

For these reasons, I am unable to agree with Mr. Kiapi that the 30 learned trial Judge properly evaluated the evidence that was before him. If he did, he would have found as a fact that the second appellant, who was the driver of the Tractor, had done all that was expected of him in the circumstances. He would have also found that it was the driver of the minibus Reg. No. UPS 847 who hit the back of the stationary Tractor Trailer, that drove without any proper look out to avoid the accident. If he had driven with a proper lookout, with all those warning signs, then he would have seen the trailer and avoided hitting it.

This ground was therefore well taken. In view of that finding, I see no usefulness in considering the other grounds and the cross appeal.

In the result, I would allow the appeal, set aside the judgment and orders of the lower Court. I would substitute it with an order for a judgment dismissing the respondent's suit with costs here and in the Court below.

Dated at Kampala this 24<sup>th</sup> day of November 1998.

**G.M. OKELLO**

**JUSTICE OF APPEAL**

**JUDGEMENT OF MANYTENDO. DC.J**

I read the judgment of Okello J.A in draft. I agree that this appeal ought to be allowed. All the evidence shows that the driver of the Minibus and not the second appellant was wholly to blame for the accident.

Contrary to the allegation in the respondent's plaint, the second appellant did not carelessly or negligently park the tractor "in the road". The tractor broke down suddenly and remained there. From the photographs of the scene of accident there was plenty of room for other vehicles to pass. The allegations that the tractor did not bear reflectors and that no other warning signs were displayed on the road were disproved by the evidence led by the appellants. It follows that the

appellants were wrongly blamed for the accident. The respondent would have done well to sue the driver of the Minibus.

As Engwau, JA also agrees the appeal is allowed in terms proposed by Okello J.A.

Dated at Kampala this 24<sup>th</sup> day of November 1998

**S. T. MANYINDO**

**DEPUTY CHIEF JUSTICE**

**JUDGMENT OF ENGWAU, J.A.**

I have had the benefit of reading the judgment of Okello, J.A. in draft and I entirely agree with it.

I would allow this appeal with the terms proposed by Okello,

Dated at Kampala this...24<sup>th</sup>.day of November 1998

**S.G. ENGWAU**

**JUSTICE OF APPEAL.**