

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT GULU
HCT – 02 – CV – CS – 0086/2002

MRS. JOSEPHINE ETIANG=====PLAINTIFF

VERSUS

THE ATTORNEY GENERAL =====DEFENDANT

BEFORE HON. JUSTICE REMMY K. KASULE

JUDGMENT

The plaintiff who is the widow and the administrator of the estate of the late John Etiang Godfrey filed this suit against the defendant under the Law Reform, (Miscellaneous provisions) Act on her behalf and on behalf of the family of the said deceased who was employed by Prisons Department, and was at the material time, stationed in Gulu. She claimed general and special damages.

The facts giving rise to the cause of action were that on 28.02.2002, the deceased, store keeper to Gulu Prisons, was sent to Loro Government Prison to collect maize. He traveled on a tractor registration number UUO 368 belonging to the Prison Department.

From Loro back to Gulu, between Lira and Kamdini, with the tractor being loaded with maize, it started raining heavily. The driver stopped the tractor, and the deceased together with the driver agreed to take shelter away from the rain by lying under the tractor and its trailer. In the course of taking the shelter, the tractor rolled backwards, stepping over the deceased and killing him.

At trial the issues framed were:

1. Whether death of the plaintiff's husband was caused by the negligence of the defendant's servant/employee
2. Whether the plaintiff's husband negligently contributed to his death.
3. Whether the plaintiff is entitled to reliefs claimed.

As to the first and second issues, PW2 Okello Michael Ocii, testified that he was the driver of the tractor on 29.02.2002 when the accident happened. He was, at that time working with Prisons Department Gulu as civilian staff, as a ton-boy and also as driver of a lorry and tractor both of Prisons Department, Gulu. On 29.02.2002 the officer-in-charge, Gulu Government Prison instructed the three of them, that is the deceased, the witness and one Opira Ben to go, using the tractor, with a trailer attached thereon, to collect maize from Loro. On going Opira Ben, drove the tractor, and on return, he the witness, was the one driving. He had the permission of the prison authorities to drive the tractor.

According to PW2 while along the tarmac road between Lira and Kamdini towards Gulu while climbing uphill, he stopped the tractor and the trailer as there was too much rain and wind. The witness, and the rest who were with him, namely the deceased and Opira Ben, in order to avoid being soaked by the rain decided to take refuge under the trailer. The deceased and Ben Opira were the first to go down on the tarmac under the trailer. The witness followed them. He positioned himself between the big wheels of the tractor and the trailer.

Before taking position as above, the witness, as driver, had left the tractor with the engine on and the handbrake applied in a locking position.

While the three were down on the tarmac, the tractor began rolling backwards down hill, and in the process the tyre of the trailer, which was full of maize, stepped and rolled over the deceased, killing him.

PW2, on seeing the tractor rolling backwards down hill, jumped to the driving seat of the tractor, found the hand brake was down, no longer in a locking position. He pulled the same three or four times, but it could not longer hold. He switched off the engine, then applied the gear, thus stopping the rolling down hill of the tractor. The plaintiff's husband was already dead by this time.

The above evidence of PW2 was not contradicted in any way by the defence.

The law is that the identity of a servant and the fact that that servant was acting in the course of his/her employment at the time the cause of action happened must be established before vicarious liability can be found. **See Supreme Court Civil Appeal Number 28 of 1993: Barugahare vs Attorney General: and also: H.C.C.S. at Lira No. 1 of 1998: Livingstone Okello vs Attorney General, both cases unreported.**

The evidence adduced by PW1 and PW2, establish on a balance of probability, that the Prison department, Gulu , employed and authorized, PW2, to drive, be in control and management of the tractor and trailer attached to it, both properties of the said prison department. The purpose of the driving and use of the tractor and trailer, at the material time of the accident, was to transport maize from Loro prison farm to the prison department premises in Gulu.

As to negligence the burden to prove negligence on the part of the defendant is upon the plaintiff. Where circumstances of accident give rise to the inference of negligence, the defendant has to show that there was a probable cause of the accident which does not connote negligence: see **FIRIPO MUNYAMPIRWA V ASSOCIATED MATCH COMPLANY (1993) HCB 63.**

On the evidence before court, it was negligence of PW2 to park the tractor and the trailer fully loaded up with maize, uphill without ensuring that the same could not roll backwards downhill. PW2, as driver, or the other occupants of the tractor and the trailer, never had in possession on the tractor/trailer any log or stone or anything of appropriate size to be used by placing the same behind the wheels of the tractor/trailer to ensure that once stationery the tractor does not roll down hill. No attempt at all was made to look for or apply this to the trailer/tractor.

The fact that, according to PW2, the handbrake that was left in a locking position, was found in an unlocking position, thus allowing the tractor to roll backwards and downhill, justifies an inference, which this court has come to, that the handbrake system of the tractor was faulty.

It is the finding of court that the defendant was negligent towards the deceased in failing to ensure that the tractor and trailer, full of maize, once parked uphill, does not roll back down hill. Defendant was negligent also in having a faulty handbrake system of the tractor.

The evidence on record, however also establishes that the deceased on his own went to take shelter from the rain under a trailer, that was heavy, fully loaded with maize, and that was parked uphill, with every possibility rolling backwards downhill quite obvious to a reasonable person.

While on tarmac under the trailer the deceased also failed to ensure that he is not run over by the tyre of the tractor.

Court finds and holds that the deceased was contributorily negligent for the fatal accident.

In the assessment of this court, the deceased and the defendant contributed in equal share in negligence for the accident.

The answers by court to the first and second issues are that the death of the plaintiff's husband was caused by partly the negligence of the defendant's servant/employee, who was acting in the course and within the scope of his employment, and as such the defendant is vicariously liable, to the extent of the negligence attributed to his death. The plaintiff's late husband also negligently contributed to his death by acting as already pointed out. Each of the defendant and plaintiff's late husband contributed in equal share in negligence for the accident.

The third issue is whether or not the plaintiff is entitled to the reliefs claimed.

Sections 5 and 6 of the Law Reform (Miscellaneous provisions) Act, entitles, the plaintiff as wife, a member of the deceased's family, to recover damages for herself, as administrator, and on behalf of the dependants of the deceased.

She testified that the deceased used to assist her and the family and other dependants financially out of his salary and as a result of his death, she, and the dependants have suffered loss and damages.

The deceased left two children, that court saw, namely: Emoit Felix, a son, aged about 11 years, studying in primary five (5); and Ochom Eddie Louis also a son, aged 8 years, in primary three(3). The plaintiff is their biological mother and she looks after and supports them.

Plaintiff testified to other dependants distant relatives, that the deceased used to support. The evidence on them was however scanty and court did not see them in court. At any rate the scanty evidence there was showed that other relatives of the deceased had taken over supporting them. Court, by reason of those reasons, is not including them in this judgment as dependants of the deceased.

In Sam Osingida & David Opolot (by next friend Peter Ariong) vs AG: C.S. No. 346 of 1991: (1993) KALR P. 102, Court held:-

“on the issue of general damages, it is now well settled that in assessing general damages for loss of dependency, the starting point is the loss of earnings of the deceased out of which is to be assessed the pecuniary benefits accruing to the plaintiffs to provide

the data which in turn is calculated as an annual sum called the multiplicand. The court has to determine the appropriate multiplier. This is based on the number of years the dependency would have lasted. In arriving at this both the ages of the plaintiff and the period the deceased could probably have lived had his life not been prematurely terminated have to be taken into account. The total lost benefits accruing to the plaintiff would therefore be the award of the multiplicand-and-the multiplier”

Court will follow the above principles in respect of this case.

According to evidence adduced, the deceased, aged 27 years at death, was in good health and earning a monthly salary of shs 168,770/=. He supported the plaintiff and two children, whose particulars have been stated. With living up to 55 years, being the expectancy rate in Uganda, deceased had a life expectancy of 28 years.

On the basis that deceased spent at least shs. 180,000/= per month on the family, then the loss of dependency is shs. $(100,000 \times 12 \times 28) = 33,600,000/=$.

Taking into consideration the issue of taxation and unforeseen circumstances, this court, on the guidance of the **Uganda Supreme Court decision of BAT (1984) Ltd vs Selestino Mushongara: Civil Appeal No. 24 of 1994**, finds it appropriate to scale the above sum by 30% which is shs 10,080,000/= leaving a balance of shs $33,600,000 - 10,080,000 = 23,520,000/=$ as the sum for loss of dependency since the deceased was 50% negligent for the accident, then the amount of loss of dependency has to be halved so that the deceased's estate is entitled to only half of the amount, that is: shs. $(23,520,000/=) / 2 = 11,760,000/=$ Accordingly a sum of shs. 11,760,000/= is awarded as loss of dependency.

The deceased died at the young age of 28 years. He left a widow, the plaintiff, and two young sons. The widow lost the consortium of a husband and the two children, a father.

Damages for loss of expectation of life are awardable for loss of prospective happiness that the deceased would have provided, but for the death, to the members of the deceased's estate. These include the deceased's spouse, children, and, where appropriate, parents and other dependants: See **BEHAM VS GAMBLING (1941) 1 ALLER 7**.

In this case, the evidence adduced, establishes that it is the plaintiff, as wife, and the two sons of the deceased who are entitled to be awarded damages for loss of expectation of life.

In H.C.C.S. No. 0071 of 2000 at Gulu, Olanga Ferdinand vs AG and George Labeja, judgment delivered on 10.11.02, Opio Rubby Aweri, J., awarded shs. 10,000,000/= general damages for loss of expectation of life. In that case the deceased died at 35 years old. He was a lands surveyor, and used to spend shs. 130,000/= per month on the family. The learned Judge relied on **Eric Okello & Another vs Wade Adams Ltd: H.C.C.S. No.110/95, at Kampala, in making the award.**

Given the rate of inflation that has eaten into the value of the Uganda shilling since the decision in the **Alanga Ferdinand** case was made, four (4) years ago, i.e. 2002, this court awards shs 12,000,000/= general damages for loss of expectation of life in this case. The amount of shs 12,000,000/= will be halved, to reflect the 50% contributory negligency of the deceased, so that shs 6,000,000/= remains the sum payable as damages for loss of expectation of life.

Plaintiff adduced no evidence to prove any award of general damages for pain and suffering. There was also no credible evidence adduced to prove any special damages. Accordingly no general damages for pain and suffering and no special damages are awarded.

The damages awarded for loss of dependency and loss of expectation of life have to be apportioned to the dependants, with younger ones getting more than the older ones on the basis that younger ones would have had longer periods of dependency than the older ones: See **Leonard Odongo Opio vs Crown Bottlers Ltd: H.C.C.S No. 16 of 1997(at Gulu), unreported, and also H.C.C.S. No. 71 OF 2000 at Gulu: Olanga Ferdinand vs AG and George Labeja** (Supra).

In this case, court, following the above stated principles apportions the amount of damages awarded totaling to shs (11,760,000/= (Loss of dependency) + 6,000,000/= Loss of expectation of life) = 17,760,000/= as follows

- i. Mrs. Josephine Etiang, widow, aged 29 years: shs 4,920,000/=
- ii. Emoit Felix: son ; aged 10-11 years: shs 6,420,000/=
- iii. Ochom Eddie Louis: son aged 8-9 years: shs 6,420,000/=

TOTAL: SHS 17,760,000/=

Accordingly judgment is entered for the plaintiff against the defendant for:-

- a. shs 11,760,000/= general damages for loss of dependency.

- b. Shs. 6,000,000/= general damages for loss of expectation of life.
- c. The general damages in (a) and (b) above are apportioned in the terms stated in this judgment.
- d. The portions for the two minor children are to be paid to the plaintiff for and on their behalf, as the one administering the deceased's estate and also as their biological mother.
- e. The damages awarded in (a) and (b) are to carry interest at 15% p.a. from the date of Judgment, till payment in full.

The plaintiff is awarded half the costs of the suit, given the fact that the deceased was 50% contributorily negligent for the accident.

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Remmy K. Kasule

Judge

31st October, 2008