

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA KAMPALA**  
**(CIVIL DIVISION)**

**CIVIL SUIT NO. 237 OF 2019**

- 1. NEKESA EMEN**  
**2. MAUMBE DISON-----PLAINTIFFS**  
**[Suing as Next of kin to Emen David the deceased]**

**VERSUS**

- 1. ABURA THOMAS**  
**2. ONE 2 ONE LOGISTICS LTD-----DEFENDANTS**

**BEFORE: HON. JUSTICE SSEKAANA MUSA**

**JUDGMENT**

The plaintiffs brought this suit as the next of kin of the Late Emen David who was killed in an accident on 10<sup>th</sup> day of February 2019 at Kireka, by a trailer No KCK 077 R/ZF 8979 being driven by 1<sup>st</sup> defendant Abura Thomas belonging to the 2<sup>nd</sup> defendant.

The said motor vehicle was driven by 1<sup>st</sup> defendant along Jinja road at Kireka when the deceased Emen David while riding a motor cycle was knocked down and killed instantly. The plaintiffs contend that the 1<sup>st</sup> defendant was negligent in execution of his duties when he overtook in a trading centre recklessly thereby knocking down the deceased and failing to brake in time to avoid the accident.

The defendants never filed a defence although the a firm of advocates attempted to file a defence in respect of another company- One-2- One Logistics (U) Limited contending that the 1<sup>st</sup> defendant was not an employee of One-2One Logistics (U) Limited.

The new purported defendant contended that the 1<sup>st</sup> defendant was a male adult Kenyan and was not their employee and that the purported new defendant was not a subsidiary of any other company.

The plaintiff in rejoinder to the defence contended that immediately after the accident as the police was investigating the accident, the 2<sup>nd</sup> defendant was approached and they admitted responsibility. They consequently agreed to settle the matter out of court and executed a settlement between the family and the 2<sup>nd</sup> defendant before the investigating officer at Bweyogerere police station in a sum of 6,000,000/=.

### **ISSUES FOR DETERMINATION.**

- 1. Whether the 1<sup>st</sup> defendant is an employee of the 2<sup>nd</sup> defendant?*
- 2. And If so, Whether the 2<sup>nd</sup> defendant is vicariously liable for the actions of the 1<sup>st</sup> defendant?*
- 3. Whether the 1<sup>st</sup> defendant was negligent in executing his duties thereby causing the death of Emen David through a motor vehicle accident?*
- 4. What are the remedies available to the plaintiff in the circumstances?*

At the trial the plaintiffs presented one witness who testified through a witness statement that was admitted as her evidence in chief and all the documents were exhibited as plaintiffs' exhibits.

The plaintiffs were represented by *Waluku, Mooli & Co. Advocates-Dennis Etot* holding brief for *Waluku Ronnie and Albert Mooli*

Since the defendants did not file a defence in the matter, counsel for One-2One Logistics (U) Ltd (*AF Mpanga & Co. Advocates*) who had filed a defence of a different party was excused from the proceedings and matter proceeded ex-parte.

### **DETERMINATION**

***Whether the 1<sup>st</sup> defendant was negligent in executing his duties thereby causing the death of Emen David through a motor vehicle accident?***

The plaintiffs' counsel submitted on the law governing negligence in respect of cause of death as provided under the **section 5 of the Law Reform (Miscellaneous Provisions) Act** which provides;

*"If the death of any person is caused by any wrongful act, negelect, or default of any person, and the act, neglect or default would, if the death had not ensured, 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 in damages, notwithstanding the death of the person injured, and although the death was caused under such circumstances as to amount in law to a felony"*

Counsel contended that the plaintiffs have proved the case of death through a police report/(abstract of the particular an accident) involved in the said accident PEx 3 & PEx 4. The said accident resulted in the death of the Emen David a copy of the post-mortem report was exhibited in court.

### **Analysis**

Negligence is essentially a question of fact and it must depend upon the circumstances of each case.

The standard of care expected is that a reasonable person proving breach of a duty is usually achieved by adducing evidence of unreasonably conduct in light of foreseeable risks.

The defendants failed to defend the suit and the evidence of the plaintiff remained uncontroverted. This implies that the acts of negligence or negligent conduct of the 1<sup>st</sup> defendant in executing his duties are proved as pleaded and supported by the documentary evidence of the police accident reports and extracts.

Drivers are expected to keep their car under control by avoiding reckless driving or overtaking in town like kireka which is an extremely busy area or avoid any negligent act which would obviously put other road users like the late Emend David in danger. Such danger was foreseeable and would have been avoided had the 1<sup>st</sup> defendant been mindful to ensure that he exercises caution in a busy town.

The sketch map clearly shows how 1<sup>st</sup> defendant knocked the deceased and the deceased motorcycle was in a good mechanical condition and the only explanation is that the 1<sup>st</sup> defendant was negligent when he caused the accident.

## **NEGLIGENCE**

Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Before the liability of a Defendant to pay damages for the tort of negligence can be established, it must be proved that

- a) **The defendant owed to the injured man a duty to exercise due care;**
- b) **The Defendant failed to exercise the due care and**
- c) **The defendant's failure was the cause of the injury or damage suffered by that man.(See H.KATERALWIRE vs PAUL LWANGA [1989-90] HCB 56)**

*“Negligence is conduct, not state of mind- conduct which involves an unreasonably great risk of causing damage.....negligence is the omission to do something much a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something, which a prudent and reasonable man would not do”. See **Salmond and Heuston on The Law of Torts** (19<sup>th</sup> Edition)*

## **STANDARD OF CARE**

The standard is reasonableness. But in considering what a reasonable man would realize or do in a particular situation, we must have regard to human nature as we know it, and if one thinks that in a particular situation the great majority would have behaved in one way, it would not be right to say that a reasonable man would or should have behaved in a different way. A reasonable man does not mean a paragon of circumspection. The duty being a general duty to use reasonable care, reasonableness is the test of the steps to be taken

## **FORESEEABILITY OF DANGER**

It is not enough that the event should be such as can reasonably be foreseen. There must be sufficient probability to lead a reasonable man to anticipate danger or injury. The existence of some risk is an ordinary incident of life, even when all due care has been, as it must be, taken

## **ANTICIPATION OF GRAVITY OF INJURY**

In considering whether some precaution should be taken against a foreseeable risk, there is a duty to weigh on the one hand, the magnitude of the risk, the likelihood of an accident happening, and the possible seriousness of the consequences if an accident does happen, and on the other the difficulty and expense and any other disadvantage of taking the precaution.

*The gravity of possible consequences is a major factor in considering precautions. The more serious the likely damage, the greater the precaution required and this is considered in determining the level of fulfillment of the duty of care.* - **Paris –v- Stepney B.C. [1951] A.C. 367.**

### **STANDARD OF PROOF NEGLIGENCE**

If the evidence in a civil case is such that the tribunal can say: We think it more probable than not, the burden is discharged, but if the probabilities are equal, it is not. Thus the standard of proof is on a balance of probabilities.

The 1<sup>st</sup> defendant was negligent in execution of his duties as a driver and thus wholly liable for the cause of the accident which resulted in the death of the deceased-Emen David.

Since the trailer driver caused the accident, then the next issue of determination is who is liable to compensate the plaintiffs who have suffered damage as result of the said accident in which the Emen David died.

***Black's Law Dictionary 11<sup>th</sup> 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.

The driver is not denied as being the person authorised to driver the said vehicle in the course of his employment. His actions bind the employer since he was acting for the employer in the cause of his employment.

The defence never denied any existence of the employer-employee relationship. The fact that he was driving this trailer for transport services, it would definitely imply that he was an employee in the course of his employment. See ***Muwonge vs Attorney General [1967] EA 67***

Secondly, the 2<sup>nd</sup> defendant tried to have the matter settled at police by executing an agreement (PEX11) was a further confirmation that the employer of the 1<sup>st</sup> defendant was accepting liability to have the matter settled.

***Whether the Plaintiff is entitled to the reliefs sought?***

*Special damages*

Special damages is a loss which the law will not presume to be a consequence of the defendant's act but which depends in part, on the special circumstances, must therefore be claimed on pleading and particularized to show the nature and extent of the damages claimed. The plaintiff must go further to prove by evidence that the loss alleged was incurred and that it was direct result of the defendant's conduct.

According to the court plaint, the plaintiff claims a total of 20,000,000/= as special damages.

*Plaintiffs must understand that if they bring actions for damages, it is for them to prove their damage; it is not enough to write down particulars and so to speak, throw them at the head of the court, saying, "This is what I have lost, I ask you to give these damages" They have to prove it. See **Benedicto Musisi vs Attorney General HCCS No. 622 of 1989 [1996] 1 KALR 164 & Rosemary Nalwadda vs Uganda Aids Commission HCCS No.67 of 2011***

The law relating to special damages is settled. **W.M Kyambadde v MPIGI District Administration (supra) and Bonham Carter V Hyde Park Hotel Ltd (1984)** holding that the guiding principle is that special damages must be specifically pleaded and strictly proved and based on credible and reliable evidence adduced at the trial.

The plaintiffs sought special damages of 20,000,000/= which was set out in the plaint, however none of these was supported by any documents. The same was merely stated without any clarity on how it was spent. In my humble view these figures appear exaggerated and baseless.

I would disallow all the expenses stated

### *General damages*

General damages are such as the law will presume to be direct natural probable consequence of the act complained of. In quantification of damages, the court must bear in mind the fact that the plaintiff must be put in the position he would have been had he not suffered the wrong. The basic measure of damage is restitution. See ***Dr. Denis Lwamafa vs Attorney General HCCS No. 79 of 1983 [1992] 1 KALR 21***

The character of the acts themselves, which produce the damage, the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstance and nature of the acts themselves by which the damage is done. See ***Ouma vs Nairobi City Council [1976] KLR 298.***

In the present case, the plaintiff has sought general damages. Considering the circumstances of the case, the plaintiff is awarded a sum of 105,500,000/= as damages for accident occasioned, general inconvenience and loss of dependence for the 4 children and the widow. There is no evidence was led to prove dependence of the alleged mother and father. The same is not considered and is disallowed.

### *Interest*

Section 26 provides for an award of interest that is just and reasonable. In the case of ***Kakubhai Mohanlal vs Warid Telecom Uganda HCCS No. 224 of 2011,*** Court held that;

***“ A just and reasonable interest rate, in my view, is one that would keep the awarded interest rate, in my view, is one that would keep the awarded amount cushioned against the ever rising inflation and drastic depreciation of the currency. A plaintiff ought to be entitled to such a 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***

***economic vagaries and the inflation and depreciation of the currency in the event that the money awarded is not promptly paid when it falls due”***

General damages shall attract an interest of 20% from the date of judgment until payment in full.

Costs

The plaintiffs are awarded costs of the suit.

It is so ordered.

**SSEKAANA MUSA**

**JUDGE**

**16<sup>th</sup>/06/2023**