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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 10 OF 2013

(Arising out of Kabale High Court Civil Appeal No.35 of 2007)

TURYATEMBA DAVID:::APPELLANT

VS

MUSINGUZI JACKSON:::RESPONDENT

CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA

HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

HON. MR. JUSTICE CHEBORION BARISHAKI, JA

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JUDGMENT OF CHEBORION BARISHAKI, JA

Introduction

The respondent sued the appellant seeking damages arising out of a traffic accident. The appellant was driving Motor Vehicle Registration No. UAG 423C and the respondent was being carried on a motorcycle when the collision occurred.

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The respondent obtained judgment against the appellant in the Chief Magistrates Court with an award of UGX 12,000,000/= as general damages with costs of the

5 suit. The appellant unsuccessfully appealed against the decision of the Chief Magistrate hence this second appeal.

The grounds of appeal as they appear in the Memorandum of Appeal are;

- 10 1. *That the learned appellate Judge failed in his bounden duty as the 1st appellate Court to re-evaluate the evidence and make his own conclusions thereby coming to wrong conclusions.*
 - a. *That the omission to tender in the Police Form No.3 which contained the medical report was not fatal to the medical evidence*
 - b. *That the award of general damages in the sum of UGX 12,000,000/= (Twelve Million) was not excessive and unconscionable.*

15 The Supreme Court in ***Ongom John Bosco V Uganda, Criminal Appeal No.21 of 2007***, held that a second appellate court is to resolve issues of law only and is thus precluded from questioning the concurrent findings of fact by the trial Court and first appellate court, provided that there was evidence to support those findings. A second appellate court can only interfere with such finding where
20 there was no evidence to support the finding because this is a question of law.

At the hearing of the appeal, neither the appellant nor his counsel were present. Learned counsel Bruce Kyerere (SC) appeared for the respondent. He requested Court to allow parties to rely on written submissions which they had filed which request was granted.

25 In his written submissions, counsel for the appellant argued the two grounds together. He faulted the appellate Judge for failing to re-evaluate the evidence on

5 record there by coming to a wrong conclusion that the omission to tender in the Police Form No.3 which contained the medical report was not fatal and that the award of general damages in the sum of UGX 12,000,000/= was not excessive and unconscionable.

He submitted that what the respondent pleaded under paragraph 4 of the plaint
10 was in conflict with what he pleaded under paragraph 8. In paragraph 4, the appellant was the owner of a Motor Vehicle Reg. No. UAG 423C and on 9th September, 2005 as the respondent was lawfully using Kihihi-Kihembo Road, the appellant knocked him at Rwenyerere and he fell off the motorcycle on which he was travelling. As a result of the accident, the respondent sustained severe
15 multiple injuries on the forehead, left arm and left side of the body. He was rushed to Kambuga Hospital in agony and thereafter transferred to Kisiizi Hospital where he was operated to remove his injured spleen. He was hospitalized for ten days. The respondent was later referred to Mbarara University Hospital for further management of his appendix which was also
20 damaged. He suffered great inconvenience caused by daily taking of medicine to reduce pain and mental anguish.

Counsel further submitted that the evidence of PW1, Doctor Mugwanya Edward who was called to identify the handwriting of Dr. Okumu who was said to have prepared a medical report was not admissible because the said report was not
25 tendered in evidence. Counsel added that it was evident that both the trial Court and the appellate Court had been influenced by Doctor Mugwanya's description

5 of the injuries and treatment of the respondent which was of no evidential value. He relied on ***D.N.N Sentongo & Anor V Uganda Railway, Civil Suit No.263 of 1987*** to the effect that medical evidence based on the evidence of other witnesses or prescriptions without observing the facts is not of much value compared with the evidence of the Doctor who personally attended to the patient.

10 Counsel further submitted that if the learned appellate Judge had evaluated the evidence properly, he would have come to the conclusion that the injuries and treatment having not been proved, there was no basis upon which to grant general damages of 12,000,000/=. That in the circumstances this amount was excessive and unconscionable. He relied on ***Musisi Dirisa and 3 Ors V Sietico***

15 ***(U) Ltd, Civil Appeal No.29 of 1993*** where Court held that any assessment of damages is based on the injuries proved to have been sustained as a result of the accident and if the injuries cannot be established, no general damages can be awarded.

Counsel for the respondent, Mr. Bruce Kyerere opposed the appeal and

20 submitted that the appellant disputed the admissibility of Dr. Mugwanya's testimony on the evidence of Police Form 3 that the testimony was hearsay because the doctor had not attended to the patient but had based his opinion on the report of Dr. Okumu. According to counsel, the argument that this was hearsay evidence was raised for the first time in the instant appeal even when

25 the appellant had an opportunity to raise it both at trial and with the first appellate Court but did not do so. He relied on the rule in ***Ex parte Firth (2)***

5 **(1828) 19 Ch.D 419** cited with approval in **Tanganyika Farmers Association Ltd V Unyamwezi Development Corporation Ltd (1960)1 EA 620** to say that if a point was not taken before the tribunal which heard the evidence and that evidence if it had been adduced had the possibility to prevent the point from succeeding, it cannot be taken afterwards.

10 Counsel for the respondent further submitted that the learned appellate Judge thoroughly re-evaluated the evidence on record and reached the right conclusion that the omission to tender in Police Form No.3 which contained the medical report was not fatal to the medical evidence.

Counsel submitted that PW2, Dr. Mugwanya testified as an expert in medicine
15 and surgery and his testimony assisted Court to make a finding on the nature of the injuries suffered by the respondent. That this evidence was admissible under **section 43 of the Evidence Act** as expert opinion.

Counsel further submitted that the omission to formally tender in Police Form 3 was a mere technicality which should be remedied under Article 126(2) (e) of the
20 Constitution.

Regarding the award of general damages, counsel submitted that the trial Magistrate awarded the respondent shs 12,000,000/= as general damages and it is trite law that an appellate Court should not interfere with an award of damages made by a trial Court unless the award is based on an incorrect
25 principle or is manifestly too low or too high. Counsel added that the trial

5 magistrate considered the age of the respondent who lost a vital organ, the spleen which shortened the respondent's life.

This being a second appeal, this Court is guided by **Rule 32(2)** of the Rules of the Court of Appeal to appraise the inferences of fact drawn by the trial Court, but not to hear additional evidence.

10 The learned appellate Judge is faulted for failing to re-evaluate the evidence and make his own conclusions thereby coming to a wrong conclusion that the omission to tender in the Police Form No.3 which contained the medical report was not fatal to the medical evidence.

It was submitted for the appellant that PW2, Doctor Mugwanya Edward was
15 called to identify the handwriting of Dr. Okumu on the medical report. In counsel's view, Dr. Mugwanya's testimony was not admissible because it was hearsay as he had not attended to the patient. That it was evident that both the trial Court and the appellate Court had been influenced by Doctor Mugwanya's description of the injuries and treatment of the respondent. Counsel added that
20 in any event, the medical report was of very little evidential value.

In dealing with this matter, the learned appellate Judge stated as follows;

*“Medical evidence given by PW2, Dr. Mugwanya Edward told Court that the plaintiff had been received and examined by Dr. Okumu Gabriel and filled Police Form PF3. PW2 restated the findings of Dr. Okumu which included
25 the following observations:-*

- 5
- i. *There was a spleen damage*
 - ii. *A bruise on left arm*
 - iii. *A lacerated left leg*
 - iv. *A wound on the front part of the head.*

10 *The Police Form was not admitted as the plaintiff's exhibit. It was not
tendered by the plaintiff who was not represented. The appellant capitalized
on this omission to discredit the medical evidence. My view is that it was
desirable to have this Police Form No.3 which contained the medical report
admitted in evidence however its omission is not fatal to the medical
evidence. The doctor who testified was adequately cross-examined and the
15 validity of the findings at the examination were never challenged. I do not
agree with the appellant's contention that the trial Magistrate solely
depended on this evidence to assess the damages.*

20 *The medical evidence only served the purpose of corroborating the plaintiff's
evidence in proof of the injuries he suffered. First and foremost there was
nothing irregular in receiving the medical evidence from PW2 who merely
stated what Dr. Okumu recorded. He was familiar with Dr. Okumu's
handwriting, he gave Okumu's evidence because Okumu was not available.
It is not correct to say that he testified in lieu of Okumu. The only valid
criticism is that the trial Magistrate should have received this document as
25 part of the plaintiff's exhibits. This was a technical error which cannot
invalidate the substance of the evidence recorded from the witness on oath.*

5 The plaintiff gave evidence of the injuries he suffered and the several hospitals he was admitted in and the operations he underwent. His injuries were adequately supported by his oral evidence and after considering the circumstances of the case I find the oral evidence credible proof of the injuries he suffered.”

10 **Section 30 of the Evidence Act CAP 6** provides for cases in which statement of relevant fact by a person who is dead or cannot be found is admitted. The section states as follows;

15 Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases-

20 (b) when the statement was made by such person in the ordinary course of business, and, in particular, when it consists of any entry or memorandum made by him or her in books kept in the ordinary course of business or in the discharge of professional duty, or of an acknowledgment written or signed by him or her of the receipt of money, goods, securities or property of any kind, or of a document used in commerce written or signed by him or her, or of the date of a letter or other document usually dated, written or signed by him or her.

25 **(Emphasis added)**

5 PW2, Dr. Mugwanya Edward who testified on behalf of Dr. Okumu Gabriel stated that he had worked with Dr. Okumu in the same ward for 3 years and was very conversant with Dr. Okumu's handwriting. That Dr. Okumu received the respondent on 14th September, 2005 and the patient came with PF3 from Kihikihi Police Station requesting Kisiizi Hospital to examine the respondent who was a
10 complainant in the accident. PW1 further stated that the Doctor who examined the patient made the following findings:-

1. Musinguzi got a rumpled spleen. This was seen after screening the abdomen
2. He had a bruise on the left arm
- 15 3. A lacerate on the left leg
4. A wound on the front part of the head.

I note that Police Form No.3 which contained the medical report was prepared and signed by Dr. Okumu Gabriel whose attendance in Court could not be procured without delay and expense as he had gone for further studies. The said
20 Medical form was prepared in the discharge of his professional duty. I therefore do not agree with counsel for the appellant that PW2, Dr. Mugwanya Edward's evidence was inadmissible.

The learned appellate Judge found that the doctor who testified was adequately cross-examined and the validity of the findings at the examination were never
25 challenged. It is my finding that the medical evidence only served the purpose of corroborating the plaintiff's evidence in proof of the injuries he suffered. First

5 and foremost there was nothing irregular in receiving the medical evidence from PW2 who merely stated what Dr. Okumu recorded.

I agree with the appellate Judge's finding above and have no reason to depart from the same.

Counsel for the respondent submitted that much as it may be conceded that it was desirable to have Police Form 3 tendered in evidence, the omission to formally tender in the document in evidence even when it was on the Court file was a mere technicality which could be remedied under Article 126(2) (e) of the Constitution because the respondent was at that time unrepresented by counsel.

The learned appellate Judge took this into consideration when he found that the only valid criticism is that the trial Magistrate should have received this document as part of the plaintiff's exhibits. This was an error which cannot invalidate the substance of the evidence recorded from the witness on oath.

Article 126 (2) (e) of the Constitution requires court to administer substantive justice without undue regard to technicalities. Further, the Supreme Court in **Nicholas Roussos V Gulamhussein Habib Virani & Anor Civil Appeal No.9 of 1993** laid down the circumstances which amount to sufficient cause to include; a mistake by an advocate though negligent may be accepted as a sufficient cause, ignorance of procedure by an unrepresented defendant may amount to sufficient cause, illness by a party may also constitute sufficient cause but failure to instruct an advocate is not sufficient cause.

5 I agree with counsel for the respondent that the omission to formally tender in Police Form 3 which contained the medical report in evidence even when it was on the Court file was a mere technicality which could be remedied under Article 126(2) (e) of the Constitution because the respondent was at that time unrepresented by counsel.

10 I therefore find that the learned appellate Judge properly re-evaluated the evidence on record before coming to the conclusion that the omission to tender in Police Form 3 which contained the medical report was not fatal to the medical evidence.

Ground 1(a) of the appeal fails.

15 On ground 1(b), the learned appellate Judge is faulted for failing to re-evaluate the evidence on record thereby coming to a wrong conclusion that the award of general damages of 12,000,000/= (Twelve Million Shillings) was not excessive and unconscionable.

20 General damages are the direct natural or probable consequence of the wrongful act complained of and include damages for pain, suffering, inconvenience and anticipated future loss. **See *Storms v. Hutchinson [1905] AC 515.***

While assessing general damages, the Court should mainly be guided by the value of the subject matter, the economic inconvenience that the respondent may have been put through and the nature and extent of the injury suffered. **See**
25 ***Uganda Commercial Bank V Deo Kigozi (2002) 1 EA 305.***

5 In awarding general damages, the learned appellate Judge stated as follows;

10 *"I do arrive at the same conclusion as the trial Magistrate that the Defendant/appellant drove his vehicle negligently, knocked the motorcycle which was carrying the plaintiff and caused him bodily injuries for which he is entitled to general damages.....The trial Magistrate considered the age of the respondent who lost a vital organ the spleen and therefore shortened the plaintiff/respondent's life for which she awarded general damages of shs. 12,000,000/=".*

15 It is my considered view that in awarding general damages, the learned appellate Judge exercised his discretion judiciously. I find no reason to interfere with the award he made.

Ground 1(b) of the appeal fails.

For the reasons given above the appeal should be dismissed and the decision and orders of the lower Court upheld. The appellant should bear the costs of this appeal and the courts below.

20 Dated at Kampala this ^{13th} day of ^{July} 2020


Cheborion Barishaki

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 10 OF 2013

TURYATEMBA DAVID===== APPELLANT

VERSUS

MUSINGUZI JACKSON=====RESPONDENT

(CORAM: KAKURU, KIRYABWIRE, MADRAMA, JJA)

JUDGMENT OF MR. JUSTICE GEOFFREY KIRYABWIRE, JA

JUDGMENT

I have had the opportunity of reading the draft Judgment of the Hon. Mr. Justice Cheborion Barishaki, JA.

I agree with his Judgment and I have nothing more useful to add.

Dated at Kampala this.....13th..... day ofJuly.....2020.

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HON. MR. JUSTICE GEOFFREY KIRYABWIRE
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 10 OF 2013

(Arising out of Kabale High Court Civil Appeal No. 35 of 2007)

TURYATEMBA DAVID.....APPELLANT

VERSUS

MUSINGUZI JACKSON..... RESPONDENT

(Appeal from the judgment and orders of the High Court sitting at Kabale (Hon. Mr. Justice J. W.Kwesiga) dated the 7th of August, 2012 in Civil Appeal No. 35 Of 2007).

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA
Hon. Mr. Justice Geoffrey Kiryabwire, JA
Hon. Mr. Justice Cheborion Barishaki, JA

JUDGMENT OF JUSTICE KENNETH KAKURU, JA

I have had the benefit of reading in draft the Judgment of my learned brother Cheborion Barishaki, JA.

I agree with him that this appeal has no merit and ought to fail for the reasons he has ably set out in his Judgment. I have nothing useful to add.

As Kiryabwire, JA also agrees, this appeal stands dismissed with costs here and at the Courts below.

We so order.

Dated at Kampala this 13th day of July 2020.


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Kenneth Kakuru
JUSTICE OF APPEAL