REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

HCT CIVIL APPEAL NO.035 OF 2007
(From Ruk. Civil Suit No.009 of 2006

TURYATEMBA DAVID::APPELLANT

VERSUS

MUSINGUZI JACKSON:::RESPONDENT

BEFORE HON. MR. JUSTICE J.W. KWESIGA

JUDGMENT

This is an Appeal from the decision of The Chief Magistrate, Rukungiri Magisterial area dated 29th October, 2007 where she found the Appellant liable for recklessly driving and causing an Accident in which the Respondent suffered multiple injuries. The trial Chief Magistrate, Her Worship Wanume Deborah awarded the Respondent General damages in the sum of Sh. 12,000,000/= plus costs of the suit.

This appeal has three grounds, namely;

1. That the trial Magistrate misdirected herself on the law and erroneously permitted Dr. Edward Mugwonya to testify instead of Dr. Okum for the Respondent and subsequently erred when her Judgment relied on the said testimony.

2. The trial Magistrate erred in Law and on evidence when she allowed and awarded the claim of general damages to the Respondent.

3. The award of Sh. 12,000,000/= as general damages was excessive and un cocionable.

My understanding of grounds 1 and 2 of this appeal are a criticism of the trial Magistrate's receipt, evaluation and reliance on the evidence as a whole and as such the two grounds will be considered together. Ground three alleges that the general damages awarded are excessive and will be handled separately.

The un contested facts are that on 9th September, 2005, the Appellant was driving his motor vehicle Registration Number UAG 423 C and got involved in a road accident by knocking or corroding with a motorcycle on which the Respondent was travelling as a passenger. The Respondent sustained multiple injuries that included injury on the forehead, left arm and the left body side. Due to this accident the Respondent was hospitalized and eventually had his spleen removed. The Appellant was charged under Traffic Offence case No. 0021 of 2005 before The Magistrate's court on a count of causing bodily injury to Musinguzi Jackson (Respondent) through reckless driving contrary to sections 2 (1) and 5 (a) of the Traffic and Road Safety Act, 1970. He admitted the offence, was convicted and he paid a fine of Shs. 5,000/= instead of serving a three months term of imprisonment.

From what I gather from the original trial file The Plaintiff averred that the Accident took place on 9th September, 2005 at Rwenyerere. The Defendant/Appellant knocked down the motorcycle on which he was a passenger. He fell down and got injured . He was hospitalized at Kisiizi Hospital and later transferred to Mbarara University teaching Hospital. He was operated and his spleen and appendix were removed. He alleged the Accident was due to reckless driving and over speeding to which the defendant pleaded guilty in a criminal trial. In the civil trial the Defendant/Respondent conceded the involvement in the Accident but attributed the cause to the motorcycle rider. He contended, in submissions, that The Plaintiff/Respondent sued a wrong party. That he should have sued Ndizeye Ignatius who was riding the motorcycle.

From the on set, I will address the Appellants contention that the Plaintiff sued a wrong party. The Plaintiff was free to sue any one or all persons who owed him a duty of care on the road which was breached. The Defendant/Appellant pleaded guilty to the offence of causing him body injuries through reckless driving and therefore accepted liability. Where the circumstances of the Accident give rise to the inference of negligence or recklessness then the Defendant has a duty to prove there was a probable cause of the Accident which does not connote negligence. See **EMBU PUBLIC ROAD SERUCES LDT VS RIMMI [1968] E.A 22.**

The moment the appellant admitted Criminal liability and paid a fine he put himself in a suable position. Whether Ignitious Ndizeye was responsible or partly responsible ought to have been

proved by the Appellant. He had the opportunity of seeking to have the said Ndezeye added to the suit as a defendant through third party proceedings, to join issues with him as to contribution to the Accident which he did not do. In Civil cases The burden of proof lies on the party who asserts the affirmative of the issue in dispute. When that party adduces evidence sufficient to raise a presumption that what he asserts is true, he shifts the evidential burden to rebut the presumption on the opponent in this case Appellant.

See **NAMATOVU FATUMA MUWONGYE VS AG H.C.C.S NO. 1001 OF 2001 (un reported)**

It will be noted that Ndizeye Ignitious was the plaintiffs witness and corroborated the plaintiff's evidence that the Defendant/Appellant lost control of the vehicle, hit a pavement and hit the motorcycle. If the circumstances were to the contrary, the Appellant/Defendant would not have pleaded guilty but would have put the same story as he now wishes this court to believe. I find the story most probable an afterthought to avoid civil liability. I have considered his plea of guilty in the Criminal trial as evidence that corroborates the Plaintiff/Respondents evidence and on a balance of probability the Respondent proved the case of negligence against the Appellant. There is no evidence in the case as a whole to prove contributory negligence. The Defendant had the duty to plead and prove contributory negligence. The Appellant contended that he was not over speeding as alleged by the Plaintiff. High speed may be a **prima facie** proof of negligence but this does not apply to all cases. Travelling within or at the speed limit prescribed by Traffic Act is not a defence. A driver could be travelling even at half the speed

limit fixed by Law for traffic purposes but this does not rule our negligence.

The Plaintiff/Respondent testified that following the accident he was taken to Kambuga Hospital, he was put on drip and transferred to Kisiizi Hospital where he spent 11 days. He was operated and his damaged spleen was removed. He was discharged while still in pain. He further went for treatment at Mbarara Hospital, and Albert Cook Hospital at Mengo. He told court he had no pre-accident illness of the spleen and appendix that they were removed in the post-accident medical operations.

Medical evidence given by PW 2 Dr. Mugwanya Edward told court that the plaintiff had been received and examined by Dr. Okumu Gabriel and filled Police Form PF 3. PW 2 restated the findings of Dr. Okumu which included the following observations:-

(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.

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 validity of the findings at the examination were never challenged. I do not agree with the Appellants contention that the trial

Magistrate solely depended on this evidence to assess the damages. 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 P.W 2 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 critism is that the trial Magistrate should have received this document as part of the plaintiff's exhibits. This was a technical error which can not invalidate the substance of the evidence recorded from the witness on oath. 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. 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 awarded the Plaintiff/Respondent Sh. 12,000,000/= as general damages. The Appellant contested this award as being excessive and un conscionable. As a matter of practice Appellate courts are reluctant to reverse the trial courts finding as to the sum of damages. The Appellate court would normally reverse the trial courts findings if it is established that the trial court acted upon some wrong principle of law or that the amount was so extremely high or very small so as to make it, in the judgment of the

appellate court, an entirely erroneous estimate of the damage to which the Plaintiff is entitled.

See **(1) Uganda Breweries Ltd vs Uganda Railways Corporation (2002) E.A (SCU).**

(2) BUTT VS KHAN CIVIL APPEAL NO. 40 OF 1977 (COURT OF APPEAL OF KENYA).

In **OBONGO AND ANOTHER VS MUNICIPAL COUNCIL OF KENYA (1971) E.A 91 AT 96, SPRY, V.P (** as he then was) held it is not for an appeal court to interfere with the quantum of damages awarded by the trial court unless it is satisfied that the award by the trial Judge was based on some wrong principle or is so manifestly excessive or inadequate or otherwise incorrect that a wrong principle may be inferred.

The instant case being a first appeal which is by way of re-hearing, the Appellant has a duty to show that the trial court errored to justify re assessment of the damages. See: **R. KULOBA'S JUDICIAL HINTS ON CIVIL PROCEDURE, VOL. 1 1984 Pages 249-257.**

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 Sh. 12,000,000/= plus costs of the suit. The Appellant has not shown any justification for interference with the above award and I find no reasons to do so.

Therefore this Appeal is dismissed with costs and the trial courts awards are upheld. The Respondent is therefore entitled to the following:-

(a) General damages in the sum of Sh. 12,000,000/= (Twelve million only).

(b) Costs of this Appeal and costs in the lower courts.

(c) Interests on the decretal sum at 6% per annum from the date of this Judgment until payment in full.

Dated at Kabale this 7th day of August, 2012.

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J.W. KWESIGA

JUDGE

7/8/2012

In presence of Mr. Rukundo Fred for Respondent.
Parties are absent.
Mr. Joshua Musinguzi- Court – Clerk.