IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 0111 of 2019

In the matter between

OIL ENERGY LIMITED **APPELLANT**

And

KOMAKECH ROBERT **RESPONDENT**

Heard: 27 February, 2020.
Delivered: 8 June, 2020.

Law of Tort *— Negligence — Negligence is proved by satisfying a three-part test: the existence of a duty of care owed to the plaintiff by the defendant; a breach of that duty by falling below the appropriate standard of care; damage caused by the defendant's breach of duty that is not too remote a consequence of the breach. — Neighbour Principle— A person must take reasonable care to avoid acts or omissions which he or she can reasonably foresee would be likely to injure his or her neighbour. where possible harm is foreseeable, a duty of care then exists. The degree of caution that we must exercise will obviously be dictated by the likelihood of the risk. A breach of duty occurs when the party owing the duty falls below the standard of behaviour that is required by the particular duty in question —. The question of whether the conduct of the defendant has met the appropriate standard of care in the law of negligence is a question of mixed fact and law. — The reasonable man only has to do what is reasonable in order to avoid risks of harm. This means that there is no obligation to go to extraordinary lengths, particularly if the risk is slight — generally, though where the defendant has sufficient control of circumstances to be able to avoid the harm, he would be obliged to act.*

Law of Evidence *— adducing evidence of negligence before the court is not enough by itself to establish liability, for it also must be proven that the negligence was a proximate, or legal, cause of the event that produced the harm or loss sustained by the*

plaintiff — Courts treat differently allegations of fact made by a witness from conclusions drawn by the witness — It is open to the court to prefer the testimony of certain witnesses over others and to place more weight on some parts of the evidence than others, particularly where there is conflicting evidence — A court will not guess between two equally probable causes — *where it is pure matter of guesswork where the greater probabilities lie, and it is just as reasonable that the damage was the result of one cause as the other, any of which could be a substantial cause of the events which produced the damage, the plaintiff would not recover since he would have failed to prove that the negligence of the appellant caused the damage.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellant for recovery of general and special damages for negligence, and the costs of the suit. His claim was that he owned motor vehicle Reg. No. UAM 357 Z, a Toyota Noah which he operated as commuter taxi along the Amuru-Gulu road. On or about 3rd May, 2017 the respondent's official driver of that vehicle, Oryem Frank, branched into the appellant's fuel station at Olayo Ilong, Layibi Division in Gulu Municipality to refuel the vehicle with 5.88 litres of petrol. To his dismay, the appellant's pump attendant, a one Watum Peter, refuelled the vehicle with diesel fuel instead. Oblivious to that occurrence, the driver set off along the Gulu-Lacor-Nimule road only for the vehicle to suddenly develop an engine knock. The respondent notified the appellant who sent their mechanic to verify the incident. The appellant towed the vehicle back to the fuel station where they proceeded to undertake repairs, unsuccessfully, hence the suit by which the respondent sought to hold the appellant vicariously liable for the negligent acts of its employee in damaging his motor vehicle during the course and scope of his employment.

[2] In its written statement of defence the appellant stated that the incident occurred a result of the respondent's driver's decision to park the vehicle at a diesel pump

and his failure to inform the appellant's pump attendant the type of fuel used by the vehicle, yet on its tank cover was written "diesel." The vehicle was driven off until it stalled at Lacor where a mechanic sent by the appellant drained out the diesel fuel, filled the tank with fuel and the respondent's driver continued with his journey. It is after one week that the vehicle developed a mechanical fault with its pistons whereupon the respondent demanded for their replacement. It is because the appellant rejected that demand that the respondent parked the vehicle at the appellant's fuel station. The respondent's suit should therefore be dismissed as a misconceived and fraudulent claim.

The appellant's evidence in the court below:

[3] D.W.1 Okello Oscar, the appellant's Manager of its fuel station situated at Lacor along the Gulu-Juba road, testified that on 3rd May, 2017 at around 9.00 am he received a complaint from the official driver of motor vehicle registration number UAM 357 Z, P.W.2 Oryem Frank, that his car had been re-fuelled with diesel instead of petrol. The vehicle was pushed back to the fuel station from where the diesel was emptied from the car's fuel tank. He noticed that the lid to the car's fuel tank read "diesel" instead of "petrol" but P.W.2 Oryem Frank told him he had used that lid for quite some time after an inadvertent swapping some time back. The tank was emptied, flushed out with a litre of petrol and re-fuelled with ten litres of petrol. The four spark plugs were replaced with new ones. The driver took the car on a six kilometre road-test and it was found to be in a sound mechanical condition.

[4] P.W.2 Oryem Frank explained that one of the four pistons had previously been replaced and that accounted for the smoking. The following day, P.W.2 returned to the fuel station complaining that along the way to Amuru, the vehicle had developed mechanical problems, involving the loss of power on acceleration and production of excessive smoke from the exhaust. He gratuitously gave him a set of four new spark plugs. Around 6th May, 2017 P.W.2 returned and reported that

the vehicle had completely stalled at Amuru. He sent D.W.2 Auma C.J, a mechanic, who upon return reported to him that he had found the car's fuel tank empty. The following day 7th May, 2017 P.W.2 drove the vehicle to the fuel station and parked it and abandoned it there claiming that in was overheating and they should undertake a complete engine overhaul. P.W.2 reported to the police where he was advised to repair the vehicle.

[5] D.W.2 Auma C.J, holder of a Diploma in Mechanical Work of Kyambogo Technical College obtained in 1989 testified that he is called upon by the appellant from time to time to undertake motor vehicle repair work as an independent contractor where he is paid per job. He attended to motor vehicle registration number UAM 357 Z on 3rd May, 2017 following a re-fuelling mishap at the appellant's fuel station. He found the vehicle had stalled at a distance of about 150 meters from the fuel station. It was pushed back to the fuel station. He noticed that the lid to the fuel tank read "diesel." It was a grey lid for diesel tanks as opposed to black lids used on petrol tanks. Upon opening the tank he found a mixture of petrol and diesel. He emptied and flushed the tank with petrol. He then re-filled it with 15 litres of petrol. The engine was started and it run smoothly. On 6th May, 2017 he was called to Amuru where he found that the vehicle had developed a problem of oil leaking onto the spark plugs, with excessive emission of smoke. This was due to delayed servicing which caused wearing out of the piston rings. He found that the fuel tank was empty. They replaced the spark plugs. He advised P.W.2 to re-fill the tank, which he did with 13 litres of petrol, and drove the vehicle to a distance of ten kilometres without any problem. The breakdown of the engine was caused by natural wear and tear on piston number three, and not by the re-fuelling mishap. Such a mishap only affects the spark plugs and not the engine. This is because only the plugs are clogged and the vehicle will not start. Cleaning the tank and replacing the spark plugs is an effective remedy. When this was done P.W.2 was able to drive it to Amuru.

[6] D.W.3 Atiku Saldrin Solomon testified that he was one of the pump attendant's at the appellant's fuel station on 3rd May, 2017 when the respondent's vehicle was refuelled with diesel by the other pump attendant, Wathum Peter. It was driven away to a distance of about 100 meters when the driver returned and told them he had been given the wrong fuel.

The respondent's evidence in the court below:

[7] P.W.1 Komakech Robert testified that he owns motor vehicle registration number UAM 357 Z. He purchased it at a cost of shs. 10,000,000/= He refurbished it at a cost of shs. 3,000,000/= Form 24th February, 2015 henceforth, he used it as a taxi along the Gulu-Amuru road, from which activity he would earn a daily income of shs. 75,000/= On 3rd May, 2017 he received a call from his driver informing him that instead of re-fuelling it with petrol the appellant's employees had re-filled it with diesel. He instructed the driver to ask the appellants to repair it. It was repaired and driven away but before it could arrive home it broke down. He returned it to the appellants and asked them to repair it. He prayed that the appellant is ordered to buy a new engine and undertake other repairs. Before that re-fuelling mishap the vehicle had no mechanical problems. He used to have it serviced every fortnight. He had last serviced it a week before the incident.

[8] P.W.2 Oryem Frank testified that he was the official driver of motor vehicle registration number UAM 357 Z. On 3rd May, 2017 he branched into the appellant's fuel station located at Lacor, along the Gulu-Juba road. He paid shs. 20,000/= to the pump attendant, a one Wathum Peter, with instructions to re-fuel it with petrol as he went to the washrooms. On return for the washroom, he was given a receipt for the fuel (exhibit P. Ex.6) and he started the car. As he joined the main road, about 150 meters away, the car stalled. He opened the car bonnet and discovered it had been re-fuelled with diesel. He notified the fuel station Manager who upon inquiring from Wathum Peter confirmed that it had been re-fuelled with diesel instead of petrol. The Manager called in a mechanic who

washed out the diesel from the car's fuel tank, replaced the spark plugs and re-fuelled the car with petrol. The vehicle would start and stall after some time. He called the mechanic back who replaced the spark plugs for a second time but he problem persisted. He drove it up to Anun in that condition but could not make it to Otwe, his intended destination. He drove the vehicle back to the fuel station where he asked the appellant to have it repaired. It has since then been parked there at unrepaired. It sustained an engine knock because of the re-fuelling mishap. As a result they have lost a daily income of shs. 75,000/=

Judgment of the court below:

[9] In his judgement, delivered on 12th July, 2019, the trial Magistrate found that the respondent's driver was a regular customer at the appellant's fuel station. Pumping diesel fuel into the respondent's petrol run vehicle was an act of negligence. The respondent purchased the vehicle at the price of shs. 10,000,000/= and used an extra shs. 3,000,000/= to refurbish it. He used the vehicle for commercial purposes and therefore suffered loss of income. Judgment was entered in his favour for shs. 13,000,000/= as special damages, shs. 7,000,000/= as general damages, interest on the decretal sum at the rate of 8% per annum from the date of filing of the suit until payment in full, and the costs of the suit.

The grounds of appeal:

[10] The appellant was dissatisfied with that decision and appealed to this court on the following grounds, namely;

1. The trial Magistrate erred in law and fact in finding and holding that the appellant was negligent and thus came to a wrong decision occasioning an justice.
2. The trial Magistrate erred in law and fact in failing, ignoring or neglecting to take into account the contradictory and inconsistent

testimonies of the plaintiff P.W.1 and his witness P.W.2 thus came to a wrong decision occasioning an justice.

3. The trial Magistrate failed to properly evaluate the evidence and came to a wrong decision to compensate the plaintiff for the loss and destruction of his property, contrary to the evidence on record.
4. The trial Magistrate erred in law in awarding the sum of shs. 13,000,000/= and shs. 7,000,000/= as special damages and general damages respectively.
5. The trial Magistrate erred in law in making awards over and above the pecuniary jurisdiction of the Grade One Court.
6. The Magistrate erred in law in awarding costs and interest to the plaintiff.

Arguments of Counsel for the appellant:

[11] In their submissions, counsel for the appellant argued that the fact that the petrol powered car was re-fuelled with diesel was caused by the respondent's driver having placed a tank lid reading "diesel" on the car fuel tank. It therefore is not attributable to the appellant's employee's negligence. Furthermore, the causal connection of that error and the eventual breakdown of the car was never proved. There was no evidence to show which parts of the engine were affected. The claim was that the car sustained an engine knock yet it was driven from Amuru to the appellant's fuel station. It was the testimony of D.W.2. that poor maintenance and natural wear and tear caused the vehicle to break down and not the wrong fuel since the latter problem was resolved prior to the respondent's driver having driven off. It was always the respondent's intention to commit a fraud on the respondent as evinced by dumping the car at the appellant's fuel station without any attempts at repairs and claiming for its full value. The respondent did not lead facts upon which the extent of his loss could be assessed.

[12] They argued further that this was not a suit for the loss or total destruction of the vehicle. In his testimony, the respondent claimed the costs of repair or replacement of the engine but never specified the amount. Included in the award is a sum of shs. 3,000,000/= representing repairs he had undertaken on the car during the year 2015 that had nothing to do with the re-fuelling incident of the year 2017 that was the subject of the suit. The claim for loss of daily income was not supported by any document. He offered no evidence of any attempt to mitigate his loss by undertaking the necessary repairs and claiming only the costs of repairs. The respondent instead chose to dump the vehicle, while still in a running condition, at the respondent's fuel station rather than a repair garage. It was erroneous for the trial Magistrate to have awarded interest retrospectively to the date of filing the suit and therefore the amount of interest when added to the decretal sum is in excess of the court's pecuniary jurisdiction. An award of interest should be prospective from the date of judgment since it is on that date that sum due is quantified. The respondent should not have been awarded costs as he engaged in dishonest, unnecessary and speculative litigation. They prayed that the appeal be allowed.

Arguments of Counsel for the respondents:

[13] In response, counsel for the respondents, argued that the respondent's driver was a regular customer at the appellant's fuel station and therefore the pump attendants knew that the car's engine was petrol driven. He paid for petrol on the fateful but instead the car was re-fuelled with diesel. Between 3rd May, 2017 and 7th May, 2017 the respondent's mechanic made several unsuccessful attempts to repair the vehicle until the respondent chose to leave it with them until its restoration to its original state. The appellant took advantage of that to switch the fuel tank cover with one with the writing "diesel" so as to make out a case of contributory negligence. The trial court rightly found the appellant's employee negligent for having refuelled a petrol powered car with diesel. The appellant's employee owed the respondent a duty of care which he breached. The vehicle

developed mechanical problems only after that re-fuelling mishap and it was proper to infer that the mishap was the cause of the resultant engine knock. The opinion offered by D.W.2 was a biased one since he is an employee of the appellant. There are no contradictions in the respondent's evidence. The award made by court are justified and within the pecuniary jurisdiction of the court. They prayed that the appeal be dismissed.

Duties of a first appellate court:

[14] It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; *[2004] KALR 236*). In a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*).

[15] In exercise of its appellate jurisdiction, this court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular, this court is not bound necessarily to follow the trial magistrate’s findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

Grounds one, two and three: Court's finding as to appellants' negligence

[16] In grounds one, two and three the decision of the court below is criticised on account of the finding of negligence on the part of the appellant. Negligence is proved by satisfying a three-part test: the existence of a duty of care owed to the plaintiff by the defendant; a breach of that duty by falling below the appropriate standard of care; damage caused by the defendant's breach of duty that is not too remote a consequence of the breach. "Wherever one person is… placed in such a position with regard to another that everyone of ordinary sense… would at once recognise that if he did not use ordinary care and skill… he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger" (see *Heaven v. Pender [1883] 11 QBD 503*). A person must take reasonable care to avoid acts or omissions which he or she can reasonably foresee would be likely to injure his or her neighbour.

[17] The method of determining the existence of a duty of care is the so-called "neighbour principle." "Who then in law is my neighbour?… persons who are so closely and directly affected by my act that I ought reasonably to have them in my contemplation as being affected so when I am directing my mind to the acts or omissions in question" (see *Donoghue v. Stevenson [1932] AC 562*). The defendant should contemplate that his or her actions may have an effect on potential plaintiffs. Therefore, where possible harm is foreseeable, a duty of care then exists. When determining where from the facts of a case there existed a duty of care, first it should be established that there is sufficient proximity between the defendant and the plaintiff for damage to be a foreseeable possibility of any careless act or omission (such that, in the reasonable contemplation of the former, carelessness on his or her part may be likely to cause damage to the latter).

[18] If this is established then it is only for the court to decide whether or not there are any policy considerations that might either limit the scope of the duty or remove it

altogether (see *Anns v. Merton London Borough Council [1978] AC 728*), or the class of person to whom it is owed or the damages to which a breach of it may give rise. Alternatively, whether or not it is fair, just and reasonable in all the circumstances to impose a duty of care (see *Caparo v. Dickman [1990] 1 All ER 568*). It was thus a question of mixed fact and law in this case as to whether the appellant's pump attendant knew or should have known of the danger of re-fuelling a petrol engine powered car with diesel. The trial court had to approach this question having regard to the duties of the ordinary, reasonable and prudent pump attendant.

[19] In the past, when there were comparatively few diesel cars on the road, the diesel refuelling pump was very often to be found in a different, separate location on the petrol station forecourt, arranged primarily to support the refuelling of commercial vehicles and trucks. An increasing proportion of new cars appearing on our roads are now fitted with diesel engines. As a consequence, that petrol stations are organising their fuel pumps to supply both diesel fuel and petrol more conveniently from the same refuelling islands is a matter of fact within the common knowledge of the community of drivers of motor vehicles. The result of changing this arrangement has been a significant increase in the incidence of the pump attendant selecting the incorrect fuel nozzle from the pump island and refuelling a vehicle with the wrong type of fuel: either diesel fuel into a petrol vehicle or petrol into a diesel vehicle.

[20] As regards the duty of care, it is only reasonable to expect an ordinary, reasonable and prudent pump attendant to foresee mix-ups which occur as a result of distraction or lack of attentiveness and not, as claimed in this case, as a result of misleading labelling on the fuel tank lid or of the driver's misleading answers. What emerges from existing authority is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of

"proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. In the circumstances of this case, there was sufficient proximity between the respondent and the appellant's pump attendant for damage to be a foreseeable possibility of any careless act or omission on the part of the pump attendant.

[21] A breach of duty occurs when the party owing the particular duty falls below the standard of behaviour that is required by the particular duty in question. The question of whether the conduct of the defendant has met the appropriate standard of care in the law of negligence is a question of mixed fact and law. Once the facts have been established, the determination of whether or not the standard of care was met is one of law. The basic requirement of foresight is simply that the defendant must have foreseen the risk of harm to the plaintiff at the time he or she is alleged to have been negligent.

[22] While the standard of care in any situation is a question of law, whether or not the defendant has fallen below the standard is a question of fact that will be determined by reference to all of the circumstances of the case. Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate human affairs, would do, or doing something which a prudent and reasonable man would not do (see *Blyth v. Proprietors of the Birmingham Waterworks [1856] 11 Exch 781*). Ordinary Care means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances. The standard of foresight of the reasonable man is an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset by lions; others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is

presumed to be free from both over-apprehension and from over-confidence (see *Glasgow Corporation v. Muir [1943] AC 448*).

[23] There is no obligation on the defendant to guard against risks other than those that are within his or her reasonable contemplation (see *Roe v. Minister of Health [1954] 2 QB 66*). However, if the defendant is aware of the possibility of harm he must guard against it, and it will be a breach of the duty of care to fail to (see *Walker v. Northumberland County Council [1995] 1 All ER 737*). The degree of caution that we must exercise will obviously be dictated by the likelihood of the risk. The magnitude of the risk then can be balanced against the extremes that must be taken in order to avoid it. The reasonable man only has to do what is reasonable in order to avoid risks of harm. This means that there is no obligation to go to extraordinary lengths, particularly if the risk is slight. Generally though where the defendant has sufficient control of circumstances to be able to avoid the harm, he would be obliged to act.

[24] The pump attendant's primary duty is to dispense motor fuels, motor oils and services normally related to the dispensing. The pump attendant must not only be proficient in the operation of dispensing equipment but also should be capable of discerning the correct motor fuel for all types of vehicles requiring to be re-filled. Pump nozzles and vehicle filler necks on gasoline-fuelled vehicles have been designed to help prevent against putting diesel in a petrol car. Some of the safety measures designed to prevent fuel mixing include a separate diesel dispenser, colour-coding the handle, designing the diesel nozzle to be a larger diameter so it won’t fit into a petrol tank filler neck and including a protective flap inside the petrol filler neck to further help prevent diesel from entering the tank.

[25] With such preventative measures, the burden of re-fuelling with the correct type of fuel lies with the pump attendant and not the customer. An ordinary, reasonable and prudent pump attendant should be able to match the fuel type of the vehicle with the corresponding labels on the fuel pump. Inadvertently putting

diesel in a petrol car is more difficult to do, because diesel bowser nozzles are deliberately larger than petrol ones, so they won't fit into the filler neck of most petrol cars. That makes it far less common to put the wrong fuel in a petrol car than putting petrol in a diesel car. The trial court was correct in rejecting the contention that the pump attendant was misled by the fact that an incorrect lid reading "diesel" was placed at the opening of the fuel tank. Had that been the case, then he would not have issued a fuel receipt reading "petrol." Either way in the instant case therefore, the pump attendant fell below the standard of behaviour that was required in the discharge of his duty in the circumstances considered as a whole.

[26] Once the respondent had shown the existence of a duty of care and proved that it has been breached by falling below the appropriate standard of care he still had to prove that the appellant's negligent act or omission actually caused the damage. From the available evidence, the court should be able to determine, with reasonable probability, the causal relationship between the event and the condition, by adducing evidence of that act or omission that produced foreseeable consequences without intervention from anyone else. As with the other two elements of negligence, the burden is on the claimant to prove the causal link on a balance of probabilities. In other words, the plaintiff will have to show that the damage was the natural and direct consequence of the proximate cause, without which it would not have occurred. This calls for nothing more than proof tending to eliminate other possible causes of the occurrence, so as to indicate that the negligence of which that occurrence speaks is probably that of the defendant. This may actually be quite difficult to do, particularly where the incident leading to the damage has been the result of multiple causes.

<u>The "But for" test.</u>

[27] The appellant will only be liable in negligence if the respondent would not have suffered the damage "but for" the appellant's negligent act or omission. If the

harm would not have occurred "but for" the breach of duty, the breach is deemed to have caused the harm. If the harm would have occurred anyway even if the defendant had not been in breach, the breach is not a cause of the harm (see *Cork v. Kirby MacLean Ltd [1952] 2 All ER 402*). Where the injury or damage would have occurred regardless of the defendant's conduct, there is no factual causation (see *Barnett v. Chelsea and Kensington Management Committee [1956] AC 613*). For example in *Barnett v. Chelsea & Kensington Hospital Management Committee [1969] 1 QB 428*, Three night watchmen from a college went to the casualty ward of the hospital at around 5.00 a.m. on the morning of New Year's Day complaining of vomiting and stomach pains after drinking tea. The doctor on duty, in clear breach of his duty towards the men, then refused to attend to them or examine them and told them to call on their own doctors in the morning. A few hours later one of the men died, as it was discovered later, through arsenic poisoning. The court found that the hospital was not liable for the failure to treat, even though this was a clear breach of their duty, because it was shown that the man would not have recovered even if he had received treatment. The failure to treat was not the cause of death.

[28] Where there exists more than one possible cause of damage or harm, the plaintiff does not have to show that the defendant's actions were the sole cause of the injury suffered. Instead, it must simply be shown that the defendant's actions materially contributed to the harm (see *Wilsher v. Essex Area Health Authority [1988] AC 1074; [1986] 3 ALL ER 801* and *Bonnington Castings Ltd v. Wardlaw [1956] AC 613*). An act contributes materially when its causative effects are in operation until the moment of damage. The term "proximate cause" means a cause which in a direct, natural and continuous sequence, unbroken by any superseding cause, produces the damage, injury or loss complained of and without which such damage, injury or loss would not have happened.

[29] However, where the court finds that it is impossible to determine this with accuracy, the suit will fail. For example in *Wilsher v. Essex Area Health Authority*

(supra) a baby after being delivered was given excess oxygen as a result of the admitted error of the doctor and the baby then suffered blindness through retrolental fibroplasia. The House of Lords identified that the excess oxygen was just one of six possible causes of the condition and therefore it could not be said to fall squarely within the risk created by the defendants. The court would not impose liability on the defendant in those circumstances.

[30] In circumstances where the defendant's act remains an effective or substantial cause of the damage, at least ordinarily, for example where the defendant's breach remains an effective or substantial cause of the damage, albeit in combination with the plaintiff's failure to take reasonable precautions in his or her own interest, the chain of causation will not be broken (see *County Ltd v. Girozentrale [1996] 3 All ER 834, at p. 849 b-c*, *per* Beldam LJ). In order to comprise a *novus actus interveniens*, so breaking the chain of causation, the conduct of the plaintiff "must constitute an event of such impact that it 'obliterates' the wrongdoing…" of the defendant (see *Clerk & Lindsell on Torts* (19th ed.), at para. 2-78). For there to be a break in the chain of causation, the true cause of the damage must be the conduct of the plaintiff rather than the act of the defendant. The act of the plaintiff does not excuse the defendant's negligence unless the plaintiff 's negligence was the sole proximate cause of the plaintiff's loss or damage. What will constitute such conduct is so fact-sensitive to the facts of any case where the issue arises that it is almost impossible to generalise.

[31] It is always a question of degree at what point the damage claimed for ceases to flow naturally and directly from the breach. A new and independent cause means an act or omission of a separate and independent agency, not reasonably foreseeable, that destroys the causal connection, if any, between the act or omission inquired about and the occurrence in question and thereby becomes the immediate cause of such occurrence.

[32] Section 113 of *The Evidence Act* enables the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of human conduct in relation to the facts of the particular case. Unlike diesel which apart from powering the car acts as a lubrication oil that keeps the fuel pump and other components of the engine running smoothly, petrol, acting as a solvent when mixed with diesel, when pumped into a diesel engine increases friction between parts, causing damage to the fuel lines and pump. Because diesel needs to be compressed before it will ignite, chances are that even the engine will not be able to start. Diesel in a petrol engine clogs up the spark plugs and fuel system. In more severe cases, the fuel pump, lines and injectors could be ruined, the fuel filter clogged up and other damage done. That means the car simply won't start. This is why putting petrol into a diesel tank causes more damage than diesel in a petrol car.

[33] The result of putting diesel in a petrol car is not quite as catastrophic as when it is the other way round. The symptoms of using diesel in a petrol car are; the engine misfiring, excessive smoke from the exhaust, the engine cutting out, and the engine failing to restart. Fixing the error ordinarily involves; draining the car's fuel tank and depending on the stage at which the error is realised, the fuel pump, injector, fuel rail and other parts may have to be replaced, or in extreme cases, replacement of the motor vehicle engine. D.W.2 Auma C.J, testified that this is exactly what was done in this case.

[34] In his testimony, P.W.2 Oryem Frank stated that the vehicle sustained an engine knock by reason of the re-fuelling mishap, but did not explain the symptomatic facts from which he deduced that conclusory fact. That the car sustained an engine knock was not a fact but a conclusion. Courts treat differently allegations of fact made by a witness from conclusions drawn by the witness. A court is not bound to accept as true a conclusion couched as a factual allegation. An engine knock is usually heralded by a rapid pinging, knocking or tapping sound in an engine. Such a sound is the result of the air and fuel mixture within an engine

cylinder igniting incorrectly. An engine knock is what happens when a portion of the fuel inside the cylinder detonates before the rest of the fuel. Engine knocks in petrol engines may be the result of multiple causes, such as; accumulation of carbon deposits in the cylinders, use of low-octane fuel, low engine speed, overheating of the engine and faulty spark plugs. The burden was on the respondent to show that it is more probable that the damage resulted as a consequence of something for which the appellant was responsible than in consequence of something for which it was not.

[35] The question then was whether in light of the multiplicity of possible causes of engine knocks, the engine knock in the instant case would not have occurred but for the negligent act or omission of the appellant's employees. The court is forced into the position of trying to determine which of the possibilities is the actual cause of the damage suffered. There can be no cause in fact if the defendant's negligence merely furnished a condition that made the injury possible. The only evidence furnished by P.W.2 Oryem Frank was that the vehicle would start and stall after some time, and this is what prompted him to drive the vehicle back to the fuel station where he asked the appellant to have it repaired. The only basis of his claim that it was un-connected to the re-fuelling mishap is that it developed thereafter and not before.

[36] However, D.W.2 Auma C.J, refuted that theory when he testified that when he emptied and flushed the tank with petrol on 3rd May, 2017, he then re-filled it with 15 litres of petrol and P.W.2 Oryem Frank drove it off after a road test confirming no serious damage beyond the spark plugs had been sustained. When he inspected the vehicle again on 6th May, 2017 in Amuru, he found that it had developed a problem of oil leaking onto the spark plugs, with excessive emission of smoke. This was due to delayed servicing which caused wearing out of the piston rings. He found that the fuel tank was empty. He concluded that the breakdown of the engine was caused by natural wear and tear on piston number three, and not by the re-fuelling mishap.

[37] Proof of causation should not be accepted on anything less than the balance of probabilities, as is common with all civil suits. Proximate cause, like any other ultimate fact, may be established by circumstantial evidence. Circumstantial evidence requires inference to reach a desired conclusion. For an unknown material fact to be fairly and reasonably inferred from other facts proved in the case, the circumstances must raise a more probable inference in favour of what is alleged. The difference between the criminal standard of proof in its application to circumstantial evidence and the civil one is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while in the latter one needs only circumstances raising a more probable inference in favour of what is alleged. In order to prevail, the evidence should be adequate to establish the conclusion sought and must so preponderate in favour of that conclusion as to outweigh any other reasonable or possible inference or deduction inconsistent therewith. When a cause is shown which might produce damage, and it further appears that damage of that particular character did occur, it is a warrantable inference, in the absence of showing of other cause, that the one known was the operative agency in bringing about such result. An inference though can be clearly wrong where the factual basis upon which it relies is deficient or where the legal standard to which the facts are applied is misconstrued.

[38] On a regular, petrol-powered vehicle, blue smoke from the exhaust usually means that the car is burning oil, but there can be several causes for this. There may be a leaking valve, which is letting oil get into places in the engine that it's not supposed to, causing smoke to come out of the exhaust. White smoke may be the product of a faulty fuel pumping injection timing, a damaged cylinder head, blown head gasket, cracked engine block, a problem with the cooling system like the intake manifold or head gasket causing a problem with the coolant. On the other hand, black smoke from the exhaust points to a problem with the fuel, which is either contaminated or mixing too heavily with oil in the engine (it is

supposed to mix, but with the right balance of oil and fuel). An excess amount of black smoke pouring out of the exhaust may be caused by; accumulation of combustion product in important areas like combustion chambers and injectors, faulty sensors, clogged air filters, damaged piston rings, damaged fuel injection system or a fuel line that may not be functioning properly. Neither P.W.2 Oryem Frank nor D.W.2 Auma C.J offered evidence of the colour of the excessive smoke the vehicle was emitting.

[39] It is open to the court to prefer the testimony of certain witnesses over others and to place more weight on some parts of the evidence than others, particularly where there is conflicting evidence. A misdirection is only a material error if it gives rise to the reasoned belief that the trial Magistrate must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. The mere fact that the trial Magistrate did not discuss a certain point or certain evidence in depth is not sufficient. In the present case, it is clear from the trial Magistrate's reasons, that he suffered a misapprehension of the evidence before the court. While P.W.2 Oryem Frank offered an un-substantiated conclusion that the vehicle had sustained an engine knock, D.W.2 Auma C.J offered the symptomatic facts that supported his conclusion that the breakdown of the engine was caused by natural wear and tear on piston number three, and not by the re-fuelling mishap. The trial Magistrate did not consider the question in any part of his judgment. Drawing erroneous conclusions from the evidence P.W.2 Oryem Frank while ignoring relevant evidence of D.W.2 Auma C.J would justify appellate interference with that finding of fact as to causation.

[40] Rather than relying on the evidence of P.W.2 Oryem Frank, which was of a hypothetical and unspecific nature the court ought to have given much more weight to the specific evidence of D.W.2 Auma C.J. Being a part time contractor with the appellant was not demonstrated by cross-examination to have influenced or biased his mind. His failure to do so becomes all the more apparent when his analysis (or lack thereof) is compared to that in cases in which the

courts applied the appropriate method. The question of whether the damage to the vehicle was caused by the appellant's employee's negligent act necessitated a somewhat more in-depth analysis of the evidence. In my view, neither the testimony of P.W.2 Oryem Frank nor any other evidence on the record that the court might have considered had it asked the appropriate question, supports the conclusion on a balance of probability that the breakdown of the engine was caused by the re-fuelling mishap rather than natural wear and tear.

[41] Adducing evidence of negligence before the court is not enough by itself to establish liability, for it also must be proven that the negligence was a proximate, or legal, cause of the event that produced the harm or loss sustained by the plaintiff. Although there may be more than one proximate cause, where, as in this case, the facts proven show that there are several possible causes of the damage in issue, for one or more of which the appellant was not responsible, where it is pure matter of guesswork where the greater probabilities lie, and it is just as reasonable that the damage was the result of one cause as the other, any of which could be a substantial cause of the events which produced the damage, the respondent would not recover since he would have failed to prove that the negligence of the appellant caused the damage. A court will not guess between two equally probable causes.

[42] In the instant case, proof was not furnished tending to eliminate other possible causes of the damage, so as to indicate that the negligence of which that damage speaks is probably that of the appellant. Had the trial court properly directed itself, it would have found that the respondent did not adduce evidence sufficient to establish on a balance of profanities, that the damage to the car was caused by the appellant's negligence. Having cone to that conclusion, I find it unnecessary to consider grounds four, five and six relating to the award of general damages and costs.

Order:

[43] In the final result, the appeal succeeds. Consequently, the judgment of the court below is set aside and instead the suit is dismissed. The costs in the court below and of the appeal are awarded to the appellant.

Delivered electronically this 8th day of June, 2020 ……Stephen Mubiru……..

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : M/s Omara and Co. Advocates.

For the respondent : M/s Masereka, Mangeni and Co. Advocates.