Hon. Justice F Tsekooko RC.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: MANYINDO, D.C.J., ODOKI, J.S.C., & ODER, J.S.C.)

Rundowncase

CIVIL APPEAL 11/1993

HADIJA NAKIBUKA .... APPELLANT

Fraud Case - D13 R 1(5)

- VERSUS -

THE ATTORNEY GENERAL OF UGANDA .... RESPONDENT

(Appeal from the judgment of the High Court at Kampala (Mpagi-Bahigeine, J. dated 17th November, 1992

IN

Civil Suit No. 486 of 1977)

JUDGEMENT OF ODER, J.S.C.

The appeal is against the dismissal by the High Court of the appellant's Suit against the Respondent for general damages and costs, instituted under the Law Reform (Miscellaneous provisions) Act.

The appellant had sued on her own behalf and on behalf of her three children, as the widow and dependents respectively of the Appellant's late husband, Mohammed Mayanja (hereinafter referred to as "the deceased").

The claim was stated in paragraph 3 of the plaint as follows:

> "On behalf or about 14th April, 1976, the plaintiff's husband Mohammed Mayanja now deceased was a passenger in a motor-vehicle registration number UVP 909 at a place called Kachumbala along Mbale/Soroti Road, the said motor vehicle registration No. 7UA 28. The said collision was caused solely by the negligence of UA 3192 L/CPL Yakobo Akol

who was driving in the course of his duties as an Army Officer of Uganda Armed Forces".

This was then followed by a long list of particulars of the alleged negligence on the part of the driver of 7 UA 28.

Alternatively the Appellant relied on the doctrine of res ipsa loquito" as the basis of her claim.

The plaint further alleged that the deceased died on the spot as a result of the accident, and that by the death of the Deceased, the widow and the three children lost support in the form of shs. 7,000/= per month from the deceased, who was 30 years old at the material time, and had been earning a regular income from his employment as a Police Officer.

The respondent defended the suit by filing a written statement of defence, in which he denied any knowledge of the alleged accident and the allegations contained in paragraph 3 and others of the plaint.

According to the record of proceedings, the plaint was filed in Kampala on 15/4/1977, exactly one year after the alleged accident had occurred; and the written statement of defence was filed on 4/6/1977. The hearing of the Suit commenced on 16/9/1992, and was completed on 27/10/1992. This was just over 15 years and four months after the last pleadings had been filed. It is remarkable that the Suit took over fifteen years to be disposed of by the High Court. The cause of such long delay appears to lie with Appellant.

Since what transpired during the hearing is material to this appeal and the record is fairly brief, it is, I think, important to refer to the relevant parts of the record, which read as follow:-

"Mr. Mugabi for the Plaintiff - present

Mr. Nagujje for the Defendant - present

Mr. Mugabi - We are ready to proceed. Issues are:

1. Whether Defendant's servant or agent was negligent.

2. Whether the accident was caused by negligence of the driver of UVP 909.

3. If the defendant is held liable what is the quantum?

Plaintiff adult, affirmed. Hadija, 37, staying at Busega, shop keeper at Luwum Street. I am single - widow. My husband died. I got married in 1966 in Butambala in a mosque. My husband was Mohammed Mayanja. He is now dead. Before his death, we were staying together. He died on 16/4/1976, in an accident at Kachumbala. He was coming from Nairobi. He was buried in Butambala. We had 3 children, Sarah Nakitende - 24 years at Makerere University, Alli Kitonsa - 22 years, Musa Lugemwa - 18 years.

The deceased was a policeman at the rank of Sergeant. He did not have any other business. I was dependant upon him for support. He used to give me money for maintenance about shs. 500/-= per month. I never knew his salary. I am seeking compensation for my husband's death.

Cross-examined by State Attorney:

My marriage card was looted. I only have his identity card. I never knew the vehicle which knocked him down. I do not have any letter from the police to show he was working there. The deceased never left a will. Nobody ever applied and obtained Letters of Administration.

Next witness:

P.W.1: BADURU KALIBALLA, 56 adult, affirmed staying at Mengo. Court Process Server with Mugabi & Co. Advocates. I know the plaintiff. I have known him for a long time. She used to be my friend's wife - Mohammed Mayanja who is now dead - died during 1976 in a motor accident at Kachumbala, we were in a Combi coming from Nairobi from a football match. It was parked aside at a shopping centre when an Army Lorry came and knocked it. The deceased and two others died on the spot. We took the body to Mbale hospital. The army driver was responsible. We were parked at the side.

It's number was 17 UA 28, my friend was a policeman. He was at Nsambya but did not know the Department in which he was working.

Cross-examined by State Attorney:

The accident happened at 3 p.m. We were parked on the left facing Soroti. Our Combi was knocked at the driver's seat at front. At the time I was working at Kassamali Remutullah's shop at Nakivubo Road. I do not know whether any measurements were even taken.

Mr. Mugabi - Close of Plaintiff's case.

State Attorney - I was expecting a ..... who has not shown up. I pray for an adjournment.

Court Ruling: Adjourned till 27/10/1992.

A.E. MPAGI-BAHIGEINE,
J U D G E
10/9/1992".

When the hearing of the Suit continued on 27/9/1992, Mr. Mugabi, Counsel for the appellant was present, but the State Attorney representing the Respondent was absent. Mr. Mugabi applied to make submissions in the Respondent's absence. Though the record does not indicate so, the trial Court apparently granted the application. In his submission, Mr. Mugabi said that in the absence of evidence to the contrary, the appellant's evidence should be accepted and the Respondent held liable. On quantum, Mr. Mugabi suggested an award of Shs. 19 million.

The learned trial Judge rejected the appellant's claim and dismissed the suit, making no order for costs. Hence this appeal.

Four grounds were set out in the memorandum as follows:

1. The learned trial Judge erred when she failed to make findings of fact on the framed issues.

2. The learned trial Judge erred when she decided the case on matters which were not framed as issues.

3. The learned trial Judge misdirected herself when she held that the Dependants have to be seen by the Court unless they happen to be abroad.

4. The learned trial Judge misdirected herself when she failed to award the quantum of damages in the event of her having held the Respondent liable in negligence.

Mr. Mugabi, learned Counsel for the Appellant, argued grounds one and two together. I shall consider them in the same manner. He submitted that the occurrence of the accident was not framed as an issue for the Court's decision. The Respondent should, therefore, have been taken to have admitted the accident by implication. It was also contended that the learned trial Judge should have made findings only on the framed issues and not on any matters outside them. Two of such issues were whether the Respondent's Agent or Servant was negligent; or whether the accident was caused by the negligence of the driver of UVP 909. On the basis of the evidence adduced in support of the Appellant's claim, and the Respondent not having adduced controverting evidence, the learned trial Judge ought to have answered the first issue in the affirmative and the second in the negative.

With respect, issues in this case do not appear to have been "framed" as Mr. Mugabi contends, and still less in the manner required by the rules. The procedure for framing issues is governed by Order 13 of the Civil Procedure Rules. Under Rule 1(5), it is the duty of the trial Court to frame issues in a Suit.

The rule provides:-

> "1(5) At the hearing of the Suit, the Court shall, after reading the pleadings, if any, and after such examination of the parties or their Advocates as may appear necessary, ascertain upon what material propositions of law or fact the parties are at variance, and shall there upon proceed to frame the issues on which the right decision of the case appears to depend".

The effect of this Rule and the object of framing issues required that issues be framed at the commencement of the trial of a Suit and before evidence (If any) is adduced by the parties. This was said so by this Court in the recent case of **Jovelyn Barugare v. Attorney General, Civil Appeal No. 28 of 1991.** This, in my opinion, must be so because the framing of issues has a very important bearing on the trial and decision of a case. Firstly, because it is the issues framed and not the pleadings that guide the parties in the matter of adducing evidence. Thus when a point has been the subject of an issue, the parties will not be heard to say that the point was not disputed and so required no proof. Secondly because the Court cannot refuse to decide a point on which an issue has been framed and evidence given by the parties even if the point involved is not mentioned in the pleadings, and the finding on such issue cannot be disturbed merely on the absence of a plea. See: **A.L.R. Commentaries on the Indian Code of Civil Procedure, by Manohar and Chitaley, 10th Edition, Vol. 3 page 493.** Therein, the learned authors discussed the provisions of Order XIV of the Indian Civil Procedure Rules, the terms of which are similar to our order 13.

In the instant case, the learned trial Judge does not appear to have framed issues in the Suit in the manner I have described above, although in her judgment she referred to the issues stated by the Counsel for the Appellant at the trial as "issues framed". However, I think that the irregularity in question was not fatal to the trial.

What constitutes issues in a Suit are defined in rule 1(1), (2), (3) and (4) of the same Order.

> "(1) Issues arise when a material proposition of law or fact is affirmed by the one party and denied by the other.
>
> (2) Material propositions are those propositions of law or fact which a Plaintiff must allege in order to show a right to sue or a Defendant must allege in order to constitute a defence.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) Issues are of two kinds: Issues of law and issues of fact".

In the instant case, the Appellant alleged in his plaint that the accident in question occurred, but the Respondent denied any knowledge of such an accident having occurred. The occurrence of the alleged accident was, therefore, an issue in the suit and ought to have been framed as such, but it was not.

In these circumstances Mr. Mugabi the learned Counsel for the Appellant submitted that because the occurrence of the accident was not framed as an issue the Respondent should have been regarded as having admitted the accident by implication. Miss Musoke, learned Counsel for the Respondent, on the other hand, submitted that the Respondent did not abandon his pleadings in the written statement of defence denying knowledge of the accident. The accident, therefore, remained an issue in the Suit.

I agree with the submissions of the learned Counsel for the Respondent in this regard, for three reasons. Firstly, since the occurrence of the accident was affirmed by the Appellant and denied by the Respondent, the accident was an issue between the two parties by virtue of the provisions of rule 1(3). Secondly, what Mr. Mugabi stated that at the commencement of the trial of the Suit as the issues in the Suit, were apparently not agreed to by the Respondent as the only issues or at all. Immediately following what Mr. Mugabi said were the issues in the Suit, the trial Court ought to have ascertained from the Respondent's Counsel at the trial whether those were all the issues agreed to by both parties. At least the Counsel ought to have been asked to indicate the Respondent's position about issues in the Suit. Unfortunately this was not done. Thus, the trial Court not having framed the issues and the Respondent not having been asked to express the views on the issues as stated by the Appellant's Counsel, omitting the accident as an issue, the Respondent

cannot, in my view, be taken to have admitted the accident by implication. It was the Appellant's Counsel who omitted the accident as an issue. Thirdly, issues in a Suit should be so framed as to embrace the whole dispute in a suit. In the instant case, the issues on the basis of which the trial of the suit apparently proceeded left out the issue of the accident, which was material to the correct decision of the case as a whole.

The Appellant's criticism that the learned trial Judge did not answer all the issues in the Suit appears to be justified. As I understand it, her judgment dealt only with issues of whether the Appellant was married to the Deceased, whether the accident occurred, and whether the Deceased died in the accident. This is the gist of the criticism contained in grounds one and two of the appeal. Though the criticism appears to have some merit, that, I think, is not the end of the matter, because the issues of whether it was the Respondent's Servant or the Driver of the motor vehicle UVP 909 who caused the accident very much depended on whether the alleged accident did, in fact, take place which, as I have already said, was an issue in the Suit. In the circumstances, I think that the learned trial Judge was justified in making a finding first on whether there had been an accident in which the Deceased died. Only after doing so could the issues of negligence arise.

In the event, the learned Judge found that the action was unsustainable. Firstly because the Appellant had failed to prove that she had been married to the Deceased before his death. According to her own evidence, she was only 11 years, in 1966 when she allegedly got married to the Deceased, which the learned trial Judge found impossible. Moreover, the Appellant had failed to adduce any evidence showing that she had been the wife of the deceased; secondly, because the Appellant had failed to adduce any evidence that the deceased was employed in the Police Force before his death; and thirdly, because the Appellant's evidence did not sufficiently prove that the alleged accident had, in fact, occurred and that the deceased had died in such an accident. Where such conclusions justified?

As the first Court of Appeal in this matter, this Court is entitled to have its own consideration and views of the evidence as a whole and to arrive at its own conclusions thereon: Pandya v. R (1957) E.A. 336. According to the plaint and the evidence of Kalibala (P.W.1) the accident occurred at Kachumbala on Mbale/Soroti. Kalibala also said that he and the Deceased were passengers in a Volks Wagen Combi motor vehicle, returning from a football match in Nairobi, and that the Combi was parked facing the direction of Soroti from Mbale on the side of the road at a shopping centre, when it was knocked by the Army truck. Kachumbala is about 36 miles on the Tororo/Mbale/Soroti road from the Tororo junction off the road from Nairobi. This is a well known fact. If the deceased, Kalibala and other passengers in the Combe were returning from Nairobi why were they at Kachumbala, so far away from the road from Nairobi when the accident occurred? Why was the Combe parked facing the direction of Soroti from Mbale? What were they doing at Kachumbala shopping centre? If the Combi was parked, where was Kalibala at the time of the accident? Was he outside or inside the Combi with the Deceased? All these questions were left unanswered by the Appellant's evidence, whose duty was to prove her case on the balance of probability.

Further, Kachumbala is only about eight miles from Mbale. In the circumstances, an accident involving a motor vehicle carrying a policeman or policemen and an Army truck, and in which the deceased, (a policemen) and two others died would be expected to have been reported to the police at Mbale, and a police accident report thereof made by the police. In such an event a police report of the accident should have been mentioned in the plaint, which was filed at Mbale on 15/4/1977, or produced in evidence at the trial of the Suit. Neither of this was done.

According to the evidence of the Appellant and Kalibala (P.W.1), the body of the deceased was first taken from the scene of the accident to Mbale Hospital and later buried in Butambala. In the circumstances the relevant death certificate or post-mortem report should have been produced at the trial as evidence of the death of the Deceased, but this the Appellant did not do.

Next, there is the very curious coincidence that Kalibala (P.W.1), the only eye witness who testified for the Appellant, happened to be a Court Process Server in the firm of Mugabi and Co. Advocates, the Appellants's Counsel in this case. This must be a very remarkable coincidence, to say the least.

All these matters, in my view, cast serious doubts on the truth of the Appellant's evidence and that of her witness Kalibala (P.W.1) about the alleged accident and the death of the Deceased in it.

Regarding whether the Appellant was, in fact the widow of the Deceased. I think that her evidence, too, fell far short of the required standard of proof on the balance of probability, especially more so as the implication of her evidence is that she was only eleven years old when she got married to the Deceased, which is unlikely in my view. Attempts were made at the hearing of the appeal to correct the evidence given at the trial that the Appellant was 37 years old when she testified on 16/9/1992 and that she married the Deceased in 1966. However, the attempts were abandoned apparently because the learned Judge had submitted to this Court her own affidavit stating that the evidence had been correctly recorded.

In the circumstances, therefore, I think that, the learned Judge was justified in reaching the conclusions she did concerning the accident, the death of the deceased, and the Appellant having been married to the Deceased. The onus was on the Appellant to prove her case to the required standard whether the respondent adduced controverting evidence or not. This, in my opinion, the Appellant failed to do.

Regarding ground three of the appeal, I am unable, with respect, to see any merit in the complaint. By virtue of **Section 8 of the Law Reform (Miscellaneous Provisions) Act**, actions under the provisions of the Act are brought for the benefit of members of the family of a person whose death is caused by wrongful act, neglect or default of another person. It has been established by a number of cases, for instance, the recent decision of this

Court in Uganda Electricity Board v. G.M. Musoke, Civil Appeal No. 30 of 1991, that only dependants of the Deceased persons can benefit from such actions. For that reason and the necessity to bring such actions on behalf of the persons concerned, it is essential that particulars of the Dependents, including names, ages and relationship with the Deceased persons, are stated in the plaints instituting the actions. It follows, therefore, that, in on grounds of prudence, persons claiming damages for dependency in such actions should be produced before the trial Court, which must see that the particulars stated in the plaint, especially ages, are correct, since the amount of awards depend on the ages of the dependents, such as children. It is also necessary for courts to be on their guard against fictitious claims. Consequently, where no dependent child is produced in Court, no award should be made in respect of such a dependent, unless the Court is satisfied with the relevant explanation regarding the failure to do so.

Grounds one, two, three of the appeal having failed, I think that it is not necessary to consider ground four concerning what damages the learned trial Judge would have assessed had the Respondent been found liable in the alleged negligence.

For these reasons given I would uphold the decision of the learned Judge, and dismiss this appeal with costs.
Dated at Mengo this...19th.....day....of....January,.....1995.

A.H.O. ODER,
JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS THE
TRUE COPY OF THE ORIGINAL.

E.K.E. TURYAMUBONA,

DEPUTY REGISTRAR, THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: MANYINDO, D.C.J., ODOKI, J.S.C., & ODER, J.S.C.)

CIVIL APPEAL 11/1993

HADIJA NAKIBUKA .... APPELLANT

- VERSUS -

THE ATTORNEY GENERAL OF UGANDA .... RESPONDENT

(Appeal from the judgment of the High Court at Kampala (Mpagi-Bahigeine, J. dated 17th November, 1992

IN

Civil Suit No. 486 of 1977)

JUDGEMENT OF MANYINDO, D.C.J.

I agree with Oder, J.S.C. that this appeal ought to be dismissed with costs, for the reasons appearing in his judgment. As Odoki, J.S.C. also agrees it is so ordered.

Dated at Mengo this.....19th....day....of.....January,.....1995.

S.T. MANYINDO,
DEPUTY CHIEF JUSTICE

I CERTIFY THAT THIS IS THE
TRUE COPY OF THE ORIGINAL.

E.K.E. TURYAMUBONA,
DEPUTY REGISTRAR, THE SUPREME COURT

THE REPUBLIC OF UGANDA

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THE ATTORNEY GENERAL OF UGANDA .... RESPONDENT

(Appeal from the judgment of the High Court at Kampala (Mpagi-Bahigeine, J.) dated 17th November, 1992

IN

Civil Suit No. 486 of 1977)

JUDGEMENT OF ODOKI, J.S.C.

I have had the benefit of reading in draft the judgment prepared by Oder J.S.C. and I agree that this appeal must be dismissed with costs, for the reasons he has given.

Dated at Mengo this....19th....day....of...January,.....1995.

B.J. ODOKI,

JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS IS THE
TRUE COPY OF THE ORIGINAL.

E.K.E TURYAMUBONA,

DEPUTY REGISTRAR, THE SUPREME COURT