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Hon. J.W. Teekoo JSC

THE REPUBLIC OF UGANDA

*Test; grant vicarious liability*  
IN THE SUPREME COURT OF UGANDA AT MENGO

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

CIVIL APPEAL 21/1994

MUTYABA LEONARD SEMBATYA ..... APPELLANT  
A minor suing through  
PANTALEO KAGGWA his  
father and next friend.

- VERSUS -

THE ATTORNEY GENERAL ..... RESPONDENT

(Appeal from the judgment/Decree  
of Uganda at Kampala (Hon. C.K.  
Byamugisha) dated 27th January  
1993, in Civil Suit No. 795 of  
1990)

JUDGMENT OF MANYINDO, D.C.J.

This is an appeal against the judgment of Byamugisha J., whereby she dismissed the appellant's suit against the respondent for inter alia, general and special damages for injuries sustained by the appellant when he was shot in the left leg by a soldier.

The incident occurred on 21-9-89, at Kisuna Village in Mubende District. On that day the appellant who was a 16 year old school boy, accompanied his father Pantaleo Kagwa (PW3) to the home of their neighbour Yokana Kiyonga, to attend the burial of Kiyonga's son Godfrey Mukasa, a soldier in the National Resistance Army, who had died at Mbuya in Kampala. The body of the late Mukasa was delivered to the home of Kiyonga by eight soldiers on an Army tractor at about 3.00 p.m. on that day. During the burial the soldiers performed a gun salute for the deceased soldier. It was during that gun salute that one of the soldiers who was apparently drunk, mishandled the gun and shot

off target. The stray bullet hit the appellant in the left leg which was subsequently amputated through the knee at Mubende Hospital. The appellant sued through his father as next friend.

The respondent did not call evidence at the trial. The State Attorney who appeared and cross-examined the appellant's witnesses did not turn up on the day final submissions were made. The respondent was not even represented on appeal. According to the respondent's Written Statement of defence, the respondent's soldiers never "negligently fired live gun shots and injured the plaintiff." In the alternative it was claimed that if a soldier injured the appellant then he was not acting in course of his employment with the respondent. In a further alternative it was claimed that the incident was inevitable. The trial Judge ~~accepted~~ the evidence of the appellant and his father as to how the incident occurred. On that evidence she held, quite rightly, that the soldier in question had acted negligently in not managing his gun which was loaded with ammunition and in firing position, properly.

The trial Judge then proceeded to consider the crucial question whether the errant soldier was acting in the course of his employment with the respondent so as to make the respondent liable on the basis of master-servant relationship. She correctly stated the law relating to liability of a master for the acts of his servant as can be discerned from, among others, the cases of: Muwonge v. Attorney General [1967] E.A. 17; Virani v. Dharamsi [1967] E.A. 132; Railways Corporation v. Obwoya [1974] E.A. 276. It is that an act is said to be done by a servant in the course of his employment not only when the servant is actually doing the work which he is employed to do, but also when the act done is an incident in performing something he is employed to do.

The Judge then took the position that in the instant case it had not been established that the soldier who fired the fatal shot did so in the course of his employment with the respondent. She dealt with the matter thus:-

"In this case, can it be stated that the soldiers were acting in the course of their employment and performing duties which they were employed to do merely because they were in uniform, armed and transported by an army tractor? I think not. There is no evidence before me on which the Court can base its finding that the soldiers were performing any duties which they are employed to do.

The fact that they were armed and transported by a Government tractor to bury their colleague is (in) no way connected with their duties.

It was a private affair, therefore their acts were independent and unconnected with their duties in my view. The situation would have been different if the area was disturbed or there was commotion and soldiers had been sent purposely to facilitate the burial of their colleague. There appears not to have been such a situation or if it was there, no evidence was adduced to prove the same. It is my finding that the soldiers were neither performing any duties for which there are employed to do nor were the act of burying their colleague incidental to such duties.

Even if it could be said that soldiers perform such functions as was case here, there is no evidence before me to show or prove that soldiers are employed to do that. To hold otherwise would be stretching the law too far in my view."

She dismissed the suit with costs to the respondent. She then assessed the damages just in case she was later found to have erred on the question of liability. She disallowed the claim for special damages which had not been proved. She assessed general damages at Shs. 4 million.

The appeal was brought on three grounds, namely:-

- (a) that the trial Judge erred in holding that the soldiers were not acting in the course of their employment with the respondent;
- (b) that the Judge erred in holding that the claim for special damages was not proved and,

(c) that the award of Shs. 4 million would have been totally inadequate in the circumstances of this case.

Mr. Kasule Remmy who represented the appellants abandoned the ground on special damages. With regard to liability, he argued that the trial Judge wrongly and unduly restricted the duties of the army. He thought that an award of Shs. 12 million as general damages would have been appropriate.

I find merit in the appeal. The evidence clearly showed that the eight or so soldiers were taken to the scene of incident in a group under the charge of an officer. The mourners were asked to stand aside as the soldiers had a ceremony to perform in honour of their dead colleague. It was in the course of that ceremony that something went wrong. It seems very clearly to me that the soldiers were on duty. The duty was the ceremonial burial of their colleague. With respect, I cannot agree that soldiers cannot be on duty in peaceful times. Military gun saluted are normal. We see them on certain functions such as welcoming visiting Heads of States. In this case the gun salute was incidental to the soldiers main job of burying their colleague. The trial Judge was in my view wrong to hold that this was a private function. There were acting in the course of their duties with the respondent. Therefore, the first ground must succeed.

On the question of general damages, I agree with Mr. Kasule that the award of Shs. 4 Million was inadequate. The appellant was 16 years old at the time of the incident and 18 years old at the time he testified. His left leg was amputated through the knee, According to the medical evidence on record he may have recurrent infection of the knee bone or what is left of it. His permanent disability was put at 65%. He will use crutches forever as an artificial leg cannot be fitted on to his left knee which goes septic from time to time.

In Wamala v. Kabazi, HCCS No. 981 (unreported) where the plaintiff's leg was amputated below the knee, which is not as bad

as an amputation through the knee, he was awarded Shs. 6 Million general damages. And in recent case of Kigundu v. Uganda Transport Company (1975) Ltd., Civil Appeal No. 7 of 1993, Supreme Court (unreported), where there was an amputation above the knee and permanent disability of 60%, Shs. 5 million was awarded. On appeal this Court raised the award to Shs. 10 million. The victim was 45 years old. Again in: Byabalema & 2 others v. Uganda Transport Company (1975) Ltd., Civil Appeal No. 10 of 1993, Supreme Court (unreported) where there was an amputation above the knee and a 60% permanent disability this Court raised the 40 year old plaintiff/appellant's award from Shs. 4 million to Shs. 9 million. Kabazi (supra) was cited in the High Court by Counsel for the appellant but the trial Judge did not refer to it in her judgment.

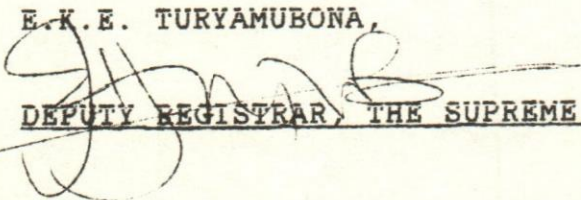
In my view the appellant's situation was slightly worse than that of the plaintiff in Kabazi (supra) Kigundu (supra) and Byabalema (supra). He deserved more than he got. The disparity in awards cannot be explained. I would uphold this ground of appeal also. In the result I would allow the appeal, set aside the judgment of the trial Court, enter judgment for the appellant and award him Shs. 10 million general damages. I would award him costs in the High Court as well as costs of this appeal. The decretal sum would carry interest at 15 % from the date of judgment in the High Court. As Odoki, J.S.C., and Platt, J.S.C., agree, it is so ordered.

Dated at Mengo this.....3rd.....day of.....may.....1995..

S.T. MANYINDO  
DEPUTY CHIEF JUSTICE

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

E.K.E. TURAMUBONA,

  
DEPUTY REGISTRAR, THE SUPREME COURT.

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JUDGMENT OF ODOKI, J.S.C.

I have had the benefit of reading in draft the judgment of  
Manyindo, D.C.J., and I agree with it and orders proposed by him.

Dated this .....3rd.....day of.....May.....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.

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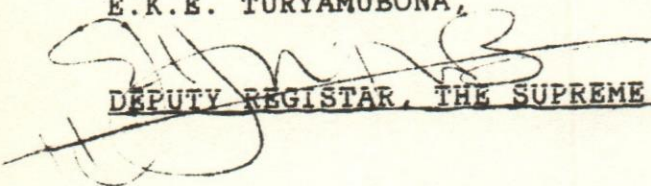
JUDGMENT OF PLATT, J.S.C.

I agree and have nothing to add.

H.G. PLATT,  
JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS IS  
THE TRUE COPY OF THE ORIGINAL

E.K.E. TURAMUBONA,

  
DEPUTY REGISTRAR, THE SUPREME COURT.