**Lutaya v Attorney-General**

**Division:** Supreme Court of Uganda at Mengo

**Date of Judgment:** 19 March 2004

**Case Number:** 10/02

**Before:** Odoki CJ, Oder, Tsekooko, Mulenga and Kanyeihamba JJSC

**Sourced by:** LawAfrica

**Summarised by:** M Kibanga

*[1] Tort – Vicarious Liability – Soldiers – Government Soldiers on duty without provisions – Soldiers*

*invading private land – Whether invasion done in the course of employment – Whether Attorney-General*

*vicariously liable.*

**JUDGMENT**

**TSEKOOKO JSC:** This appeal arises from the decision of the Court of Appeal which upheld the judgment of the Principal Judge dismissing the appellant’s action. There is a little confusion in the recording of evidence from witnesses and the numbering of witnesses in the trial court record. But the facts appear clear Lutaya, the appellant, at all time material to these proceedings, was the registered proprietor of a piece of land comprised in leasehold register volume 425 folio 13 block 97 plot 1, situate at Kyaggwe, in Mukono District. He established a farm in one part of the land, (hereinafter referred to as the “land”). He brought an action in trespass against the respondent Attorney-General in the High Court. In the action he claimed for general damages and special damages for trespass to the land. In the plaint, it was alleged that during February 1995, 600 soldiers of the National Resistance Army (NRA), now Uganda Peoples Defence Forces (UPDF), who were deployed at Mpoma satellite station, trespassed on the land and caused substantial damage to the farm by cutting down trees and removing all available timber, which was in his exclusive and demarcated forest for construction of residences at the satellite station and that the soldiers together with their dependants continuously engaged in firewood collection and burning charcoal on a commercial basis. In the process the soldiers ruined the appellant’s hitherto well preserved and treasured forest cover. In his written defence, the respondent admitted the presence of some soldiers at the station, but denied they were 600. He also denied knowledge of the existence of a farm and the alleged damage to it by the soldiers. The respondent stated further that if any soldiers trespassed, they did so on a frolic of their own. In the trial court, six issues were framed for determination. The Principal Judge, who tried the action, answered the first and second issues in the affirmative and the rest of the issues in the negative. Issue number 4 was key in the case, both during trial and on appeal, and it was whether the Attorney-General was liable for the acts of the soldiers belonging to Uganda Peoples Defence Forces (UPDF). The Learned Principal Judge held that the Attorney-General was not liable. The appellant appealed to the Court of Appeal where he lodged six grounds. The fourth ground upon which the Court decided the appeal was whether the respondent was vicariously liable for the act of the soldiers. The Court of Appeal answered this in the negative and so dismissed the appeal. The appeal before us is founded on two grounds, the first of which was amended with leave of the Court. The grounds are formulated as follows:

1. The learned Justices of the Court of Appeal erred in law in holding that the Attorney-General was not vicariously liable for the acts of the soldiers of the National Resistance Army (NRA).

2. The learned Justices of the Court of Appeal erred in law and fact when they held that the crux of the case was the vicarious liability of the Attorney-General and refused to entertain other grounds of the appeal raised. In substance these grounds are about the same thing. Submitting on the first ground, Mr *Semuyaba*, for the appellant, argued that on the evidence available, the Court of Appeal erred in holding that the acts of the soldiers did not bind the Attorney-General and that the Court misdirected itself and misinterpreted the evidence of Brigadier Nanyumba (PW6) when it held that his evidence was hearsay. Counsel contended that the soldiers who cut the appellant’s timber and trees did so in the course of their duty. He further contended that the Court wrongly applied the principle of vicarious liability as enunciated in the decision of *Muwonge v Attorney-General* [1967] EA 7. In support of his contention that the Attorney-General is liable, learned counsel relied on *Kafumbe Mukasa v Attorney-General* [1984] HCB 33, *J Barugahare v Attorney-General* civil appeal number 28 of 1995 and *Mutyaba Leonard Sembatya v Attorney-General* civil appeal number 21 of 1994 Supreme Court (both unreported). Mr *Wamambe*, State Attorney, supported the decision of the Court of Appeal, arguing that the Court acted properly when it relied on vicarious liability principles in *Muwonge* case to hold that the respondent was not liable for the alleged acts of the soldiers. Learned State Attorney also supported the view of the Principal Judge who had opined that Brigadier Nanyumba gave evidence to support the appellant as a friend, contending that the Brigadier’s evidence as well as that of the appellant himself is hearsay. The State Attorney argued that the cases cited by appellant’s counsel are distinguishable and that if the soldiers went to the land they were not officially ordered, employed or authorised to trespass on the land. In his contentions, Mr Semuyaba relied mainly on the evidence of four witnesses. These were the appellant himself who is PW1, of Kibuuka Joseph (PW5) who was the appellant’s worker and driver and Brigadier Nanyumba (PW6). In the Court of Appeal, Okello JA, delivered the lead judgment with which the other members of the Court concurred. The learned Justice of Appeal first considered the fourth ground of appeal before he upheld the decision of the Principal Judge who tried the suit. The fourth ground read as follows: “The learned Principal Judge misdirected himself on the law of vicarious liability and erred in law in finding that the respondent is not vicariously liable for the acts of the National Resistance Army (NRA) soldiers”. During the trial the Principal Judge, considered issue number 4 which was “whether the Attorney-General is liable for the Acts of the Uganda Peoples Defence Forces (UPDF)”. In his written arguments, counsel for the present appellant contended before the Principal Judge, that National Resistance Army/Uganda Peoples Defence Forces (NRA/UPDF) soldiers are servants of the government, just like the policemen were in *Muwonge v General* case. He therefore argued that the acts of the army personnel who collected timber and crops from the appellant’s farm to supplement their government provisions were acts done in the course of their employment. Therefore, the government was vicariously liable for the acts of the soldiers. Counsel argued that the evidence of the appellant (PW1), of Edward Semucho (PW4), of Kibuuka Joseph (PW5), and Brigadier Nanyumba (PW6), proved that the respondent’s servants entered the appellant’s land, got and used materials from the land to build huts, burnt charcoal and sometimes collected food. He also contended that there was no evidence establishing that the soldiers collected or could collect materials from anywhere else other than the appellant’s farm. The learned Principal Judge first disposed of the third issue which was “whether National Resistance Army (NRA) soldiers invaded the plaintiffs farm land and caused extensive damage to the crops thereon and forest cover” before he resolved the fourth issue. The learned Principal Judge alluded to the relevant averments in paragraphs 2, 3 and 4 of the plaint, then to the evidence of the appellant, that of Semucho (PW4) of Dr Alum (PW3) and Brigadier Nanyumba and concluded that the plunder of the farm was done from or prior to 1973 by soldiers of the pre-Nanyumba era as well as by ordinary people. He held that Nanyumba was a liar who was helping a friend, the appellant. The learned Principal Judge opined that the appellant should have produced evidence of the places where the burning charcoal took place, the particulars of the soldiers, of trucks, of the market where the charcoal had been sold and even one or two customers to whom the soldiers had sold the charcoal. He concluded that “it was not only the National Resistance Army/Uganda Peoples Defence Forces (NRA/UPDF) who caused the extensive damage to the property”. Consequently, he answered the third issue in the negative thereby holding definitely that the respondents servants did not participate in the damage complained of. Having thus made that finding, the learned Principal Judge found it easier to answer the fourth issue also in the negative. These finding are a little puzzling especially on the basis that Nanyumba was a liar. Brigadier Nanyumba does not appear to have been cross-examined on his evidence. To brand him a liar when his evidence was not challenged is with respect unfair. The fact that he had known the appellant was not good enough for labelling him a liar and holding him unreliable. He testified that he was the Chief of Staff at the material time and continued: “Mr Lutaya complained about his farm near Mukono. This is a copy of the communication (Exhibit P3). I received a copy of it. We as the army were occupying the area and that the army had destroyed Lutaya’s property. When I received this communication it was my duty to task the commander. I do not remember what the response of the unit commander was. But he confirmed that Uganda Peoples Defence Forces (UPDF) was occupying the land near Mr Lutaya’s and that they had damaged his crops. I was not informed of the number of troops. The State sometimes may not be able to cater for the needs of the army. The local commander may take the initiative to secure provisions. So Mr Lutaya’s complaint is not unusual”. This evidence appears to be that of a neutral witness who was doing his best to recollect what he could remember. The appellant testified about the crops, the fruits and the trees planted on his farm. He also stated that there was a natural forest and that in 1995 soldiers who were guarding Mpoma satellite station were without provisions. According to him: “From the day the soldiers arrived there was the invasion of my managed forest to collect timber for the construction of their huts. They cut my forest by literally invading my forest and took it over. When they were challenged the soldiers said the commander had sent them. I went to complain to the commander. I complained that my workers were frightened out of their wits. The commander said they wanted shelter and the men were sent by orders from above. They needed huts and firewood; they needed water, the cutting of the forest started around January 1995 or even earlier. Since then this has continued up to date. I established there were about 300 soldiers of National Resistance Army (NRA).” Eventually the population grew to about 600 people, including wives and children. Those who are transferred they were destroying the old huts for health reasons. Each time there is a reshuffle, there is new cutting. When I filed the suit the cutting had taken one year. As a result my forest reserve has been severely depleted. It continues to be harvested at random without inventory, without remuneration and without any arrangement whatsoever. The soldiers have concentrated on natural forest and on the high and tall trees on the deliberately managed forest”. The evidence of Nanyumba implicitly supported this evidence. The appellant was cross-examined at length and he substantially repeated what he stated in examination in chief about the destruction of the forest, charcoal burning and ferrying of poles. Edward Semucho (PW4) had worked on the farm before 1994. His evidence shows that during the time he was at the farm, the soldiers were not very many. He also implied that the damage claimed by the appellant was rather exaggerated and that much of the farm had been neglected. According to his evidence, fruit trees (avocados, bananas, mangoes, jackfruits) were there and by 1994 they were bearing fruits. When he revisited the farm in 1996, avocados, mangoes and jackfruits and been roughly handled and damaged. He did not say who damaged them. The appellant used to market his fruits. According to Semucho, soldiers went to the farm from 1992. By 1996 there were many huts of soldiers and “bush” from the farm had been cut to build these huts. The soldiers used to collect firewood from the farm. This evidence supports that of the appellant. Ssewadde Sonko (PW3) an agriculturist and one of the expert witnesses counted fruit trees on the appellant’s farm and produced his report (Exhibit P4) in which he assessed the value of the loss. In April 1997, the appellant engaged Dr John Alum, a forest expert to value the damage to the farm. He and his assistants produced a report (Exhibit P2). At the time he saw no evidence of charcoal burning but trees had been harvested from the forest. He saw some huts. For security reasons, he could not photograph the huts occupied by soldiers. Now, in the Court of Appeal, as already pointed out, the appeal was disposed of after consideration of only one ground, namely ground 4, which hinged on vicarious liability of the respondent because of the activities of the soldiers on the appellant’s farm. In his lead judgment Okello JA, cited passages from the *Muwonge* case (*supra*) in which Sir Charles Newbold, the President of the East Africa Court of Appeal, set out the principles of vicarious liability. The learned Justice of Appeal then referred to a passage in the judgment of the Principal Judge from which the learned Justice of Appeal concluded that the Principal Judge “certainly tended to give a narrower interpretation to the principle of vicarious liability of a master than was stated in *Muwonge v Attorney-General*”. Thereafter he stated the principle to be: “Once the acts were done by the servant in the course of his employment, it is immaterial whether he did it contrary to his master’s orders or deliberately, wantonly negligently or even criminally or did it for his (servant’s) own benefit, the master is vicariously liable so long as what the servant did was merely a manner of carrying out what he was employed to carry out”. In the Court of Appeal counsel for the appellants had argued that by cutting poles to construct huts, the soldiers’ conduct made the respondent liable vicariously. According to Okello JA the crucial question to answer in the case was whether when the soldiers cut poles for making their huts or when the soldiers collected fire wood or burnt charcoal, those were acts which soldiers were employed to do or the manner of carrying out what they were employed to do. He then referred to the appellant’s complaint to the local commander of National Resistance Army (NRA) and the latter’s reply that: “The men were sent by order from above.” The learned Justice of Appeal concluded that there was insufficient evidence to establish vicarious liability. Thereafter he stated the principle to be: “Once the acts were done by the servant in the course of his employment, it is immaterial whether he did it contrary to his master’s orders or deliberately, wantonly negligently or even criminally or did it for his (servant’s) own benefit, the master is vicariously liable so long as what the servant did was merely a manner of carrying out what he was employed to carry out”. In the Court of Appeal counsel for the appellant had argued that by cutting poles to construct huts, the soldiers’ conduct made the respondent liable vicariously. 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Further, Brigadier Nanyumba testified that soldiers were in the area and that the appellant complained about the damage caused to this farm by those soldiers. Therefore the Brigadier tasked the local commander who informed him that soldiers had damaged the appellant’s crops. The Brigadier stated that the State sometimes may not be able to cater for the needs of the army. Therefore the local commander “may take initiative to secure provisions. So Mr Lutaya’s complaint is not unusual”. The trial Judge held that in this evidence the brigadier in this regard was helping his friend, the appellant. In my view and with all due respect, this finding is without proper foundation. The brigadier was not cross-examined about the motive for testifying as he did. He was not asked whether he was helping a friend or was simply telling the truth or falsehood. That means that his evidence remained untainted and credible. This entitled the trial court to make such inferences as are reasonable within the context. In my opinion the most reasonable inference on the evidence as a whole is that normally when the soldiers lack provision for their needs, they help themselves. They can do this, for instance by invading a nearby forest to get firewood. The appellant testified that soldiers cut his forest so as to construct huts for the soldiers to live in while performing their duty. This forced the appellant to raise his complaint directly with the local commander who was in charge of the soldiers. The commander was then obliged to tell the appellant, in effect, that what the soldiers were doing, for example, cutting timber, was okayed from superiors. It was not in these circumstances incumbent upon the appellant to embark on the exercise of establishing the truth of that commander’s statement. He was entitled to assume and believe that the soldiers had been authorised to construct huts using materials from the appellant’s forest. Mind you, the soldiers were supposed to be housed by the State. No houses appear to have been provided. The soldiers constructed the huts while on official duty so as to be comfortable. They were therefore, performing official functions in a crude way. Both the Learned Principal Judge and the Court of Appeal appear to regard what the local commander told the appellant as hearsay. I cannot agree. I think it has evidential value. What the appellant reported is as much evidence in as such a statement was made, as it is evidence of what was taking place as factual and truthful. In that regard, the evidence of Kibuka Joseph (PW5) is important. He testified: “Between 1995-96 I saw soldiers coming to visit us. They would gather firewood and timber for building. They ate matoke, tomatoes, fene, et cetera. Accompanied Lutaya to report to chairman RC1 Kiswera. He gave us a letter to take to Mpoma satellite to report to the boss of the soldiers. There were many soldiers coming. Some were sitting, others picking firewood, others moving in and out. Their uniports were more than 100. They continued despite our complaint. I know the environs of the farm. There is nowhere else they could have collected firewood”. This witness was not challenged on this evidence. It is my view that if it was a question of one soldier or two soldiers doing the damage complained of by the appellant once or twice or stealthily, it could accord with the findings of both the learned Principal Judge and the Court of Appeal. But, where, as it is quite evident in this case, that groups of soldiers made it routine to harvest timber and fruits for themselves or for performing their functions, it ceases to be a frolic of the soldiers. The matter appears to have been so routine and so apparently official that the appellant had to complain not only to RCs but also to the Resident District Commissioner and to the commanding officer and eventually to the Chief of Staff of the army. The latter in reality acknowledged the damage which he impliedly attributed to failure by the State to provide for soldiers. In my opinion, these acts of the soldiers were really official and they bound the respondent in terms of the vicarious liability principles enunciated in the *Muwonge* case. I therefore hold that both the Principal Judge and the Court of Appeal erred when each held that there was no vicarious liability for the respondent arising from the conduct of the soldiers. The Ministry of Defence deployed soldiers at Mpoma satellite station to perform State security matters. The Ministry of defence was bound to provide accommodation and food to the soldiers. Failure to make the provisions for the soldiers tempted the soldiers or their commanders to use initiative for the soldiers to survive in order to be able to perform the State duties. Surely it cannot lie in the mouth of the respondent to say that in those circumstances soldiers did what they did at their peril or that they should have slept in the open to face the vagaries of nature or that the soldiers should perform duties on empty stomachs. I cannot agree. I think that vicarious liability for the respondent was proved and therefore ground one must succeed. It follows that ground two must succeed because the Court of Appeal should have considered the other grounds. This means the appeal must succeed. What is the consequence of this success? In his plaint:

(*a*) The appellant prayed for damages arising from trespass to land.

(*b*) Damages for loss of property and business investment valued at UShs 255 800 000.

(*c*) A permanent injunction restraining the defendants from trespassing on the plaintiff’s land.

(*d*) Costs.

The learned Principal Judge held that the loss claimed was speculative. He appears to have ignored prayers (*a*) and (*c*) and concentrated on prayer (*b*). In his view: “As I have stated it cannot be stated that only the soldiers of National Resistance Army/Uganda Peoples Defence Forces NRA/UPDF could have invaded the plaintiff’s farmland and harvested crops, wood and timber. For anyone therefore making a claim of the loss, there must be apportionment of the cause of the loss. In particular it is now trite law that special damages must not only be specially pleaded but they must in addition be specifically proved. I confess I have not found any proof of damage attributed wholly or even partially to be National Resistance Army/Uganda Peoples Defence Forces NRA/UPDF soldiers. The financial loss adduced is based on quantitative and market speculation”. He dismissed the suit. So he awarded no damages. He said nothing about the prayer for an injunction. It is a well-established judicial practice that in this type of cases, a trial court should estimate what it would have awarded as damages if the plaintiff had established his claim. If the learned Principal Judge had followed this practice, I would have considered his estimate of the damages on the matter. In this case he said nothing about the prayer for trespass to land. There is definitely proof that the soldiers trespassed on the appellant’s land. In that respect, he is entitled to some damages for trespass. Consequently he would be entitled to the grant of the prayer for injunction. I agree that damages for timber, charcoal and fruits may have been exaggerated. But since there is evidence of damage, some reasonable amount should have been awarded. This Court is not in a position to assess the damages now. This should be done by the trial court. Meantime I would grant the injunction. For the foregoing reasons, I would allow the appeal, I would set aside the judgments and orders of the two courts below. I would remit the record to the trial Judge for him to assess and award damages for: (*a*) Trespass to land; and (*b*) Special damages. I would award the appellant the costs in this Court and in the two courts below. The taxed costs will carry interest at the rate of 6% per annum from date of judgment till payment in full.

**ODOKI CJ:** I have had the advantage of reading in draft the judgment prepared by my learned brother Tsekooko JSC, and I agree with him that this appeal should be allowed with the orders he has proposed. The main issue in this appeal is whether the Court of Appeal erred in holding that the Attorney-General was not vicariously liable for the acts of the soldiers of National Resistance Army (NRA), which forms the first ground of appeal. I agree that there was sufficient evidence to prove that the soldiers who plundered the appellant’s farm and forest were acting within the course of their employment because the trees, timber and firewood they removed from the appellant’s forests were used by them to facilitate the performance of their duties. The trees and grass they removed were used to build houses and huts for their barracks and the firewood was used to cook the food they had secured from his land. These activities were part of the manner in which they were enabled to carry out their duties. It was immaterial if the manner in which they carried out their duties was improper or unauthorised, so long as it was merely a manner of carrying out their duties. *Muwonge v Attorney-General* [1967] EA 7. The soldiers’ employer namely the government benefited from the activities of soldiers since there was evidence from their supervisors that it was normal for soldiers to obtain these supplies for themselves when the government failed to provide them. Therefore there was at least an implied authorisation for the soldiers to help themselves on the appellants’ property. However, from the evidence of the officer in charge of the soldiers and Brigadier Nanyumba, who was the then Chief of Staff, it is clear that the authorities were aware of what was happening and did nothing to stop it. On the contrary, it was alleged that the soldiers were doing so because of the orders from above. In those circumstances, the respondent was clearly vicariously liable for the actions of the soldiers which were committed in the course of their employment, and the Court of Appeal erred in holding otherwise. In view of the fact that the learned Principal Judge did not, as he should have done, assess the damages he would have awarded had he found for the appellant, I agree that the case be remitted back to the trial Judge to assess general and special damages payable to the appellant. I also agree that a permanent injunction be issued against the respondent to stop the soldiers from trespassing and plundering the appellant’s land. As the other members of the Court agree with the judgment and orders proposed by Tsekooko JSC, this appeal is allowed with the orders as proposed by the learned Justice of the Supreme Court. Kanyeihamba, Mulenga and Oder JJSC concurred with the judgment of Tsekooko JSC.

For the appellant:

*Mr J Semuyaba* instructed by *Semuyaba Iga & Co*

For the respondant:

*Wamambe*