**Musisi v National Water & Sewerage Corporation**

**Division:** High Court of Uganda at Kampala

**Date of judgment:** 12 March 1974

**Case Number:** 149/1973 (93/74)

**Before:** Allen J

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*[1] Negligence – Contributory negligence – Infant – Care to be expected from infant – Principles.*

*[2] Negligence – Contributory negligence – Mother of infant – Not in issue in action to which mother*

*not a party.*

**JUDGMENT**

**Allen J:** The plaintiff, Yozefu Musisi, aged 6 years, brought this action through his next friend against the National Water and Sewerage Corporation for damages as a result of an injury which he received when he fell into a trench dug by the defendants. The plaintiff was aged 4½ years at the time and, according to the medical report of the surgeon, Mr. Kisumba, Yozefu fractured his right arm at the humerus causing a deformity and swelling around the elbow. After treatment he was seen for an assessment when it was found that the flexion was limited to 90° whereas extension was full. There was evidence of mal-union which, it was hoped, would gradually correct itself. The surgeon gave it as his opinion that: “Because the lateral shift at the fracture was not corrected, there is a possibility that this child may have a cubitus deformity at the elbow and it was hoped the stiffness would gradually improve the complication of my ositis ossificans.” Presumably the bone has now healed without any such complications as there was no evidence of any later examination or report and no complaint was made by the boy’s mother, Nalubega, concerning any difficulty now experienced by the child. He looked quite normal in court. Each party called only one witness, neither of whom was an eye-witness. Nalubega lives at her father’s home at Kiruddu Village where the accident occurred. Her husband apparently lives in Mbarara. Nalubega works as a food seller and has 6 children to care for although she does not stay at home with them. Yozefu was attending school at the time of the accident in June 1972, and although he was only 4½ years old she allowed him to go to and fro un-accompanied. On the day in question at about 4.00 p.m. Nalubega had just returned home and she was undressing when a man passing by in the road called out to her that her child had an accident. He lifted the boy out of the trench into which he had fallen and she saw that his arm bone was broken. He was subsequently taken to hospital where he remained for 2 weeks. The defendants have admitted that they dug a trench almost two miles long which passed through Kiruddu Village. According to Mwanga Ssalongo, the superintendent of works, the trench was 4 feet deep and 3 feet wide. Soil was piled up on both sides to a height of 3 feet. He stated that he made daily visits to the trench and he always stopped where the men were working and excavations were in progress. He agreed that there were many houses along the line of the trench and that it took about 6 months to complete the job which was commenced in January 1972. Unfortunately the Inspector of Works who supervised on the spot has since died. Ssalongo maintained that at every access and crossing there was either a bridge of wooden planks or the trench was filled in temporarily with earth so that people could get across. He asserted that this was also done outside the house of Nalubega but he could not recall whether it was a bridge of planks or an earth filling. Nalubega, however, testified that there was no crossing at all outside her house and so no access to the road. She said that the trench passed through her plot of land about seven yards from the house. She added that she had complained to the workmen who had replied, “we cannot do anything for you. Everyone must mind himself when crossing.” If this was true then it showed a most unhelpful and negligent attitude on the part of the corporation’s employees, in my opinion. Nalubega clamed that she and others went to the offices of the then Water Board on 15 February 1972 to complain but found nobody there. Since she could get nothing done she said she had to make a bridge for herself and she used two tree branches of about 2 to 3 inches in diameter as she had no flat wooden boards. She told Yozefu to be careful when crossing the trench and evidently he managed all right until June when he fell in. This woman gave her evidence in a straightforward and confident manner. She appeared to be truthful especially with regard to her efforts to provide some sort of crossing over the trench after receiving an unhelpful reply from the defendant’s employees. I do not consider that she was making this up. It is not at all clear why it was necessary for the defendants to keep an open trench nearly two miles long through busy villages for about six months. If the pipe-laying work was so slow, then the trench could have been dug in parts only when it was actually needed and then filled in immediately afterwards. Ssalongo himself admitted that there were very many houses along the line of the trench, which therefore presented a considerable inconvenience and danger to the inhabitants, especially to the very old, the crippled and the children. If, as he claimed, every single access was provided for by a plank bridge or filled-in earth even that would be unsatisfactory and unsafe for such a long period since rain and continued use would no doubt result in dangerous situations. In any case, if Nalubega is to be believed, and I can see no reason to disbelieve her evidence about this, no access at all was provided outside of her house. In her dilemma she was obliged to improvise something for herself and her family and, although she probably did the best she could in the circumstances, rounded branches cannot have made a very safe bridge. If the trench was inspected daily as Ssalongo claimed then such hazards ought to have been noticed and action taken by the Corporation to provide a safer means of crossing. The whole situation seems to indicate a certain amount of incompetence, irresponsibility and negligence on the part of the Corporation, in my opinion, and they had a clear duty to reduce the amount of inconvenience and danger to the public to the minimum. I cannot find that they did so in the circumstances, and, as a result, I find that the defendants were guilty of negligence. Mr. Bamuturaki for the defendants submitted that there was contributory negligence by the child plaintiff and that there was negligence also by the boy’s mother, Nalubega, who allowed him to go out unescorted. However, this woman was not a party to this action and her negligence, if any, is not a question to be decided here. With regard to contributory negligence by the boy Yozefu the position as I see it is that in order to make a child liable, it must be proved that he failed to show the amount of care reasonably to be expected from a child of that age, i.e., 4 1/2 years. It is not enough that an adult would have been guilty of negligence had he acted in the same circumstances. The general principle seems to be that if a child is incapable of realising the probable consequences of his conduct then he is relieved from liability. This is especially so if he has merely indulged the natural instincts of a child of his years. In a Canadian case *Walmsley v. Humenick* (1954), 2 D.L.R. 232 the plaintiff, aged five and a half, was struck in the eye by an arrow shot from a toy bow by the defendant, aged five, while both were playing together. The defendant had not aimed at the plaintiff, and even assuming that the circumstances would have justified a finding of negligence against an adult, the Supreme Court of British Columbia held that he was not liable. The court had no hesitation in finding that the defendant “had not reached that stage of mental development where it could be said that he should be found legally responsible for his negligent acts.” In *Lynch v. Nurdin* (1841), 1 Q.B. 29 the defendant’s servant left a horse and cart unattended in the street for half an hour and the plaintiff, aged under seven, climbed on to the cart to play and fell off it and he was injured. The court held that the defendant’s “most blameable carelessness” had tempted the child who had merely indulged his natural instincts in playing with the cart, and the defendant was held liable. In the present case the plaintiff was only 4½ years old and I am satisfied that he was incapable of realising the probable consequences of his conduct at such an age and, consequently, there can be no question of any contributory negligence by him.

*Judgment for the plaintiff.*

For the plaintiff:

*SK Katende* (instructed by *Mugenyi & Co*, Kampala)

For the defendant:

*ES Kirenga* (instructed by *Kirenga & Gaffa*, Kampala)