IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2020

CORAM: GBADEGBE, JSC (PRESIDING)

AMEGATCHER, JSC

LOVELACE-JOHNSON (MS), JSC

TORKORNOO (MRS), JSC

KULENDI, JSC

CIVIL APPEAL

NO. J4/03/2020

2ND DECEMBER, 2020

RICHARD PEPRAH ……..

PLAINTIFF/RESPONDENT/APPELLANT

SUNYANI PRISONS, SUNYANI

VRS

1. DIRECTOR GENERAL, GHANA PRISONS SERVICE SUNYANI
2. THE ATTORNEY-GENERAL, SUNYANI

DEFENDANTS/APPELLANTS/

3. THE DRIVER-IN-CHARGE, SUNYANI RESPONDENTS
4. SERGEANT FRANK SASU, PRISONS SERVICE

JUDGMENT

GBADEGBE, JSC:-

We have before us an appeal from the judgment of the Court of Appeal. By that judgment, the decision of the trial court on the question of negligence including the apportionment of the plaintiff's contribution was upheld. The learned justices of the Court of Appeal however interfered with the award of damages by reducing it from GH¢425,000.00 to GH¢ 150,000.00. Before us the plaintiff has launched an attack on both the determination of negligence particularly that relating to the apportionment of liability that was assessed at 15% against the plaintiff against the defendants and also the reduction of damages awarded in his favor at the trial court.

Before proceeding to consider the appeal, we need turn our attention to the response filed by the parties to a point of law raised by us under rule 6(8) regarding the question of vicarious liability of the 1st 2nd and 4th defendants for the negligence on which the claim herein was based. Although both parties complied with the direction, we would like to address certain points of law raised by learned counsel for the plaintiff regarding our authority to raise points of law on an appeal. In his submission, he contended that to be good, the question should be limited to jurisdiction. In support thereof, reference was made to certain authorities, but we say at once that the arguments made by him suffer from a misreading of the operative words by which rule 6(8) is expressed. In our view. the power conferred on us under the rule is an acknowledgement of the authority in the court to raise points for parties to respond thereto is not derived from the rules of Court but arises out of the requirement of the duty to deliver decisions in accordance with the law for which reason at our appointment we make an open declaration to that effect. The power of determining

appeals is derived both from the Constitution and the Courts Act, (Act 459) and accordingly what the rules provide is only to regulate how the court may take a point of law not raised by the parties into account; it is limited only to ensuring that the Court does not without affording the parties before it the opportunity of responding thereto to base its decision on it. In fact, from the formulation of the rule, there is no indication that the rule was conferring any new authority on the Court. That the power of the Court under the rule is not limited to jurisdictional issues as is evidenced by a collection of cases including **Akufo Addo v Catheline** [1992] 1 GLR, 337 and **Tindana v Attorney-General** [2011], 2 SCGLR, 743. Both cases dealt with non-compliance with rules of procedure and or an order of the court.

Then, it was contended against us that the point raised had the effect of substituting a new case for the defendants. Quite clearly, that is far from the truth as the point was raised by the plaintiff in paragraph of his Reply to the Statement of Defence filed on behalf of the defendants other than the 3rd. As it was derived from the pleadings, it is a question that we are entitled to have it addressed by the parties before determining the case and it is of no consequence that the courts below adverted their minds to it. It being a question of law, we are free unlike those relating to determinations of fact, to consider it anew on appeal.

Closely related to the above attack is the contention that as there was a wrong, the court was bound to provide a remedy. Whiles , it is true that courts are citadels of justice where those whose rights have been wronged at law may basing themselves on the appropriate legal remedy arising from the facts on which the case turns seek redress in the form of compensation or damages. Courts are not enabled to allow remedies without the plaintiff first satisfying it on the appropriate legal remedy.

We have also observed a default arising from the proceedings that raises an unanswerable point which we would like to comment on for future guidance. It

concerns the alleged unnamed 3rd defendant. He was never served with the writ and accompanying processes and although from the nature of the case, he was a proper and necessary party to the action whose presence was necessary for an effectual and complete determination of the dispute, the action proceeded without him and any attempt being made by the plaintiff to have his identity known so that he could be served. It seems that the plaintiff was content with dealing with the other defendants only when from the facts, the plaintiff was thrown overboard from a vehicle being driven by the said 3rd defendant. Curiously, the Attorney-General's Department entered appearance on behalf of a party who was neither an employee of the government or any of its agencies or driving a vehicle owned by the government. The appearance entered on his behalf was therefore without authority and although counsel who acted for the defendants limited his statement of defence to the 1st, 2nd and 4th defendants only, nothing was done at the trial court to expunge the purported appearance in order that consequential steps might be taken thereon including either striking him out of the writ or serving him o that the dispute could be determined in accordance with requirements of due process. But as under the Rules, misjoinder and or non-joinder cannot defeat any action, we are bound, though unhappily to determine the matter notwithstanding that from the pleadings the 3rd defendant looks a competent party to the proceedings.

We now turn our attention to the consideration of the appeal on the merits. Regarding the question of liability in negligence and the apportionment of liability, we are of the view that having supported extensively the said finding when the defendants appealed against same to the intermediate appellate Court, the plaintiff cannot now be enabled to resile from the arguments canvassed before the Court of Appeal in support of the trial court's finding only to turn round before us urging to the contrary. We think that learned counsel's conduct amounts to approbating and reprobating, something which we cannot condone. We are in great difficulty to appreciate how the affirmation by the Court of Appeal of a position that was supported by the said

counsel can now be the very basis of arguments that are contrary to the view of the matter urged before them. Indeed, the judgment of the learned justices on appeal to us reveals that they accepted the submissions made by learned counsel for the plaintiff who was acting for the respondent before them. In the circumstances, we reject the appeal of the plaintiff against the determination of liability and the related apportionment of the question of contribution. We are also of the view that the decision of the trial court on the issue of contributory negligence properly took into account the fact that although the prisoners were carried in the bucket of the truck, it was only the plaintiff who found himself on the ground when the accident occurred. Although, we are of the view that the relation between the plaintiff and the Prison authorities is regulated statutorily, we are prepared for policy reasons to hold that in causing the plaintiff to board the Kia truck, the 4th defendant, the accompanying prison officer owed a duty of care towards him in relation in particular to his safety. It is of great import in the public interest that we impose such a responsibility on the 4th defendant to avoid seating the plaintiff in the bucket of a truck. That certainly brings the damage suffered by the plaintiff within the range of reasonable foreseeability. The case of **P1 and others (minors) v Bedfordshire County Council** [1995] 2 AC 63, is a case in point. In the course of his judgment in the said Conjoined Appeals Lord Jauncey observed:

> *"Where a statute confers a private law right of action a breach statutory duty. Howsoever caused will found an action. Where a statute authorises that to be done which will necessarily cause injury to someone no action will lie if the act is done with reasonable care. If, on the other hand, the authorised act is performed carelessly whereby unnecessary damage is caused a common law action will lie."*

This means that the only grounds of appeal properly before us are those which call into question the reduction of damages awarded in favor of the Plaintiff from GH₵ 425,000.00 to GH₵150,000.00. The question that we have to determine from the

available evidence is whether the reduction was justified. We have carefully attended to the written briefs submitted by the parties as well as the record of appeal and have reached the view that in the statement of claim, the plaintiff merely sought a global award for general damages in the sum of GH¢500,000.00. At the trial, the plaintiff produced evidence of the injuries suffered by him consequent upon the accident that required him to go through surgeries. While noting the plaintiff's entitlement to compensation for the injuries, we observe that the trial court accepted without proof the allegation that the plaintiff was an income earner from masonry and took same into account in allowing the GH¢ 425,000.00. In reducing the award made by the trial court, the learned justices provided no breakdown of the various sums that aggregated to GH¢150,000.00.

In our opinion, the award of damages being a question of law and fact and regulated by settled principles, the Court is enabled in the light of the challenge to the reduction of damages by the Court of Appeal to inquire into the question of damages. In so doing, the court may prefer either of the two awards or substitute its own view of the appropriate damages that ought to have been awarded to the plaintiff against the defendants. After carefully examining the evidence of the plaintiff in support of his claim to the award of damages, we are of the opinion that although the award of the Court of Appeal looks more reasonable than that of the learned trial judge in respect of the true estimate of damages, the said award suffers from the erroneous inclusion for loss of future earnings from the trade of masonry by the plaintiff on which there was no credible evidence. The learned trial judge accepted without more the bare allegation of the plaintiff that he was a mason when in fact no evidence of previous earnings was offered before the court from which reductions caused a common law right future earnings can be inferred. Therefore that head of damage must be excluded from the total award first by determining its percentage in the award of GHS 425,000.00 by the trial court and thereafter proceed to trace it within the award made by the Court to deduct it from the GHS 150, 000.00 in order that it truly reflects

appropriate heads of damage. This will involve a process of severing the good from the bad, so to say.

As follows:

Although the initial award of GH¢500, 000.00 by the trial court was reduced by 15%, each of the separate heads of damage which aggregated to that amount will still retain the percentage that they bore in the initial amount. The amount of GH¢200,000.00 therefore allowed for loss of convenience, for example will still be 40% of the amount allowed after applying the 15% reduction consequent upon the determination of the plaintiff's contributory negligence. Therefore, when the learned justices of the Court of Appeal varied the award from GH¢ 425,000.00 to GH¢150,000.00, the amount allowed for loss of earnings would be 40% of the total award for damages. By a simple arithmetical computation, we need for the conclusion reached in this delivery that there was no proof of the loss of earnings deduct 40% from the amount of GH¢150,000.00 which comes to GH¢150,000.00- 60, 000.00= GHS90,000.00. The rationale for this is that as the learned justices of the Court of Appeal having reduced the award without any corresponding disallowance of any of the heads of damage allowed by the trial court, the award continues to include that relating to the unproved head of damage for loss of earnings which must be deducted therefrom to render it compliant with the principles regulating the award of damages. Therefore, we reduce the award to GH¢90,000.00 which on the evidence is fair and reasonable. This we reach, without impairing any of the other heads of damage allowed by the learned trial judge at page 105 of the record of appeal although a close look at pages 104-105 of the record of appeal shows that in making the ward relating to, for example, loss of conveniences of life, the learned trial judge did not take into account an known activities that the plaintiff had been engaged in before the accident; he just made an award in the sum of GH¢ 75, 000.00. The same situation applies to the award of GH¢50, 000.00 for future nursing care, a claim that was bare on the pleadings and the evidence as was the award for loss of expectation of life. This being the case,

we think that the award made by the learned trial judge was based mainly on conjectures and it is no doubt that he made such a very high award. Had he taken the relevant matters into account, he would in all probability have come to a figure proximate to the GH₵90, 000.00 that we consider fair and reasonable from the evidence.

Accordingly, subject to the variation of the award for general damages, the appeal is dismissed. The result is that we substitute an award of GHS 90, 000.00 in place of that allowed by the Court of Appeal.

N. S. GBADEGBE
(JUSTICE OF THE SUPREME COURT)

N. A. AMEGATCHER
(JUSTICE OF THE SUPREME COURT)

AVRIL LOVELACE-JOHNSON (MS)
(JUSTICE OF THE SUPREME COURT)

G. TORKORNOO (MRS)

(JUSTICE OF THE SUPREME COURT)

E. YONNY KULENDI

(JUSTICE OF THE SUPREME COURT)

COUNSEL

BARIMA-AGYEKUM HINNEH FOR THE PLAINTIFF/RESPONDENT/APPELLANT.

UMMU ZAKARI (MS), PRINCIPAL STATE ATTORNEY FOR THE DEFENDANTS/APPELLANTS/RESPONDENTS.