IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: KIMARO, J.A., MANDIA, J.A., And ORIYO, J,A.)

CIVIL APPEAL NO.39 OF 2011

FLORA KIFEBE as a LEGAL PERSONAL REPRESENTATIVE OF PROSPER MWESIGWA.....APPELLANT

VERSUS

KAHAMA MINING CORPORATION LTD.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Dar es Salaam)

(Shaidi, J.)

dated 9th February, 2011

in

Civil Case No. 81 0f 2009

JUDGEMENT OF THE COURT

1 August & 23 November, 2012

KIMARO, J.A.

Flora Kifebe is a personal legal representative of Mwesiga Kamala. Mwesiga Kamala is an assistant surveyor. He was employed by the respondent in 1995 as a drill helper. Flora Kifebe was the wife of the deceased. The respondent is a limited liability company whose business, among others, include mining and mining exploration. The respondent has

a gold mine at Bulyankhulu within Kahama District. Prosper Mwesiga died on 19th March 2004 while he was conducting a survey in one of the underground tunnels. He was with two other employees of the respondent. They went underground using a company car. It was averred in the plaint that when the late Prosper Mwesiga Kamala and the other employees were still underground carrying on the survey, the respondent's personnel, without regard to the existing safety measures, did recklessly and/or negligently sanction a blast to be carried out at the area where the deceased was conducting the survey. The blast caused instant death of the said Prosper Mwesiga Kamala and his co employees. At the time of his death, Prosper Mwesiga Kamala had risen to the post of Assistant Surveyor with a salary of T.shillings 231, 115/68 and was aged 35 years.

It was the manner in which the deceased died and the loss of income for the upkeep of the family that gave rise to the institution of the suit against the defendant. The appellant was the plaintiff in the trial court. She is the administratrix of the estate of the deceased. She sued the respondent as the defendant employer, for damages for negligently or recklessly causing the death of the deceased. She claimed for T.shillings

51, 915, 600/= being income that the deceased would have earned for the 20 years he had for working until retirement if his life had not been miserably terminated by the reckless blast. The appellant also prayed for T. shillings 500, 000,000/= general damages for the reckless acts of the defendant's employees for which the defendant is vicariously liable.

The particulars of negligence and or recklessness complained of is that the respondent allowed the underground blast to be carried out before confirming that all the employees were already outside the tunnel. Another is failure to ascertain that the security or identity cards of the deceased and others which still hang on the board were re-claimed, failure to cross-check the where about of a motor vehicle the deceased and his co-employees used to go underground in the tunnel. Lastly is failure to give a proper warning and/or reasonable lapse of time before allowing the blasting to take place.

The defendant refuted the claim. It claimed that it was the deceased who deliberately skipped the standard safety procedure of tagging in at the

tag board before going underground. She averred that if the procedure was observed, it would have been a signal of his presence underground and the blast would not have been carried out before they signed out of the tunnel. Another factor claimed to be contributory negligence on the part of the deceased was failure by the deceased to identify hazards as he performed his activities at or near the charged and connected face, hence exposing himself to eminent danger, although he was trained in safety procedure. It was further averred by the defendant that the deceased went underground after normal working hours and crossed the barricaded area which sign he ought to have taken as a warning not to cross over.

The only issue framed in the trial court for the determination of the court was whether the death of the late Prosper Mwesiga Kamala was caused by negligence of the defendant or whether the deceased was the one to blame. The trial court resolved the issue in the negative. The trial court held that there was no evidence to prove the defendant's negligence on a balance of probabilities as required by the law and dismissed the suit.

Being aggrieved by the decision of the trial court, the appellant filed this appeal. The grounds of appeal are four.

1. That the learned trial judge erred in law and on evidence by holding that the evidence of PW1 Flora Kifebe and PW2 Nicholaus Kamala was hearsay and could not be acted upon, without taking into account the peculiar environment and circumstances leading to the death of the deceased as a result he shifted the burden of proof to the plaintiff instead of the defendant, now respondent company.

2. That the learned trial Judge erred in law and on evidence by not taking into account the circumstances which cumulatively confirm that death was caused by the negligence of the respondent namely the undisputed newspapers reports, the presence of a motor vehicle underground which was being used by the deceased persons, the discovered identity cards of the deceased at the tag board, the non production of the log books and the investigation reports by the various teams by the respondent company.

3. The learned trial judge erred in law and on evidence by holding that there was no evidence to show that the deceased died due to the defendant's employee's recklessness and or negligence acts whereas appellant could not have testified more than what she adduced taking into account the closed nature of the mining activities at the mine.

4. That the learned trial Judge erred in law and on evidence by not taking into account the respondent's pleaded fact under paragraph 4 of the written statement of defence that the blasting was carried out by an Independent contract or M/S Bymecut International Limited as free agent using own staff and own procedures whereas such procedures were never made open to the trial court.

At the hearing of the appeal the appellant was represented by Mr. Joseph I. Rutabingwa, learned advocate and the respondent by Mr. Thomas Sipemba, learned advocate. They both filed written submissions under Rule 106(1) and 106(8) respectively of the Court of Appeal Rules, 2009 to support the respective positions of their clients.

Before going to the grounds of appeal, we find it pertinent at this juncture to briefly explain what transpired in the trial court. As already mentioned, the deceased was an employee of the respondent. It was not disputed by the defendant's witness that the deceased died because of a blasting that was done at the defendant's Bulyankulu Gold Project on 19th

employees after the death of the deceased had occurred, and also what was widely reported in the newspapers.

From the defendant's side it also had two witnesses, but the material evidence came from Mtereku Muganda (DW1). He was the Senior Mining Engineer. His evidence was that the deceased died because of a blast which was done in one of the tunnels while the deceased was still working there. However, he blamed the deceased for contributory negligence. According to DW1 the deceased was wholly responsible for his death. Explaining about the safety procedure of working underground, the witness said, for each specific tunnel an employee goes to work deep down in the mine, there is a tag board. The employee must write his name in the log book of the particular tunnel and leave his coin there. By signing the log book and leaving a coin there, that will signify that there is a person working in the tunnel. Because the deceased failed to take this precautionary measure, the person who did the blasting did not know that there were people working in the mine.

The witness testified further that the identity card of the deceased was discovered at the mine's entrance. This, according to the witness, was contrary to the procedure because before one goes to the mine, he must first tag at the entrance at the top of the mine. The tagging at this point involves leaving the identity card at the tag board at the top of the mine before descending into the mine. The witness blamed the deceased for failure to observe this procedure. The identity card of the deceased and that of others who also died in the accident were, according to the witness, discovered at the tag board. The witness informed the trial court that after the discovery of the identity cards of the deceased employees, the blasting was called off and search of the deceased started immediately and they were discovered in one of the tunnels. Explaining why the identity cards of the deceased was found at the tag board at the entrance of the mine, DW1 said that the deceased had decided to go quickly into the mine to do some work. It is important to remark here that the learned trial judge was left unsatisfied with this explanation because he failed to see how the defendant's witnesses got this information because all the employees died in the blast. Nevertheless, at the end of the trial, the learned trial judge

dismissed the plaintiff's case. In dismissing the suit the learned trial judge observed that:

> *"The plaintiff's evidence in this area consists of hearsay and other evidence like newspaper reports which the court being a court of Law cannot act upon. The first issue is therefore answered in the negative in a sense that there is no evidence to prove the defendants negligence on a balance of probabilities as required by the law."*

In support of the appeal Mr. Rutabingwa, learned advocate for the appellant reiterated what he said in the submissions he filed under Rule 106(1) of the Rules in support of the appeal. He faulted the learned trial judge for dismissing the plaintiff's suit on allegation that it was based on hearsay evidence without considering the closed circumstances under which the death occurred. He said in this appeal there are two issues to be determined by the Court. The first is whether under the circumstances of the case, and in particular the closed nature of the mine where the death occurred, it can be said that the burden to prove negligence and/or recklessness is on the appellant (then plaintiff) and particularly where

every fact was within the knowledge and powers of the respondent company. The second one is, if compensation is payable whether the appellant is bound by the Workers Compensation Act, CAP 263 and whether the amount allegedly paid out by the respondent was under that Act or through contractual relationship under the insurance policy, or that the appellant was free as she did to sue in tort under the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, CAP 310 of the Laws. The learned advocate said in the event the appeal will be allowed, he will request the Court to step into the shoes of the High Court and assess damages because the trial court refused to award general damages.

He conceded that the burden of proof is on the one who alleges. However, the learned advocate said, given the circumstances under which the deceased met his death, in the closed compound of the mine, the burden of proof was shifted to the respondent to prove that the death of the deceased was not caused by the negligence or recklessness of the respondent and /or her employees or agents. Mr. Rutabingwa said there was no way in which the appellant would have brought eye witnesses to

explain to the court the safety procedure applicable to the respondent. Commenting on the contributory negligence which the respondent said was committed by the deceased, the learned advocate said the evidence of DW1 Mtereko Muganda proved that it was the respondent who was negligent and the deceased did not commit any acts which contributed to his death. He said DW1 admitted that in 2004 there was blasting in the mine which killed three employees. Referring to the safety procedure of going underground, the learned advocate said DW1, apart from testifying on the tagging system, also said that the blaster had to check the board and the log book to ascertain whether all the employees had signed out and also to physically check the area he was blasting. Another shortfall pointed out in the respondent's case, was failure by DW1 to produce the log book for checking so as to ascertain whether or not the deceased signed the log book on the date of his death as he went to work underground. In his considered opinion, if the blaster had checked the mine before carrying on the blasting, the deceased and the motor vehicle used to go underground would have been spotted before the blasting and the deaths would have been avoided. In his view, even if the blasting was done by an independent blaster as contended by the respondent, the

blaster was an agent of the respondent and therefore the respondent cannot deny liability.

The learned advocate also blamed the respondent for not producing the investigation reports done by the police, the respondent and the zonal mining office for assisting the trial court in determining the suit.

The learned advocate was of the opinion that the omission by the respondent to bring evidence which would have exonerated it from negligence and or recklessness makes the respondent liable to the appellant for damages for the death of her husband. He said if the learned trial judge had properly evaluated the evidence, he would have found out that the death of the deceased was caused by the reckless blasting that was carried out by either the respondent or his authorized agent and hold the respondent liable for damages to the appellant for the death of the deceased.

The other witness of the respondent, Ena A.R. Suguti DW2 testified on what the respondent paid to the relatives of the deceased. The total amount paid was T. shilling 6,000,000/=. T.shillings 1,000,000/= was paid for the upkeep of the family pending appointment of administrator. T. shillings 4,000,000/= was paid by the respondent after the appointment of the administrator, and a further sum of T.shillings 1,000,000/= was paid from the National Insurance. Commenting on this payment, the learned advocate said the amount should not form part of the damages to be assessed by the Court. He prayed that the appeal be allowed with costs.

On his part, Mr. Sipemba, learned advocate for the respondent was of the view that the issues arising from the memorandum of appeal are:

1. Whether the court was justified to find that the appellant had failed to prove that the respondent had negligently and or recklessly caused the death of the late Prosper Mwesiga Kamala.

2. Whether it was proper for the court to hold that the Appellant's evidence on record consisted of hearsay and newspapers reports which could not be acted upon by the court. Whether if the court finds that indeed the respondent had negligently caused the death of the late Prosper Mwesiga Kamala there is evidence to prove the claim for damages of TZS 500,000,000/= as claimed by the appellant.

Submitting against the appeal the learned advocate for the respondent reiterated the principle on the burden of proof as stipulated in section 110(1) of the Law of Evidence Act, [CAP 6 R.E.2002]. He said the appellant was the one who filed the suit. It was her responsibility to prove that the death of the deceased resulted from the negligence of the respondent. However, she failed to discharge that burden. As for the documents which the learned advocate for the appellant said the respondent was required to produce in court, Mr. Sipemba said the appellant was required to use Order XI of the Civil Procedure Act to make discovery of the documents and use them for establishing his case and not

to shift the burden of proof to the respondent. In his considered opinion, it was illusory for the advocate for the appellant to claim that the burden of proof shifted to the respondent because of her failure to produce the said documents to show that the accident was not caused by the negligence and or recklessness of the respondent. He said failure by the appellant to gather evidence on the reports should not be used to shift the burden of proof to the respondent. To augment his submission, he cited Rantlal & Dhiralal on Evidence 18th edition at page 265 where the author discusses section 101 of the Evidence Act, which is in *pari materia* to our section 110 of the Law of Evidence Act, at page 266 where he says:

> *"The party on whom the onus of proof lies must, in order to succeed establish a prima facie case. He cannot, on failure to do so, take advantage of the weaknesses of his adversary's case. He must succeed by strength of his own right and the clearness of his own proof.* ***He cannot be heard to say that it was too difficult or virtually impossible to prove the matter in question.***
> (Emphasis added)

The learned advocate concluded his submission by saying that given the evidence on record, the appellant failed to prove that the respondent negligently or recklessly caused the death of her husband. He prayed that the decision of the trial court be upheld and the appeal be dismissed with costs.

This is a first appeal. It is settled law that as first appellate court we are entitled to consider and evaluate the evidence and come to our own conclusion. In Siza **Patrice V R** Criminal Appeal No.19 of 2010(unreported) the Court observed that:

> *"We understand that it is settled law that first appeal is in the form of rehearing. The first appellate court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its finding of fact, if necessary."*

Similar views were also expressed by the Court in the cases of **Pandya V R (1957)** EA 336 and Mwafamo **s/o Silaa Hofu and three other V R** Criminal Appeal No. 246 of 2011 (unreported).

From the pleadings, the grounds of appeal raised and the submissions made by the respective advocates to support their positions, the crucial issue in this appeal is whether the death of the appellant was caused by negligent acts of the respondent and whether the deceased contributed to his death. In the written statement of defence the death of the deceased is attributed to his own negligence. The negligence complained of on the part of the deceased has already been stated above.

From the evidence that was led during the trial it is true that the witnesses for the appellant were not eye witnesses to the accident that caused the death of the deceased. The deceased was an employee. He died at his place work and during working hours. His family was not with him and they were not naturally expected to be with him. It is common knowledge that employees do not carry their family members with them at their places of employment. We also agree with the learned advocate for the respondent that if the advocate for the appellant required the reports of the accident to be produced in court, he had to invoke Order XI Rule 10 to request the court to order the respondent to produce the documents. Order XI Rule 10 provides:

"Any party may, without filing any affidavit, apply

to the court for an order directing any other party to any suit to make discovery on oath of documents which are or have been in his possession or power, relating to any matter in question therein and on the hearing of such application the court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at the stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion, be thought fit..."

As contended by the learned advocate for the respondent, if the advocate for the appellant wanted to rely on the documents to prove his case, he was entitled to make discovery of the reports under the cited provision of the law. But in our considered opinion, the omission to make that discovery does not prejudice the appellant's case. We will soon explain why we say so. DW1 made it point blank that the deceased died in a blast that was carried out in the mine while he was working underground. He testified as follows:

"Before going to a working place there is a person tagging in i.e. kitambulisho. All people going underground must "tag". Down in the mine there Is also a "tagging" for specific people working there. So down in the mine there is a tag board and a logbook. In a particular tunnel there must be a tunnel and log book. In the underground mine there is "tagging" showing that you have gone to a particular tunnel. 2nd one is for specific people. The second one uses "coin" rather than identity card. In addition writing your name on the log book you "tag" your coin. When you go out you sign on the log book –sign out and take your tag...Before blasting he checks his board to make sure that the board is clear, then checks the log book to make sure that people have signed out. He also physically, checks the area he is blasting. The measures have been placed to make sure that the place is safe for blasting...In 2004, three workers died who were assistant surveyors. They were working in an underground tunnel where they were working without tagging in and without signing in the log book- "storing in"... At 6.00 p.m were supposed to blast the mine but couldn't because there were still 3 tags which had not been taken.

We therefore skipped blasting and called emergence response team including myself. After three hours search we came to the area of independent blasting and found a Land Cruiser and we came closer we found three bodies. Our inquiry showed that the cause of the problem was failure by the deceased surveyor to follow the procedure of writing and signing in the log book and signing in and "tagging in." Our results also showed that the deceased went in hurriedly to their "pick up " That was our suspicion."

As already said, although the learned trial judge dismissed the suit, he was not satisfied that the respondent proved that she was not negligent. Since the respondent denied responsibility for causing the death of the deceased negligently or recklessly, she was supposed to prove that she was not negligent or reckless. In his testimony DW1 confirmed that the deceased was on duty on the day he met his death. Speaking about the log book the witness said the deceased had to sign it, the witness said it was with the company. He also confirmed that if the blaster had checked the area in which the deceased was working, he would have seen the deceased and also the motor vehicle they used to go underground.

The evaluation of the evidence of DW1 on the precautionary measures that the deceased had to take shows that it is contradictory. DW1 said that before blasting the blaster had to ensure that all employees had signed out and there were no tags left on the tag board. A simple question which arises is if the blaster did a thorough check out of the tunnels before blasting and was satisfied that there was no employee still working in the tunnel, why were the three tags found at the tag board? Who else could have put the tags there if not the deceased? Another and most crucial question is why did the respondent who blamed the deceased for contributory negligence failed to bring in court the log book so that the court would be certain that the deceased went underground without signing in the log book. If the log book was produced in court, the trial court would have been satisfied whether or not the deceased complied with the safety procedure before going underground. If the respondent was not the one to blame, why was the log book, being such a vital document not produced in court? What about the presence of the motor vehicle which was found near the dead bodies. All these questions called for explanation from the respondent. That explanation by the respondent

would not have amounted to shifting the burden of proof to the respondent. She was sued. She had to prove that she was not liable. Instead, the respondent chose to give a flimsy explanation that the deceased went to work underground without tagging. This evidence is defeated by the recovery of the tags, presence of the dead bodies underground the mine, the motor vehicle the deceased used to go underground in the tunnel. From the re-evaluation of the evidence the obvious answer for all the questions paused is that the blasting was carried out while there were still employees working in the tunnel. This signified that the blaster did not make a thorough check out of the area before doing the blasting. He was dealing with a dangerous job. He had to ascertain that it was done after all the precautionary measures had been taken. Failure to do so led to the untimely death of the deceased. The respondent is therefore to blame for such failure. Under the circumstances the respondent cannot avoid responsibility for negligently causing the death of the deceased.

After being satisfied that the deceased died because of the negligent acts of the respondent, the next issue which now arises is whether the

appellant is entitled to damages and if so under which law? What is the quantum of damages which should be paid to the appellant?

As stated the appellant is suing as a legal representative of the deceased under tort. The suit was filed by the appellant under the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, [CAP 310 R.E.2002] and not under the Workman's Compensation Act, [CAP 263 R.E.2002]. The survivors of the deceased are his wife the appellant, and two young children. Section 4(2) of CAP 310 provides that;

> *"In every such action the court may give such damages as it may think appropriate to the injury resulting from such death to the parties..."*

The case of **The Attorney General V Roseleen Kombe (as the Administratrix of the late Lieutenant General Imran Hussen Kombe, deceased**) [2005] T.L.R. 2008 gives a guideline on the principles of assessment of damages under such circumstances. In determining the case, the Court cited R.F.V. Heuston, author of Salmond on the Law of Tort 17th edition at page 585 where he stated that:

"The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a dictum or basic figure which will generally be turned into lump sum by taking a certain number of year's purchase. That sum, however, has to be taxed down by having due regard to uncertainties.

These principles were also promulgated by Lord Wright in the case of **Davies V Powell Duffryn Associated Collieries** (1942) A.C. 601 and also restated in **Nance V British Columbia Electric Railways Co. Ltd** (1951) AC. In **Taylor V O'Connor** (1971) AC 115 Lord Pearson stated:

"There are three stages in the normal calculation,

namely, (1) to estimate the lost earnings, that is the sum which the deceased would have earned but for the fatal accident; (2) to estimate the lost benefit,

grant damages to the appellant for the sum of 52,000,000/= for the lost earning the deceased would have earned for upkeep of the family, education for the children and other related matters. There is also evidence led to show that the mother of the deceased was seriously affected by the death of the deceased who was his son. The law does not allow payment of such damages for such sufferings. We also allow interest on the quantum of damages allowed at the court rate of 7% from the date of the judgment till satisfaction and costs. The appeal is thus allowed with costs.

DATED at **DAR ES SALAAM** this 24th day of October, 2012.

N. P. KIMARO
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(E. Y. Mkwizu)
DEPUTY REGISTRAR
COURT OF APPEAL