IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MWARIJA, J.A., KITUSI, J.A., And KEREFU, J.A.)

CIVIL APPEAL NO. 257 OF 2018

KUMBWANDUMI NDEMFOO NDOSSI .....APPELLANT

VERSUS

MTEI BUS SERVICES LIMITED.....RESPONDENT

(Appeal from Judgment and Decree of the High Court of Tanzania at Arusha)

(Massengi, J.)

dated the 30h day of March, 2016
in
Civil Appeal No. 1 of 2016

JUDGMENT OF THE COURT

16th & 19th February, 2021

KEREFU, J.A.:

The appellant, Kumbwandumi Ndemfoo Ndossi, lodged this appeal on 16th July, 2018 challenging the judgment and decree of the High Court of Tanzania at Arusha (Massengi, J.) dated 30th March, 2016 in Civil Appeal No. 1 of 2016.

The material facts leading to this appeal as found in the record of appeal are somewhat not complex. They can briefly be stated as follows: On 19th March, 2003 at Babati, the appellant boarded the respondent's bus with registration No. MCL 29 make Mitsubishi travelling to Arusha. On the

way the said bus was involved in an accident and the appellant sustained injuries which caused him to be hospitalized at Mount Meru Hospital and Kilimanjaro Christian Medical Centre (KCMC), respectively.

Thereafter, and upon being discharged from the hospital and making a follow up on his rights, he was paid a compensation by an insurance company at the tune of TZS 2,000,000.00. The appellant was not satisfied with the said amount and he persistently made several demands to the respondent without success. As a result, he decided to institute a suit against the respondent in the District Court of Arusha vide Civil Case No. 25 of 2008. In that suit, the appellant, among other things, claimed to be paid TZS 14,850,000.00 specific damages for the sustained injuries and TZS 50,000,000.00 as general damages. The appellant also claimed for payment of interest and costs of the suit.

The respondent disputed the appellant's claims, but in the end, the trial court entered judgement in favour of the appellant and ordered the respondent to pay him TZS 50,000,000.00 as general damages and interest on the decretal sum at 7% per annum from the date of judgement to final payment.

Aggrieved, the respondent appealed to the High Court of Tanzania at Arusha in Civil Appeal No. 1 of 2016. Having heard the parties, the High Court in the course of composing its judgment observed that the suit before the District Court was supposed to be brought under the principle of vicarious liability which was to be specifically pleaded. Based on that finding, the learned High Court Judge, allowed the appeal and nullified the entire proceedings of the trial court and set aside the judgement and decree.

Aggrieved by that decision, the appellant preferred this current appeal. In the memorandum of appeal, the appellant has raised the following grounds: -

1. *That, the first appellate court erred in law and in fact in holding that the principle of vicarious liability was not applied and proved suo motu and decided it without affording the parties an opportunity to be heard on that point.*

   IN THE ALTERNATIVE

2. *That, the first appellate court erred in law and in fact in finding that the proceedings of the trial court were nullity.*

When the appeal was placed before us for hearing, the appellant was represented by Mr. John Materu, learned counsel while the respondent had the services of Mr. Emmanuel Kinabo, also learned counsel. It is noteworthy that both counsel for the parties had earlier on filed their written submissions as required by Rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules) which they sought to adopt.

In his submission, Mr. Materu faulted the procedure adopted by the learned High Court Judge of raising a new issue, on the principle of vicarious liability, *suo motu* at the stage of composing the judgment and made a finding on the same without according parties the right to be heard on it. He said that the said issue was not one of the grounds of appeal and was not even raised during the hearing of the appeal. It was his argument that, the proper procedure which was supposed to be adopted by the learned High Court Judge, after she noted the need of considering that issue, was to invite the parties to address the court on the same. He argued that the omission committed by the learned Judge is fatal and has contravened the mandatory provisions of Order XXXIX Rule 2 of the Civil Procedure Code, [Cap 33 R.E 2002] and principles of natural justice, hence occasioned a miscarriage of justice to the parties. To buttress his position,

he cited the cases of **Mbeya – Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** [2003] T.L.R 251 and **Deo Shirima & Others v. Scandinavian Express Service Ltd** (2009) 1 EA 127. He finally urged us to allow the appeal, quash and set aside the decision of the High Court and order that the appeal be re-heard afresh before another Judge.

In response, Mr. Kinabo conceded to the submissions and the prayers made by his learned friend. He as well added the cases of **Ausdrill Tanzania Limited v. Musa Joseph Kumili and Another,** Civil Appeal No. 78 of 2014 and **Jamali Ahmed v. The CRDB Bank Ltd,** Civil Appeal No. 57 of 2010 (both unreported).

From the above submissions of counsel for the parties, it is clear that they are at one that it was not proper for the learned High Court Judge to raise a new issue *suo motu,* in the course of composing the judgment and decide on it without according the parties the right to be heard. We respectfully, agree with them because it is evident at page 202 of the record of appeal that, the issue of the applicability or otherwise of the principle of vicarious liability in the appellant's case was not among the five grounds raised by the respondent in the memorandum of appeal. It is also

not in dispute that the said issue was introduced by the learned High Court Judge in the course of composing the judgment contrary to the law and principles of natural justice on the right to be heard.

Basically, cases must be decided on the issues or grounds on record and if it is desired by the court to raise other new issues either founded on the pleadings or arising from the evidence adduced by witnesses or arguments during the hearing of the appeal, those new issues should be placed on record and parties must be given an opportunity to be heard by the court.

This Court has always emphasized that the right to be heard is a fundamental principle of natural justice which should be observed by all courts in the administration of justice. Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 provides that: -

> *"When the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned."*

Therefore, a denial of the right to be heard in any proceedings would vitiate the entire proceedings. Together with the authorities cited by both

parties on this aspect, we wish to add the case of **Abbas Sherally and Another v. Abdul S. H. M. Fazalboy,** Civil Application No. 33 of 2002 (unreported) where the Court observed that: -

> *"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by courts in numerous decisions.* ***That right is so basic that a decision which is arrived at in violation of it will be nullified,*** *even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice." [Emphasis added].*

In the instant case, it is evident that parties were not accorded the right to be heard and address the court on the new issue on the applicability of the principle of vicarious liability which was raised by the learned High Court Judge when composing the judgment. Therefore, the learned High Court Judge arrived at its finding in contravention of the right to be heard. Such omission amounted to a fundamental procedural error which occasioned a miscarriage of justice to the parties. Consistent with the settled law, the resultant effect is that, such finding cannot be allowed to stand. It was a nullity. In the circumstances, since we have held that

finding a nullity, we hereby quash the judgment of the High Court and set aside the orders arising therefrom.

Consequently, we remit the case file to the High Court for it to compose a judgment after hearing the parties on that issue. As the parties are not to blame on what transpired, we hereby order that each party shall bear its own costs.

DATED at **ARUSHA** this 18th day of February, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 19th day of February, 2021 in the presence of Mr. Mitego Methusela Robert, learned counsel for the Appellant and Mr. Fredrick Lucas, learned counsel holding brief for Mr. Emmanuel Kinabo, learned counsel for the Respondent, is hereby certified as a true copy of the original.

H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL