IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MWARIJA, J.A., GALEBA, J.A, And KENTE, J.A.)

CIVIL APPEAL NO. 44 OF 2020

ROBERT MHANDO..... 1ST APPELLANT
TEREZA DAVID MANUMBU..... 2ND APPELLANT

VERSUS

THE REGISTRERED TRUSTEES OF

ST. AUGUSTINE UNIVERSITY OF TANZANIA.....RESPONDENT

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

(Rumanyika, J.)

dated the 15th day of January, 2019
in
Civil Appeal No. 80 of 2017

JUDGMENT OF THE COURT

15th & 24th February, 2023

KENTE, J.A.:

In 2012, the appellants Robert Mhando and Tereza David Manumbu were students of the respondent St. Augustine University of Tanzania pursuing undergraduate studies. Whereas the first appellant was doing Bachelor of Public Relations and Marketing expecting to graduate in November, 2012, the second appellant was pursuing a Bachelor degree in Sociology. She was looking forward to graduating in November, 2013.

However, at some stage during the pendency of the 2011-2012 academic year, they were stopped by the respondent from attending classes and doing examinations on the allegation that they had not paid the required tuition fees.

Point blank, the appellants denied the truth of the allegations levelled against them. They maintained throughout that, they had paid the requisite tuition fees and been issued with receipts by the respondents' accountant acknowledging the receiving of their payments. They accordingly pressed the respondents' leadership to allow them to attend classes and do examinations but all to no avail as their complaints and demands appear to have fallen on deaf ears.

Deeply aggrieved and extremely bitter, the appellants went to the Resident Magistrate's Court of Mwanza (the trial court) to give an airing to their grievances and seek redress. They asked the trial court for the following substantive orders and reliefs:

i) A declaratory order that they were lawful students of the respondent University deserving recognition and enjoyment of students' rights including but not limited to the right to do examinations and being associated in the respondents' curriculum.

ii) An order directing the respondents to set for them special examinations in their respective academic years to fully recompense for their incomplete examinations.

iii) Special damages amounting to TZS. 2,154,000.00; and

iv) General damages to the tune of TZS 30,000,000.00

Despite the respondents' denial of the appellants' claim, the trial court found the appellants to have been unlawfully discontinued by the respondents from pursuing their studies. It therefore held the respondents liable and ordered them to pay the appellants TZS 50,000,000.00 being general damages and to refund the appellants' unspecified amounts of loans allegedly owed by them to the Higher Education Students Loans Board.

The respondents were dissatisfied with the whole of the trial court's judgment and decree. They accordingly appealed to the High Court which, after hearing arguments from both sides, allowed the appeal and set aside the trial court's judgment and decree ordering the appellants to bear the burden of costs.

In making the above decision, the learned Judge of the first appellate court, accepted the respondents' contention that, indeed the appellants had not paid any tuition fees as to be allowed to sit for exams. He went by the

respondent's further contention that, if they had paid, then the money was not deposited into the respondents' bank accounts as required. According to the learned Judge, the probability was that, the appellants had paid their respective fees to someone Steven Moris the respondents' Janus-faced accountant who had since been sacked for embezzlement of his employer's funds.

The learned High Court Judge took the view that, the appellants were to blame for having violated the respondents' bylaws requiring them to deposit tuition fees directly into their (respondents') bank account as opposed to paying cash to the accountants. By so doing, the learned Judge concluded, the appellants had voluntarily assumed the role which they had created for themselves of being criminal abettors to the respondents' dishonest accountant and therefore deservedly barred from taking examinations. He thus allowed the appeal, quashed the decision of the trial court, and condemned the appellants on costs as above alluded to.

The appellants were deeply aggrieved by the decision of the first appellate court. Fending for themselves, they have come to this Court with three grounds of complaint against the whole of the High Court decision.

Before the appeal proceeded to hearing, we drew the attention of the parties to the fact that, the appellants did not ask the Court for any specific relief in the appeal. This glaring omission together with the memorandum of appeal which appears to be narrative without specifying the points which are alleged to have been wrongly decided by the first appellate court, prompted Mr. Anthony Nasimire learned advocate for the respondents who submitted that, the memorandum of appeal was violative of Rule 93 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

When the appellants prayed informally to be allowed to amend it so as to reflect the reliefs sought, Mr. Nasimire submitted in a quick rejoinder that, in essence, there was no memorandum of appeal properly so called which could be amended.

However, since we had raised the issue ***suo motu,*** and being mindful of the overriding objective principle as provided for under sections 3A and 3B of the Appellate Jurisdiction Act Chapter 141 of the Revised Laws together with the fact that, it is not every failure or omission to comply with a Court rule that will be fatal to the non-complying party, in terms of rule 111 of the Rules, we allowed the appellants to amend their memorandum of appeal. Pursuant to that leave, the appellants implored us to allow their

appeal, set aside the decision of the first appellate court and restore the decision of the trial court. Our stance is that, in allowing for amendment of the memorandum of appeal, the overriding consideration should be whether or not, on the basis of the amended memorandum of appeal, an appeal can fairly be determined without prejudice to either party. There was no grain of fear in our mind or any possibility that any of the parties to this appeal would be prejudiced by the decision allowing the appellants to amend their memorandum of appeal, and, contentedly, to that extent, Mr. Nasimire had no qualms.

Going to the merits of the appeal, in the first ground of appeal, we understand the appellants to fault the learned Judge of the first appellate court for finding that they did not deposit any money in the respondents' bank account while there was an unequivocal admission by the respondents' sole witness (DW1) that, exhibits PW3 and PW6 were genuine receipts issued by the respondents themselves. In the second ground, the appellants are complaining that the learned Judge of the first appellate court had shifted the burden of proof onto them even after they had led evidence showing that indeed they had paid the contested tuition fees. Having

considered what is in dispute between the two parties, we will deal with the 1st and 2nd grounds of appeal all rolled as one.

For his part, while looking askance before admitting that indeed exhibits P3 and P6 were genuine receipts duly issued by the respondents, Mr. Nasimire submitted that, more importantly, the tuition fees allegedly paid by the appellants did not find their way into the respondents' bank account. Reverting to the admissibility of the two documentary exhibits, Mr. Nasimire contended in the first place that, their admission was omnibus and that their copies were neither attached to the plaint nor were they mentioned in the list of documents to be relied upon by the appellants during the trial. As if that was not enough, Mr. Nasimire charged, the two exhibits were not read out in court immediately after being admitted in evidence. The learned counsel's concluding prayer on that aspect was that, the two exhibits should be expunged from the record for having been wrongly admitted in evidence.

Quite clearly, and as correctly submitted by the appellants in their joint written submissions which they had filed earlier on in terms of Rule 106 (1) of the Rules, in order to answer the most important question in this appeal as to whether or not the appellants had paid the requisite tuition fees, the

evidence on the mode of payment, becomes an indispensable prelude. On this, we take the liberty to reproduce what was testified on by DW1 on behalf of the respondents which is materially the same as the testimony of the appellants. The relevant part of DW1's evidence at page 75 of the record of appeal, runs as follows:

> *"The student is issued with the invoice which stipulates the amount the student should pay as fees. Upon receipt of the invoice, the student pays the due amount into the University's bank account. Then the student deposits the pay-in-slip at revenue department and then the student is issued with a receipt to acknowledge the payment. The receipt has the St. Augustine University logo".*

As stated earlier, both parties were of the same mind on the above - stated conventional mode of payment. In view of the above general consensus, the appellants remained steadfast in their position that they had paid the disputed tuition fees. According to them, exhibits P3 and P6 whose authenticity was not challenged by DW1, were the mammoth proof that indeed they had paid the fees and correspondingly been issued with the said receipts.

For their part, the respondents were emphatic that the contested fees were not paid. The linchpin of their argument and stance is that, contrary to the University by-laws, the said fees were paid to one of their accountants in the revenue department who converted them into his own use. While contending that the first appellant had made himself vulnerable to the said accountant's snares, DW1 told the trial court that, that accountant was sacked because he was receiving cash from students and issuing them with receipts without depositing the said money into the respondents' bank account.

Regarding the first appellant, DW1 is on record as having told the trial court that, the said accountant was using him to collect money from other students and that it was established that, the first appellant owed the respondents some fees which he did not deposit into the respondents' bank account. Asked how much money was deposited by the second appellant into the respondents' bank account, DW1 sort of surmised and finally told the trial court that, she thought that the second appellant did not pay fees in full and that if she did, then it was not paid through the proper way. On the whole however, DW1 did not dispute the genuiness of the receipts tendered by the appellants as she had no doubt that they were issued by

the respondents' accountants who were then under her leadership in the revenue department. She also conceded to the unpleasant fact that, some of the respondents' accountants were indeed not reliable and trustworthy.

Starting with exhibits P3 and P6 which are still at the centre of what is cooking, it appears to us that, throughout the trial, the respondents were not focused in their defence. Whereas Mr. Nasimire is on record as having strongly objected to the admissibility of the two exhibits saying, ***inter alia*** that they were not genuine for not having been issued by the respondents, DW1's evidence is remarkable of her discordant but conclusive statement that, there was no doubt that all the disputed receipts were issued by the respondents. Given this state of affairs, one thing becomes clear. That is, throughout the trial, the material contents of the disputed documentary exhibits were well known to the respondents as to render inconsequential the complaint by Mr. Nasimire that, they were not read out in court after being admitted in evidence. And what is more, the said documents were not disowned by the respondents particularly DW1 the only witness who testified on their behalf.

Still on the same subject, following on heels, is the disquieting way the learned High Court Judge shifted the onus of proof onto the appellants

(though later stating that he should not be mistaken for doing so) after they had led evidence showing that indeed they had paid the disputed tuition fees. We feel it appropriate at this juncture to reproduce what the learned Judge of the first appellate court said on the burden of proof:

> *"Now that it is an undeniable fact that like any other student, and in accordance with the appellants' by laws (Exhibit D1), the respondents should not have seated for exams until, by way of evidence, proved that they had paid fees through appellants' bank account but no copy (s) of bank pay -in-slip were, in that regard, or bank statements, produced by the respondents.... Strictly there were no fees paid by them.* ***This however, should not be mistaken for shifting onus probandi, much as the respondents contended that they had paid the fee. He who alleges must prove".***
> *[Emphasis added]*

With due respect, it seems to us from the foregoing extract and the evidence on the record that, what the learned High Court Judge was claiming not to be misunderstood for, is exactly what he did. The evidence on record shows that all things being equal, after a student had paid the tuition fees, he would submit the bank pay-in-slip to the respondents' revenue department and be issued with a receipt. Put in other words, the

only evidence in the possession of any student who had paid the fees, was a receipt.

While we are not oblivious of the well-known position of the law that, in civil cases such as the instant one, the burden of proof is on the claimant and the standard required of them is that they prove the case against the defendant, on a balance of probabilities, we are settled in our mind that the learned Judge fell into the obvious error when he observed that, the appellants had failed to tender the respondents' bank statements and bank pay-in -slip showing that indeed they had deposited the money into the respondents' bank account. For, we were told by the appellants and this was not convincingly denied by the respondents that, the bank deposit slips were submitted to the respondents' accountants in the revenue department who then issued the appellants with receipts which DW1 acknowledged as genuine documents of the respondents. In the context of this matter, and given the evidence on the record, it should be very elementary that the appellants could not have tendered as exhibits the respondents' bank statements which were not in their possession as bank statements are ordinarily issuable to the holder of the account. In the circumstances, it was the respondents and not the appellants who were saddled with a duty to

lead evidence in the form of bank statements under section 115 of the Evidence Act showing that, the disputed tuition fees were not deposited into their bank account.

In the absence of such evidence, and in the light of the incontrovertible evidence showing that the respondents had issued the appellants with receipts acknowledging to have been paid the disputed tuition fees, there is no rational conclusion other than that the appellants had paid the requisite fees. With respect, we find the prayer by Mr. Nasimire to have exhibits P3 and P6 expunged from the record to be aimed at circumventing them, an attempt which we cannot allow.

Before we conclude on this point, one thing deserves our remark, albeit very briefly. Throughout the trial, the respondents' appeared to blame their accountant in the revenue department for allegedly receiving money in the form of cash from the appellants and converting it into his own use. Following the above lamentations, we asked Mr. Nasimire if the respondents were not vicariously liable for the misconducts of their employee. In response, the learned counsel appeared to be inclined more to the narrow view that the respondents would be liable if only they were sued on tort.

We think with respect, that the answer by Mr. Nasimire was not the correct one in the circumstances. In an employment context such as the one under scrutiny, simply stated, vicarious liability is a rule of law which imposes strict liability on the employer for the wrongdoings of their employees. Under this rule, an employer may be held liable for any wrongful act or omission committed while the employee is performing his duties if it is shown that, the employee's wrongdoings were closely connected with the acts he was authorised to do.

In the instant case, it is common grounds that what the respondents' accountant allegedly did, if any, was done in the course of his employment. From that stand point, the respondents cannot be heard to dissociate themselves from the wrongdoings of their employee. The argument that the appellants had not paid the fees simply because they paid it to the respondents' accountant contrary to the prescribed rules, is in our respectful view, without substance. Having regard to what we have highlighted above, it is needless to say that the appellants were wrongfully terminated from pursuing their studies.

Notwithstanding the appellants' omission to disclose the nature of their cause of action against the respondents, we are settled in our mind, as the

Latin maxim goes that, **ub jus ibi remedium** – where there is a wrong, there is a remedy. The appellants have invited us to set aside the judgment and decree of the first appellate court sustaining the respondents' appeal and in lieu thereof, to restore the judgment and decree of the trial court which awarded them general damages amounting to TZS. 50,000,000.00.

As a matter of law, in any case of the present nature, the court is enjoined to assess the amount of damages attributable to the wrongdoings of the defendant based on the facts before them and common law precedent. Put in other words, in assessing general damages, it is necessary for the court to make use of the existing precedent and the evidence adduced by the parties. However, in the end, the court must always take into consideration the circumstances of each individual case.

In support of the third ground of appeal, the appellants faulted the learned High Court Judge for interfering with the discretion of the trial court in awarding general damages. Relying on the principles laid down in the case of **Cooper Motor Corporation Ltd Vs. Moshi/ Arusha Group Occupational Health services** [1990] T.L.R 96, they challenged the learned Judge of the first appellate court for allegedly not applying any of the said principles. The appellants further contended that, in opining (as he

was not deciding) that the amount TZS 50,000,000.00 which was awarded by the trial court as general damages was both on the high side and excessive, and that the trial Magistrate went an extra mile to grant it, the learned High Court Judge had unconventionally relied on his personal view of the case as opposed to the trial Magistrate who had correctly exercised his discretion in a judicious manner.

The respondents' argument to counter the appellants' complaint is as articulated in Mr. Nasimire's submission. He argued that, although general damages are awarded at the discretion of the court, all things being equal, the trial court was not justified to award general damages amounting to TZS. 50,000,000.00. The learned counsel further contended that, if the justification for the staggering figure is that the appellants' future was frustrated because they were not allowed to pursue their studies to finality, how could they have predicted with mathematical precision that they would be awarded their degrees? All in all, since he had challenged the appellants' claim right from the outset, the learned counsel was of the final conclusion that, the learned Judge of the first appellate court had acted properly and therefore, he could not be faulted for dismissing the appellants' claim in

respect of general damages as there was no good ground upon which the whole decision of the trial court could be sustained.

Going by the evidence on the record, it occurs to us that both appellants were as consistent as the polestar that their academic expectations were cut short by the respondents. They complained bitterly that they had spent their precious time at the respondents' University but only to end up dropping out for no fault of their own. For his part, the first appellant is on record as having told the trial court that, wherever he went, he could not be formally employed for lack of professional qualifications.

Apart from the argument advanced by Mr. Nasimire that the appellants were not sure beyond any doubt (as if there is evidence of their academic incompetence) that they would be awarded degrees, the appellants' testimony regarding the agony and frustration to which they were subjected after their ambitions for scholastic achievement were cut short and silenced in a misguided fashion, was not materially controverted. For the foregoing reasons, it is clear to us that their claims for general damages are irresistible. What remains to be considered as a vital question, is the amount of damages payable, in the circumstances of this case.

Going by their submissions, the appellants would have this court find that the decision of the trial court awarding them TZS. 50,000,000.00 as general damages were, for all purposes and intents, correct. With due respect, we are of the slightly different view. As it will be noted at once, the present case comes four squares within what was succinctly stated by this Court in the case of **Cooper Motors Corporation (T) Limited Vs. Arusha International Conference Centre** [1991] T.L.R 165 where we held that, it was wrong for the trial Judge to award special damages which were more than what the respondent had claimed and that, a party is only awarded damages which he pleaded provided that damage or injury is proved by way of evidence. (See also **Arusha International Conference Centre Vs. Edward Clemence**, Civil Appeal No. 32 of 1988 (unreported).

Taking into account the evidence led by the appellants in support of their claim and, in view of the applicable law, we reduce the general damages awarded to the appellants by the trial court from TZS. 50,000,000.00 to the amount claimed in the plaint, that is TZS. 30,000,000.00 which shall be shared by the appellants on equal basis. The above amount of damages will attract interest at the bank rate from the date of the judgment of the trial court to the date of this judgment and

thereafter, at the court rate from the date of this judgment to the date of full satisfaction of the decree. Only to that extent, the appeal is allowed with costs in favour of the appellants both in this Court and the two courts below.

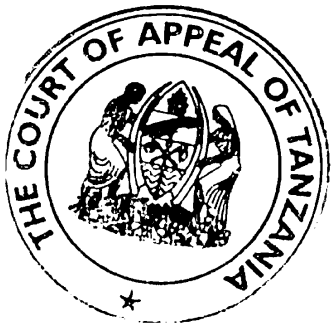
DATED at **MWANZA** this 24th day of February, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

This Judgment delivered this 24th day of February, 2023, in the absence for the Appellants and Mr. Anthony Nasimire, learned Counsel for the Respondent, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL