IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 47 OF 2004

S.G. LAXMAN ..... APPELLANT

VERSUS

JOHN MWANANJELA ..... RESPONDENT

JUDGMENT

SHANGWA, J.

This is an appeal against the decision of the court of the Resident Magistrate at Kisutu in Civil Case No. 31 of 1998. In that case, the Appellant S.G. Laxman was found liable in negligence and ordered to pay the Respondent John Mwananjela special damages of Shs. 121,100/=, Shs 34,000/= for treatment, general damages of Sh. 2,000,000/=, interest thereon and costs of the suit. He was not satisfied with the said finding and order. He then decided to appeal to this court.

There are six grounds of appeal which he advanced against the trial court's decision. The first ground is that the trial Magistrate was wrong in basing her decision on evidence adduced by incredible witnesses. The second ground is that the trial Magistrate erred in awarding special damages which were not prayed for. The third ground is that the trial Magistrate erred in awarding special damages without proof thereof. The fourth ground is that the trial Magistrate erred in awarding general damages without considering contributory negligence on the part of the Respondent. The fifth ground is that the trial magistrate erred in admitting the Medical Assessment made by a single Doctor. The sixth ground is that the trial Magistrate erred in

delivering judgment without considering the issues between the parties.

The Appellant was represented by M/S MSK Law Partners (Advocates) and the Respondent was represented by M/S Magesa & Co. Advocates.

The facts of this case are as follows: On 21.9.1996, the Respondent boarded a mini bus locally known as Dala Dala with Registration No. 7997. He boarded it at Bahama Mama bus Stand, Kimara area. On that day, it was being driven by the Appellant's driver. When it reached Shekilango area, it stopped. The Respondent decided to go out. As he was moving out, its driver drove off suddenly and he fell down on the ground. He got injured on his face. He sustained a cut wound. The driver never stopped. He took a taxi and went to Magomeni Hospital. He found no Doctor

there. He then went to Hindu Mandal Hospital where he got treatment of his cut wound on his face. The driver of the Mini bus was later arrested and charged in the District Court of Ilala with Reckless and Negligent act c/s 233 (g) of the Penal Code. He pleaded guilty to the charge. He was convicted and sentenced to a fine of Shs. 10,000/= or 7 months in jail in case of default. He paid the fine.

The question to be determined by this court is whether or not the court of the Resident Magistrate at Kisutu was justified in finding the Appellant liable in negligence and if so whether or not the said court acted properly in awarding the Respondent special damages, general damages, interest and costs arising out of the suit.

It is a well established principle that in tort, a master is vicariously liable for the negligent acts of his servants

committed in the course of their employment. Equally, the employer is vicariously liable for the negligent acts of his employees committed in the course of their employment.

In this case, the driver of the Mini bus from where the Respondent fell down and got injured on his face was employed by the Appellant to whom that Mini bus belonged. Evidence on record does show that the driver of the Minibus pleaded guilty to the Offence of being reckless and negligent which was preferred against him in the District Court of Ilala in Criminal case No. 4434 of 1996. This was after the Respondent had reported him to the Police for action.

The plea of guilty to the Criminal act of being reckless and negligent which was made by the Appellant's driver makes it obvious that the Respondent got injured due to the negligence of the said driver. At the time when he was

injured, the Appellant's driver was in the course of executing his duties namely transporting passengers from one place to another in the city. In principle, the Appellant is Vicariously liable for the reckless and negligent act of his driver which was committed in the course of his employment. That is what the trial court found after considering the evidence of P.W. 1 John Mwananjela (Respondent) and P.W. 2. Julius Kibasa.

P.W. 1 is the one who got injured. He was the plaintiff before the trial court. He testified on how he got injured and the legal action he took against the Appellant's driver who caused his injury out of being reckless and negligent. P.W.2 is the Doctor who treated him. He testified on the treatment which was given to the Respondent in order to cure his injury. He said that the Respondent had a cut

wound on his face which was stitched and that he was given medicine to kill the pain.

The trial Magistrate believed the evidence given by P.W 1 and P.W. 2 to be true. In practice, once the trial court has believed the witnesses who testified before it, the appellate court cannot interfere and say that they are not credible witnesses because the trial court is always in a better position to assess the credibility of witnesses who have testified before it. This court being an appellate court cannot therefore say that P.W.1 and P.W. 2 are incredible witnesses. Moreover, there are no basis upon which this court can say so. At any rate, PW.1 & P.W. 2 cannot be said to be incredible witnesses in view of the fact that the Appellant's driver pleaded guilty to the offence of being reckless and negligent which offence resulted in P.W.1's injury. For that reason, the first ground of appeal stands to fail.

In law, special damages have to be proved strictly. These damages are those damages which the plaintiff incurs in form of money payments issued in order to avert the Civil wrong committed against him. Proof of such damages has to be made by production of payment Vouchers or receipts. In this case, the special damages of Shs. 33,100/= which were claimed by the Respondent as medical expenses were not proved by him. An attempt to prove them by production of the receipts was made during the hearing, but those receipts were rejected on grounds that they were not annexed to the plaint. No cross appeal has been made against the rejection of those receipts.

In her judgment, the trial Magistrate S.S. Seme awarded to the Respondent special damages of Shs 121,100/= and Shs. 34,000/= for treatment. In fact, these

amounts were neither proved nor claimed by the Respondent. According to paragraphs 9 and 12 of the amended plaint, what was claimed are special damages of Shs. 33,100/= only. I therefore agree with the Appellant that the trial magistrate erred in awarding special damages to the Respondent which were neither prayed for nor proved. Thus, the second and third grounds of appeal have merit and stand to succeed.

There is nothing on record upon which this court can apportion the blame on the Respondent and say that he fell down from the Mini bus and got injured due to his own negligence. Therefore, in awarding general damages, the trial magistrate was not wrong in not taking into consideration contributory negligence which did not exist at all. It is common knowledge that in awarding general damages the court has absolute discretion. In this case, out

of Shs. 9,000,000/= which were claimed by the Respondent as general damages for the injury he sustained, Shs 2,000,000/= were awarded to him. In measuring the quantum of damages which were awarded to the Respondent, the trial magistrate correctly took into consideration the extent of the injury that was suffered by him. According to the Medical assessment which was made by one Doctor, the Respondent sustained 15% disability.

In my opinion, medical assessment of a single Doctor in respect of the injury suffered by the claimant is sufficient in considering the general damages to be awarded to him. It is not necessary that such assessment should be done by more than one Doctor in order to be taken into consideration. There is no law which provides so. None of such law has been cited by the Appellant to support his fifth ground of appeal.

The major issue which the trial court was supposed to consider is whether or not the Appellant was liable in negligence. The trial magistrate did consider this issue and correctly found that the Appellant was vicariously liable for the reckless and negligent act of his driver which he committed in the course of his employment. It was from that very act that the Respondent got injured and suffered pain. Thus, the fourth, fifth and sixth grounds of appeal stand to fail.

Now, considering the nature of the injury which was sustained by the Respondent who simply got a cut wound on his face, I think that the general damages of Shs. 2,000,000/= which were awarded by the trial Magistrate to the Respondent are on the high side. I reduce them to Shs 1,000,000/=. I also reduce the interest rate of 30% per

annum on the said amount to the rate of 7% per annum with effect from the date of the trial court's judgment until full payment.

In general, I allow this appeal to the extent mentioned above but as the reckless and negligent act which resulted into the Respondent's injury was not committed by the Appellant himself but his driver, I order that each party should bear his own costs here and in the court below.

A. Shangwa

JUDGE

22.8.2005

Delivered in Court this 22nd day of August, 2005

A. Shangwa

JUDGE

22.8.2005