

IN THE HIGH COURT OF TANZANIA

(AT DAR ES SALAAM)

Civil Appeal No. 33 of 2010

(Appeal from the Judgment of V.M. Nongwa-RM, Kisutu Resident Magistrate's Court- Civil Case Number 209 of 2005 delivered on 16 February 2010)

HILARY MATHEW CHINENDACHI.....APPELLANT

VS

ZABLON MASIAGA.....RESPONDENT

JUDGMENT

Date of last Order: 22-02-2010

Date of Judgment: 28-02-2011

JUMA, J.:

This appeal arises from a judgment delivered by Resident Magistrate's Court of Dar es Salaam at Kisutu (Civil Case No. 209 of 2005) dated 16th February 2010. At Resident Magistrate's Court the suit was filed by Hillary Mathew Chinendachi, hereinafter referred to as the appellant against both the respondent- Zablon Masiaga (1st Defendant at subordinate court) and Mark Raimond Tema (2nd Defendant at subordinate court). Appellant was a non-paying passenger travelling to Dodoma from Dar es Salaam in the Toyota Hiace vehicle registration number MG 7867. This vehicle which belonged to the respondent was conveying delegates who were travelling to attend a meeting convened by the Parents

Association of the ruling party-CCM. Mark Raimond Tema was the driver of the vehicle. At the subordinate court the appellant claimed general damages which the appellant alleged to have suffered following a motor vehicle accident which occurred on 5th March 2004 at Kibaigwa in Kongwa district. During the early stages of the trial it emerged that Mark Raimond Tema was not only attending the trial but had not filed his written statement of defence. The trial court entered a default judgment against Mark Raimond Tema. The trial continued against the remaining defendant (respondent) and at its conclusion the subordinate court (V.M. Nongwa) dismissed the entire suit. The reason advanced by the trial court for dismissal of the suit against the respondent was because the appellant was being carried gratuitously as a non-paying passenger when the accident occurred.

Appellant's memorandum of appeal contains two grounds. In the first ground the appellant contends that the trial magistrate was wrong to disregard the default judgment which had been entered against the driver of the fateful vehicle who appeared as 2nd Defendant at the subordinate court. Having found that the appellant was indeed injured in the accident, appellant feels that the trial magistrate erred for failing to grant the appellant requisite relief.

At the subordinate court, the respondent contended that at the time of the accident his vehicle was in the hands and authority of Mwananyamala branch of the ruling party (CCM) and the driver who was involved in the accident was not his employee. Further, respondent contended that the vehicle did not have requisite road licence allowing it to carry passengers from Dar es Salaam to Dodoma. On its part, the trial court framed three issues to guide its determination of the case before it, i.e.

- i) whether the plaintiff/appellant herein was among the people who were travelling to Dodoma;
- ii) whether the plaintiff/appellant herein sustained injuries in that accident; and
- iii) what reliefs parties were entitled to.

With respect to the first issue whether the plaintiff/appellant herein was among the people who were in the fateful vehicle travelling to Dodoma, the trial magistrate found as a fact that the appellant was amongst the people travelling to participate in the campaigns organized by the Parents Association of CCM in Dodoma. On the second issue, the trial also found that the appellant sustained harm which was not at the level of serious injury. On the third issue of what relief the appellant was entitled to, the trial court was of the opinion that since the transport to Dodoma was free and no fares

were paid appellant cannot not maintain any legal claim against the carrier,

"..it is the principle that a person who is carried gratuitously or in other words who is neither a paying passenger nor a person who hired has no claim against the carrier"- **page 7**

Hearing of this appeal proceeded by written submissions. Contending that the trial magistrate disregarded the default judgment, appellant submitted that the judgment of the trial court did not make any finding on the default judgment and as result no decree was issued from that default judgment. According to the appellant, the entire judgment of the trial court was devoted to the respondent (1st defendant at the trial court) but silent on 2nd Defendant at subordinate court. In his replying submissions which were filed on his behalf by the Mashiku & Co. Advocates, respondent did not dispute that indeed the trial court entered a default judgment against the driver Mark Raimond Tema (2nd Defendant at the trial court). Respondent however pointed out that default judgment against the driver of the fateful vehicle does not raise any legal liability against him.

As a court of first appeal, this Court shall evaluate entire evidence presented before the trial court and draw its own conclusions. I will always bear in mind that the trial court had

the benefit of hearing and watching the demeanour of witnesses and forming first-hand opinion of them in the process of its evaluation of evidence. I have carefully considered the opposing submissions made on behalf of the parties. I have also revisited the evidence which was presented before the trial court. However, I must begin by addressing myself to the three issues which the learned trial magistrate framed to guide the determination of the matter before the subordinate court. These issues seemed to suggest that mere sustaining of an injury in an accident attracts legal liability. In my opinion, sustaining of an injury, whilst travelling in a vehicle belonging to another person does not by itself attract relief in law. In other words not every kind of injury can be the basis of a personal injury lawsuit. Only injuries that result from violation of a legal right are the ones which attract reliefs in a lawsuit. Plaintiffs claiming injuries must bring their suit within the injuries that attract relief in law. If a person becomes legally liable then the person suffering the injuries is entitled to a legal relief.

It will be necessary in my evaluation as the court of first appeal to also look at the allegation of facts made by the appellant to determine which ground of liability can sustain the set of facts alleged by the appellant. Paragraphs 4, 5 and 7 of the Plaint which the appellant filed at the Resident

Magistrate's Court clearly suggests that the suit which the appellant filed was grounded on the tort of vicarious liability of the respondent, arising from the negligence of his driver (Mark Raymond Tema):-

4. The second Defendant is an employee of the 1st Defendant working as a driver of motor vehicle.... Toyota Hiace Mini bus with registration number MG 7867 which is the property of the 1st Defendant.

5. On 5th March 2004 the Plaintiff being the passenger of the 1st Defendant's motor vehicle driven by the 2nd Defendant was involved in car accident at Kibaigwa, Kongwa District whereby he sustained bad injuries on the neck. The plaintiff craves leave to refer to copy of Particulars of Road Accident (Police Form 90) annexed hereto and marked "HM 1" as forming part of this plaint.

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7. The second defendant was prosecuted for driving negligently and he admitted the charge as a result he was convicted by the Mpwapwa District Court. The plaintiff craves leave to refer to copies of Police Force final report (PF 115) and proceedings are annexed hereto and collectively marked "HM 3" as forming part of this plaint.

Apart from revisiting the three issues which the trial magistrate drafted for his determination of the case before him, I will in

addition re-evaluate evidence to see whether appellant proved three ingredients establishing the tort of vicarious liability against the respondent. Appellant needed to prove that tort of negligence was committed by the driver (Mark Raymond Tema). Secondly, appellant need to show that employment (or agency) relationship existed between the respondent herein and the driver of the accident vehicle. Lastly, appellant had to prove that the negligence of the driver was committed in the course of his employment by the respondent.

Let me first address the first two issues whether the appellant was among the people who were travelling to Dodoma and sustained injuries in that accident. With due respect to the trial magistrate, there is no where in his judgment where he is seen to weigh and evaluate all the evidence before reaching the conclusion that the appellant was amongst the people in the vehicle who was injured following the accident.

I will revisit the evidence on record which the trial magistrate should have weighed and evaluated. In his testimony as PW1 appellant maintains that he was amongst the five people who were injured while travelling to Dodoma. According to the appellant, all the injured received medical treatments. But I find it hard to understand why the appellant did not report to

the police immediately till five months later. Appellant's version was supported by Francis s/o Steven Chisangula (PW3) who alleged that appellant was badly injured and taken to a hospital. Again, PW3 did not specify which hospital the appellant was taken for treatment. Evidence of Hassan s/o Said Tambaza (DW1) who was travelling in the vehicle contradicted the appellant. According to DW1 all those travelling to Dodoma for the conference had introduction letters together with identification cards which the appellant did not have. DW1 maintains that the appellant was not amongst the fifteen passengers who travelled in that vehicle. DW1 remembered two passengers who were injured (Hassan Dalali and one woman) who were taken to hospital by Mr. Chusi. The injured even managed to attend the Dodoma Conference before returning to Dar es Salaam.

Even Shadrack Masiaga (DW3) was sure that the appellant was not amongst the passengers travelling in the vehicle that overturned at Kibaigwa. DW3 was also travelling in the same delegation to Dodoma Conference driving a saloon car just behind the Hiace. He was amongst the first people at the scene of accident. According to DW3 only one woman was injured when she tried to force her way out of the vehicle that had overturned. From the evidence tendered, I will not agree with the trial magistrate that appellant has established on

balance of probability that he was amongst the people travelling to participate in the campaigns organized by the Parents Association of CCM in Dodoma and sustained injuries at Kibaigwa on the way to Dodoma. The trial magistrate did not indicate why he chose to believe the evidence of the appellant and PW3 but not DW1, DW3 and respondent. The trial magistrate did not evaluate why Medical Examination Report which was admitted as Exhibit P1 was issued by the police on 26 July 2004 which was more than four months after the accident.

There is another reason why I think this appeal should fail. As I suggested earlier in my judgment, Appellant needed to prove that tort of negligence was committed by the driver (Mark Raymond Tema). Appellant in addition had to show that employment (or agency) relationship existed between the respondent herein and the driver of the accident vehicle. Lastly, appellant had to prove that the negligence of the driver was committed in the course of his employment by the respondent. The trial magistrate did not evaluate evidence establishing these points of linkage of the respondent to the tort committed by the driver under his employment or agency.

No witness travelling in that vehicle testified on how the accident was caused by the negligent driving. It is not clear how the driver was responsible for tyre bursting which led to the car overturning. My perusal of the record shows that appellant relied on the records of the Traffic Case No. 33 of 2004 in the District Court of Mpwapwa at Mpwapwa which was admitted as Exhibit P3. In addition the appellant also relied on Particulars of Road Accident (Police Form 90) and the conviction of the driver of the accident vehicle on plea of guilty to establish negligence of the respondent's driver.

But it is worthwhile to note that no other witness corroborated the nature of negligence suggested in the record of traffic case. Even the appellant testifying on his own behalf as PW1 did not indicate the nature of negligent driving committed by the driver. Appellant only testified that when they reached Kibaigwa their vehicle was involved in an accident after a tyre burst and tendered the particulars of accident which was prepared by the police. From the evidence of witnesses it is not possible to say that appellant proved on the balance of probability that the driver of the fateful vehicle was driving at excessive speed or he was not taking reasonable care and attention while driving the vehicle. Negligence of the driver is not therefore proved. Likewise, the trial magistrate did not make any finding on whether the driver of the accident

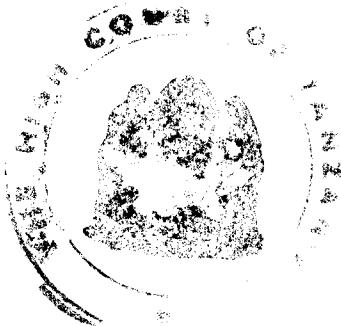
vehicle was an agent or employee of the respondent for purposes of vicarious liability of the respondent. The trial magistrate did not evaluate and weigh evidence by the respondent who contended that he had never employed Mr. Mark s/o Raimond Tema as his driver because the vehicle in question at that time hired to a third party who had his own driver. The respondent maintained that the name of his driver was Kichefuchefu Raymond Ramadhani.

Accordingly, and for reasons outlined, even the default judgment against the driver of the accident vehicle is not enough to prove that the respondent is vicariously liable for the accident. This appeal is dismissed with costs.

Orders accordingly.


I.H. Juma
JUDGE
28-02-2011

Delivered in Court Chambers in the presence of: **Mr. Hillary Mathew Chinendachi (Appellant) and Mr. Sabasaba (Advocate for the Respondent).**




I.H. Juma
JUDGE
28-02-2011