IN THE HIGH COURT OF TANZANIA

(Dar es Salaam District Registry)

AT DAR ES SALAAM

CIVIL CASE NO. 149 OF 2007

SAMSON M MUSSA ..... PLAINTIFF

VERSUS

E. 228 PC ELIAS .....1ST DEFENDANT

THE PERMANENT SECRETARY MINISTRY

OF PUBLIC SAFETY AND SECURITY.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

13/11/2015&12/02/2015

JUDG MENT

MWANDAMBO, J.

The suit giving rise to this judgment is founded on the tort of assault to a person whereby the Plaintiff claims to have been injured by the 1st Defendant in the course of his employment with the 2nd Defendant. By reason of the injury alleged to have resulted from the said assault, the Plaintiff claims damages from the Defendants jointly and severally in the sum of Tshs. 500,000,000/=. Not unusual, the Defendants through their joint written statement of defence resist the Plaintiff's claim praying for the dismissal of the suit in its entirety.

The facts material to the suit are fairy straight forward and can be stated as follows. On 10 January 2006, the Plaintiff was a passenger in a commuter bus in Dar es Salaam commonly known as *Daladala* plying between Kigogo and Ilala. Somewhere in Kigogoarea, one of the passengers in the said daladala complained of theft of his money and this resulted in the driver of the said daladala drivingto a nearest police post at Kigogo with a view to seeking the

necessary intervention to identify a cuiprit. Upon arrival at the police station, the police officers on duty ordered all passengers to disembark for a search one after another at the bus's door by police officers. One of such police officers was E 3228, PC Elias the 1st Defendant who was stationed at the door doing the search. Like other passengers, the Plaintiff disembarked from the daladala and after the search nothing was found from him in connection with the alleged theft. No sooner had the search on the Plaintiff been completed than the 1st Defendant started assaulting the Plaintiff by hitting his mouth bya fist. That resulted in the Plaintiff sustaining injuries on his lower jaw. The injuries the plaintiff sustained led to a referral to a specialist Hospital in India after the treatment from the local hospitals had proved to be unsuccessful. By reason of the said injuries, the Plaintiff lodged his complaint with the 1st Defendant's employer through the Police Force which, upon being satisfied that the 1stDefendant had committed the assault, it terminated him from employment. In addition, the 1st Defendant was taken to court facing Criminal charges but later on the District Court acquitted him. Finding himself in the state he was after the assault, the Plaintiff sought to vindicate his rights by demanding compensation from the Defendants but to no avail and hence the instant suit for damages as highlighted earlier.

Before the commencement of the trial, my learned sister, Munisi, J who conducted the trial up to the Plaintiffs' first witness, framed the following issues namely;-

1. Whether the Plaintiff was injured by the 1st Defendant,
2. If issue No. 1 is in the affirmative, whether the actions of the 1st Defendant was (sic) in the course of his duties.
3. Whether the 2ndDefendant is vicariously liable to the Plaintiff
4. To what reliefs (if any) are the parties entitled.

The Plaintiff prosecuted his case through his own testimony as PW1 andthat of Iddi Heri (PW2). On the other hand, the Defendants had three witnesses namely; Inspector Deus Shatta (DW1), Inspector Ezekiel Kiogo (DW2) and PC Elias, the 1st Defendant who testified as DW3.

In his testimony, PW1 led by Ms. Mariam Majamba learned Advocate stated that on the material date that is to say; 10 January 2006he first Defendant who at that time was with his colleagues at Kigogo police post assaulted him immediately after searching him by punching fists on his month leading to the fracture of his lower jaw. In support, PW1 produced in evidence a PF3 (exh. P6) and medical Medical chits for hospital attendances at Mwananyamala and Mnazi mmoja Hospitals which were admitted as exh. P3 collectively. Although PW1 did not know the name of his assailant on the date of the assault, he was able to identify him at Magomeni Police Station where he saw the 1st Defendant standing at the counter as the same person who had assaulted him few days before. He came to know the 1st Defendants' name after he had pointed him in front of the Officer Commanding District (OCD) who mentioned his name as PC Elias. Subsequently, the 1st Defendant was charged before a court martial of the police force at which PW1 testified and identified him as his assailant. During cross examination by the 1st Defendant, PW1 testified that the 1st Defendant admitted to have been at Kigogo Police Station on the material date and admitted also to have assaulted the Plaintiff underthe influence of bhang. In his testimony, DW3 did not dispute PW1's version except for the assault which he described to be a lie including the admission of it made by the Police Commissioner, Dar es Salaam special zone to the Chairman of the Human Rights and Good Governance dated 5 May 2006 admitted in evidence as exh. P2.Regarding the injuries sustained, PW1 told the court how the assault affected him leading into an open surgery entailing putting up wires to fix a deformed lowerjaw. As this operation did not succeed, PW1 told the court how

he was referred to Apolo Hospital in India at the Government's expenses (exh. P3). PW1 told the court that he was hospitalized from 30 September to 5 December 2006 and had several operations in between. The Plaintiff testified further that whilst in hospital, he suffered a six weeks paralysis after the first operation. To substantiate, PW1 produced in evidence a discharge report which was admitted as exh. P5 summarizing the nature of the injury and the treatment received at the hospital. DW2, who is a Dental Surgeon working with Sinza Hospital, Kinondoni Municipality also working at a private Dental clinic known as Smiles Dental Clinic. DW2 narrated the history of his involvement in attending the Plaintiff at both Smiles Dental Clinic and Sinza Hospital. In brief, DW2's testimony confirmed the extent of the dental complications arising from the injury the Plaintiff had sustained. According to DW2, the Plaintiff had experienced a fractured lower jaw which had been reconstructed by putting tectonic plates in the form of hard material made of metal to enhance the strength of the jaw to assist him bite things like food which he was not able to bite prior to the treatment. It was DW2's further testimony that the Plaintiff developed several complications as a result of the artificial inplants to address the deformed jaw. These complications include; dental abscessand teeth insensitivity on his lower jaw due to metal friction on the upper jaw. Above all, the injury sustained had subjected the Plaintiff to constant medical attention throughout his life not only in relation to the deformed lower jaw but also regular consultation with Neuro Surgeons to address partial paralysis effect following the assault. DW2's testimony was barely challenged in cross examination as far as the nature and extent of the injury and the post injury complications are concerned. Apart from DW3 whose evidence has been summarized above, the testimony of DW1 and DW2 was by and large similar.DW1's evidence dwelt on disputing the assault and injury inflicted on the Plaintiff largely because he (the Plaintiff) did not report it immediately with the police and received medical attention instantly. Secondly, whilst admitting that the 1st Defendant was

dismissed from employment as a result of the complaint the Plaintiff had lodged, DW2 contended that according to him the procedure employed in dismiss him was not observed by his employer. Thirdly, at any rate, the 1st Defendant committed the assault on his own outside the scope of his duties. Fourthly, the 1st Defendant was acquitted of the Criminal charge the subject of the disciplinary proceedings which led to his dismissal.

Lastly, DW3 told the court that he was the In- charge of a team of police officers from Magomeni Police Station who had been assigned a special duty in Kigogo area on 10 January 2006. He also confirmed that he, and his team took some inspects they had arrested in the application to Kigogo police post on the material date. This witness confirmed also the daladala incidence in which the Plaintiff was a passenger and the search at Kigogo police post but denied having seen the 1st Defendant attacking and assaulting the Plaintiff on that date. During cross examination, DW3 admitted that the 1st Defendant was in his ordinary course of business at Kigogo police post on the material date. In addition, DW2 confirmed that the 1st Defendant was one of the police officers who conducted an inspection/search of the passengers in a daladala which had parked at Kigogo police post. Apart from saying that the procedure employed in dismissing the first Defendant was different from what he (DW2) was aware of, hewas reluctant to say it was a bogus one.

After the end of the trial I invited counsel and the 1st Defendant to file their final submissions which they dutifully did on the fixed schedule.

In their submissions, the Defendants would have the court answer the first issue against the Plaintiff primarily because, according to them, none of the passengers complained to have been injured on the material date. Likewise, the Defendants contend that the claim by the Plaintiff is not substantiated because he did not produce any body to prove witnessing the assaults administered by

the 1st Defendant on the date he claims to have been assaulted by the 1st Defendant. For her Ms. Miriam Majamba, learned Advocate for the Plaintiff invites me to answer the first issue affirmatively because:firstly, the 2nd Defendant had admitted that the 1st Defendant was responsible for assaulting the Plaintiff through a letter to the Chairman, Human Right and Good Governance dated 5 May 2006 (exh. P2), secondly, the 2nd Defendant prosecuted the 1st Defendant at a court martial which led to his termination from employment and subsequently, the 1st Defendant was subjected to criminal charges in relation to the same act of assault.

With respect, I agree with the learned Advocate for the Plaintiff that the evidence tendered by the Plaintiff both oral and documentary has established on the required standard that the 1st Defendant committed the assault which resulted in an injury to the Plaintiff. I refuse to accept the Defendant's testimony which was by and large geared at face saving as it were. In my view, it defeats both common sense and logic for the 2nd Defendant to admit as it did through exh. P2, conduct a Court Martial against its employee resulting in his termination and later on field witnesses to deny that the 1st Defendant did not commit the assault resulting in the Plaintiff's injury. Without much ado, I answer the first issue in the affirmative.

The second issue seeks to investigate whether the 1st Defendant was in the course of his duties. Put it differently, did the 1st Defendant commit the assault in the course of his duties? The Defendants through their submissions contend, as they do that since there is no proof that the 1st Defendant committed the assault, there is nothing to suggest that the 1st Defendant did anything out of his normal duties warranting responsibility of his employer. On the other hand, the learned Advocate for the Plaintiff submits that there is sufficient evidence to prove that the 1st Defendant committed the assault in the

course of his duties. According to the learned Advocate, that evidence is constituted by admission by both DW2 and DW3 of their presence at Kigogo police station on the material date performing their duties. Secondly, admission by both DW2 and DW3 of the search conducted by police officers including the 1st Defendant in a daladala which had parked outside the police station. Again, I am bound to agree with the Plaintiff's learned Advocate on this issue. The evidence on record by DW2 that the 1st Defendant was in his ordinary course of business on the material date and that he (the 1st Defendant) is one of the police officers who conducted search on passengers from a daladala that had parked outside Kigogo police station. DW2's evidence too confirms that the 1st Defendant was one of the police officers who conducted a search on passengers from a daladala on 10 February 2006.It is, in my view inconceivable to say as the Defendants do that the 1st Defendant was not on his ordinary course of duties on the material date. It would have been different if, for instance, the assault was committed in a place like a pub in which both the Plaintiff and the 1st Defendant were customers. Since the assault was committed by the 1st Defendant while on his duty at a police station of his employer I find no amount of argument persuade me decide that the 1st Defendant's actions were committed outside the course of his duties. Accordingly, I answer the second issue affirmatively.

The third issue is whether the 2nd Defendant is vicariously liable for the acts of the 1st Defendant. The learned State Attorney has invited me to hold otherwise because vicarious liability can only be sustained where a wrong is committed by a servant in the course of employment. He bolsters his submission by reference to Salmond and Heuston 19th edition on the Law of Torts at pages 521 and 522. On the strength of the definition provided by the learned and distinguished authors the learned State Attorney invited the court to find and hold that since there is no proof of any assault being committed by the 1st Defendant neither has the Plaintiff proved that the 1st Defendant was in the

ordinary course cause of his duties, the 2nd Defendant is not vicariously liable to the Plaintiff. The learned Advocate for the Plaintiff had a strong view that the second Defendant cannot escape liability for its employee's acts relying on **Bashiri Ally (A Minor)** V. **Clemensia Falima, Regional Medical Officer and the Attorney General** [1998] TLR 215.

There is, I think no dispute about the position of the law as it relates to the doctrine of vicarious liability on the authorities placed before the court by both the learned State Attorney and the learnedAdvocate for the Plaintiff. To that list it may perhaps not be irrelevant to add one more authority to make the point clearer. In Halsbury's Laws of England 4th Edition Vol. 16 paragraph 743 it is stated:

> *"In order to render the employer liable for the employee's act it is necessary to show that the employee, in doing the act which occasioned the injury, was acting in the course of his employment. An employer is not liable if the act which gave rise to the injury was an independent act unconnected with the employee's employment. If at the time when the injury took place, the employee was engaged, not on his employer's business, but on his own, the relationship of employer and employee does not exist, and the employer is not therefore liable to third persons for the manner in which it is performed, since he is in the position of a stranger. In this case it is immaterial whether the employee in using his employer's property with his employer's permission, as long as he is clearly acting on his own behalf, or whether he is using it*

surreptiously, and is therefore, as regards his employer, trespasser".

The doctrine of vicarious liability in the context of the instant suit is premised on the liability of the Government in relation to its employees such as the 1st Defendant on the date the cause of action arose. In **Ismail Lazaro vJosephine Mgomera**[1986–1989] 1 EA 302 the Court of Appeal had the following to say in relation to the liability of the Government pursuant to the provisions of section 3(4) of the Government Proceedings Act [Cap 5 R.E 2002]:

"....In matters of tort, a tortfeasor, the person who commits a tort, is aiways primarily liable. An employer is vicariously liable if his servant commits a tort in the course and within the scope of his employment. That does not absolve the liability of the servant for the tort committed. It only means that the employer is also liable as the tort was committed when the servant was supposed to be acting in place of or for the employer, whose act it becomes..."(at page 304)

I find the above to be very relevant to the case at hand for the operation of the doctrine of vicarious liability. As discussed when dealing with the second issue, the Plaintiff has succeeded in proving that the 1st Defendant who was an employee of the 2ndDefendant committed the assault which led to injury in the course of his duties. Accordingly, the 2nddefendant cannot escape its liability for the acts of its employee. It is thus not surprising that the learned State Attorney did not have much argument aimed at exonerating the 2ndDefendant from liability apart from the contention that the Plaintiff had not proved that the 1stDefendant had committed the assault. Having determined the first issue

against theDefendants the question of lack of proof is, with respect, devoid of merits in the circumstances and in consequence I answer issue number three in the affirmative.

As regards reliefs there can be no doubt that the Plaintiff who has proved his case on the required standard is entitled to judgmentto the extent I will endeavor to show shortly. The main relief the Plaintiff has asked is general damages in the sum of Tshs 500,000,000/= jointly and severally. The learned StateAttorney has invited the court not to award any damages because the plaintiff gottreated outside the country by the same government he is now seeking to recover damages. With respectthat is besides the point of contention here since the Plaintiff is not claiming special damages neither is there any justification for saying that treatment is a substitute reparation for the injury the Plaintiff sustained as a result of the assault by the 1st Defendant. I would reject that argument out rightly. For her part Ms. Majamba learned advocate for the Plaintiff has invited me to award the sum claimed on the strength of the evidence of the injury sustained by the Plaintiff leaving him with permanent deformity of his lower jaw and the associated complications, loss of ability to bite solid foods, pain and suffering and permanent dependency on medication and doctors specialist consultations particularly Dental surgeons. As to the quantum, the learned advocate has invited the court to find the amount claimed has now been rendered inadequate by the passage of time as a result of inflation. To buttress her submissions, Ms. Majamba referred me to **Cook V J.L. Kier &Co. Ltd** [1970] 2 All. ER 513 a decision of the Court of Appeal of England she made reference to in her submissions. That case involved negligence causing the plaintiff a severe head injury. Owing to the brain damage resulting from this injury the plaintiff, who was 38 at the time of the accident, lost his sense of taste and smell and was rendered sexually impotent. He was also unable to control his limbs properly with resulting difficulty in driving and curtailment of physical

activities. The trial judge awarded the plaintiff a total sum of £9,589 10s 10d damages being agreed special damages of £5,824 in respect of loss of future earning and £3,000 general damages in respect of pain and suffering. On appeal on the quantum of damages, the Court of Appeal found the award to be on the low side and increased it to £7,000 for pain and suffering to take into account especially the plaintiff's sexual impotence. Apart from the appellate court's inclination to enhance the award of damages specifically on account proven sexual intercourse the decision is not very helpful in the instant suit.

All in all I have taken into account the wanton act of the 1st Defendant in maiming the Plaintiff and the nature of the injury sustained which has made him permanently dependent on medication and regular consultation with doctors. I have also taken into account the fact that the Government paid for the Plaintiff's referral costs for treatment in a specialist hospital in India and the fact that the Plaintiff is still an employee of the Government and I accordingly assess the damages at Tshs 60,000,000/=.

In the upshot, judgment is hereby entered against the Defendants jointly and severally for payment of Tshs 60,000,000/= in general damages. That amount shall attract interest at the rate of 7% per annum from the date of judgment till full payment. Finally, the plaintiff is awarded the costs of the suit.

Order accordingly.

L.J.S. MWANDAMBO

JUDGE

12/02/2016