

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM

CIVIL APPEAL NO. 28 OF 2016

SAIDI IBRAHIM WASHOKERA1ST APPELLANT

VERSUS

MARY PATRICK MSILA1ST RESPONDENT

PANUELA ELIASIKIA MWAMBO.....2ND RESPONDENT

DR. CHARLES KALUMBO3RD RESPONDENT

KINONDONI MUNICIPAL COUNCIL 4TH RESPONDENT

25/10/2017 & 8/2/2018

JUDGMENT

I.P.KITUSI

Mary Patrick Msila and Panuel Eliasikia Mbwambo the first and second respondent respectively were employed and working as Nurses at Mwananyamala Municipal Hospital, a Government institution owned by Kinondoni Municipal Council the fourth respondent. Dr .Charles Kalumbo the third respondent was the Medical officer in charge of the said Hospital.

Said Ibrahim Washokera was appellant sued the respondents for recovery of monies accruing from acts injurious to him and allegedly committed by them in the course of their duties. The appellant

was admitted at that hospital for surgery on his hernia on 7th May 2002 and the operation is said to have been successful.

The alleged injurious acts allegedly happened as the appellant was being taken back to a Ward on a stretcher that was being pushed by the first and second respondents. It was alleged by the appellant that the first and second respondents pushed the wheeled stretcher in a fast and reckless manner with no regard to the safety of the patient(appellant) lying on it eventually causing him to fall off landing on a flower bed.

The appellant alleged at the trial that he landed on his head on the stony flower bed injuring his head back and feet and inevitably suffering terrible pain on the freshly operated part of his body. He also complained of being left to lie naked and exposed for the crowd to watch and ridicule, as the first and second respondents picked and placed him back on the stretcher taking their time as they did that .

In his plaint the appellant referred to the humiliation resulting from being exposed his nakedness to members of his family and the crowd that got attracted by the fall some of them suspecting him to have been a Criminal trying to escape as others took him for a drunkard.

As a result of all that, the healing process delayed, causing more expenses in terms of transport and medicines. Further that the defendants act rendered him incapable of attending hi profit generating venture which nets Shs 55, 000/= per day.

The first and second respondents disputed the allegation that they pushed the stretcher fast and recklessly and accused the appellant of ignoring their instructions directed at him to stop rolling around the stretcher. As a result he caused the said stretcher to topple but before the appellant fell to the ground, they got hold of him and further that all this happened only in the presence of hospital employees denying the appellant's version as to a crowd of watchers.

The respondents also denied the alleged prolonged healing period and called upon the appellant to prove that fact. Other assertions such as additional costs for transport and medication were denied. The respondent referred to the claims as fabrications, frivolous, fictitious and baseless.

The appellant first testified before Hon. Beda, Resident Magistrate on 23/1/2011 and before he could finish his testimony the case was adjourned. This opened a series of adjournments until on 18/11/2013 when Hon. Beda recused from the case. It seems from the record dated 27/11/2013 the case was re – assigned to Hon. Kasailo RM but it was not until 27/11/2014 exactly one year later that the learned Resident Magistrate proceeded from where his predecessor had stopped three years earlier. Even then the plaintiff (Pw1) had to finish his testimony on 3/12/2014.

The substance of the appellant's testimony was an amplification of what he had pleaded except for some small details. He stated that at the time of the fall his body from the waist down was

limp as a result of being anesthetic, therefore he was helpless. One Mfaume Juma (Pw2) supported the appellant's story on the fact that a crowd surrounded to watch him as he lay naked as some whispered that he was a criminal who had attempted to escape. Pw2 identified the appellant as a person he had once worked with. He further stated that when he visited him at the hospital on 10/5/2002, the appellant's condition had worsened as he looked more ill.

The plaintiff's case was that after his discharge from Mwananyamala Hospital on 11/5/2002 he had to undergo more treatment at Mnazi Mmoja Hospital, and he tendered medical records from that Hospital to substantiate his story.

In defence Mary Patrick Messiwa (DW4) gave an account of what happened on the material day as she was pushing the stretcher to send the appellant back to the ward. She stated that one of the tryes of the stretcher was defective so that at one point they had to stop to have it fixed. Thereafter they proceeded to the Ward safely and that at no point was the appellant dropped as alleged.

Dr. Charles Peter Kalumbo (DW3) testified that he was the Medical Doctor in charge of Mwananyamala Hospital during the material period but received no complaints relating to the alleged incidence. Dr. Ackim (DW1) is the one who performed the operation on the appellant and that the procedure required the patient to turn up to him after seven days for him to review his condition. Dw1 and dw3 doubted the genuinness of the appellant's discharge forms. Dr .

Philemon Kwaay of Mnazimmoja doubted the authenticity of the medical records tendered by the appellant in proof of the fact that he was attended at that hospital.

In his judgment, the learned Resident Magistrate concluded that the documents tendered by the appellant in relation to his attendance at Mnazimmoja Hospital were not genuine. Concluding that there was no evidence to prove the claim, the learned trial magistrate dismissed the suit ordering parties to bear their own costs.

The appellant who enjoyed services of Mr. Msuya learned advocate at the trial, appeals hereto, using services of Mr. Msuya again. At the trial the respondents were represented by Ms Grace, but during these proceedings Ms Flora Lutala, learned Solicitor for Kinondoni Municipality represented them.

The appeal raises three grounds. The first ground complains against the trial magistrate's failure to address the issues. The second ground raises the fact that the court gave little weight to the appellant's evidence. The third is the issue that the Court erred in not finding the respondents negligent.

Mr. Msuya submitted that at the trial, five issues were framed including the first issue whether or not the 1st and 2nd defendants were negligent. He submitted that the court erred in considering only the issue of negligence and left the rest of the issues undetermined.

With respect the record bears, Mr. Msuya out that the issues framed by the court before commencement of trial were;

1. Whether the first, second and third defendants were negligent.
2. Whether there was any defamatory act committed by the first and second defendants
3. Whether there was contributory negligence by the plaintiff.
4. Whether the defendant are liable to pay damages
5. What reliefs are the parties entitled to.

Ms Lutala submitted in response, citing the case of **Joseph Marko Vs. Pastor Rweyemamu** [1977] LRT 59 that failure to address the issues was not fatal if the parties addressed the case by evidence.

With respect the judgment of the trial court does not meet the tests of a judgment as required by Order xx Rule 4 of the Civil Procedure Code, Cap 33 or as elaborated by the Court of Appeal in the case **Ikindila Wigae V. Republic.**[200] T.L.R 365.

There are no findings of important facts as whether or not the appellant indeed fell or not. This fact is very important because it is only after such finding that the court could proceed to determine other issues. Yet there is no determination of other issues, importantly whether there was defamation or not.

As a result, this judgment cannot be quashed or sustained. I would have ordered retrial if this case was not very old with the possibility

of some witnesses having moved to unknown places. For that reason I order that the record be returned to the trial magistrate for him to compose a proper judgment as per law.

To that extent, the appeal is allowed, but given the nature of my decision and the parties, I order each party to bear their costs.



I.P.KITUSI

JUDGE

8/2/2018