**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL CASE NO. 92 OF 2014**

**ABDULAHI MOHAMED ISMAN (*father and administrator of estate of the Mariam Abdulahi Mohamed Isman*.....PLAINTIFF**

**VERSUS**

**KILEM ENGINEERING CO. LTD.....1ST DEFENDANT**

**BENITHO THADEI CHENGULA.....2ND DEFENDANT**

**MEWA CONSULTING ENGINEERING CO.....3RD DEFENDANT**

**ILALA MUNICIPAL COUNCIL.....4TH DEFENDANT**

**JUDGMENT**

***Date of Last Order:*** *30/07/2019*
***Date of Judgment:*** *26/08/2019*

## *MLYAMBINA J.*

This is one of the cases in Tanzania attracting vicarious liability. The 2nd defendant in this case is the owner of Plot No. 202 Exdaya area Ilala Municipality in Dar es Salaam. It is undisputed fact that:

***One,*** the 2nd defendant had a statutory construction contact with the 1st defendant on the said Plot No 202 Exdaya area Ilala Municipality: ***Two,*** the 2nd defendant had engaged main consultant architect in the name of Eco Design Consultants: **Three,** the 2nd defendant had engaged electrical contractor in the name of Mwanyonga Electrical Contractor: ***Four,*** the 2nd defendant engaged structural consultant in the name of Mewa Consulting

Engineering (3rd defendant) five, the 2nd defendant engaged quantity surveyor in the name of Nziko Quants: ***Six,*** under the statutory employment contract, the 1st defendant was to render construction services (labour work) through the supervision of the 3rd defendant. The later had a supervision contract with the 2nd defendant who was under General Central of ECO Company: ***Seven,*** it is not in dispute that, on 16th May, 2013 at around 7:00am Mariam Abdulah Mohamed Isman on the way to her school white near the 2nd defednant's house on erection, was hit with a chunk of wood with a sharp nail causing her death on the sport: ***Eight,*** it is not in dispute that the chunk of wood was thrown by one Ms. Olive from the fourth floor of the erected building.

The issues for determination are:

1. Whether the defendants acted negligently in causing the death of the plaintiff's daughter.
2. If the first issue is answered in the affirmative; are the defendants liable to what extent.
3. To what relief (s) are the parties entitled to.

The claims by the plaintiff against the 1st defendant arises from the construction employment between the 2nd defendant and the 1st defendant. It was claimed by the plaintiff that the 1st defendant failed to build and put protection to any one passing under the building site by putting place and building necessary protection such as wire mesh, fencing where the accidental falling of pieces would fall around the fenced area and for failure to buy insurance cover to settle the claims.

It was the claims of the plaintiff that the accident was caused by the negligence of the 1st defendant. Thus, under the principal of vicarious liability, the 2nd defendant is liable to the claims by the plaintiff.

The plaintiff's claims as against the 3rd defendant for the reason that the 3rd defendant was employed by the 2nd defendant as a consultant entrusted with the duty of making sure that the builder and the contractor was building according to specification regulation and all the protection measures were in place. But it failed to point out the faulty and non adherence of the building regulation and protection by the 1st to the 2nd and 4th defendants.

The 4th defendant has been sued because it is an authority entrusted with the duty of issuing building permit and making sure that the one given the permit do follow strictly the regulations and conditions so as not to cause injuries and death by negligence. But the 4th defendant did not care to inspect and ensure that the building was covered with wire mesh to protect the neighbour and passersbys in case of falling items as what happened to the plaintiff's daughter.

The plaintiff claims severally and jointly as against the defendants for failure to take care in construction commensurate with building standards. Hence, the death of the child which caused a lot of traumatic experience to the plaintiff's family psychological torture and the whole processing of witnessing the untimely death.

The plaintiff therefore prayed for the following relief (s):

a) Shillings one hundred million (TZS 100,000,000/=) as funeral costs including the cost incurred by the family during the wake which took

longer because it was a shocking and untimely death of the deceased, costs of Hitma and the whole process of finalizing the burial ceremony and prayers.

b) Payment of TZS 200,000,000/= as punitive damages.

c) General damages of not less than TZS 700,000,000/= for the psychological, mental torture, shock to the plaintiff and family and the whole process of witnessing the untimely death of the deceased child whose life was taken away by negligence of the defendants.

d) Interest at the current commercial rate from the date of filing this suit to the date of Judgment.

e) Interest at the court's rate on the decretal sum from the date of judgment to the date of full and final payment.

f) Costs of the suit.

g) Any other relief this Honourable Court may deem fit and just to grant.

The defendants vehemently disputed all the claims. They are all, however, not disputing that an act of negligence to apply the plaintiff have to prove the extent that the defendants failed to exercise standard of care which the doer as the reasonable man should have exercised in the circumstance. It is further not in dispute that the outcome of negligence depends on whether the defendants owed a duty to the plaintiff and the plaintiff must prove that the defendants breached his duty to plaintiff by failing to exercise reasonable care in fulfilling the duly. The standards of negligence were set out in the Judgment of Lord Alkin in the famous case of **Donogue v. Stevenson 1932** in which he stated:

*"The rule that you are to love your neighbour become in law you must not injure your neigbouir and the lawyer's question, who is my neighbour receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour who, then, in law is my neighbour? The answer seems to be person who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions, which are called in question".*

In proving the case, the plaintiff appeared himself only and adduced evidence as (PW1), the defence side paraded four witnesses. These were Mr. Mathew Cosmas Kimaro (DW1) Benitho Thadei Chengula (DW2), Juma Hussein Msonge (DW3) And Justine Peter Magoda (DW4).

In his evidence, PW1 affirmed that, as the father of the deceased they lived adjacent to the erected house in Plot No 202 Exdaya area Ilala Municipality on 16/05/2013 at around 6:30am his daughter Mariam was going to school but when nearby the suit premise the piece of wood with nail coming from the fourth floor of the erected building hit her heard and caused death on the spot. The death certificate was tendered as exhibit P1.

PW1 adduced that he complained about the situation and require immediate response from the defendants herein in vain. They even did not help him in the burial expense of his beloved daughter.

DW1 on his part did not dispute the plaintiff's allegation. He however, testified that as the engineer and director of the 1st defendant Oliva Isidory is not her employee though he used to see her in different time as the blood relative of the owner of the house.

DW1 testified that the issue of day to day security was in the hand of the owner of the house as per the contract. Thus, perhaps the tortfesor either relative or a trespasser, the security of the said house was in his hand controlled by the owner of the building.

DW1 was of testimony that at the time of death of Mariam the building was not covered by building net due to the rotten one and they did not replace new one despite the fact that the building activities was stopped for more than five months.

DW2 who is the owner of the erected building denied to be in any relation with the said Oliva. But he testified further that oliva was the employee of the 1st defendant. Of interest, DW2 conceded that he was responsible for security. DW2 told the court that during the incidence there was a guard in the name of Simon Magaya. DW2 by then he was in china for business issues. DW2 was of testimony that even if there was building gear net, could not help anything from the thrown wood.

DW2 went further to concede that he is responsible for any omission or act done by the guard whether negligently or internationally. DW2 also conceded that he never paid for 3rd party insurance.

DW4 testified that the death of the plaintiff's daughter was not in any how caused by the 4th defendant because her duty was to make sure that the

construction is complied with the building permit granted to the 2nd defendant.

It was DW4 testimony that no any negligence by the 4th defendant caused the death of the said deceased. Indeed, the building was properly inspected and complied with the building permit. The evidence of DW3 is in line with that of DW4. DW3 deposed *inter alia* that structural drawing and structural member were complied with. Thus, no any negligence by the 3rd defendant caused the death of the plaintiff's daughter.

From the afore pleadings, evidences and exhibit, looking into the terms of the contract (exhibit D1 which is the contract of work), it is clear that the nature of relationship between the 1st defendant and the 2nd defendant was of employer and employee relationship.

It was admitted by the 2nd defendant that the works were not insured against death or injuries to third parties. It is not in dispute that the 2nd defendant did not elect to use the standard forms of building contract which could bind the contractors to have contactors all risk insurance.

Therefore, the relationship between the 2nd defendant with the 1st and 3rd defendants was purely statutory in terms of **Section 6 (a) and (f) of The Labour Institutions Act No. 7 of 2004.**

It is court's findings that the death of the plaintiff's daughter was a result of the security guard failure to take reasonable care during his employment. As submitted by the 1st defendant, as a general rule, an employer is vicariously liable for the depicts of his or her employee acting in the course and scope of the latter's employment.

The 2nd defendant is liable for the security guard's action/omission as admitted during his testimony. **Section 2 (3) (a) of the Occupiers liability Act no. 54 of 1968 Cap 64** states:

> *"The provisions of this act relating to an occupier of premises and his visitors, shall also apply in like manner and to the same extent as the principles applicable at common law to an occupier of premises and his invitees or licensees would apply, to regulate (a) the obligations of a person occupying or having control over any premises or structure in respect of damage to property including the property of persons who are not themselves his visitors"*

The generality of evidences in record shows that the 2nd defendant is the occupier of the premises. Also, the evidence in totality has casted light that at the time of accident there was no ongoing construction at the site. The death of the plaintiff's daughter was caused by negligence or omission of the 2nd defendant's security guard by not restraining the said oliva and by the said Oliva herself of acting negligently when throwing the wood chunks. Unfortunately, Oliva has not been sued.

It is the court's finding that, even if the accident could have been caused under the professional negligence, still the liability partly goes to the 2nd defendant who was the employer of the Security Guard. In the cited case of **Manager of Imara Guest House v. Egnas Kaganda (1980) TLR 40** the court held an employer vicariously liable for the act done by his employee in course of employment.

In evidence there is no proof that Oliva was an employee of the defendants. However, the vicarious liability of the 2nd defendant stems from the negligent act or omission of letting Oliva to enter into the premise and start growing chunk of woods without precautions. **Section 13 (1) and (2) of the law reform (Fatal Accidents and Miscellaneous Provisions Act Cap 310 (R.E 2002) states:**

> *(1) It shall not be a defence t an employer who is sued in respect of personal injuries caused by the wrongful act of a person employed by him, that person was, at the time the injuries were caused, in common employment with the person injured.*
>
> *(2) Any provision contained in a contract of service or apprenticeship , or in an agreement collateral thereto (including a contractor agreement) entered into before the commencement of this act shall be void in so far as it would have the effect of excluding or limiting any liability of the employer in respect of personal injuries caused to the person employed or apprenticed by the wrongful act of persons in common employment with him."*

In the premises of the above it follows clear that the 2nd defendant acted negligently causing death of the plaintiff's daughter.

On the second issue, the evidence of DW1, DW3 and DW4 established that by the time the death occurred the 2nd defendant was in China. Indeed, there is no proof that the construction was going on. Even if the construction was going on, there is no proof that Oliva was the employee of the 1st defendant.

It is the court further findings that the plaintiff failed to prove the case as against the 1st, 3rd and 4th defendants because there is no professional or supervisory negligence by act or omission of the said defendants. The second issue is thus answered in the negative.

To answer the third issue, the court finds that the 2nd defendant cannot escape liability. However, the funeral costs claimed by the plaintiff is at the higher side. Also, the general damages cannot be specified. It is a bad pleading to specify genera l damages. In the case **of Edwin William Mshetto v. Managing Director of Arusha International Conference Centre (1999) TCR 130 Mrosso J** (*as he then was*) held:

> *"It is wrong pleading to put specific amount in a claim for general damages the quantum of general damages, where awarded is accessed by the court"*

in the cited case of **Tanzania Saruji Cooperation v. African Marble Company Ltd 91997) TLR 155** the Court of Appeal held:

> *"General damages are such as the law will presume to be direct, natural or probable consequence of the act complained of the defendant's wrong doing must, therefore, have been cause, if not the sole, or particularly significant, cause of damage"*

In the instant case there is no doubt that the negligent act of the employer caused the psychological, mental torture, shock to the plaintiff and family. The whole process of witnessing the untimely death of the deceased child naturally flows from the negligence of the 2nd defendant (employer) in the

conclusion the suit is hereby granted as against the 2nd defendant only with the following orders:

1. The 2nd defendant to pay the plaintiff funeral costs at the tune of TZS 20 million.
2. The 2nd defendant to pay the plaintiff general damages at the tune of TZS 100,000,000/=
3. The 2nd defendant to pay the plaintiff court interests of the decretal sum herein above at 12% from the time of delivering this judgment to the time when the same is fully paid.
4. The 2nd defendant to pay costs of this case.

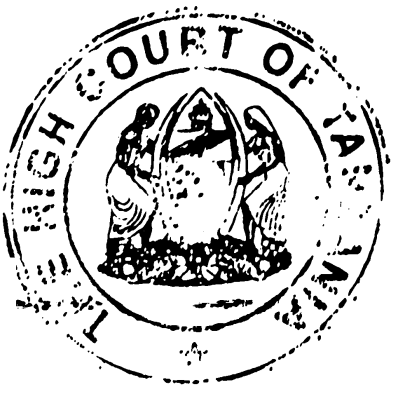
It is so ordered.

**Y. J. MLYAMBINA**

**JUDGE**

**26/08/2019**

Dated and delivered this 26th August, 2019 in the presence of the plaintiff in person, Diana Arnold Advocate holding brief of Mussa Kyobya and Reginald Shirima for the 1st and 2nd defendants respectively. The 3rd and 4th defendants been absent. Right of Appeal explained.



**Y. J. MLYAMBINA**

**JUDGE**

**26/08/2019**