IN THE HIGH COURT OF TANZANIA

AT MWANZA

CIVIL CASE NO. 25 OF 2017

KHALFAN ABDALLAH HEMED ..... PLAINTIFF

VERSUS

JUMA MAHENDE WANG'ANYI ..... DEFENDANT

Date of last Order: 02.12.2019

Date of Judgment: 25.02.2020

JUDGMENT

ISMAIL, J.

The Plaintiff has instituted a suit against the defendant, for a claim of damages for what he alleges to be acts of negligence which were caused by the defendant's driver, a Mr. Joshua Lubeni. The plaintiff alleges that due to the said driver's negligent driving, his vehicle, Scania passenger bus, bearing registration No. T736 AWJ collided with the defendant's motor vehicle, thereby substantially damaging the plaintiff's vehicle and claim lives of people.

The plaintiff contends that, as a result of the alleged negligent act perpetrated by the defendant's agent, the plaintiff has suffered loss and damage against which the following remedies are sought:

(a) Payment of the sum of TZS. 250,000,000/= being a replacement cost of the said vehicle;

(b) Payment of the sum of TZS. 183,000,000/= being loss of profit, calculated at TZS. 250,000/= per day from the date of the accident;

(c) General damages;

(d) Interest on the decretal sum at the court's rate from the date of judgment until payment in full;

(e) Costs; and

(f) Any other relief as the Court may deem fit and just.

The defendant vehemently denied any wrong doing in the accident which caused the alleged loss from which the present claim emanates. In his Written Statement of Defence, filed on 17th August, 2018, the defendant averred that no proceedings in respect of a traffic case were instituted to ascertain any wrong doing on the part of the defendant's driver, as to constitute the basis for the defendant's vicarious liability.

At the commencement of the proceedings four issues were drawn to guide the proceedings. These were:

1. *Whether the Plaintiff is the lawful owner of motor vehicle with registration No. T 736 AWJ which was allegedly involved in the accident.*
2. *Whether the Defendant is the owner of motor vehicle with registration No. T 677 CYC.*
3. *Whether the Defendant is vicariously liable for negligent driving of one Joshua Reuben who was allegedly the driver of a motor vehicle with registration No. T 677 CYC.*
4. *What reliefs are the parties entitled to.*

As I embark on the disposal journey of the framed issues, I choose to combine the first two issues and resolve them together. These issues touch on the ownership of the vehicles which were allegedly involved in the road accident from which the present matter stems. Going by the plaintiff's allegations, as pleaded in paragraphs 3 and 4 of the plaint, vehicles with registration numbers T. 736 AWJ and T.677 CYC belonged to the plaintiff and defendant, respectively, and that both of them were involved in a road accident which occurred on the Mwanza – Musoma highway. This contention was backed up by PW1 who tendered in Court, a vehicle registration Card No. 4500010 for motor vehicle with registration No. T. 736 AWJ, and the same was admitted as ***exhibit P1***. This testimony bears the name of Khalfan Abdallah Hemed, the plaintiff herein, described by PW1 as the registered owner of the vehicle.

PW1 tendered, as well, vehicle registration card No. 6290264 for registration No. T.677 CYC, registered in the name of Juma Mahende Wang'anyi. This card was tendered and admitted as ***exhibit P2***. The registered owner of the vehicle was the defendant in this matter, a fact which was confirmed by DW1, Juma Mahende.

In view of this incontrovertible evidence and concurrence by the defendant, the 1st and 2nd issues on the ownership of the vehicles are settled in the affirmative.

The next point of contention relates to the third issue. This is in respect of whether the defendant holds vicarious liability for what has been contended as the defendant's employee's negligent conduct.

Gathering from the testimony adduced by both parties, a contention does not arise with respect to the occurrence of the accident that caused humongous losses of lives and property. Both parties bore the brunt of this unfortunate incident. The plaintiff's argument is that since the defendant's driver indulged in negligent driving that caused the accident, these culpable and damaging actions ought to be transferred to the defendant, and he bears a vicariously liability.

Before I delve into the heart of the discussion on this disputation, I find it apposite that the term vicarious liability be defined and the parameters they cover be ascertained. ***Black's Law Dictionary***, Henry Campbell Black, 1990 defines Vicarious Liability to mean:

> *"The imposition of liability on one person for the actionable conduct of another, based solely on a relationship between the two persons. Indirect or imputed legal responsibility for acts of another; for example, the liability of an employer for the acts of an employee."*

This branch of tortious liability has had a wider scope in its applicability across jurisdictions. In our case, the Court of Appeal of Tanzania (Mustafa, J.A.) had an opportunity of propounding a principle on how vicarious liability can apply. This was in the case of ***Machame Kaskazini Corporation Limited (Lambo Estate) v. Aikaeli Mbowe*** [1984] TLR 70, wherein it was held as follows:

> *"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 G 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 H position of a stranger."

This position traces its roots from the English case of ***Marsh v. Moores*** [1949] 2 KB 208 at 215. The King's Bench observed as follows:

"It is well settled law that a master is liable even for acts which he has not authorized provided they are so connected with the acts which he has authorized that they may rightly be regarded as modes, although improper modes, of doing them ..."

Deducing from these astute holdings, it is quite clear that the employer's vicarious liability arises in situations where one party is supposed to be responsible for (and have control over) a third party, and is negligent in carrying out that responsibility and exercising that control. Gathering from the testimony adduced by the parties, it is safe to conclude, in the absence of any controverting testimony, that the defendant's vehicle which was involved in a fatal accident with the plaintiff's vehicle was being driven by Mr. Joshua Lubeni who has since died. He was a duly authorized driver under whose control the vehicle was, at the time of the accident. He, therefore, was in the course of his employment when the accident occurred, and what he did was authorized by the defendant, his employer. As

such, what happened with respect to the accident happened in the course of his employment.

While it is clear that the defendant was a master of the deceased's driver, the profound question for resolution, at this point, is whether the driver's conduct exhibited any sense of negligence that can be said to have caused the accident and from which a liability against the defendant may be inferred. In other words, can it be said that the deceased was negligent in the management of the motor vehicle? If so, whether the defendant is vicariously liable for such negligence.

It should not escape any body's mind that, being a civil case, the burden of proving that the accident that damaged the defendant's vehicle was caused by the defendant's driver and, that the defendant is vicariously liable, lies with the plaintiff. Such burden is, like in all civil cases, on the balance of probabilities, consistent with ***section 110*** of the Tanzania Evidence Act, Cap 6. The position that obtains in the said provision traces its roots from the Indian Evidence Act, 1872. The latter statute has been the subject of extensive discussions through commentaries published by various authors of high renown, epic among them being the legendary commentaries

made by Sarkar on Sarkar's Laws of Evidence, 18th Edn., ***M.C. Sarkar, S.C. Sarkar and P.C. Sarkar***, published by *Lexis Nexis*. The relevant part of the commentaries is found is found at page 1896 which states as follows:

> ***"... the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof.*** *It is ancient rule founded on consideration of good sense and should not be departed from without strong reason .... Until such burden is discharged the other party is not required to be called upon to prove his case.* ***The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..."*** [Emphasis added].

The learned authors' views bed well with a fabulous reasoning of Lord Denning in ***Miller v. Minister of Pensions*** [1937] 2 All. ER 372, cited with approval in the most recent decision of the Court of Appeal of Tanzania in ***Paulina Samson Ndawavya v. Theresia Thomas Madaha***, CAT-Civil Appeal No. 45 of 2017 (unreported), in which the following passage was quoted:

> *"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to*

come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches of the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say – We think is it more probable than not, the burden is discharged, but, if the probabilities are equal, it is not ...."

Having gone through the testimony of both parties, it comes out clearly that the testimony of PW1 on which the plaintiff's case hinges contains an account of facts that was passed on to the said witness by a third party. It is all hearsay as none of it was witnessed by PW1. The law, as it currently obtains is that, as a general rule, evidence can only be admissible if the same is direct, and that whatever else that is not direct is hearsay and, inadmissible. This is the spirit of ***section 62*** of the Tanzania Evidence Act, Cap. 6 [R.E. 2002] which lays a general condition that oral evidence must be direct.

In ***Subraminium v. Public Prosecutor*** [1956] W.L.R. 965, the Privy Council held that hearsay evidence is an assertion of a person other than the witness testifying, offered as evidence of the truth of that

assertion rather than as evidence of the fact that the assertion was made. describing the hearsay rule, the Court held:

> *"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made."*

The just quoted passage clearly demonstrates that the hearsay rule is simply an exclusionary principle in the sense that it casts away any testimony other than that given by a person who directly perceived it. This is what PW 1's testimony is. It would not have been admissible, were the Court to be made aware of what it is composed of. Having been admitted, the same holds no value to the plaintiff's case. For ease of reference, I wish to reproduce part of PW1's testimony:

In examination in chief:

> *"Cause of the accident was Joshua trying to overtake a small car while the driver of the plaintiff's vehicle was also trying to*

overtake. This is according to the drawings made after the accident."

During cross-examination:

"...On the fateful day I was not at the scene of the accident. I got to know about it through police reports and news in the media. I have a sketch map which is in the file which is with my advocates. ***I have not been requested by the Court to tender it....***"

Significantly, the alleged sketch map which would lay out the circumstances under which the accident occurred was not tendered in Court. The plaintiff did not procure attendance of a police officer who purportedly drew the sketch map, either. In the absence of this set of evidence, the plaintiff's contention that the accident was caused by the defendant's driver remains to be an allegation which is yet to be proved.

The witness's argument that the Court has not requested him to tender the sketch map in order to prove the allegation of negligence is strange, if not ludicrous, and does more harm to the plaintiff's case than aiding or advancing arguments in support of the claims against the defendant. It also infers that the Court is cast upon itself, the duty of creating a case for the parties and, specifically in this case, the plaintiff's case. That is an abhorrent

conduct that no court would be prepared to indulge in. The Court is only charged with the responsibility of evaluating and making sense of what is presented before it. It does not plug the gaps or stitch torn cases to a party's interest.

In ***Haji v. New Building Society Bank*** [2008] MWHC 36, the High Court of Malawi held as follows:

> *"It is never the duty of the Court to create a case for the parties and, specifically in this case, for the plaintiff by contradicting the defendant's case.* ***Where the plaintiff has no evidence on the matter in issue the Court has to analyse the evidence of the defendant and make a finding one way or the other, and then decide the case on the merit of the evidence available.***"

I find an invaluable wisdom in this passage from which to borrow a leaf. The plaintiff's sole evidence has not been able to throw blemishes at the defendant. Nothing was stated, with any semblance of mathematical precision or material particularity, that the accident was caused by the defendant's driver, on the basis of which the defendant would be held liable to the claim of vicarious liability. None of the persons who witnessed the accident was called to testify to that effect and the sketch map which would provide a picture of what happened at the scene of the crime was not forthcoming.

I consider this is to be a failure, by the plaintiff, to prove that the cause of the accident was the fault of the defendant's driver. Since the plaintiff has offered no evidence on the matter, I have no option but to turn my attention to the defence testimony and analyze it with a view to making a finding on the matter.

The evidence in support of the defence case was adduced by three defence witnesses. The defendant himself featured as ***DW1***, and his testimony was to the effect that he is the owner of a motor vehicle with registration No. T. 677 CYC, which was being driven by Joshua Lubeni, at the time of its involvement in the accident with the plaintiff's vehicle. The information about the accident was conveyed to him by the police in Musoma. He testified that, besides the late Lubeni, there were two other employees, namey: Messrs Ernest Owigo who was the checking officer and Malisa Mtete who was the bus conductor. Both of these employees were on board. The witness testified that he was also informed of the accident by his staff, and that the cause of the accident was a Nissan Terrano that was attempting to overtake his bus. In the process, it collided with the plaintiff's vehicle and, as a result, the latter knocked the defendant's vehicle. DW1 further testified that he instructed his manager to visit

the scene of the crime and assess the fatality of the accident and help the casualties. He stated that, while the police requested for documents like registration card, insurance, and licence to operate as a transporter, no further action followed the request. The witness further stated that his vehicle was comprehensively insured. He vehemently denied the plaintiff's claim, contending that it is Nissan Terrano which caused the accident and not his driver.

Wilson Malesa Mtete, testified as DW2 and stated that he was serving as a bus conductor for the defendant. He recounted what happened on 5th September, 2014, the day on which the accident from which this matter arises occurred. He said that the accident involved three vehicles which were the Mwanza Coach bus, J4 Express and a Nissan Terrano. The accident claimed lives of three drivers and a few passengers who were on board. The cause of the accident was said to be the Nissan Terrano which overtook the defendant's bus, only to bump onto the plaintiff's vehicle which in turn knocked the defendant's bus. The small vehicle ran into the river. He testified that the accident occurred when the defendant's driver had come to a stop. He denied that the accident was caused by negligent driving of the defendant's driver, stating that the said

driver took all the precautions with a view to avoiding the accident. The witness testified that he was seated on the fifth seat on the left hand side of the driver and he witnessed the accident.

Next in the list was DW3, ***Ernest Owigo Vitalis***, who testified that he was the defendant's checking officer and was aboard the defendant's bus on the date the accident occurred. He stated that it was in the course of verifying passengers' tickets that their vehicle was knocked by the plaintiff's vehicle. He stated that their vehicle was not in motion at the time, throwing the blemishes at the plaintiff's driver. The witness stated further that, other than being given a PF3 form for treatment, no further action was taken by the police. He testified that he broke a collarbone as a result of the accident. He stated that he was facing where the vehicle was heading to and he saw every step of the accident. In his view, it is the Mwanza Coach bus which caused the accident and that the defendant's driver conformed to the speed limit.

From the totality of this testimony, it is quite clear, in my considered view, that the accident from which the present claim emanated was caused by a person other than the defendant's driver. In this case, the defendant was on the receiving hand of the

accident, more or less the same way the plaintiff found himself. The defence evidence has demonstrated, with material particularity and sufficiency, that the road accident that inflicted loss on the plaintiff was caused by a third party and that consequences of all that were brutally met by the plaintiff and the defendant. No scintilla of evidence exists to support the plaintiff's contention that the defendant's driver acted in any negligent manner or had a hand in the occurrence of the accident. Based on the testimony given by the defendant and his witnesses, no court or tribunal would be persuaded to hold that the defendant's driver was culpable.

Since no blemishes can be apportioned to the defendant's driver, no liability would vicariously transfer to the defendant and hold him liable and, therefore, responsible for claims which are anchored in the allegation of wrong doing by the defendant's driver. This drives me to the conclusion that the answer to the third issue is in the negative. No evidence has been adduced to convince me that the defendant is vicariously liable for an accident in respect of which his driver had no role in its causation.

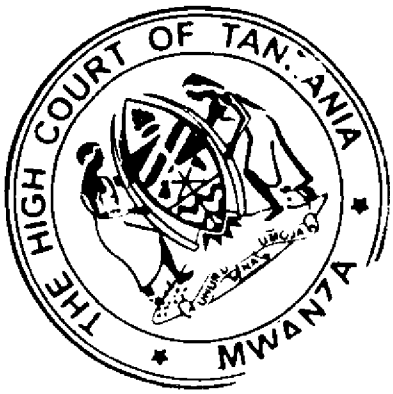
Having disposed of this substantive issue, the next question requires the Court to determine the reliefs that the parties are

entitled to. I find this question easier to resolve, in the light of what has been discussed in the third issue. I am guided by a canon of justice as emphasized in ***Hemed Said v. Mohamed Mbilu*** [1984] TLR 113 to the effect that ***"the person whose evidence is heavier than that of the other is the one who must win***. Since testimony adduced by the defendant was far heavier and reliable than that of the defendant, my unflustered conclusion is that the scale tilts heavily in the defendant's favour. I find that the defence testimony has done enough to vindicate the defendant. The force of this testimony has reduced the plaintiff's claim into a patchy, sketchy and underwhelming complaint which deserves no better treatment that that of rejection.

Consequently, I dismiss the suit, in its entirety, with costs.

It is ordered accordingly.

DATED at **MWANZA** this 25th day of February, 2020.



M.K. ISMAIL

JUDGE