

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 162 OF 2018**

*(Originating from Civil Case No. 53 of 2017 at Kisutu Resident Magistrate Court of Dar es Salaam at Kisutu)*

**EMMANUEL MASSANJA GAGANGA.....APPELLANT**

**VERSUS**

**THE MANAGING DIRECTOR**

**OUT DOOR TANZANIA.....RESPONDENT**

**JUDGEMENT**

**Date of last Order:** 17/03/2020

**Date of Judgement:** 22/05/2020

**MLYAMBINA, J.**

The question for consideration and determination in this appeal is:

*Which forum should the employer who sustains injury while at work prefer his/her complaint as against the employer on negligence?*

Before considering the brief facts of the case, it must be noted, however, that for many years, prior Labour Law Reforms of Tanzania in 2004, disputes of such nature were adjudicated by normal courts. Under the Workers Compensation Act, Cap 263, the injured employee could file the incapacitation report filled in by a Medical Practitioner to the Resident Magistrate's Court for adjudication and award of compensation. The other alternative for

the injured employee could be to pursue a cause of action in tort to sue for compensation on injuries before the Resident Magistrate's Courts. After the Labour Law Reforms, there are intricacies and confusions on the forum upon which cases on negligence by the employee against their employer should be lodged. The same it does to cases of torts of defamation. Such intricacies which creates dual system of redress *violates Article 5 to 8 of the ILO Convention No. 17 for Accidents of 1962* of which Tanzania ratified it on 30<sup>th</sup> January, 1962. It is also against *section 3 of the Worker's Compensation Act, R.E. 2015* whose objectives is *inter alia* to give effect to international obligation. In order to address the forum upon which the employee should file negligence cases against the employer, I will start to consider the brief facts and arguments of both parties on the matter.

The dispute at hand originated from the Kisutu Resident Magistrate Court of Dar es Salaam at Kisutu. The plaintiff (the appellant herein) claimed against the defendant a total amount of Tshs 50,000,000/= being compensation for the injuries sustained due to negligence of the defendant which resulted into amputation of four toes and serious burns and scalds on the body.

It was alleged that the plaintiff while on duty on 7<sup>th</sup> November, 2015 was involved in an accident at the premises of the defendant

when was performing his duties, the accident which resulted into amputation of toes and burns on the body. The plaintiff was then referred to Muhimbili National Hospital for surgery and treatments. Basing on the foregoing claims, the plaintiff prayed for the following reliefs as against the defendant:

- a) General damages to the tune of Tshs 15,000,000/=
- b) Specific damages to a tune of Tshs 35,000,000/=
- c) Cost of the suit
- d) Any other relief as the honorable court would deem fit and just to grant.

In the course of hearing, the defendant raised a preliminary legal point of objection to the effect: *That, the Kisutu Resident Magistrate court has no jurisdiction to determine this matter.* The Kisutu Resident Magistrate Court, upon hearing of the preliminary objection, reached a decision of dismissing the suit without costs for want of jurisdiction. The appellant has been aggrieved with such decision. Hence this appeal on the following grounds:

- 1) That, the Honorable Magistrate erred in law by considering that the Resident Magistrate Court has no jurisdiction on the matter at hand relying on the fact that it is a labour matter

without considering the fact that such liability is tortious to the respondent.

- 2) That, the Honorable Magistrate erred in law and fact in failing totally to give a well considerable judgement as required by the law. Thus, the judgement erroneously deprived the appellant of his right to compensation arising from the respondent's negligence.
- 3) That, the Honorable Magistrate erred in law and fact by not considering the evidence and fact tendered by the appellant concerning compensation benefits as claimed without taking into account that there is tortious liability to the respondent.

*Whereof*, the appellant prayed this court to quash the decision of the trial court, allow the appeal, order the dispute be determined on its merits and costs be borne by the respondent.

The appellant was of *inter alia* general submission that he has a prima facie case on tort liability. He was of view that there is an actual causation by the respondent. He argued that his claims are based on damages arising from the appellants negligence, the claims which are purely civil in nature and that this court has jurisdiction as per the law.

It was further argued by the appellant that the respondent conduct was the actual cause of the injury to the appellant. Thus, the injuries sustained seriously affected him and he cannot perform any economic activities notwithstanding various medications which he incurred personally after the respondent refused to pay medical bills.

In view of the appellant, the damages claimed will cater to assist the appellant to find alternative means for living. Also, the respondent conduct has caused severe pain, economic hardship and psychological problems in which the damages claimed cater for that. To back up the argument and without further details, the appellant cited the Kenyan case of **Rosemary Wanjiru Kungu v. Elijah Macharia Githinji and Autoplus Used Parts Trading Company**, Civil Case No. 145 of 2010 High Court of Kenya at Nairobi (unreported).

In reply, the respondent argued that the appellant is trying to litigate his case out of the established labour institution which one of them is the Commission for Mediation and Arbitration (CMA). According to the respondent, the law demands that any labour dispute has to be first determined by the CMA before it is entertained by the Labour Court. To buttress its argument, the respondent cited *Section 51 of the Labour Institutions Act, 2004 as*

*amended by Written Laws (Misc. Amendments) Act No. 8 of 2006* which states that:

Subject to the constitution and the labour laws, the labour court has *exclusive civil jurisdiction over any employment matter falling under the common law, tortious liability, vicarious liability or breach of the contract within the pecuniary jurisdiction of the High Court.* (Emphasis applied)

The other reason advanced by the respondent was that the High Court Labour Division does not exercise original jurisdiction on dispute like this one. The respondent cited *Section 94 (2) (a) of the Employment and Labour Relations Act No. 6 of 2004* which provides *inter alia*:

*The labour court may refuse to hear a complaint if; (a) the complainant has not been referred to mediation by the commission under section 86; or (b) the provisions of that section have not been complied with and (c) the applicant is not urgent.*

The respondent went on to cite the case of **Rahib Abdallah Valale (Administrator of the Estate of the Late Abdullah Valale and Amina Mfaume v. The Registered Trustees of**

**Tanzania Parents Association (TAPA),** Labour Revision No. 1 of 2013 in which my brethren Madam Mashaka, J. held:

*As I was perusing the court record, I noted that this matter is prematurely filed in this court. It is a mandatory requirement for a matter of this nature to be referred to the Commission for Mediation and Arbitration (CMA) for mediation. Section 94 (2) (a) read together with Section 86 and 88 (1) (b) (ii) of the Employment and Labour Relations Act No. 6 of 2004 (the Act) as amended and Section 12 (a) (b) of the Written Laws (Misc. Amendments) No. 3 of 2010, clearly stipulates that all disputes of this nature have to be referred for mediation and if mediation fail the parties may opt either to go for arbitration before CMA or to the labour court for adjudication of the same.*

In the case of **Francisca K. Muindi v. Tanzania Posts Authority (TPA) and 2 Others**, Labour Dispute No. 4 of 2014 my brethren Mipawa J (as he then was) held *inter alia* that:

*In limine (at the outset) it is a condition precedent in Tanzania Labour law jurisprudence that all disputes of labour (labour disputes) must be referred to the Commission for Mediation and Arbitration styled the "CMA" in a prescribed form...*

I had ample time to consider the above submission of the parties. I'm of settled view that both parties have gone astray on the proper procedure of lodging disputes arising out of injuries sustained by employees at working place against their employers on negligence.

My brethren Lord Mkasimongwa J. had an occasion to address the same issue in several occasion. In the case of **Shafee Ismail Chilumba (appellant) v. MMI Steel Mills Ltd (Respondent)**, Civil Appeal no. 100 of 2017 High Court of Tanzania at Dar es Salaam (unreported) the issue was; *whether the Kisutu Resident Magistrates Court of Dar es Salaam had jurisdiction to entertain a claim for compensation by the employee who sustained injuries while in the course of employment in the defendant company.* It was alleged that the appellant was employed by the respondent. On 31<sup>st</sup> January, 2010 while at employment and from the respondent's negligence, his right hand was crushed inside a moving machine used to manufacture corrugated sheets a result of which it was amputated when he was taken to Muhimbili Orthopedic Institute (MOI). Under the Workers Compensation Act, the appellant was compensated the sum of TZs. 344,000/=. The appellant was not satisfied with such amount for being not proportional to the injuries he sustained. The suit was legally



objected at the preliminary stage. The trial Court upheld the objection on jurisdiction basis with the following wording:

*Basing on the nature of the dispute, it is of employer and employee relationship on which their relationship is regulated by the new Employment and Labour Relations Act Cap 366 of 2004 and Workmen Compensation Act. Under Section 80 that any person aggrieved by the decision of the Director General may appeal to the Minister and if aggrieved may do the same to the Labour Court.*

On appeal to this Court, my brethren Mkasimongwa, J. took a different stand and observed:

*....It is so from my understanding that the Workers Compensation Act, 2008 does not limit or in any way affect any civil liability of an employer or any other person in respect of an occupational injury or disease.*

In reaching the above position, Mkasimongwa, J. relied on the provision of *Section 30 (1) of the Worker's Compensation Act, 2008* which provides:

*Notwithstanding in this act shall limit or in any way affect any civil liability of an employer or any other person in respect of an occupational injury or disease resulting in the disablement*

*or death of an employee if the injury or disease was caused by negligence, breach of statutory duty or any other wrong full act or omission of the employer, or any other person whose act or omission the employer is responsible or any other person.*

Similar position was reached by this court through my Brethen Mkasimongwa, J. in the case of **Hassan Kassim v. MMI Steel Mills Ltd**, Civil Appeal No. 99 of 2017, High Court of Tanzania at Dar es Salaam (unreported). In that case, it was alleged that the appellant was employed by the respondent. On 14<sup>th</sup> day of February, 2011 while at employment and form the respondent's negligence, his left hand four fingers were crushed inside a moving machine used to manufacture corrugated sheets a result of which they were amputated when he was taken to Sino-China Hospital. In determining the matter, the trial court stated:

*The question now is whether this court has jurisdiction or not. I do concur with the defendant's counsel that under the Worker's Compensation Act No. 20 of 2008 this honorable court has no jurisdiction. This is per Section 79 (1) to 80 (2) of the same act. That the plaintiff is required to report the matter to the Director General under section 79 (1) then if*

*aggrieved by the decision he has to appeal to the Minister, and final to the Labour Court....*

In the light of the above case law survey, it is my found view that, the jurisdictional hurdle of cases involving injuries sustained at working place caused by employer's negligence, can be sorted out by assessing the requirement of the *inter alia* provisions of *Section 30 (1), 79 (1) and 80 (2) of the Worker's Compensation Act, R.E. 2015, Section 51 of the Labour Institutions Act, 2004 as amended by Written Laws (Misc. Amendments) Act No. 8 of 2006* along with the objective of the labour law reforms of 2004.

The objective of the workers compensation act as per its preamble is; *to provide for compensation to employees for disablement or death caused by or resulting from injuries or diseases sustained or contracted in the course of employment; to establish the fund for administration and regulation of workers compensation and to provide for related matter.*

The dispute settlement mechanism is covered under part IX of the Workers Compensation Act which comprises of section 79 and 80 which provides:

*79 (1) The Director General may review any decision in connection with a claim for compensation or the award of compensation on the ground:*

- a) That the employee has not submitted himself for an examination referred in section 38;*
  - b) That the disablement giving rise to the award is prolonged or aggravated by the unreasonable refusal or failure of the employee to submit to medical aid;*
  - c) That compensation awarded in the form of a periodical payment or pension is excessive or insufficient because of existing or change circumstances;*
  - d) That the decision or award was based on an incorrect view or misrepresentation of the facts, or that the decision or award would have been otherwise in the light of evidence available when the Director General made the decision or award.*
- 1) In reviewing the decision in accordance with subsection (1), the Director General shall issue notice inviting a party concerned to make representation.*
- 2) The Director General may, after considering the evidence and representations submitted and making such enquiry as the Director General may deem necessary, confirm, amend or set*

*aside its decision, and may suspend, discontinue, reduce or increase compensation awarded.*

*80 (1) any person aggrieved by the decision of the Director*

*General may appeal against the decision within thirty working days to the Minister.*

*2. Any person aggrieved by a decision of the Minister may, within sixty working days, from the date of decision, appeal against the decision to the Labour Court.*

From the afore provisions of *section 79 and 80 of the Worker's Compensation Act (supra)*, it is clear that the complaint on compensation of injuries sustained at work by the employee arising out of employer's negligence starts with the Board through the Director General. In terms of *section 33 (1) and 34 (1) of the Workers Compensation Act*, there must be written or verbal notice of accident occurrence by employee or employer to the Director General.

It is further clear from the provision of *section 80 (1) and (2) of the Worker's Compensation Act (supra)* a person aggrieved with the decision of the Director General has to appeal to the Minister responsible for labour matters whose decision is appealable to the Labour Court. The term Labour Court is not defined under the

Workers Compensation Act. In my opinion, it is the High Court Labour Division in its broad meaning as per *the Labour Division Judges and Deputy Registrars Designation Notice issued by the Chief Justice on 30<sup>th</sup> April, 2018*.

As regards the jurisdiction hurdle brought by *section 51 of the Labour Institutions Act, 2004 as amended by Written Laws (Misc. amendment) Act No. 8 of 2006 and section 30 (1) of the Workers Compensation Act R.E. 2015*, I'm of the view that, as long as Section 51 (*supra*) has conferred exclusive jurisdiction to the Labour Court on all matters falling *inter alia* under the common law, tortious liability and vicarious liability, the Resident Magistrate Court has no jurisdiction to try the same.

The proper root of compensation cases concerning employer's to his/her/its employee while at working place has to start with the Director General of the Worker's Compensation Fund whose appeal lies to the Minister with a second appeal to the High Court Labour Division as per *the Labour Division Judges and Deputy Registrars Designation Notice issued by the Chief Justice on 30<sup>th</sup> April, 2018*.

The other parallel avenue for those aggrieved by the decision of the Director General of Worker's Compensation Fund is to prefer review to the Division established under *section 77 of the (SSRA)*

*Amendment Act, No. 13 of 2019. Section 4 of the Social Security Regulatory Authority Act as Amended by Section 77 of the Written Laws (Misc. Amendments Act) (supra)* disestablished the Social Security Regulatory Authority and established the Division under the Ministry to deal with Social Security regulatory matters. As of now, its practicability is questionable and brain work needs be done to operationalize it. Otherwise it remains another confusion.

It is a parallel way of addressing compensation matters, in a way that, an aggrieved party of the decision of the Director General of Worker's Compensation Fund may appeal to the Minister of Labour matters or go for review to the Division within the Ministry of Labour. The question as to who forms the Division (members) is unknown and leaves much to be desired.

It is my profound view, however, that *Section 30 (1) of the Worker's Compensation Act* (supra) provide for civil liability if the injury or disease is caused by negligence breach of statutory duty or other wrongful act or omission. The condition precedent is that the injury or decease should result from wrongful act of the employer not in normal cause of business as usual. In this regard, the issue whether there was a wrongful act or omission should be looked upon before considering other issues. In its absence, the court is not seized with jurisdiction.

In any case, if the dispute involves an employer and employee over any employment matter under the common law, tortious liability like the case at hand, vicarious liability or breach of contract, it is the High Court Labour Division alone which has exclusive jurisdiction subject to pecuniary limits. The Resident Magistrate Courts lacks jurisdiction.

My Brethren Masengi, J (as he then was) addressed the jurisdiction issue on tortious liability in the case of **Anne Mushi and 7 others v. Vodacom Tanzania Limited**, Civil Case No. 92 of 2010, High Court of Tanzania at Dar es Salaam (unreported). In that case Vodacom Tanzania Ltd was sued for *inter alia* failure to provide the plaintiff with safe and adequate head sets in their employment of attending customers through phones. As a result, the plaintiffs sustained injuries. It was a tortious liability under the tort of employer's liability. In reaching decision, Masengi, J. relied on *section 94 (1) (d)* and the exclusive jurisdiction conferred to Labour Court by *Section 51 of the Labour Institutions Act*. The judge ultimately struck out the suit for want of jurisdiction.

Before finalizing this judgement, I need to comment that, there is still a dilemma and confusing manner of settling tortious liability pursued by employers who sustains injuries against their employer in the course of work. The jurisdiction hurdle under the provisions



of *Section 30 (1) of the Workers Compensation Act (supra)* and *Section 51 of the Labour Institutions Act, 2004 as amended by Written Laws Misc. Amendments) Act No. 8 of 2006*, needs be clearly addressed by amendment of the law.

In my humble opinion, cases on negligence by employers that causes injuries to the employees should be handled by the Workers Compensation Fund which is manned with specialists on social welfare issues and schemes such as vocational rehabilitation and medical care. The appeal thereon be to the High Court Labour Division as per *the Labour Division Judges and Deputy Registrars Designation Notice issued by the Chief Justice on 30<sup>th</sup> April, 2018*.

Moreso, the parallel redress of compensation to workers by way of review against the decision of the General Director of the Worker's Compensation Fund to the Division within the Ministry of Labour is more confusing than it was expected. It has to be re-assessed to see if it is in line with the labour law review objective of removing multiple procedure in labour dispute resolution.

I further find, the dispute before the court concerned tortious liability levelled to the employer by its employee who sustained injury in the course of work. It was not a pure case on compensation. As such, neither the trial court nor the Director

General of Worker's Compensation Fund has jurisdiction to try the same. As the law stands, it is the High Court Labour Division which has exclusive jurisdiction to handle all matters under the common law, tortious liability, vicarious liability and breach of contract subject to pecuniary limits.

If the dispute evolved on compensation, the trial court had no jurisdiction. The jurisdiction is with the Director General Worker's Compensation Fund whose decision is appealable to the Minister responsible for labour matters.

Needless the above observation, the matter was preferred against the Managing Director who is the mere employee just like the appellant. Out door Tanzania has its own distinct corporate legal entity which is capable of suing and being sued. If this appeal was to succeed, its execution would be problematic because of distinct legal personality.

In the premises, the appeal is dismissed for lack of merits. Considering situation of the appellant, I award no costs.

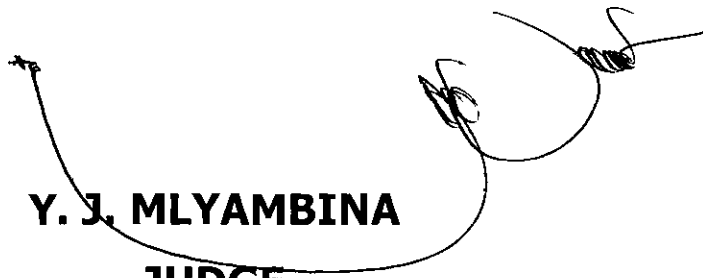


**Y. J. MLYAMBINA**

**JUDGE**

**22/05/2020**

Judgement pronounced and dated 22<sup>nd</sup> May, 2020 in the presence of the appellant in person and in the presence of Counsel George Shayo for the respondent.



**Y. J. MLYAMBINA**  
**JUDGE**  
**22/05/2020**