IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

CIVIL APPEAL NO. 29 OF 2019

(Appeal from the judgment and decree of the Resident Magistrates' Court of Geita at Geita in Civil Case No. 36 of 2017 Dated 12th of April, 2019)

LEONARD SALALA ..... APPELLANT

VERSUS

GEITA GOLD MINE ..... 1ST RESPONDENT

G4S SECURITY SERVICES (T) LTD ..... 2ND RESPONDENT

EGZAVERY REVOCATUS ..... 3RD RESPONDENT

JUDGMENT

3rd June, & 27th July, 2020

ISMAIL, J.

This appeal arises from the decision of the of the Resident Magistrates' Court of Geita (Kato, SRM) sitting at Geita, in which the appellant's claims for compensation for loss of life were dismissed. The trial magistrate took the view that the plaintiff failed to prove a case against the respondents and that the case had been wrongly instituted.

This decision was not warmly received by the parties. They both felt aggrieved by it, hence their decision to challenge it by way of an appeal and a cross appeal, the latter of which has been preferred by the 1st respondent. The appellant has preferred five grounds of appeal, reproduced in verbatim as follows:

1. *The trial Magistrate did not properly assess/evaluate the evidences adduced in the appellant's case hence ended in delivering a wrong decision.*
2. *That the Magistrate haphazardly drawn out the judgment he delivered.*
3. *That the trial Magistrate did not bother to read to read the evidences regarding the relationship between the two names.*
4. *That the trial Magistrate wrongly dismissed the plaint while the appellant proved his case in the balance of probability as it is required by the law.*
5. *That as the respondent evidences do not deny the fact that they killed the deceased person the magistrate wrongly dismissed the case against them.*

Filing of the appeal by the appellant triggered a cross-appeal, instituted by the 1st respondent, punching holes on the trial magistrate's decision which did not pronounce itself on two aspects which feature in the 1st respondent's cross-appeal. The Cross-Appeal has been preferred by way of a memorandum of Cross Objection has the following grounds:

1. *The Trial Magistrate erred in fact for failure to hold that Muhoja Leonard was not negligently shot.*

2. *The Trial Magistrate erred in law and in fact for failure to hold that the 1st respondent is not liable on vicarious and occupier's liability for any wrongful act done by the 2nd and 3rd Respondents.*

The brief facts that bred the instant appeal are as hereunder. On 31st May, 2012, Mhoja Leonard, the deceased, succumbed to gunshots allegedly fired by the 3rd respondent, a security guard employed by the 2nd respondent who was stationed to guard the 1st respondent's premises. At the time of the incident, the deceased was 17 years of age and a student at Kivukoni Primary School. The appellant, the deceased's father and administrator of his estate, alleged that death of the deceased was caused the 3rd respondent's negligent conduct. Subsequent to the deceased's demise, the 1st respondent allegedly gave out a sum of TZS. 2,375,000/- paid through DAS-Geita, to cover funeral expenses. The perpetrator of the incident, the 3rd respondent, was allegedly arraigned in court but criminal proceedings against him "ended in-vain".

In the proceedings instituted against the respondents, the appellant invoked vicarious liability to hold them liable, contending that the 3rd respondent was working for the 2nd respondent whose services were contracted by the 1st respondent. It is at the 1st respondent's premises that the shooting occurred. It is in respect of this that a claim of compensation

to the tune of TZS. 75,000,000/- was made against the respondents, jointly and severally. The 1st respondent denied any wrong doing. With respect to vicarious liability, the 1st respondent contended that the 2nd respondent rendered security services as an independent contractor, under which arrangement the principles of vicarious and occupier's liability for any wrongful act allegedly committed by the 3rd respondent would not apply. The 1st respondent contended that the deceased was a trespasser onto the 1st respondent's premises who intended to steal properties which were under the 2nd and 3rd respondent's guard. The respondents imputed contributory effect on the deceased's part.

After conclusion of the trial proceedings, the trial court found nothing blemished in the respondents' conduct. Consequently, the claims by the appellant were thrown away. It is this decision which has elicited disgruntlement which has bred the instant appeal.

When the matter was called on for orders on 23rd April, 2020, the Court acceded to the parties' unanimous prayer to have the matter disposed of by way of written submissions. These submissions were duly filed consistent with the schedule which was drawn by the Court.

While I commend the counsel for the parties for their splendid efforts and industry exhibited in their respective submissions, I wish to remark that a chunk of their submissions has dwelt on issues which deviated from what appears to be the contention, as gathered from the grounds of appeal. I have inescapably given an unfleeting review to all of the said submissions but my decision will only pick what I consider to be relevant to the grounds of appeal.

Submitting in support of the grounds of appeal, Mr. Pauline Rwechungura, learned counsel, took an exception to judgment of the trial court. With respect to grounds 1 and 4, the appellant's counsel was of the contention that the impugned decision was based on the plaint and the death certificate, ignoring other pieces of evidence adduced by the appellant. It is on the basis thereof, that the trial magistrate contended that two witnesses testified instead of three and that the said witnesses testified on different issues and not one as contended by the trial magistrate. The appellant maintained that the evidence adduced by the appellant was not properly evaluated as were the principles of vicarious liability.

With respect to ground two, the learned counsel argued that the impugned decision was utterly deficient of the basic tenets of a judgment as eshrined in Order XX Rules 4 and 5 of the Civil Procedure Code, (CPC) Cap. 33 R.E. 2019, since points for determination were not shown. The appellant further argued that issues framed were not determined as is the mandatory requirement of the law. The learned counsel further contended that the judgment contains untrue statements on the appellant's case one of which relates to the number of witnesses marshalled by the appellant during trial.

On ground three of the appeal, the appellant's argument is that the trial court ignored the evidence which was to the effect that names "Hoja" and "Mhoja" referred to the same person and that this fact was testified by PW2 and PW3 both of whom were of the view that these names were interchangeably used to refer to the same person. He held the view that the alleged variance in the names was neither here nor there.

With regards to ground five, the appellant submits that since the respondents have not denied the fact that the deceased died of the gunshots or that the 2nd and 3rd respondents were employed by the 1st respondent, it was wrong to dismiss the suit while the respondents did not

deny their involvement. Consequently, the appellant prayed that the impugned judgment be quashed and the trial court be ordered to compose a decision that conforms to the tenets of a good judgment.

Submitting in rebuttal, the 1st respondent's counsel leapt to the defence of the trial magistrate in dismissing the appellant's claim. With respect to grounds 1 and 4 of the appeal, the 1st respondent submitted that the impugned decision was a result of evaluation of evidence adduced and upon realization that the same fell below the requisite standard. Defending the trial court's conclusion on the variance of names, the 1st respondent contended that the trial court was right in contending that it is Hoja Leonard who died and not Mhoja Leonard in respect of whom the trial proceedings were instituted. He held the view that the appellant had failed to lead in evidence which would meet the threshold set out in section 110 of the Evidence Act, Cap. 6 R.E. 2019.

With respect to ground two, the 1st respondent was of the view that the trial court was spot on in its decision to determine the issue which was decisive. In this case, the issue on the identity of the person who was killed resolved the next issues the moment the trial magistrate held the view that the deceased in the trial proceedings was distinct from the Hoja Leonard,

meaning that the appellant had failed to prove the case beyond reasonable doubt. To buttress his contention, the learned counsel cited the case of ***Jomo Kenyatta Traders Ltd & 5 Others v. National Bank of Commerce***, CAT-Civil Appeal No. 48 of 2016 (DSM-unreported), in which it was held that the court has powers to determine all or any of the matters in controversy.

Addressing the third ground, the 1st respondent held the view that the appellant failed to discharge the burden of proof by failing to prove that Mhoja Leonard and Hoja Leonard refer to one and same person. Such failure meant that the provisions of section 110 of the Evidence Act had not been conformed to.

With regards to ground five of the appeal, the 1st respondent argued that, while it did not deny that the 3rd respondent killed Hoja Leonard who was allegedly involved in a criminal trespass, the contention is that such killing was not perpetrated by the 1st respondent. In the whole, the 1st respondent prayed that the Court should uphold the trial court's decision to dismiss the claim with costs.

Submitting in rejoinder, the appellant maintained that the trial court's decision was based on the plaint and death certificate without evaluating

other exhibits which were tendered in court. He attributed what he called errors on the number of witnesses and other clerical errors to the trial court's failure to accord weight to the said exhibits. The counsel contended that the appellant proved that the 1st respondent was vicariously liable for the acts committed by the 3rd respondent.

The appellant reiterated the contention that the impugned judgment did not conform to the requirements of Order XX Rules 4 and 5 of the CPC as drawn issues were not resolved. He also contended that the impugned judgment contained untrue statements, and that the trial magistrate erred when he dismissed the appellant's claim while the respondents admitted to the fact that the victim died of gunshots.

Addressing the cross appeal, the 1st respondent faulted the trial court for its failure to hold that Muhoja was not negligently shot. On this, the counsel for the 1st respondent laid down key ingredients which should be proved if one is to succeed in a claim of negligence. These are duty of care; breach of that duty; and that the breach must result in a damage. He fortified his arguments by citing the decisions of ***Bamprass Star Service Station Limited v. Mrs Fatuma Mwale*** [2000] TLR 390; and ***Winfred***

Mkubwa v. SBC Tanzania Limited, CAT-Civil Appeal No. 150 of 2018 (unreported).

Highlighting that the appellant held the duty of proving the allegations, the 1st respondent cited the provisions of sections 110 and 115 of the Evidence Act, Cap. 6 R.E. 2019, and the decisions in ***Barelia Karangirangi v. Asteria Nyalwambwa***, CAT-Civil Appeal No. 237 of 2017 (unreported); and ***Hemed Issa v. Mohamed Mbilu*** [1984] TLR 113, in both of which emphasis was laid to the fact that the burden of proof which is both legal and evidential lies on the person who alleges, and failure to discharge the burden constitutes a failure to prove the case. The 1st respondent's contention is that the appellant failed to prove that the late Muhoja Leonard was negligently shot by the 3rd respondent, as PW1 who was not at the scene of the crime at the time did not see when the alleged shooting occurred. The 1st respondent also contended that neither a PF3 nor a postmortem examination report was tendered to prove what the appellant contended. In view of the fact that that the deceased indulged in criminal trespass, the 1st respondent contended, the trial magistrate erred when he failed to hold that the appellant failed to prove that the 3rd respondent acted negligently in shooting Muhoja Leonard.

With respect to the second ground of cross-appeal, the 1st respondent revisited the principles governing the torts of vicarious and occupier's liability and how they apply. The counsel for the 1st respondent submitted that, to succeed in a claim of vicarious liability the appellant ought to have proved that the 1st respondent gave instructions to the 2nd respondent to shoot the victim or that the 1st respondent was negligent in retaining the 2nd respondent. None of the two witnesses (PW1 and PW2) proved the case to that effect. He contended that PW1 stated in cross examination that he was not present to witness if the 3rd respondent was instructed by the 1st respondent to shoot the victim. The 1st respondent further argues that the 2nd respondent was an independent contractor who was not under the 1st respondent's direct supervision. With respect to occupiers' liability, the contention is that since the deceased trespassed onto the 1st respondent's premises, he consented to any risk or harm that would arise. It was a case of *volenti non fit injuria* and that the trial magistrate ought to have held that, since the 1st respondent did not do anything that endangered the deceased's safety then liability did not attach to him.

The 1st respondent holds the view that besides the reasons cited in the judgment for the dismissal of the suit, it should also be held that the 1st respondent bears no blemishes in respect of vicarious or occupiers' liability.

In reply to the cross-appeal, the appellant began by punching holes on the defence testimony which was described to be sheer hearsay and contrary to the law. These included the contentions that the deceased was shot as he was stealing from the 1st respondent; that the deceased committed an act of criminal trespass; that the 2nd respondent was an independent contractor. The appellant contended that there was no evidence to that effect and, as such, the narrations made by the 1st respondent were not part of the record of proceedings. On rejoinder to the 1st respondent's submission, the appellant's counsel held the view that if the respondents weren't responsible for the killing then the 1st respondent would not offer TZS. 2,375,000/- that funded burial expenses. He reiterated that the trial magistrate was erroneous in his decision to dismiss the suit.

The 1st respondent's rejoinder was mainly a reiteration of the submission in chief. The counsel contended, however, that the appellant's submission was merely a submission from the bar and not evidence. The

submission was merely a submission from the bar and not evidence. The 1st respondent further contended that particulars of the alleged negligence were not pleaded in the pleadings, meaning that what is contended by the appellant does not constitute his claims as pleaded. The 1st respondent maintained that a case against the respondents had not been proved. With respect to the 2nd ground of cross appeal, the 1st respondent contended that the same had not been controverted, meaning that the contention was meritorious. The 1st respondent prayed that the cross appeal be allowed with costs.

I have gone through the long and exhaustive submissions by the counsel. As I commend them for their splendid effort and industry, let me state here and now that the contention against the impugned decision revolves around one key issue. This relates to the quality of the decision and whether the same conforms to the requirements of a judgment as the law dictates; and whether it responded to issues drawn at the commencement of the trial.

This necessitates, therefore, that I should narrow my focus to ground two of the appeal which questions conformity of the impugned judgment to the provisions of Order XX Rules 4 and 5 of the CPC. The appellant's

contention is that the said decision was "*haphazardly drawn*" by the trial magistrate, and the main reason is that the issues were not considered and resolved. The view held by the 1st respondent is that, having resolved the crucial issue on whether the deceased was Mhoja Leonard or Hoja Leonard, need did not arise for the trial magistrate to determine the rest of the issues.

Before I dwell on the counsel's contentions, let me first trace back the proceedings of the trial court. This takes me to page 16 of the typed proceedings at which proceedings held on 26th July, 2018 were recorded. On this date, the trial court, in the presence of parties framed the following issues to lead the trial proceedings:

1. *Whether the third defendant negligently short death (sic) the later (sic) Muhoja Leonard?*
2. *If issue number one is answered in affirmative whether their (sic) first defendant is liable an (sic) vicarious and occupiers liability for any wrongful act done by the 2nd and 3rd defendant? (sic)*
3. *Whether the plaintiff is a father of the late Muhoja?*
4. *If the issue number one is answered in affirmative wether (sic) the plaintiff suffered damages (sic) that could be attributed to the third defendant (sic) negligent act?*
5. *At (sic) what reliefs are the parties entitled?*

While issues were drawn in order to lead the discussion and help the trial court to arrive at a conclusion on whether the appellant's claims held any semblance of weight, the contest was settled when the trial magistrate delved into the confusion of names between Mhoja Leonard which appeared in the plaint and death certificate, and Hoja Leonard in respect of whom the 1st respondent paid out the sum to cater for burial expenses. Having settled that these were distinct persons, the trial magistrate put the matter to rest by dismissing it. This means that the battleground areas as drawn through the issues were not canvassed. The trial magistrate charted his own shorter route which he found to be expedient and less tedious.

As the trial magistrate did this, little did he know that the requirement of stating its finding or decision upon each separate issue is imperative and one that cannot be wished away. This is in terms of Order XX Rule 5 of the CPC which provides as hereunder:

> *"In suits in which issues have been framed, the court shall state its finding or decision, with the reason therefor, upon each separate issue unless the finding upon any one or more of the issues is sufficient for the decision of the suit."*

The imperative requirement imposed on the trial courts under the cited provision was given an impetus in ***Sheikh Ahmed Said v. The***

Registered Trustees of Manyema Masjid [2005] TLR 61, wherein it was held as follows:

> *"It is an elementary principle of pleading that each issue framed should be definitely resolved one way or the other. It is necessary for a trial court to make a specific finding on each and every issue framed in a case, even where some of the issues cover the same aspect."*

The incisive reasoning in the just cited decision of the superior bench was reiterated in ***Alnoor Shariff Jamal v. Bahadur Ebrahim Shamji***, CAT- Civil Appeal No. 25 of 2006 (unreported), wherein the following guidance was accentuated:

> *"One of the basic principles is the duty of the court to determine one way or another an issue brought before it. This is the principle which finds expression in rule 4 of Order XX of the Civil Procedure Code, 1966. The rule states as follows with regard to contents of a judgment:*
>
> > ***"A judgment shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision."***
>
> *Though the rule refers to judgments, the principle therein is applicable in any type of decision in a court following the hearing of a matter. Among the cases cited by counsel for the appellant is the case of* ***Kukal Properties Development Ltd v. Maloo and others*** *– (1990-1994) E. A. 281which we find to be relevant to the case before us. The Court of Appeal of Kenya in this case had an opportunity to discuss the effect of failure by a judge to decide on issues framed. The Court's holding, with which we are in complete agreement, was to the following effect:*

"A judge is obliged to decide on each and every issue framed. Failure to do so constituted a serious breach of procedure."

In the present case the matter before the High Court was a petition for extension of time within which to file an application to set aside the Award of the Sole arbitrator. The question that the trial judge was obliged to resolve is whether there was sufficient ground for granting the extension of time sought. With due respect to the learned judge, we think that he abandoned what was before him and embarked on something that had not, as yet, been asked of him."

In yet another spate of infraction, in ***Shabani Amiri v. Republic***, CAT-Criminal Appeal No. 18 of 2007 (unreported), the superior Bench was confronted with a deficient judgment. Unable to hold back, it observed:

"This 'decision' does not show the points or issues which were to be determined, the decision on those issues and the reasons for the decision thereon. It was, in short, not a judgment at all."

See also: ***James B. Kumonywa v. Mara Cooperative Union (1984) Ltd & Another***, CAT-Civil Appeal No. 22 of 1995; and ***Tanga Cement Company Limited v. Christopherson Company Limited***, CAT-Civil Appeal No. 77 of 2002 (both unreported).

Looking at what is before me now, there can be no flicker of doubt that, by and large, the impugned judgment mirrors what the learned Justices of Appeal encountered when they made these insightful decisions

in which such abhorrent behavior of the judicial officers was censured. I find myself unable to deviate from the path taken by the Court of Appeal in the cited decisions. It is simply that the trial magistrate was on a different wave length from that which the parties shared through the issues that the trial court itself framed, only to abandon them midway through the evaluation process, and choose what was not contemplated by him and the parties when the issues were framed. Nothing was said on vicarious and occupiers' liabilities which were the centre of the parties' contentions. The long and short of all this brings the conclusion that the impugned judgment is in every respect profoundly defiant, in every respect, of Order XX Rule 4 of the CPC.

Thus, applying the holding in ***Shabani Amiri case*** (supra), I am unflustered in my opinion that the impugned decision is no judgment, at all, and one which should not be allowed to see the light of the day, any further.

Consequently, in view of the foregoing and, on the basis of this ground alone, I find merit in the appeal by the appellant and I allow it. I order that the matter be remitted back to the trial court for fresh determination, in its comprehensive sense. I take this decision is in line

with the holding in ***Tuungane Workshop v. Audax Kamala*** [1978] LRT n. 21 in which it was held as hereunder:

> *"Omission to frame issues is not fatal unless it results in a failure to decide properly the point in question amounting to a failure of justice. Such an omission should amount to a mis-trial, entitling the appellate court to remit the suit for retrial."*

I make no order as to costs.

Right of appeal explained.

It is so ordered.

DATED **at MWANZA** this 27th day of July, 2020.

M.K. ISMAIL

JUDGE

Date: 27.07.2020

Coram: Hon. M. K. Ismail, J

Appellant: Absent

Respondent: Mr. Libent Rwazo, Advocate for the 1st Respondent

B/C: B. France

Court:

Judgment delivered in chamber in the presence of Mr. Libent Rwazo, learned Counsel for the 1st Respondent in the absence of the Applicant and 2nd and 3rd respondents, and in the presence of Ms. Beatrice B/C this 27th day of July, 2020.

M. K. Ismail

JUDGE

At Mwanza

27th July, 2020