**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**(DISTRICT REGISTRY OF MBEYA)**

**AT MBEYA**

**CIVIL APPEAL NO. 02 OF 2020**

(From the Resident Magistrates' Court of Mbeya at Mbeya (R. W. Chaungu, SRM,) in Civil Case No. 07 of 2019.)

**ELDA SAMWEL MAHENGE.....APPELLANT**

**VERSUS**

**EMMANUEL SUSUTA.....1ST RESPONDENT**

**AHADH MBUBA.....2ND RESPONDENT**

**JUDGMENT**

Date of Last Order: 27/01/2021
Date of Judgment: 05/03/2021

**MONGELLA, J.**

This appeal emanates from the decision of the RMs' court of Mbeya, Chaungu, SRM in Civil Case No. 7 of 2019. In that case the appellant claimed for specific damages to the tune of T.shs. 78,000,000/- as well as general damages jointly and severally against the respondents. The brief facts of the case are as follows:

The appellant used to farm paddy. On 13th July 2017 she hired a motor vehicle to transport paddy from Usangu to Mbeya. The vehicle belonged to the 1st respondent and was driven by the 2nd respondent. On their way back to town, the 2nd respondent drove at a high speed and as a result

they got involved in an accident. She was badly injured on her hand. The injuries she sustained impeded her from continuing with her farming activities. She as well claimed to have incurred huge expenses on treatment to the tune of T.shs. 78,000,000/- which she claimed as specific damages. Her inability to continue with her farming activities due to the accident led her into claiming general damages to the tune of T.shs. 20,000,000/-.

At the end, the trial court found the 2nd respondent liable. It ordered him to pay T.shs. 15,000,000/- as general damages and T.shs, 4,373,000/- as special damages. The 1st respondent was released from any liability. Disgruntled by the decision of the trial court, particularly in not finding the 1st respondent liable, she has filed this appeal on three grounds. The grounds are:

1. *That the trial Magistrate erred in law and in fact for excluding the 1st respondent from liability basing on unproved evidence that the 1st respondent sent the 2nd respondent to carry cow grass, hence reached to unfair decision.*

2. *That the trial Magistrate erred in law and fact for failure to analyse well the evidence on record, hence reached to unfair decision.*

3. *That the trial Magistrate erred in law and in fact for making decision in favour of the 1st respondent despite the first respondent's failure to call the purported conductor who is a material witness.*

The appellant was represented by Ms. Zawadi Erasto, learned advocate while the 1st respondent appeared in person. The 2nd respondent never entered appearance since the matter was determined in the trial court. The matter thus proceeded *ex parte* against him at both stages. The appeal was argued by written submissions filed by the parties in adherence to the scheduled orders of the court.

With regard to the first ground, Ms. Erasto submitted that DW1, who is the 1st respondent, adduced evidence in the trial court that he is the owner of the motor vehicle with registration number T127AAU that was involved in the accident causing injuries to the appellant. The 1st respondent stated that he sent the 2nd respondent to go get cow grass. He denied to have given the vehicle to the 2nd respondent to carry paddy at Usangu. She argued that the testimony of the 1st respondent contradicted with that of the appellant who stated that the 2nd respondent was authorised by the 1st respondent to carry paddy at Usangu. The appellant's testimony was corroborated with that of PW3. Given this situation, Ms. Erasto contended that the 1st respondent had the duty to prove his assertions, but failed to do so as he brought no exhibits or witnesses to prove his assertions.

Ms. Erasto argued further that considering the testimony of DW1, it appears that the 1st and 2nd respondents had an oral agreement. She said that even on oral agreement the respondent still had a duty to prove as for oral evidence to be enforceable it has to be witnessed by other people. She invited the court to consider the decisions in ***Catherine Merema v. Wathaigo Chacha***, Civil Appeal No. 319 of 2017, (CAT at

Mwanza, unreported) and in ***Engen Petroleum (T) Limited v. Tanganyika Investment Oil and Transport Limited***, Civil Appeal No. 103 of 2003.

She argued further that even if it is assumed that DW1 sent the 2nd respondent to get cow grass, still he is liable under section 4 (2) of the Motor Vehicle Insurance Act, Cap 169 R.E. 2019 which provides for compulsory third party insurance and creates an offence for failure to compulsorily insure. She contended that in the matter at hand DW1 allowed the 2nd respondent to drive an insured motor vehicle. Under the circumstances, she concluded that the trial court misdirected itself to hold that the 1st respondent was not liable.

With regard to the second ground, Ms. Erasto argued that the trial court failed to analyse the evidence on record thus arriving at an unjust decision. She contended that the appellant's evidence was strong and reliable compared to that of the 1st respondent. She believed the case was proved as required under section 110 of the Evidence Act, Cap 6 R.E. 2019.

Referring to the appellant's testimony in the trial court, Ms. Erasto said that the appellant testified that on 13th July 2017 she went to a place where Lorries park. There she found the 2nd respondent who informed her that the 1st respondent is the owner of the vehicle. She then negotiated the price with the owner, that is, the 1st respondent under a condition of advance payment. Then the 1st respondent allowed the 2nd respondent to go carry paddy. Ms. Erasto further said that the appellant's testimony was

corroborated by that of PW3 who also testified to have witnessed the agreement between the appellant and the 1st respondent.

On the other hand she scrutinized the evidence of the 1st respondent and argued that it was not credible. The 1st respondent testified that he sent the 2nd respondent to carry cow grass and the appellant lied to him and convinced him to go carry paddy for her for T.shs. 50,000/- instead of T.shs. 200,000/-. Considering this piece of evidence she wondered how the 1st respondent could know if the appellant lied to the 2nd respondent and hired him for T.shs. 50,000/- instead of T.shs. 200.000/- if he was not aware of the trip and the vehicle was not for business. She concluded that the 1st respondent made up the story to escape liability.

On the third ground, Ms. Erasto argued that DW1 gave testimony that he never sent his driver, the 2nd respondent, to load paddy at Usangu, rather he sent him and his conductor to carry cow grass. However, the 1st respondent failed to call the said conductor to testify in court. Ms. Erasto was of the stance that this said conductor was a material witness to reveal the truth on the matter. She contended that the act of not calling the said conductor reveals that he intended to hide the truth. She referred the court to the case of ***Hemedi Said v. Mohamed Mbilu*** [1984] TLR 113 in which it was held: "*... where for undisclosed reasons a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witness was called he would have given evidence contrary to the party's interest.*" With this submission she prayed for the appeal to be allowed with costs.

The 1st respondent vehemently opposed the appeal. In reply to the first ground, he contended that the ground is misconceived as the appellant is finding who blame for her failure to establish the fact that the 1st respondent did not authorise the trip and had no knowledge of the whereabouts of his motor vehicle on the date of the accident. Relying on section 110 (1) of the Evidence Act, he argued that the onus of proof was on the appellant who alleged to have communicated with the 1st respondent on a price of T.shs. 50,000/-. He argued that apart from the appellant's mere words there is no other proof presented to prove the allegations. He said that the appellant's allegations are doubtful as there is no way he could agree to transport paddy for a distance exceeding 150 kilometers for T.shs, 50.000/- while the minimum price is T.shs. 200,000/-. Apart from that he added that the appellant failed to prove that she communicated with him.

The 1st respondent further expounded on the doctrine of vicarious liability and whether it can be applicable to make him liable. He submitted that this doctrine is applicable on certain conditions. Referring to the case of ***Rev. Christopher Mtikila v. The Editor Business Times and Augustine Lyatonga Mrema*** [1993] TLR 63; ***Machame Kaskazini Corporation Limited (Lambo estate) v. Aikael Mbowe*** [1984] TLR 70 and that of ***Ssembati v. Uganda Enterprise Company Limited and Another*** (1970) ULR 561 she said one of the conditions is that it has to be established on evidence that the employee, in doing the act that caused the injury, was acting in course of employment and under the instruction of the employer.

On the strength of the above cases, he argued that the question to be asked is whether the 1st respondent instructed the 2nd respondent to carry paddy from Usangu to Mbeya. He contended that the answer to this question is negative as the 2nd respondent was instructed to carry cow grass and the appellant did not establish the fact that on the material day the 1st respondent authorised the 2nd appellant to do what he did. He argued that the appellant asserted mere words that she communicated with the 1st respondent and hired his vehicle. He added that the 2nd appellant worse enough headed to a direction not authorised by the 1st respondent while the law requires that the employee should be under faithful execution of his employer's functions. To buttress his point he referred the court to the case of ***I. G, Lazaro v. Josephine Mgomera***, Civil Appeal No. 2 of 1986 (unreported); ***Ami Mpungwe v. Abas Sykes***, Civil Appeal No. 67 of 2000 (unreported) and that of ***Salim Kabora v. Tanesco Limited & Two Others***, Civil Appeal No. 55 of 2014 (unreported). Under the circumstances, he concluded that the 1st respondent cannot be held liable for the actions of the 2nd respondent.

He further challenged the argument by Ms. Erasto that the vehicle was not insured. On this point he argued that the issue is new as it was never raised and discussed in the trial court nor stated in the appellant's memorandum of appeal.

With respect to the second ground, he replied that the trial court keenly considered the evidence adduced by the parties. He said that the trial court found the appellant's evidence insufficient to establish the 1st respondent's liability under the doctrine of vicarious liability. He

contended that the appellant is just confusing the court as she does not know what she wants from the court. He argued so saying that the appellant won the case and instead of executing the judgment against the 2nd appellant who was found liable she is in this court appealing against her own best judgment.

He argued further that the trial court's findings were to the effect that the accident was due to the driver's negligence and high speed leading him to lose control of the motor vehicle. Under the circumstances, he maintained the stance that the 1st respondent cannot be held liable for the 2nd respondent's negligence which was neither contributed nor authorised by him.

Arguing on the last ground, the 1st respondent contended that the argument by Ms. Erasto that the appellant ought to have called the conductor to testify is misconceived. He argued so saying that there is nowhere in the proceedings and judgment where it is written that the 1st respondent alleged to have employed a driver and a conductor. He added that even the appellant herself never testified to have found the driver and the conductor upon hiring the vehicle. He was of the further view that even if the said conductor was called it would have not changed the trial court's findings as the burden of proof lied on the appellant and she failed to discharge it. He prayed for the appeal to be dismissed with costs.

Considering the grounds of appeal and the arguments by both parties, I find that everything revolves around one issue being that: whether the 1st

respondent is liable to compensate the appellant for the injuries suffered in the accident. I shall therefore base my deliberations on this issue.

The appellant basically strives to pin down the 1st respondent on vicarious liability. For the defendant/respondent to be vicariously liable the claimant has to establish that there is a relationship between the person that caused the injury and the person whom the plaintiff is claiming to have responsibility on the acts of the other. For example like in the case at hand where the 1st and 2nd respondents are claimed to be under employer employee relationship. Under such relationship, the law further requires that the acts of the employee which occasioned into the injury must have been committed in the course of his engagement. This position has been well articulated by the Court of Appeal in the case of ***Machame Kaskazini Corporation Limited (Lambo Estate) v. Aikaeli Mbowe*** [1984] TLR 70. In this case the Court quoting in approval the explanation provided in **Halsbury's Laws of England 4th Edition Vol. 16** at paragraph 743, held:

> *"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 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 position of a stranger."*

The Court also considered similar decisions in long celebrated English cases in ***Marsh v. Moores*** [1949] 2 KB 208 and ***Canadian Pacific Railway v. Lockhart*** [1942] A.C. 591. Considering the decision in the above cited case, it is clear that for an employer to be liable for the acts of the employee, the employee must have committed the acts while in the course of employment. The Court in ***Machame Kaskazini*** (supra), held that *"it is a question of fact whether the unauthorised act by a servant is within, or outside the scope of his employment."* The claimant thus has an obligation to prove on balance of probabilities that the employee was in the course of employment and not on frolic of his own.

In the matter at hand, the appellant claimed that he went to a place where lorries park and hired the 1st respondent's vehicle. She said that she found the 2nd respondent, who was the driver of the vehicle, and they agreed to carry her paddy for T.shs. 50,000/-. She also claimed that the said driver ensured her, after talking over the phone, that the 1st respondent has authorised him to carry her paddy on the agreed price. On the other hand, the 1st respondent denies liability on the ground that he never authorised the 2nd respondent to go to Usangu to carry the appellant's paddy. He said that he would have never agreed to the price of T.shs. 50,000/- while they usually charge T.shs. 200,000/- for such a trip. He added that he had sent the 2nd respondent to carry cow grass at another place.

In her arguments, Ms. Erasto contended that the 1st respondent failed to prove that he sent the 2nd respondent to carry cow grass as he never presented a key witness, that is, a conductor, to prove the allegations. I

however find Ms. Erasto's argument unmeritorious. In my view, the burden of proving that the 2nd appellant was on official engagement when he committed the unlawful act lied with the appellant and not the 1st respondent. It is therefore absurd for Ms. Erasto to shift her duty of proving the case to the respondent. It sufficed for the respondent to deny that he sent the 2nd appellant to carry paddy for the appellant. The appellant ought to have adduced sufficient evidence to prove that the 2nd appellant was officially engaged.

In their testimonies, both PW1, the appellant, and PW3, the appellant's grandson, testified that the 2nd respondent told them that he talked over the phone to the 1st appellant who authorised him to carry her paddy at T.shs. 50,000/-. However, there is no evidence to back up that assertion. The appellant did not state anywhere that she communicated with the 1st respondent who is also her neighbour and entered into any agreement or produced any receipts for transportation. There is nothing presented to prove that the 1st respondent authorised the 2nd respondent over the phone to transport the appellant's paddy. Under the circumstances it becomes the appellant's word against that of the 1st respondent who also claimed that the appellant allured the 2nd respondent to transport her paddy at such a low price without his authorisation.

Further, the 1st respondent testified that he is neighbours with the appellant and they know each other well. I am made to believe this fact as the record indicates that it was never challenged on cross examination. The law is settled to the effect that failure to cross examine on an issue or fact entails acceptance of the facts presented. See:

***Damian Ruhele v. Republic***, Criminal Appeal No. 501 of 2007 (unreported); ***Nyerere Nyague v. Republic***, Criminal Appeal No. 67 of 2010 (unreported); ***George Maili Kemboge v. Republic***, Criminal Appeal No. 327 of 2013 (unreported: and ***Bakari Abdallah Masudi v. The Republic***, Criminal Appeal No. 126 of 2017 (unreported).

Under the circumstances, I wonder why the appellant failed to talk to his neighbour, the 1st respondent to enter into an agreement in transporting the paddy after the 2nd appellant told her that the vehicle belongs to the 1st appellant. Instead she decided to deal only with the driver, the 2nd appellant. This connotes that she never wanted the 1st respondent to find out about the engagement whereby the 2nd respondent acted without authorisation from the 1st respondent.

Ms. Erasto further argued that the 1st respondent is liable as he allowed the 2nd respondent to drive an uninsured motor vehicle. With all due respect, I agree with the respondent's argument that this is a new fact. I have gone through the record and found nowhere such fact was canvassed in trial court. As much as the question of insuring a motor vehicle is one of law, it takes facts in evidence to prove that one did in fact not insure his motor vehicle. As such, it is trite law that matters of fact not canvassed at the trial court cannot be brought up on appeal. This was decided by the Court of Appeal in the case of ***Farida and Another v. Domina Kagaruki***, Civil Appeal No. 136 of 2006 whereby it held that:

*"It is the general principle that the appellate court cannot consider or deal with issues that were not canvassed, pleaded and or raised at the lower court."*

In conclusion it is my finding that the appellant failed to prove that the 2nd respondent did the unlawful act which caused her injuries while performing the authorised acts or duties of the 1st respondent. The trial court was correct in holding the 2nd respondent liable and exonerating the 1st respondent from liability. The appeal thus lacks merit and is dismissed with costs.

Dated at Mbeya this 05th day of March 2021.

**L. M. MONGELLA**

**JUDGE**

**Court:** Judgment delivered in Mbeya in Chambers on this 05th day of March 2021 in the presence of both parties and Ms. Zawadi Erasto, learned counsel for the appellant.

**L. M. MONGELLA**

**JUDGE**