

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SONGEA

AT SONGEA

CONSOLIDATED DC CIVIL APPEAL NO. 09 OF 2020, AND DC CIVIL APPEAL

NO. 10/2020

(Originating from Civil Case No. 20 of 2018 at Songea District Court)

KASSIAN NZIKU..... APPEALANT

Versus

GADSON MBALILA..... RESPONDENT

JUDGMENT

Date of Last Order: 06/05/2021.

Date of Judgment: 25/05/2021.

BEFORE: S.C. MOSHI, J.

Before Songea District court the respondent sued the appellant and two others namely Constantine Nziku and Said Selemani inter alia for the following orders: -

- (i) Declaration that the respondent and two others are liable for negligence.*
- (ii) An order for the defendants to pay the plaintiff T.shs. 50,000,000/= in general damages or*

such other sum as this honourable court might deem fit and just to grant.

(iii) Costs of the suit.

(iv) Any other or further relief (s) as this honourable court might deem fit and just to grant for the ends of justice.

The District court drew four issues thus: -

(i) Whether or not the defendants were negligent.

(ii) Whether or not the 2nd Defendant drove the motor vehicle that caused the accident without a valid license.

(iii) Whether or not the 2nd defendant drove the motor vehicle that caused the accident without a valid license.

(iv) Whether or not the plaintiff is entitled to the reliefs he claims from the defendant.

The matter was heard interparties. At the end of the trial the court held that the respondent did not manage to prove his case against the first defendant whereas the 2nd and 3rd defendants was ordered to pay the plaintiff a tune of T.shs. 30,000,000/= being general damages. Being

dissatisfied by the decision, the appellant who was the second defendant preferred this appeal on four points as reproduced hereunder: -

- (i) *That, the trial court erred in law and fact not to dismiss the case whose evidence was seriously contrary to the pleadings.*
- (ii) *That, the trial court erred in law and fact not to dismiss the case contrary to the evidence which was presented before it.*
- (iii) *That, the trial court erred in law and fact to decide the case by assuming the facts and not basing on the evidence which was presented by the respondent.*
- (iv) *That, the trial court in law and fact to hold the appellant liable for negligent basing on the facts to hold the appellant liable for negligent basing on the fact, the appellant left the engine on while there was no proof from the evidence that leaving the engine on in such circumstances was negligent act and more it was not the act complained of by the respondent.*

On the other hand, the respondent Gadson Mbalila filed Civil appeal no. 10 of 2020 against the appellants and two others namely Constantine Nziku and Said Selemani as they appeared in the trial court proceeding on the following grounds namely: -

- i. That, the trial court erred in law and fact not to hold that the first respondent was vicariously liable as he was the owner of the car.*
- ii. That, the trial court erred in law and fact not to find the 1st respondent Costantine Nziku liable as necessary party he was the owner of the car which involved in the accident for effectual disposition of the suit.*

The court consolidated Civil Appeal no. 9 and 10 of 2020 as both originate from Civil Case No. 28 of 2018. The appeal was disposed off by way of written submissions, whereby the appellant was represented by Mr. Vincent Kassale, advocate and the respondent was represented by Mr. Ndunguru Dickson.

Starting with the submission in respect of Civil Appeal No. 9 of 2010 Mr. Vincent Kassale argued that, the trial court was wrong when it failed to dismiss the entire suit as the evidence which was adduced was completely at variance with the plaint. He said that, under paragraph 5 of the plaint the cause of action was negligence, that the appellant was negligent as he was driving a car on public road without a driving licence, the fact which was supported by Exhibit P2 a demand letter. Contrary to the above evidence; the respondent told the trial court that the negligent act of the appellant was by ordering Seleman who was the third respondent to drive a car while he knew that the said Selemani had no

driving skills, and had no driving license. He supported the submission by citing the cases of **Yara Tanzania Limited vs. Charles Aloyce Msemwa t/a Msemwa Junior Agrovat and Two others**, High Court of Tanzania at Dar es salaam, (Unreported) and **James Funke Gwagilo vs. Attorney General** (2004) T.L.R 161.

He argued the 2nd, 3rd, and 4th grounds together that, page 10 of the typed judgment reflects the reasoning of the trial court that the act of the appellant leaving the engine when he got outside to inspect is a negligent act and that in normal circumstances one cannot enter another person's car without permission. He said that going through the entire evidence of PW1, PW2 and Pw3; none of them testified that the act of leaving an engine on was a negligent act. He said that, this fact was assumed by the court to implicate the appellant.

Furthermore, he said that the holding of the court that the appellant and one Said Selemani knew each other, and that a person cannot enter another person's car without permission is not supported by evidence, what is seen from the evidence is that PW1, PW2 and Pw3 cannot and could not by any means justify the finding of the court that the said Said Selemani had a permission from the appellant to reverse the car nor that the two were known to each other. He said that, on the issue that Said Seleman was drunk; PW1, PW2 and PW3 had a different story. PW1 told

the court that it was Said Selemani who told the appellant to enter into the car, PW3 said that, it was Said Selemani who told the appellant to remove the car, then Seleman reversed the car and knocked the Bodaboda. If as per the evidence in records that Said Selemani told the appellant to enter the car, why then some civilians condemned him for telling a drunken person that is to say the one who was found not drunk? And why it is Said Selemani who had reversed the car? He said that, any prudent man can agree with the appellant that, the Said Selemani had reversed the car without permission and in the absence of the appellant who was also outside the car inspecting it after it was removed from the trenches.

In reply to the above submission, Mr. Dickson Ndunguru responded to the first ground of appeal among other things that, the evidence which was adduced related to negligence driving regardless of having valid driving license, keeping the car on ignition is dangerous conduct which is negligent as the object is dangerous by itself. But the plea was on the tort of negligence which was also accordingly pleaded.

Concerning the cited cases, he said that, they are distinguishable from the facts of this case and the same cannot be considered in this matter as the evidence and pleading established tort of negligence and the same was proved.

On the second, third and fourth ground he said that, as long as there was evidence the car was on ignition and he did not take effort to avoid the third respondent from driving the motor vehicle while drunk means the second respondent blessed the conduct of the third respondent who was negligent.

On the issue of entering in the car of another person and driving without his permission, he argued that, the court considered the reasonability of that conduct for which upon evaluation of the evidence the court found the appellant liable for tort of negligent as he acted unreasonable enough to endanger the life of other road users, hence being liable for tort of negligent.

In respect of Civil Appeal no. 10 of 2020 in his submission in support of the appeal, Mr. Ndunguru submitted that, under the law of Tort the owner of the motor vehicle who employs a driver to drive the car is under form of strictly liability called vicarious liability to indemnify the victim for tortious liability committed by the driver to the third party. He said that, even though the court found the first respondent not liable for the tort of negligent to the appellant still the court was supposed to go further and determine if there was any vicarious liability for the negligent act which was committed by second and third respondents. He cited the case of **Cassidy vs. Minister of Health** (1952) 2QB 343. He said that,

this principle is there to ensure the victim of the wrong doing is compensated fairly by the owner who can cover the loss through insurance. He said that, the tort was committed by a son when he was away to Matalawe to carry the duty instructed by his father.

He argued further that, on 4th October 2018 the presence of 3rd respondent is not shown but mediation proceeded as usual. He said that, this is an irregularity which is serious for which proceeding need to be nullified; some coram show the defence is present, it does not show who was present 1st, 2nd, or 3rd defendant. He said that this is fatal because it is difficult to ascertain if the trial proceeded in court with or without parties and for what reason.

In reply on the issue of vicarious liability Mr. Kassale submitted that this ground is an afterthought because it was not pleaded anywhere in neither appellant's plaint nor was it even alleged in evidence at the trial court by the appellant. The trial court likewise this court could not implicate the respondents with the liability which is completely contrary to the pleadings, the evidence and the issues which were framed for determination at the trial court.

He submitted further that on 10th July 2019 the appellant being the plaintiff through his advocate E.O.Mbogoro filed a final written submission in which at page two told the court that the first defendant now the first

respondent can't be pinned down with negligence or any liability, and that the appellant should be stopped under section 123 of the Evidence Act, Cap. 6 R.E 2019. He said further that even if this issue was to be discussed, the appellant could not succeed to implicate the first respondent liable of vicarious liability as it is expressly clear that the car had changed hand from the second respondent to third respondent, therefore the chain of control by the first respondent could not have been vicariously liable for negligence of the third respondent. But again, the second respondent could not have been found liable as the evidence of the appellant was at variance with the plaint which is contrary to the law as it was held in the case of **James Funke (supra)** where it was held that, parties are bound by their pleadings.

On the issue of irregularity, he said that, it should not be determined as it was not put as a ground of appeal in his memorandum of appeal which was filed in this court, to put this ground of appeal in his submission instead of putting it as a ground of appeal is to go contrary to the well established principle of law that parties are bound by their own pleadings. He also said that even if it is let to be discussed, yet it is not fatal as it has never caused any miscarriage of justice to either party to the appeal.

In rejoinder Mr. Ndunguru reiterated his submission in chief on the issue of vicarious liability and irregularity in the trial proceedings.

The issue to be determined is whether the appeal has merit.

I have carefully gone through the rival arguments both in support and against the two appeals. In determining the first appeal, I will start with the first ground of appeal. I am inclined to be guided with the law relating to pleadings. The object of pleadings is, to secure that both parties shall know what are the real points in issue between them. It is trite law that the parties to a suit are bound by their pleadings.

In the case of **Makori J.B Wassanga and Joshua Mwaikambo and Another** (1987) TLR 88, the court of Appeal said: -

"In general, and this is I think elementary, a party is bound by his pleadings and can only succeed according to what he has averred in his plaint and in evidence he is not permitted to set up a new case".

What is gathered from the above authorities is that a party to the suit shall prove what is pleaded in his or her pleadings. In the instant case, the respondent under paragraph 14 of the plaint which I quote provided that:-

14. That the plaintiff state that the said accident was caused by negligence of the defendants jointly and severally.

PARTICULARS OF NEGLIGENCE.

- (I) *The first defendant by handing over his car for being driven by the second defendant while fully aware that the second defendant had no driving license.*
- (II) *The second defendant by driving a car on a public road without a driving license.*
- (III) *The third defendant by drink driving(sic) and without a driving license and reversing the car recklessly.*

That being the pleadings; on the part of appellant who was the second respondent, the respondent was required to prove the second item as pleaded. That the appellant was negligent as he was driving a car on public road without a driving license. The adduced evidence shows that the appellant ordered Selemán Nziku (who was the third defendant at the trial court) to drive a car while he knew that the Said Selemani had no driving skills, had no driving license and was drunk. All these were not pleaded in the plaint and it is a matter of law that parties to the case are bound by their own pleadings. That being said, I am in agreement with counsel for the appellant Mr. Kassale that trial court erred to base its finding on matters not pleaded in the plaint. In the circumstance I find that, the trial Magistrate erred to find that the case was proved against the appellant.

In respect of the second, third and fourth grounds, I once again subscribe to what has been submitted by Mr. Kassale that the court based its decision on assumptions and speculations which have no room in civil justice. The law requires he who alleges to prove his allegations. See section 110 of the Evidence Act Cap. 6 R.E 2019. The court also has to decide basing on the evidence. I have perused the trial court's proceedings, nowhere it was testified by the respondent or other witness that that the appellant left the engine on when he got outside the car, and that the act of leaving an engine on was a negligence act or that Said Selemani entered in the car with the permission of the appellant and the two knew each other.

Furthermore, I have noted that exhibit P1 and Exhibit P2 having being admitted were not read in the trial court, failure to read them denied the appellant an opportunity to know their nature and contents and to use them in defence. See the case of **Jummanne Mohamedi and Two others**, Criminal Appeal No. 234/2015, Court of Appeal (Unreported). The above exhibits were tendered by Mr. Mbogoro, the respondent's counsel instead of the witness. This is a fatal irregularity; hence the exhibits are expunged from the record.

Coming to Civil Appeal No. 10 of 2020, it was Mr. Ndunguru's submission that since the second and third respondent were indulged in

negligent driving that caused the accident, these culpable and damaging actions ought to be transferred to the first respondent and he bears a vicariously liability. The memorandum of appeal in this appeal contains new issues which were not decided by the lower court. The position of the law is that an appellate court will not entertain an issue that was not decided by the lower court. See the case of **Elisa Moses Msaki vs. Yesaya Ngateu Natee** (1990) TLR 90, **Mehta Naikiminjal Luishalaan Nakiminjal vs. Saivelo Loiba Njuti** (1998) TLR 120 and the case of **The Grand Alliance Limited vs. Mr. Wilfred Lucas Tarimo and four others**, Civil Application No. 187/16 of 2019 Court of Appeal sitting at Dar es Salaam (Unreported).

Looking at the grounds of appeal, all are new issues which were not decided by the trial court and as per the above law cannot be deliberated at this stage. However, even if I were to deliberate on it yet it was not established that the second defendant was negligent so as to hold the first defendant vicariously liable. Hence, I find Civil appeal No. 10 of 2020 has no merits. It's dismissed with costs.

That said and done, I find merit on Civil Appeal No. 9 of 2020, I reverse the decision of the trial court with costs as the respondent didn't prove his case to the required standard.

Right of Appeal Explained.




S.C. MOSHI

JUDGE

25/5/2021