

**IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)**

AT MWANZA

HC CIVIL APPEAL NO.01 OF 2021

(Arising from RM's Civil Case No. 95 of 2019)

EMMANUEL CONSTANTINE NYALALI

T/A KING MUSUKUMA APPELLANT

VERSUS

HAJI EMILY HASSAN 1ST RESPONDENTS

HASSAN MUSSA 2ND RESPONDENTS

JUDGMENT

Date of last order: 28.06.2021

Date of Judgment: 30.06.2021

A.Z.MGEYEKWA, J

The appellant is appealing against the Judgment of Resident Magistrates Court of Mwanza in Civil Case No. 95 of 2019 delivered on 3rd December, 2020. Briefly, the facts which bred the instant appeal are quite straightforward. They roll back to the Resident Magistrates Court of Mwanza

whereby the gist of the plaintiffs' claims at the trial court was for compensation for damages caused by the appellant's bus which was driven by DW2's employee.

At the trial court, it was alleged that the respondents (original plaintiffs) jointly and severally claimed for payment of Tshs. 50,000,000/= to include compensation, medical expenses, accommodation, and transport allowances, damage of body injuries, and economic deterioration from the date of the accident. On his part, the appellants (original defendants) denied the allegations and urged the trial court to dismiss the suit with costs.

The Resident Magistrates Court of Mwanza determined the following framed issues; whether there was negligence on the part of the first defendant, whether the injuries sustained by the plaintiff's resulted from the negligence made by the first defendant, if at all the first and second issues are answered in affirmative, whether the second defendant is vehicleiously liable for the negligence made by the first defendant, whether on the material date of the motor vehicle with registration number T 204 CGW make Scania was operating and trading under the names of King Msukuma and to what reliefs are the parties entitled to.

Haji Emily Hassani testified as PW1 and Hassan Mussa Hassan (PW2) claims were based on the damages incurred after bus accident with registration No. T 204 CGW. They were among the passenger travelling to Bukoba. To substantiate that their claims; PW1 and PW2 tendered bus tickets (Exh.P1) and (Exh.P7) respectively. PW1 also tendered a PF3 (Exh.P2). Both of them were hospitalized, PW1 paid hospital bills in a tune off Tshs. 2,953,275/= and PW2 claimed for general damage totaling Tshs. 50,000,000/=.

On the defence side, one Mwitwa Chacha Chagucha, the driver of the said bus admitted that he was driving a vehicle with registration No. T 202 CGW from Mwanza to Bukoba and the vehicle was involved in an accident. He reported the incident to the Police Officer and was sentenced and paid a fine. To substantiate his submission he tendered a copy of traffic case proceedings (Exh.D1). DW1 said that his employer did not issue an employment contract. Jamal Abdulkarim (DW2), a supervisor of King Msukuma Company. He claimed that they are not the owner of the vehicle involved in the accident.

After the closure of the plaintiff and defence case, the trial Magistrate analysed the framed issues and decided in favour of the respondents s. The appellants were ordered to pay specific damages to the tune of Tshs,

2,967,275/=, a refund of bus fare to the tune of Tshs, 32,000/= for both respondents. They were also awarded general damages to the tune of Tshs, 40,000,000/=, and interest at 7% from the date of the judgment until the satisfaction of the decree.

Being aggrieved the appellant has taken his battle to this Court, seeking to assail the decision of the Resident Magistrates of Mwanza. The appellant has coined three grounds of appeal as follows:-

- 1. That, there was no evidence adduced before the trial court to show that one Chacha Mwita Chaguche was an employee of King Msukuma.*
- 2. That exhibits P2 and P3 were tendered in court without following the legal procedures.*
- 3. That the trial court failed to establish the ownership of motor vehicle with registration No. T 204 CGW was owned by the appellant.*

The learned counsel for the appellant prayed to add one ground of appeal, the learned counsel for the respondents did not object. The additional ground was as follows:-

- 1. The trial court erred in law for failure to apply the Doctrine of vicarious liability on the appellant.*

Therefore, I have re-arranged the grounds of appeal, the additional ground to is regarded as the second ground of appeal.

When the matter was coming for hearing on 28th June, 2021, the appellant enjoyed the legal service of Mr. Makwaga, learned counsel whereas the respondents s enjoyed the legal service of Mr. Linda, learned counsel.

Mr. Makwaga was the first to kick the ball rolling. Submitting on the first ground, he contended that the first defendant Chacha Mwita Chaguche was not employed by the King Msukuma Company. To bolster his submission he referred this court to page 40 of the trial court proceedings. He went on to state that there was no any contractual relationship with the King Msukuma Company and the foreman of Msukuma Company claimed that they did not hire Chacha Mwita Chagush. He claimed that the driver did not tender any contract or vehicle licence.

Submitting on the second ground, that the Doctrine of vicarious liability was not proved. Mr. Mawekga was brief and straight to the point. He argued that the trial Magistrate failed to translate the Doctrine of vicarious liability. He valiantly argued that the trial court placed the burden of proof on the King Msukuma Company. He claimed that the trial court went further and found

that the appellant was liable for the act of DW1. While DW2 evidence is very categorically that they did not hire DW1. And the respondents did not cross-examine DW2 thus the same was not controverted.

On the third ground, Mr. Magweka argued that there was no any employment contract that was tendered in court. He added that DW2 also testified to the effect that they had such an arrangement of issuing a contract to his employees. He went on to state that until the date when the accident occurred DW1 was employed by DW2.

With respect to the fourth ground that relates to ownership of the vehicle with registration No. T 204 CGW. Mr. Makwega argued that DW was not able to narrate who is the owner of said vehicle. In his view, DW2 narrated well by stating that the owner is named in a vehicle vehicled. He lamented that the trial court erred in law to state that DW2 was liable for the actions of DW1.

On the strength of the above, Mr. Makwega beckoned upon this court to quash the trial court judgment and allow the appeal with costs.

Opposing the appeal, Mr. Linda on the first ground stated that there was no content to show the relationship between the employer and the employee,

Mr. Linda valiantly argued that DW1 testified to the effect that there was no employment contract. He referred this court to page 1 of the trial court proceedings. Mr. Linda went on to argue that DW1 narrated why there was no contract of employment and he could not tender it because there was no any existing contract. Insisting, Mr. Linda contended that DW1 confirmed that he was working with DW2 until the occurrence of the bus accident. DW1 complained the employer did not use to sign contracts with his employees.

It was Mr. Linda's further submission that DW1 could not drive the vehicle without being authorized by DW2. He went on to argue that when DW1 was cross-examined he stated that the bus tickets were written King Msukuma. Stressing, Mr. Linda contended that the appellant was liable for the act of DW1.

On the second ground, Mr. Linda valiantly argued that PW1 was the right person to tender the said exhibits P2 and P3. He argued that DW1 was questioned able to explain how he possessed the said exhibits. Insisting, Mr. Linda argued that the tendering of exhibits P2 and P3 was in accordance with the law and PW1 tendered the exhibits, the appellant did not object. He urged this court to disregard this ground.

As to the third ground, he submitted that DW1 said that exhibit P1 was issued by King Msukuma Company and at the time when the accident occurred the owner of the bus was King Msukuma was the one that got into an accident and the registration vehicle was required to tender the ticket which proves that the said bus was owned by King Msukuma.

On the strength of the above submission, the learned counsel for the respondents beckoned upon this court to dismiss the appeal with costs.

On his brief rejoinder, the learned counsel for the appellant reiterated his submission in chief. He that DW1 did not tender any employment contract which is a mandatory requirement in compliance with SUMATRA procedures and law. Mr. Makwega lamented that there were no reasons for the trial court to consider the oral evidence of DW1, and denied DW2's version that he has never employed DW1. He strenuously contended that without contract vicarious liability cannot be proved.

He maintained his submission that section 240 (3) of the Criminal Procedure Act Cap.20 [R.E 2019] specific as to who is required to tender a PF3 document. He stressed that PW1 failed to elaborate the content of the PF3 thus he urged this court to expunge exhibit P3 from the records. Mr. Makwega insisted that the respondents were required to discharge the

burden of proof that the vehicle was owned by Msukuma on the contrary they did not tender any relevant document to prove their allegation.

In conclusion, Mr. Makwega urged this court to allow the appeal, and quash and as set aside the decision of the lower court.

I have considered the rival arguments by both learned counsels for and against the appeal. I wish to determine the appeal as summarized above and in the light of the manner argued by the appellant's Advocate and the respondents 's Advocate. In my determination, I will consolidate the first and fourth grounds because they are intertwined. The rest of the grounds will be argued separately in the order they appear.

Starting with the first and fourth grounds, that there was no evidence to prove that one Chacha Mwita Chaguche was an employee of King Msukuma Company. In answering this ground, I will embark on determining whether DW1 and DW2 employment relationship was proved. There is no dispute that a contract is a proof of employment relationship between the employee and employer. However, parties can enter into an oral contract as well. In the instant case both parties proved that there was no any employment contract. Records reveal that Chacha Mwita Chagushe stated that he was driving the

bus with registration No. T 204 CGW was involved in a vehicle accident and the receipt read King Msukuma though he was not sure if the owner was King Msukuma.

In the instant case, DW1 testified that his employer (DW2) did not issue an employment contract to his employee. However, there is no dispute that DW1 was driving the King Msukuma Company bus and the second defendant bus was involved in an accident. It is my firm view that DW1 was the one who drove the King Msukuma bus, the bus tickets bear King Msukuma business trading name, and the same was involved in a vehicle accident. The respondents on their side proved their case by tendering the tickets which bear the business name of King Msukuma and DW1 did not object that he was involved in the said accident. In my respectful view, going by DW1 evidence, I believe that DW1 was working for King Msukuma Company and the evidence on record suffice to prove that King Msukuma was the owner of the bus which was involved in the said accident. Therefore, this ground is demerit.

Next for consideration is the second ground, that the trial court failed to apply the Doctrine of Vicarious Liability. Briefly, Vicarious Liability as defined

by Black Law Dictionary 8th Edition Bryan A. Garner, Thompson West page 934 means:-

"Is that liability that supervisory party such as an employer bears for the actionable conduct of a subordinate or associate such as an employee based on the relationship between the two parties."

The tort of Vicariously Liability in the book of Giliker P, Vicarious Liability, in Tort: A Comparative Perspective. Cambridge: Cambridge University Press, 2013, reads:-

"A vicarious liability is as well-established institute that has its roots in Common Law systems and , in short, is underpinned by an idea that a person may be held vicariously liable for someone else's legal wrong".

From the above definition and excerpt, in the instant case, the DW2 can be held vicariously liable for DW1's wrong. I want to make it clear from the outset that, what needs to be established for one to succeed in a tortious action as is in the present matter, the first issue for determination is whether the involved employee (DW1) was in the course of employment of King Msukuma Company when the accident occurred. This issue is answered in

the affirmative, as I have analysed in the first ground that DW1 evidence proves that DW1 was in the course of employment of DW2. And the second issue is whether DW2 was vicariously liable for the act of DW1. This kind of proof lies with the plaintiff (respondents). Such burden of proof is like in all civil cases, on the balance of probabilities, consistent with section 110 of the Evidence Act, Cap.6 [R.E 2019].

Apart from DW1 testimony, this being a civil case, the burden of proving that King Msukuma Company was liable for compensating the respondents was upon the respondents. As rightly stated by Mr. Makwega the burden of proof cannot shift to the defendants. In the instant case, the respondents to prove their case, tendered two bus tickets (Exh.P1) and (Exh.P7) to prove that King Msukuma was the owner of the bus which was involved in the accident. Thus, the respondent proved their claims.

The third issue for determination is whether the unauthorized act by a servant is within, or outside the scope of his employment. DW2 denied that he did not hire DW1 and claimed that there was no any contract between DW1 and the employer. However, the circumstance of the case reveals that DW1 was driving the bus with Registration No. T204 CGW that was owned by King Msukuma Company. Furthermore, DW1 proved that he was involved

in the vehicle accident and a traffic case was instituted against him and he paid a fine. Therefore, this issue is answered in the affirmative, that DW1 drove the said bus after being authorized by DW2 and in case DW2 did not authorize DW1 then, it means DW2 was negligent thus he is liable for his negligence.

Therefore there is no dispute that an accident occurred and the owner of the bus was DW2. Therefore, it is my firm view that the respondents were right to sue the owner of the bus for compensation since his bus was involved in said accident and the respondents proved their case that they were injured, hospitalized and the fact that DW1 pleaded guilty on the traffic case. Therefore, in my view, there is no need to reverse the trial court decision since the vicarious liability was proved.

With respect to the third ground, exhibits P2 and P3 were tendered in court without following proper procedure. Without wasting the time of the court this ground is baseless for the reason that, the PF3 which was issued to PW1 was related to the case at hand. PW1 was involved in a vehicle accident and he was injured as a result the Police Officer issued a PF3. It is indisputable fact that PW1 had knowledge and was in possession of the PF3. In the case

of **The DPP v Mirzai Pirbakhsh @ Hadji and Three Others**, Criminal Appeal No. 493 of 2016 (unreported), the Court of Appeal of Tanzania listed the categories of people who can tender exhibits in court. It stated thus:

"A person who at one point in time possesses anything, a subject matter of trial, as we said in Kristina Case is not only a competent witness to testify but he could also tender the same. It is our view that it is not the law that it must always be tendered by a custodian as initially contended by Mr. Johnson. The test for tendering the exhibit, therefore, is whether the witness has the knowledge and he possessed the thing in question at some point in time, albeit shortly. So, a possessor or a custodian or an actual owner or alike are legally capable of tendering the intended exhibits in question provided he has the knowledge of the thing in question." [Emphasis added].

Applying the above excerpt in the instant case, PW1 was in possession of the PF3, therefore, he was a competent person to tender the PF3 during the trial. Therefore, this ground is demerit.

In consequence, I find that there is no merit in these grounds of grievance. That said and done, I hold that in instant appeal there are no

extraordinary circumstances that require me to interfere with the lower court findings. The appeal fails and is, accordingly, dismissed.

Order accordingly.

Dated at Mwanza this date 30th June, 2021.




A.Z.MGEYEKWA

JUDGE

30.06.2021

Judgment delivered on 30th June, 2021 via audio teleconference whereby the Mr. Makwega, learned counsel for the appellant and Mr. Linda, learned counsel for the respondents were remotely present.


A.Z.MGEYEKWA

JUDGE

30.06.2021