

**IN THE HIGH COURT OF TANZANIA**

**IN THE DISTRICT REGISTRY**

**AT MWANZA**

**HC CIVIL APPEAL NO. 73 OF 2020**

*(Originating from Civil Case No. 02/2019 at Misungwi District Court)*

**K. K. SECURITY TANZANIA LIMITED ..... APPELLANT**

**VERSUS**

**RICHARD JOHN BUSWELU ..... RESPONDENT**

**JUDGMENT**

*10/08/2021 & 27/8/2021*

**W. R. MASHAURI, J;**

This appeal is emanating from the decision of the District court of Misungwi at Misungwi in Civil Case No. 02 of 2019. Hon. E. R. Morley SRM delivered on 21/09/2020.

Being dissatisfied with the said decision, the appellant K. K. Security Tanzania Limited who was second defendant in the trial court has now come to this court.

The appellant has fronted four grounds of appeal as follows: -

1. That, the trial magistrate erred in law and fact to find the appellant liable while the tortfeasor are unknown and never made party to the case.
2. That, the trial magistrate erred in law and fact for failure to analyses the evidence in record, hence arrived at the wrong decision.
3. That, the trial magistrate erred in law and fact to base his decision only on the evidence of the respondent.
4. That, the trial magistrate erred in law and fact to grant general damages while no evidence in record to support the same.

The appellant is represented by Mr. Salehe Nasoro learned counsel and the respondent by Miss. Mariasyntha Lazaro Senior State Attorney. Mr. Mugabe learned counsel appeared for the respondent in cross appeal.

The appeal has been argued by way of filing written submissions. In his written submission in support of the appeal, Mr. Salehe Nassoro counsel for the appellant K. K. Security Tanzania Ltd submitted that, in Civil Case No. 02 of 2019, the respondent Richard John Buswelu who was plaintiff in the original action sued the appellant alleging that, he was beaten by three unknown persons alleged to be an employees of the appellant. That, there is no evidence by the respondent given in the trial court to prove that the

purported three tortfeasors were employees of the appellant nor are their names were mentioned by the plaintiff.

However, after the full trial the court entered judgment in favour of the respondent, the decision of which has aggrieved the appellant, hence this appeal.

That, in his submission in support of his appeal, the appellant is challenging the wide judgment and decree of the trial court and the appellant is moving this court for an order that, the judgment and the decree of the trial court be quashed and set aside with costs.

He submitted in respect of the 1<sup>st</sup> ground of appeal that, the appellant is an artificial person in the eyes of law, and being an artificial person, its operations and functions are performed by employees, who carry out their functions under the name and direction of the employer (appellant). That, under the vicarious liability doctrine, the employer is liable for the act done by the employees in the course of their employment.

The learned counsel for the appellant however was of the view that, if the act of the employee is out of what he is employed to do, the employer would not be held liable for the employee's wrong doing.

That, the respondent sued the appellant as 2<sup>nd</sup> defendant but the actual tortfeasor or employee of the appellant was not named and even identified by the plaintiff (now respondent). That, in tort cases, a company cannot be sued as a person who committed an actual tort to the respondent. The respondent should have made clear in his plaint by stating the names of the actual employees who have caused injury to the plaintiff and not merely mentioning the name of the employer.

That, it was held in the case or I. G. Lazaro v/s. Josephine Mgomera Civil Appeal No. 2 of 1986 (unreported) that: -

*"in a matter of tort, a tortfeasor, the person who commits a tort is always primarily liable, an employer is vicariously liable if his servant commits a tort in the course and within the scope of his employment."*

That, under the principle of various liability the appellant could not be held liable if there is no evidence on record which proves that the respondent was the actual tortfeasor who caused injury to the appellant and that who caused injury to the respondent were employees of the appellant. The respondent has therefore failed to prove his case. He prayed the court to allow the appellant's appeal with costs.

In reply to the appellant's grounds of appeal the learned counsel for the respondent submitted in respect of the 1<sup>st</sup> ground of appeal that, the respondent was seriously injured, beaten and tortured and defamed by the appellant's guards for being a thief and was admitted to Mitindo Hospital for treatment upon being given PF3 at police station, the act of which is not challenged by the appellant.

That, the vicarious liability stands where it is proved by the plaintiff that the claimant/plaintiff was injured by the agent and/or employee of the employer in the course of his employment. That, in this matter, the appellant's guards injured the respondent at the time were in uniform at their working place at Sayona Steel Ltd premises and due to the fact that they don't know their names but he recognized them as the act was committed at around 14:00 hours. On that regard the appellant cannot in any way escape liability under the doctrine of vicarious liability.

The issue to be raised for consideration and determination in this matter is whether the appellant is guilty for injury if any caused by his employees to the respondent.

The vicarious liability doctrine is defined to be an imputation of liability upon one person for the actions of another. In tort, law it is the responsibility of the master for the acts of the servant or agent done in the course of or doing his employment.

It is said by the plaintiff Richard John (PW1) who is respondent in this appeal that, upon reached home from shamba on 03/01/2019 at around 14:00 hours, he found many people gathering at his house amongst of which were workers and guards of K. K. Security who were beating some of his children. When he asked them what had happened they replied were beating his children because they are thieves and had stolen a none disclosed item and owner of the alleged stolen item.

When he introduced to them to be a cell leader of that area, the workers and/or guards from K. K. Security who were in their work uniforms turned to him and severely beaten him. They took him inside Sayona Industries premises yard, closed the gate and proceeded beating him until when were told by an Indian person to stop beating him and they stopped. He was asked by one of the K. K. Security workers to admit but he refused. At about 16:00 hours, a police car reached there from Misungwi police station. He was pulled out from the yard of K. K. Security and taken to

Misungwi police station. He prayed the court to tender in evidence his pictures taken at the scene of crime but were not admitted for want of the actual maker.

In his defence, the 1<sup>st</sup> defendant Destus Nicholaus (DW1) said is employed by Sayona Steel Co. Ltd as assistant Company Manager.

That, while in his office on 03/01/2019, he heard shouts outside the gate of the company's' yard. He found two guards and two youths shouting to each other. He called police officers and upon police officer reached there, they took over the whole issue as the other person was alleged to have stolen an iron which had been left outside by a customer of Sayona. When he got outside, he found the K. K. security guard with one youth being complaining against each other and because of that confrontation he reported the matter to the police post as that youth was complaining to have been beaten upon being complained of to have been stolen an iron which had been left outside Sayona steel compounds. He did not make follow ups to police station where that person was taken.

The second defence witness Ibrahim Boniface Ibrahim (DW2) said is also worker of K. K. Security as security guard for six years, and currently is supervisor.

That, on 03/01/2019 night was on duty, and sometimes on day time was used to sleep inside the camp yard, and while sleeping during the daytime inside the yard, he heard shouts. He got side and went to place the shouts were emanating and found the plaintiff with one youth who is an agent of selling scrapers being grabbed each other, and upon reached them those youths dispersed and ran away and ambushed the plaintiff who was holding an iron, the property of that youth, who was fighting with the plaintiff, who was searching for scrapers from a lorry make Scania with Registration No. T. 221 AAH which was in a process to leave the compound.

The issue is whether the respondent was injured by the applicant's employees while in the course of their employment.

It is ample evidence on record that, the respondent was injured by workers of Sayona Steel manufacturing company. He was assaulted by the appellant's employees who are security guards while attempting to steal an iron which was outside near the gate of the company. As security guards the



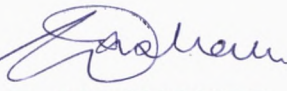
workers of the appellant are vested with a duty of making sure that, no property or an item of the respondent be it a scraper or whatsoever cannot be stolen. The 2<sup>nd</sup> defendant who is appellant in this appeal cannot be subjected to pay the respondent general damages in the tune of Shs. 1,500,000/- as going to the appellant's premises and attempted to steal an iron from thereof, the plaintiff freely and voluntary with full knowledge of the nature and extent of the risk he ran implicitly agreed to incur it.

His allegation that he went to the appellant's premises to rescue his children who alleged were being beaten by the employee of the appellant lack merits for want of calling the said children who in this case are material witnesses to support his evidence.

From the look of events, this appeal lacks merit. The same is dismissed.

No order as to costs is made.



  
**W. R. MASHAURI**  
**JUDGE**  
**27/8/2021**

Date: 27/8/2021

Coram: Hon. W. R. Mashauri, J

appellant:

Respondent:

B/c: Jackline

Mr. Mugabe advocate, for respondent.

Mr. Swalehe Advocate, for the appellant.

**Court:** Judgment delivered in court in presence of Mr. Swalehe Advocate for the appellant and Mr. Mugabe Advocate for the respondent this 27/8/2021.

Right of appeal explained.



  
**W. R. MASHAURI**

**JUDGE**

**27/8/2021**