IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CIVIL APPEAL NO. 24 of 2020

(Appeal from the judgement of the District Court of Kyela dated 30th October 2020 in Civil Case No. 15 of 2019)

1. KYELA DISTRICT COUNCIL

2. NSIMBI SOLOMON MWAMBENJA ---------- APPELLANTS

VERSUS

LEONARD MWINUKA ---------- RESPONDENT

JUDGEMENT

Date of last order: 26.10.2021

Date of Judgement: 03.12.2021

Ebrahim, J.:

The Respondent herein successfully sued the Appellants at the District Court of Kyela in Civil Case No. 15/2019 claiming specific as well as general damages and interest thereon on the claim of

vicarious liability. The Respondent who is an administrator of the estate of the deceased, claimed that on 28.07.2018 at 1209hrs while driving a motor vehicle at Kiwira Port Road, the second Appellant recklessly knocked the deceased causing his death. As the records of the proceedings would show, the 2nd Appellant was driving the motor vehicle with Registration SM 3266 Make Toyota Land Cruiser Hardtop the property of the 1st Appellant while in the vice president convoy, a task that he was assigned by his employer. The evidence shows that during the said convoy, the 2nd Appellant swerved to the side of the road where he knocked the late Sprian Mwinuka. The Respondent claimed Tshs. 37,000,000/- as specific damages and payment of Tshs. 200,000,000/- as general damages. He also prayed for the interest of 12% per annum. Upon hearing the evidence from both sides, the trial court awarded the Respondent general damages to the tune of Tshs. 30,000,000/- and interest at 8%. The trial court also ordered the Appellants to pay costs.

Aggrieved, the Appellants lodged the appeal in this court raising five grounds of appeal as follows:

1. That the trial magistrate erred in law and fact by failing to prove that the appellant had a duty of care against the deceased and that the appellant breached the said duty.
2. That the trial magistrate erred in law and fact by holding that the 2nd appellant drove the Motor Vehicle with registration number SM 3266 recklessly without considering that the 2nd appellant was driving a 5th car in a convoy of the Vice President which was escorted by a police siren vehicle and a swiper.
3. That the presiding magistrate erred in law and fact by failure to consider that the deceased obstructed the vice president convoy as a result he was the author of his own death.
4. That the presiding magistrate erred in law and fact by failure to consider that the cause of accident was a result of contributory negligence.
5. That the presiding magistrate erred in law by awarding TZS 30,000,000/- as general damages without proving that the cause of accident was due to reckless driving.

This appeal was argued by way of written submission whereas the Appellants were represented by Mr. Kelvis Kisayo, learned State Attorney and the Respondent preferred the services of advocate Mwampaka.

Submitting in support of the grounds of appeal, counsel for the Appellant citing the case of **Donogue Vs Stevenson**[1932] AC 532 argued that the respondent had a duty to prove that the Appellants had a duty of care. In expounding their proposition, counsel for the Appellants argued further that the deceased was knocked down by the 2nd Appellant while driving the 5th vehicle in the convoy of the Vice President and he could not stop and let the deceased cross the road. The said convoy was escorted by a police siren and a swiper. He contended therefore that the trial magistrate erred by holding that the appellant drove the said motor vehicle negligently. To buttress his argument, he cited the case of **Strabag International (GMBH) Vs Adinani Sabuni,** Civil Appeal No. 241 of 2018 CAT - Tanga where it was observed that:

> *"In an action for negligence the plaintiff must give full particulars of the negligence complained of and the*

damages he sustained. Without a pleading and proof, negligence cannot be countenanced and the decree for damages cannot be awarded. The plaint must clearly allege the duty enjoined on the defendant with the breach of which he is charged"

Counsel for the Appellants further referred the court to the book titled **"The Principles in Tort Law", 4th Edition, Vivienne Harpwood, Cavendish Publishing Limited 2000 at page 25** where it was stated that:

"The first matter to be proved is that the defendant owed a duty of care to the claimant unless it is possible to establish this in the particular circumstance of the case, there will be no point in considering whether a particular act or omission which had resulted in harm was negligent; the existence of a duty of care depends upon oversight, proximity and other complex factors. It should be noted that in the vast majority of negligence cases there is no dispute about the existence of duty of care".

He concluded on the point that the duty of care by the 2nd accused to the deceased was not proved.

Submitting on the 1st and 2nd grounds of appeal, counsel for the Appellants argued that the deceased was the author of his own

death having crossed the road while there was a police siren and Vice President convoy. He thus surmised on the 3rd, 4th and 5th grounds of appeal that the accident was a result of contributory negligence of the deceased hence it was wrong for the presiding magistrate to award Tshs. 30,000,000/- as general damages. He concluded thus, it was wrong to substitute specific damages with general damages and prayed for the appeal to be allowed with costs.

Responding to the submission by the counsel for the Appellants, counsel for the Respondent in admitting the principle enunciated in the cited case of **Donogue Vs Stevenson (supra)** argued that the 2nd Appellant had a duty of care towards the deceased and it is the reason that the convoy was led by police escort. He contended further that the negligence of the 2nd Appellant was proved by his own plea of guilty in Traffic Case No. 14/2018 at Kyela District Court – exhibit PE4. He contended further that the Appellants had a duty of care following the fact that DW1 was employed as a mechanic but was authorized to drive in a convoy as testified by DW3 hence causing the death of Cyprian Mwinuka. He said also that the

negligence of the Appellants is established by the motor vehicle inspection report which indicated that the deceased was knocked at the side of the road. To buttress his argument, he cited the case of **Nicko Egid@Ng'umbi & Another vs Simon Bunyake Kitana**, Civil Appeal No. 04/2019, (HC).

He concluded on the point that the Appellants did not challenge their negligence which led to the death of the Respondent's father at the trial court. He added that the 1st Appellant is bound by the act of his employee as held in the case of **K.K. Security Tanzania Limited Vs Richard John Buswelu, Civil Appeal No. 73/2020 (HC)** where it was held that:

> *"The vicarious liability doctrine is defined to be an imputation of liability upon one person for the action 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".*

As for the 1st, 2nd and 3rd grounds of appeal, Respondent's Counsel argued that the Traffic Case No. 14/2018 proves the negligence of the 2nd Appellant after he swerved to the side of the

road and knocked the deceased. He further commented on the fact that the 2nd Appellant knocked the deceased while his car was the fifth as also an act of negligence. He contended also that there is no any single piece of evidence suggesting that the deceased contributed to his death. As to the argument that the deceased crossed the road suddenly, counsel for the Respondent contended that the same are mere words from the bar as there is no evidence to prove the said fact.

Responding on the issue of general damages, he contended that the same need not be proved specifically but presumed from the wrong complained of. He referred to the cited case of **Nicko Egid @ Ng'umbi & Another (supra).** He prayed for the appeal to be dismissed with costs.

In rejoinder, counsel for the Appellants argued on the issue of general damages that the same is excessive and there is no reason assigned by the trial court in awarding Tshs. 30,000,000/- as required by law. He cited the case of **Alfred Fundi Vs. Giledi Mango and 2** Others, Civil Appeal No. 49 of 2017.

Counsel for the Appellant raised the issue of locus standi in his rejoinder. He cited the Court of Appeal case of **Suzana Warioba Vs Shija Dalawa**, Civil Appeal No. 44 of 2017 which commented on the fact that the title of the administrator of the estate of the deceased was not reflected in the title of the case. He thus prayed for the decision of the District Court to be quashed and set aside and appeal be allowed.

Before I proceed to address the grounds of appeal, I must point out that this being the first appeal, this court is obliged without fail to subject the entire evidence in record into objective scrutiny and come to its own findings of facts if the need be-- **Charles Mato Isangala and 2 Others V The Republic**, Criminal Appeal No. 308 of 2013 (CAT - unreported).

In determining the present appeal, I would like to begin with the issue raised by the counsel for the Appellant that the Respondent had no locus standi to sue in his personal capacity as he sued as an administrator. Hence, the title of the case should have reflected so. I must out-rightly say that the objection of the Respondent much as it is a point of law came as an afterthought at

the rejoinder stage. Again, it is the cardinal rule of practice and procedure that preliminary objections must come at the earliest stage for the just adjudication and determination of the same. The Respondent Counsel referred to the Court of Appeal decision in the cited case of **Suzana S. Waryoba (supra)** which observed in obita dicta that it would have been desirable for the capacity of the litigant as an administratrix of the estate of the deceased to be reflected in the title. Nevertheless, it remarked the omission not to be fatal considering the fact that the position of the litigant as an administratrix was well evidenced at the outset. The same is the position in this case and as per the order of the trial court of 12.12.2019 allowing the amendment of the plaint. The amended plaint filed on 18.12.2019 correctly reflect that Leornard Mwinuka (Legal Administrator of the estate of the late Sprian Mwinuka). More-so, the Respondent plaint shows at para 1 and 8 of the plaint as the administrator of the deceased's estate and letters of his appointment were admitted as exhibit PP1 without objection. I therefore find the argument by the Appellants' counsel as baseless.

In essence, the genesis of the Appellant's complaint in this appeal is that the Respondent did not prove negligence on part the 2nd Appellant and neither was there a proof of duty of care.

The book of **Clerk and Lindsell on Torts, Sweet and Maxwell, 17th Edition (1995) pg 217** has explained the negligence liability to base on the conduct of the defendant which may be imposed irrespective of a wide range of interests damaged by that conduct. It has been further explained in the book that negligence may overlap the narrow approach which protects just one particular interest.

It is from the tort of negligence where one of the main requirement is the existence of duty of care. Thus, as per the cardinal principle of the law the duty of care is not only a duty not to act carelessly, but also a duty not to inflict damage carelessly – **page 220 - Clerk and Lindsell on Torts, Sweet and Maxwell, 17th Edition (1995).** Counsel for the Appellant cited the case of **Strabag International (GMBH) Vs Adinani Sabuni,** (supra) and referred to the book titled **"The Principles in Tort Law", 4th Edition, Vivienne**

Harpwood, Cavendish Publishing Limited 2000 in arguing the point that in order for the plaintiff to claim negligence, there must be full particulars of such negligence and proof of duty of care that the defendant owed to the claimant and that there should be no dispute on the existence of such duty.

This being the first appeal, I dispassionately visited the evidence on record in seeing whether the said duty of care was proved for the claimant to be entitled to claim tort of negligence, hence the redress.

At this juncture, I am guided by the cardinal principle of the law as intimated earlier that *the duty of care is not only a duty not to act carelessly, but also the duty not to inflict damage carelessly* –**Clerk and Lindsell on Torts(supra).**

The Respondent/Plaintiff pleaded at para 6 of the amended plaint that the 2nd Appellant negligently and without care of other road users knocked down the deceased Syprian Mwinuka and caused his death. Following the negligent act of the 2nd Appellant, he was charged for recklessness and negligent driving in **Traffic Case**

No. 14/2018 at the District Court of Kyela where he pleaded guilty of charged offence and accordingly convicted **(exhibit PP4).** Further, the evidence on record shows that the 2nd Appellant while responding to cross examination questions, he admitted to have knocked the deceased who was beside the road. This piece of evidence support the evidence adduced by the Respondent. However, the testimony of DW2 is gravely contradictory as he suggested that the deceased was knocked while crossing the road. DW2 testified that he was sitting at the front seat hence saw what happened whilst the driver who swerved the car admitted to have knocked the deceased who was at the side of the road. Thus, I out-rightly find the testimony of DW2 to be contradictory and cannot be relied upon.

In this case, the Respondent tendered in court the proceedings and the judgement of the Traffic Case No. 14/2018 where the 2nd Appellant pleaded guilty to the charged offence on 28.08.2019 where he said thus" **Kweli niliendesha gari kizembe nikasababisha kifo cha marehemu alietajwa".** In literal translation it can be interpreted thus "It is true that I drove the car negligently and

caused the death of the mentioned deceased". It is therefore clearly that the 2nd Appellant admitted his negligent act. Thus, I can easily say that the 2nd Appellant voluntarily acknowledged the existence of the truth of fact that he had a duty of care of driving the car carefully so as not to injure the bystanders and he negligently breached such duty the result of which there was injury. The trial court in addressing the issue as to whether the 2nd Appellant negligently knocked the deceased and caused his death, referred to the plea of guilty of the 2nd Appellant on a Traffic Case as well as his own admission when crossed examined by the Mr. Mwampaka during the trial. The trial magistrate then ruled out that indeed the deceased death was caused by the accident negligently caused by the 2nd Appellant.

The law, i.e., **section 43A of The Evidence Act, Cap 6 RE 2019** provides for the relevance of judgements in criminal proceedings as conclusive evidence that the person was convicted of the offence to which the judgement relates. In this case, to negligent act. Furthermore, I have visited the entire evidence on record, I found nowhere that the 2nd Appellant protested that he was not negligent.

Like the trial court, I find that the fact that the 2nd Appellant was driving the 5th motor vehicle and ended up knocking a person who was at the side of the road, confirm his own admission of negligence.

Another aspect that was correctly considered by the trial court and it is an undisputable fact, is that the 2nd Appellant was acting in the course of his employment and the 1st Appellant being an employer. More-so, DW1 and DW3 admitted in court that the 2nd Appellant was employed as a mechanic but on that particular day he was assigned to drive a car in a convoy!!!! In that case, I hasten to comment that it was the employer who in-fact contributed to the negligence of 2nd Appellant as opposed to the submission of the Counsel for the Appellant's blaming the deceased.

Tailoring the above facts and the illustrated principles, I find that the Appellants had a duty of care and the negligence by the Appellant was accordingly proved by the Respondent.

Now comes the issue of the general damages as complained by the Appellants that the same is excessive.

At this juncture, I associate myself with the decision of this court in the cited case of **Nicko Egid@Ng'umbi & Another vs Simon Bunyake Kitana**, (supra) which quoted with approval the case of **Heaven Vs Pender** (1883) 11QBD S03 where it was held that:

> "***Every man ought to take reasonable care that he does not injure his neighbour***, *therefore,* ***whenever a man receives any hurt through the default of another***, *though the same were not wilful* ***yet if it be occasioned by negligence the law gives him an action to recover damages for the injury sustained***" (emphasis is mine).

The question for determination however is whether the award of Tshs. 30,000,000/- as general damages was justifiable.

General damages have been well elaborated in the case of **TANZANIA SARUJI CORPORATION V AFRICAN MARBLE COMPANY LTD** [2004] TLR 155 as herein below:

> *"General Damage are such as the law will presume to be the direct, natural or probable consequence of the act complained of, the defendant's wrongdoing must, therefore, have been a cause, if not the sole, or a particularly significant, a cause of damage, its discretion of the court."*

General damages are those elements of injury that are the proximate and foreseeable consequence of the defendant's conduct. It was stated in the case of **Anthony Ngoo & Another V Kitinda Maro**, Civil Appeal No. 25/2014 that *"general damages are those presumed to be direct or probable consequences of the act complained of"*.

I am alive to the principle of the law that general damages are awarded by the court after consideration and deliberation on the evidence on record able to justify the award. The court has discretion in the award of general damages, the discretion that must be exercised judiciously, by assigning reason. Again, the award of general damage is a province of a trial court and appellate courts are discouraged into interfering it. The appellate court may only interfere upon being satisfied that the trial court in assessing the damages applied a wrong principle of law, misapprehended the facts, has made a wholly erroneous estimate of the damage suffered that resulted to the amount awarded to be inordinately low or so inordinately high. Various cases of Court of Appeal have illustrated the above principle i.e., **Razia Jaffer Ali V Ahmed**

Mohamedali Sewji and 5 Others, Civil Appeal No. 63 of 2005, which cited with approval the case of **Davies V Powell Duffryn Associated Colliers Ltd** [1935] 1 KB 354, 360; and **The Cooper Motor Corporation V Moshi/ Arusha Occupational Health Services** (1990) TLR 96 (CA); to mention but a few.

In assessing the general damages, the trial magistrate considered the agony that the plaintiff and the deceased's immediate family members went through and that no quantum of compensation may be enough. The trial magistrate continued to award Tshs. 30,000,000/.

Nevertheless, as alluded earlier, in awarding general damages, the court must consider and deliberate on the evidence on record able to justify the award. At first, the Respondent claimed for Tshs. 37,000,000/- as specific damages but he could not prove. Going by the evidence on record, I agree that one cannot imagine the anguish of losing a loved one. However, as evidence would reveal, apart from such anguish, all the deceased's children are grown up and independent. Thus, the award of general damage should only act as a solitude of the loss of their parent. It is on those bases I find

that the award of Tshs. 30,000,000/- which is as nearly as the prayed amount on specific damage is inordinately too high. In the circumstances, I find that the award of general damages to the tune of Tshs. 10,000,000/- would act as a solitude under the circumstances and saves justice of this case. Accordingly, the award of Tshs. 30,000,000/- is reduced.

At the end results, the appeal succeeds only to the extent that the award of general damages is reduced from Tshs. 30,000,000/- to Tshs. 10,000,000/-. I give no order as to costs in this appeal.

Accordingly ordered.

R.A. Ebrahim

Judge

Mbeya

03.12.2021