

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB - REGISTRY OF MWANZA

AT MWANZA

CIVIL APPEAL NO.59 OF 2021

(Originating from the Civil Case No. 89/2019 before the District Court of Nyamagana at Mwanza)

LUCY LWIZA JOSEPH APPELLANT

VERSUS

SALUMU IBRAHIM SALUM..... 1ST RESPONDENT

JOHN JOSEPH MSAYE2ND RESPONDENT

JOSEPH KASHEKU MSUKUMA @ KING MSUKUMA.....3RD RESPONDENT

JUDGMENT

7th June & 5th July, 2022

Kahyoza, J.:

Salum Ibrahim Salum (Salum) sued John Joseph @Msaye (Msaye), Lucy Lwiza Joseph and Josephat Kasheku Msukuma @ King Msukuma for causing damage to his vehicle. He claimed among other things, for specific damages at the tune of Tzs. 6,359,000/= and general damages at a total of Tzs. 35,000,000/=.

After a full trial, the trial court found Msaye to have carelessly knocked Salum's motor vehicle, damaging it and that at that time of the accident Msaye was **Lucy Lwiza Joseph's** employee. The trial magistrate held both, **Msaye and Lucy Lwiza Joseph** liable, ordered them to pay **Salum** specific

damages to the tune of Tzs. 4,655,000 and general damages assessed at Tzs. 5,000,000/=.

Aggrieved, **Lucy Lwiza Joseph** appealed raising one ground of appeal that:-

1. That the trial court erred in law to shift liability upon the shoulders of the appellant while there was no proof of negligence on her party to make her vicariously liable for the negligence of the second respondent.

Before hearing commenced, the first respondent's advocate raised a concern that the appellant's advocate had a conflict of interest because he presented the appellant, the second and third respondents before the trial court and he has appealed against the second and third respondents. Thus, the first appellant's advocate is appealing against his own client.

The appellant's advocate did not dispute the allegation that he was appealing against his client. He contended that only one of his clients was aggrieved by the decree of the trial court the other respondents, had no grievance with the decree of the trial court.

It is true that the law bars an advocate to act for a client when the interests of the client and the personal interests of the advocate or, the interests of any person in his firm are in conflict. I agree with the first respondent's advocate that the appellant's advocate had person interest in

the second and the third respondents' case. They paid him to defend them, he would not wish to see them losing the appeal much as he wanted the appellant to win the appeal. The appellant's advocate misconducted himself. For interest of determining this case to finality, I will not pursue the appellant's advocate's misconduct as the same will not lead to determination of the pending case.

I now revert to consider the merit of the appeal. The background leading to the current legal squabble is simple. **Msaye** while driving motor vehicle with registration No. T. 462 CEZ make Scania bus knocked Salum's motor vehicle. **Msaye** was charged and convicted with the offence of careless driving following his plea of guilty. The evidence on record proved that **Msaye** caused an accident whilst driving **Lucy Lwiza Joseph's** motor vehicle. Surprisingly, all defendants did not testify. There was only one witness from a Company **Josephat Kasheku Msukuma @ King Msukuma** owned, who deposed that the Company was not liable.

Given the evidence on record and the uncontested party of the trial court judgment, there is no dispute that Msaye drove **Lucy Lwiza Joseph's** motor vehicle driven at the time the accident occurred. It is further not disputed that **Msaye** caused accident in the cause of his employment. There is ample evidence to prove that Salum's motor vehicle was damaged. The

issue is whether **Lucy Lwiza Joseph** is vicarious liable. Vicarious liability is a common-law principle, which is part of our laws, stating that a master is liable for tortious acts or omissions of the servant and the two are joint tortfeasors; either or both can be sued. Vicarious liability does not transfer the principal liability of the servant to the master. I wish to associate myself with the observation of Lord Denning MR observed in **Lanchbury and Others v Morgens and Others**

*"What is the basis of this doctrine of vicarious liability? To answer it, I would first ask: what does "vicarious" mean? I turn to the Shorter Oxford English Dictionary, 3rd ed (1944), Vol II. It means one "that takes or supplies the place of H another . . ." So vicarious liability means that one person takes the place of another so far as liability is concerned. Familiar instances are where the master shoulders the liability of his servant; or the principal shoulders the liability of his agent; and so forth. Whenever the law imposes vicarious liability, it does so for reasons of social policy - reasons which commend themselves to the people at large. If a servant injures another by his negligence, his master should make good the loss. **It does not matter whether the servant or agent is acting for the benefit of his master or principal, or not.**"*

I find it established in the present case, that, Salum was required to prove three things: **one**, that **Msaye** committed wrongful act which caused him damage; **two**, that some special relationship recognized by law existed

between **Msaye** and **Lucy Lwiza Joseph**; and **three**, that some connection exists between **Msaye's** act and his special relationship with **Lucy Lwiza Joseph**. Salum proved all three factors. He proved that **Msaye** carelessly knocked his motor vehicle damaging it significantly. He also established that Msaye caused the accident in course of his employment. **Msaye** knocked Salum's motor vehicle while driving **Lucy Lwiza Joseph's** bus. In the circumstance, I find that, **Lucy Lwiza Joseph** has no reason to complain.

Lucy Lwiza Joseph's complained that the trial court shifted the burden of proof to her. With all due respect to **Lucy Lwiza Joseph's** advocate, I was unable to appreciate the basis of the complaint. It is common ground that in civil case the burden of proof lies on a party who alleges anything to prove in most cases is the plaintiff. In the present case, it was Salum who had a burden to prove **Lucy Lwiza Joseph's** vicarious liability. However, the burden of establishing or disapproving any fact in civil cases is not static, it moves from plaintiff to the defendant as the scale tilts. In other words, once the plaintiff adduced strong evidence the burden of shifts to the defendant to disapprove the allegation. That is the reason why in civil cases it always argued that a party whose evidence is heavier than that of another must win. (See the case of In **Hemed Said V. Mohamed**

Mbiu [1989] TLR 113). Not only that but also the Court of Appeal in **Yusufu Selemani Kimaro v. Administrator General and 2 Others**, Civil Appeal No. 226/ 2020, took a stand that once the plaintiff gave evidence the defendant bears a burden to controvert the plaintiff's evidence. It stated-

*"To demystify, the burden of proof is the duty or responsibility cast on a party to put forth evidence in order to prove their claim. In civil cases, as a general rule, it is the party bringing the claim (the plaintiff) on whose shoulder the burden of proof lies. However, after the plaintiff has led evidence either in the form of oral testimony, documentary evidence or objects, the burden of proof as a matter of adducing evidence or the onus of proof (as it is otherwise called to distinguish it from the burden of proof which never shifts), shifts to the defendant to lead evidence either with the view to controverting the plaintiffs evidence or supporting his own case. According to the English case of **Pickup v. Thames Ins. Co.** 3 QBD, 594,600, the burden of proof in this sense, is always unstable and may shift constantly throughout the trial accordingly as one scale of evidence or the other preponderates.*

*Going by the above exposition of the law, it would be insincere if not a misapprehension of the law on the part of Mr, Halfani to complain as he did that the trial Judge had shifted the onus of proof onto the second respondent. **For, in civil cases, the onus of proof does not stand still, rather it keeps on oscillating depending on the evidence led by the parties and a party who wants to***

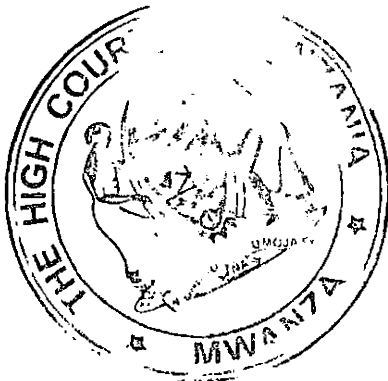
*win the case is saddled with the duty to ensure that the burden of proof remains within the yard of his adversary. This is so because as per the case of **Raghramma v. Chenchamma**, A 1964 SC 136, such a shifting of onus is a continuous process in the evaluation of evidence."*

Given the above position of the law, after Salum proved that Msaye knocked his motor vehicle, causing damage whilst discharging **Lucy Lwiza Joseph's** duties, **Lucy Lwiza Joseph** had a burden to disapprove Salum's evidence. **She** never testified. In the absence of **her** evidence to rebut Salum's evidence, she was bound to fail. There was no legal duty to prove that she was negligent. I see no cause for complaining. Thence, the ground of appeal is meritless, I accordingly dismiss it.

In the upshot, I find the appeal futile and dismiss it with costs. Subsequently, I uphold the judgment and decree of the trial court.

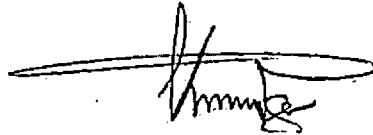
It is accordingly ordered.

Dated at Mwanza this 5th day of July, 2022.



J.R. Kahyoza
JUDGE
05/07/2022

Court:-Judgment delivered in the virtual presence of Mr. Kisigiro, the first respondent's advocate and in the absence of the appellant, her advocate, the second and third respondents. B/C Ms. Jackline (RMA) present.

A handwritten signature in black ink, appearing to read 'J.R. Kahyoza', with a long horizontal stroke extending to the left.

J.R. Kahyoza
JUDGE
05/07/2022