IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 201 OF 2016

SEIF ALLY MATEKE..... PLAINTIFF

VERSUS

AHMAD ATHUMAN..... 1ST DEFENDANT

MINISRTRY OF WATER AND IRRIGTION..... 2ND DEFENDANT

THE ATTORNEY GENERAL..... 3RD DEFENDANT

JUDGMENT

Date of last Order: 29th June, 2022

Date of Judgment: 12th August, 2022

E.E.KAKOLAKI, J.

The plaintiff herein is suing the defendants for tortuous action arising from negligence of the 1st defendant and employee of the 2nd defendant, who caused accident and damages to the plaintiff's motor vehicle while in the course of employment as driver of a motor vehicle with Registration No. STK 6544 make Nissan Patrol. The 3rd defendant was joined as a necessary party in accordance with the law governing proceedings against the Government. The plaintiff is therefore praying for specific damages to the tune of Tshs. 14,000,000/- being the purchase cost of the said motor vehicle, Tshs. 1,000,000/- as costs for storage services, Tshs. 480,000/- costs for drugging the said motor vehicle from the scene of crime to the storage premises,

general damages to be assessed by the Court, interest at the rate of 18% of the decretal sum from the date of judgment till full payment and any other reliefs as the Court deems fit.

The plaintiff's case as garnered from the plaint goes thus, on 30th August 2015, at around 17:45 hrs at Muslim area along Tabata Road within Ilala District in Dar es salaam region, the 1st defendant while carelessly and negligently driving a motor vehicle with registration No. STK 6544 make Nissan Patrol owned by the 2nd defendant on the public road, extended to the extreme right side of the road and failed to control it as a result knocked the plaintiff's vehicle with registration No. T 141 AVW make Toyota TownAce Noah. It was his averment that, his motor vehicle driven by one Furahini Juckton, was seriously damaged together with other two passengers Mhalila and Luth Salum, injured. On the basis of those facts the plaintiff preferred this suit against all three defendant, the 2nd and 3rd defendant being vicariously liable for the conducts of their employee (1st defendant) allegedly perpetrated in the course of his employment.

All defendants through the respective written statements of defence denied any liability. Before the trial could commence the court with assistance of

parties' advocates framed five issues for determination of the parties' dispute going thus:

1. Whether the 1st defendant caused accident to the plaintiff.
2. If the first issue is answered in affirmative, whether the 1st Defendant acted carelessly, negligently and/or recklessly.
3. Whether the 2nd and 3rd defendants are vicariously liable for the 1st defendant's conduct(s).
4. Whether the plaintiff suffered any damages.
5. To what reliefs are the parties entitled to.

At the hearing the plaintiff enjoyed the service of Mr. Frank Michael, learned advocate while the 1st defendant represented by Mr. Twahil Burhan, learned advocate and the 2nd and 3rd defendants defended by Ms. Hosana Mgeni, learned State Attorney. In a bid to establish his case, the plaintiff summoned two witnesses, himself as PW2 and Furahini Jocktan Mhalila the driver of his motor vehicle on the fateful day who testified as PW1. Apart from their testimonies a total number of six (6) exhibits were tendered and admitted in court in support of plaintiff's case.These are Motor Vehicle Registration Card of Toyota Townace Noah with registration No. T141 AVW (Exh.PE.1), original sale agreement of the said motor vehicle make Toyota Noah between Fakhi

Mohamed and Seif Ally Mateke dated 1/8/2016 (Exh.PE.2), Court proceedings of the District Court of Ilala at Samora in Traffic case No.479 of 2015 between Republic and Ahmad Athuman (Exh.PE.3), Vehicle Inspection Report in respect of Motor Vehicle Toyota Noah with registration No. T141 AVW (Exh.PE.4), Motor vehicle storage agreement between Nefron Ekonga and Seif A. Mateke dated 5/9/2015 (Exh.PE.5), and notice of 90 days issued by the Plaintiff to the 2nd defendant dated 13/06/2016 (Exh.PE.6). On the other hand, the 1st defendant testified as sole witness (DW1) while Mr. Jacob Herbert Kingazi, a principal administration officer from the 2nd defendant's office testified as DW2 for the 2nd and the 3rd defendant with no exhibit to tender.

In this judgment, I am not intending to reproduce the whole evidence as adduced by both parties, but rather relevant part of it which will be referred in the course of responding to the issues raised if need be. Nevertheless I find it worth to state the principles under which this Court will be guided with in determination of this suit. It is the principle of law under sections 110 and 111 of the Evidence Act, [Cap. 6 R.E 2019] that, any party who alleges existence of any fact or claim of right must prove that the same exists and the onus of so doing lies on the party who would lose if no evidence in

adduced at all on that particular fact or claim. It is further settled principle of law under section 2(3) of the Evidence Act that, the standard of proof in civil matters is on the balance of probabilities. There are plethora of authorities in support of the above settled principles of the law such as the cases of **Abdul Karim Haji Vs. Raymond Nchimbi Alois and Another**, Civil Appeal No. 99 of 2004, **Paulina Samson Ndawavya Vs. Theresia Thomasi Madaha**, Civil Appeal No. 53 of 2017 and **Berelia Karangirangi Vs. Asteria Nyalwambwa,** Civil Appeal No. 237 of 2017 (All CAT-Unreported). The above principles were lucidly summarised by Court of Appeal in the case of **Paulina Samson Ndawavya** (supra) when the Court observed that:

> *"It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence act, Cap. 6 [R.E 2002]. It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible that the other…"*

With that understanding in mind, I now move to consider the framed issues, starting with the first issue as to whether the 1st defendant caused accident to the plaintiff, which I find the same to be answered in affirmative. I so find

as PW1 the driver of accused motor vehicle with registration No. T141 AVW make Toyota Noah exhibited to the Court that, it is the 1st defendant who knocked his car when driving the motor vehicle with registration STK 6544, make Nissan Patrol. This evidence which is not disputed by DW1 the driver of the said Nissan Patrol Reg. No. STK 6544 during his defence and in the final submission by Mr. Burhan, is also corroborated by PW2 in that, according to the police report and traffic case proceedings exh. PE3. Thus the 1st issue is answered in affirmative.

Coming to the 2nd issue as to whether the 1st defendant acted carelessly, negligently and/or recklessly, I think the issue need not detain this Court much as through evidence of PW1 which is not contested by Mr. Burhan for the 1st defendant in his final submission, the 1st defendant's act of knocking the plaintiff's car resulted from his act of careless driving as exhibited in the proceedings in Traffic Case No. 479 of 2015 (exh. PE3), where the 1st defendant pleaded guilty to the offences of careless driving and causing damages to the plaintiff's motor vehicle, convicted and sentenced accordingly to pay a fine of Tshs. 60,000/- or to serve two months on each count. It was PW1's further testimony that, the 1st defendant while driving in a high speed failed to control his motor vehicle and crossed the road to

his right hand side where PW1 was coming from and knocked his car thereby causing it serious damages. With that uncontroverted evidence it is no doubt that, the 1st defendant acted carelessly and negligently without taking care of other road users whom he owed duty of care. The second issue is also answered in affirmative.

Next for determination is the 3rd issue, as to whether the 2nd and 3rd defendants are vicariously liable for the 1st defendant's conduct. Before I venture into determination as to whether the two are liable or not let me revisit first the law related to vicarious liability. The term vicarious liability is defined by the **Oxford Dictionary of Law**, 5th Ed, Oxford University Press, 2002 at page 525 to mean:

> *"A Legal liability imposed on one person for torts or crimes committed by another (usually an employee sometimes an independent contractor or agent), although the person made vicariously liable is not personally at fault."*

This Court also in the case of **K.K Security Tanzania Limited Vs. Richard John Buswelu**, Civil Appeal No. 73 of 2020 defined the term vicarious liability in the following terms:

> *"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."*

From the above definitions it is obvious therefore that, an employer can be held vicariously liable for torts committed by his employees. He so becomes when it is established by the plaintiff that he authorized or ratified his employee's tortious act either directly or indirectly or when the tort is committed in the course of the employees' work. In other words any negligent or tortious act committed by the employed driver in the course of his work is connected to his employment, but if the driver is to assault a passing pedestrian for motives of private revenge, the assault will not be connected with his job and his employer will not be liable. The purpose of this doctrine of vicarious liability is to ensure that an employer/master pays the costs of damage caused in the course of his business operations. The employer's vicarious liability, however, is in addition to the liability of the employee, who remains personally liable for his own torts. The person injured by any tortious action may sue either the driver/servant in exclusion of his employer/master or both of them, but normally will generally prefer to

sue the employer who has financial mussels to settle the damages. See also **Oxford Dictionary of Law** (supra) at page 526.

Adumbrating further on the position of the law concerning vicarious liability of employer against his employee, in the case of **Lazaro Vs. Mgomera [1986-1989] 1 EA 302**, it was held that:

> *"An employer is vicariously liable if his servant commits a tort in the course and within the scope of his employment. This does not absolve the liability of the servant but only means that the employer is also liable as the tort was committed when the servant was supposed to be acting in place of or for the employer, whose act it becomes".*

In a very recent decision of the Court of Appeal on the same subject in the case of **North Mara Gold Mine Limited Vs. Emmanuel Mwita Magesa** (Civil Appeal No.271 of 2019) [2022] TZCA 442 (18 July 2022); www.tanzlii.org, where case *of* ***Machame Kaskazini Corporation Limited (Lambo Estate) v. Aikaeli Mbowe*** *[1984] TLR 70 at page 73, in which the position held in* ***Marsh v.Moores*** *[1949]2 KB 2018 at 215 were quoted with approval,* the Court extended the scope of vicarious liability to cover even the unauthorised acts or conducts of the employee/servant which

are associated to the authorised ones. In so doing the apex court roared that*:*

> *"It is well settled law that a master is liable even for acts which he has not authorised provided they are so connected with the acts which he has authorised that they may rightly be regarded as modes, although improper modes, of doing them. On the other hand, if the authorised and wrongful act of the servant is not connected with the authorised act as to be a mode doing it but is an independent act, the master is not responsible, for in such as case, the servant is not acting in the course of his employment but has gone outside it."*

Furthermore, the Court of Appeal was inspired with the decision made in **Canadian Pacific Railway Vs. Lockhart** [1942] A.C. 591 which cited the case of **Marsh Vs. Moores** (supra) when referring to a passage in Halsbury's Laws of England 4h Edition Vol. 16 paragraph 743, the Court stated:

> *"In order to render the employer liable for the employee's act it is necessary to show that the employee, in doing the act which occasioned the injury, was acting in the course of his employment. An employer is not liable if the act which gave rise to the injury was an independent act unconnected with the employee's employment. If at the time when the injury*

took place, the employee was engaged, not on his employer's business, but his own, the relationship of employer and employee does not exist, and the employer is not therefore liable to third persons for the manner in which it is performmed, since he is in the position of a stranger. In this case it is immaterial whether the employee is using his employer's property with his employer's permission, as long as he is clearly acting on his own behalf, or whether he is using it surreptitiously, and is therefore, as regards his employer, trespasser."

With such understanding on the term vicarious liability and its applicability to the employer or master against his servant or employee's conducts or tortious act(s), I now revert to determination of the 3rd issue above where the plaintiff in his testimony PW1 contended that, the 2nd and 3rd defendant being employers of the 1st defendant are vicarious liable for his negligent act which resulted into damage of his motor vehicle. On their side the 2nd and 3rd defendants disclaimed any responsibility from the 1st defendant's conduct as through DW2 the court was informed that, when caused accident the 1st defendant was not in the course of his employment. It was his testimony that, on the date of accident i.e. on 30/08/2015, it was Sunday and the 1st defendant was not in the course of employment and that is why after his

conviction and sentence on traffic offences he was subjected to office disciplinary proceedings, convicted too and punished accordingly. He said, the 1st defendant was involved in an accident while coming from visiting his relatives, the evidence which was not denied by the 1st defendant (DW1) during his defence. When subjected to cross examination by Ms. Mgeni for the 2nd and 3rd defendants as to whether he had any permission from his superior to use the said motor vehicle on the incident date, DW1 confessed to have not obtained any as that was his private arrangement. Mr. Burhan for the 1st defendant also does not dispute this fact in his submission. Basing on the above uncontested fact that, when involved in the accident the 1st defendant was not in the course of employment, I hold the 2nd and 3rd defendants are not vicariously liable for the 1st defendant's the conducts. The 3rd issue is answered in negative too and in that regard, I hold the 1st defendant is to bear the liability alone.

Coming to the 4th issue as to whether the plaintiff suffered any damage, Mr. Burhan for the 1st respondent submits that, it is not in dispute that the plaintiff suffered damages but what is contested is the issue of the extent suffered. Relying on section 110 of Evidence Act and the case of **Harith Said Brothers Company Vs. Martin Ngao** (1987) T.L.R 12, stating that

special damages must be strictly proved, Mr. Burhan submitted that, the claims of Tshs. 14,000,000/-, Tshs. 1,000,000/- and Tshs. 480,000/- by the plaintiff have not been proved. As to the claim of Tshs. 14,000,000/- he contended mere tendering of exhibits PE1 and PE2, car blue card and sale agreement indicating the purchase price of Tshs. 14,000,000/- as well as the inspection report of the motor vehicle exhibit PE4 describing and particularizing the defects caused to the car, without proving that the car was written off do not justify the claim of Tshs. 14,000,000/. In his defence DW1 on the same claim stated that, he was ready to repair the said motor vehicle to the state it was maintaining before. On his side the plaintiff in his testimony (PW2) testified to the effect that, his mechanic one *Omary* confirmed to him that, the motor vehicle was damaged beyond repair and that is the reason he was claiming to be compensated the purchase price to the tune of Tshs. 14,000,000/-. He relied on exhibit PE4 the vehicle inspection report to establish the damage sustained to the car. In his submission Mr. Michael insists that, since it is the 1st defendant who caused accident and suffered the plaintiff damages then he is responsible to compensate him the whole amount of car purchase price to the tune of Tshs. 14,000,000/-.

Having examined the submission and the evidence adduced by the parties in support and against the claim of specific damage of Tshs. 14,000,000/- at discussion. It is the settled law by this Court and Court of Appeal that special or specific damages must be specifically pleaded, particularized and strictly proved, meaning there must be three P's. Special Damages are strictly proved as they involve the actual loss incurred and not the one to be assumed. Drawing an inspiration from the wisdom of the judge and jurist on application of three P's, on proof of specific damages, Justice Yaw Appau, Justice of the Court of Appeal, in his Paper Presented at Induction course for newly appointed circuit judges at the Judicial Training Institute (Ghana), **Assessment of Damages**, *(www.jtighana.org)* at page 6 had this to say:

> *"Unlike general damages, a claim for Special damages should be specifically pleaded, particularized and proved. I call them three P's."*

Unlike general damages which is assessed on the discretion of the Court the standard required in proving special damages is higher than on balance of probabilities. See **Reliance Insurance Co (T) Ltd and Others Vs. Festo Mgomapayo,** Civil Appeal No. 23 of 2019 (CAT-unreported).

In our jurisdiction the principle of law on proof of special damages is also reflected in a number of cases including **Zuberi Augustino Vs. Anicet Mugabe**, (1992) TLR 137 at page 139, **Peter Joseph Kilibika and Another Vs. Patrick Aloyce Mlingi,** Civil Appeal No. 39 of 2009 and **Reliance Insurance Company (T) Ltd and 2 Others Vs. Festo Mgomapayo**, Civil Appeal No. 23 of 2019 (all CAT-unreported). I was held in the case of **Zuberi Augustino** (supra) that:

> *"It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved."*

Similarly the Court of Appeal in **Peter Joseph Kilibika and Another** (supra) when explaining as to why special damages must be strictly proved cited with approval the holding of Lord Macnaughten in **Bolog Vs. Hutchson** (1950) A.C 515 at page 525, which held that:

> *"… such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character and, therefore,* ***they must be claimed specifically and proved strictly.***" (Emphasis supplied)

Guided by the above principle in this matter it is undisputed fact that the plaintiff pleaded and particularized the claimed specific damages as averred in paragraphs 7, 8, 9 and 10 of the planit contending that, his car suffered

damages a result of the 1st defendant's careless and negligent act of knocking it down. Vide exhibit PE4 describing the damaged parts of the car, I also find he managed to establish the damaged parts of the car in which the 1st defendant is not disputing and ready to repair. What is in dispute is the extent of such damage in monetary value which I agree with Mr. Burhan that the plaintiff has failed to strictly prove. I so find as apart from his mere assertion that, he was advised by his mechanic that his car was written of the plaintiff tendered in Court no evidence so proving that the case was not road worth, meaning was damaged beyond repair. No doubt as per exhibit PE4 the damage occurred to the car include front bumper, radiator, mad guard, window glass, dashboard show (damaged), front and rear combination light, front tire and rim, air cleaner, front chassis, front shock ups and suspension and indicators. It was expected of him however, to call in Court the said Omary (mechanic) for proving the fact that the said car was written off or tender an inspection report showing the car was damaged beyond so as to be entitled to another car or compensation to the tune of Tshs. 14,000,000/-, the duty which he failed to discharge. I therefore find the claim of the said amount is not justified as the 1st defendant is ready to make good the damages sustained by paying for the repair costs.

Next for determination is the claim of Tshs. 1,000,000/- in which the 1st defendant disputes that the same was not proved. In a bid to prove that claim, the plaintiff (PW2)relied on exhibit PE5, the contract for storage of the car in his neighbour's compound, claiming that it was their term in that agreement that, he would be paying Tshs. 3,000 per day to Nefron E. Konga for storage services of the car as his compound had no enough space. However, when cross examined whether he had any proof of payment of the claimed amount PW1 said payments were to be effected upon collection of the car. As there plaintiff failed to exhibit to court that he incurred such cost, I agree with Mr. Burhan that this claim was not proved too.

Lastly is the claim of Tshs. 480,000/- allegedly costs incurred by the plaintiff for pulling or moving the car from the scene of crime to Tabata Police station and later on to his place at Ulongoni 'A' street, Gongolamboto area within Ilala District, which claim again Mr. Burhan says was not proved at all. It is true and I agree with Mr. Burhan that, the plaintiff apart from pleading it in the plaint, neither testified on it during when giving his testimony nor is there any witness who tendered any receipt to exhibit that the said amount was in fact spent by the plaintiff. Thus the same remains unproved too and is

rejected for failure to comply with the provisions of section 110 of the Evidence Act.

I now move to consider the last issue on the relief(s) which the parties are entitled to. As indicated above the plaintiff's claims are for compensation of the tune Tshs.15,500,000/= as specific damage being Car purchase price, storage costs of the damaged car and its movement costs, general damages to be assessed by the court, interest of 18% of the decretal sum from the date of judgment upon full payment and any other reliefs. As intimated above when deliberating on the proof of specific claims the plaintiff has failed to strictly prove the said claimed Tshs. 15,480,000/- as per the principle stated in **Reliance Insurance Co (T) Ltd and Others** (supra) and **Peter Joseph Kilibika and Another** (supra) above. The plaintiff can be entitled to Tshs. 14,000,000/- which is the purchase price of the motor vehicle only and only if the 1st defendant fails to repair the car within specified time, and not rest of the specific claims of Tshs. 1,480,000/-.

With regards to general damages the plaintiff left it for the court to assess the amount to be awarded. Unlike specific damage, general damage is the kind of damage presumed by the law to have resulted from the defendant's tortious actions or breach of a contract which is neither quantified by the

plaintiff in the plaint nor specifically proved. It is enough for the same to be pleaded.The same is presumed in relation to wrong complained of or probable consequences. See the case of **Stroms Bruks Ark Vs. Hutchison** (1905) AC 515, as per Lord Macnaughten. See also the case of **Peter Joseph Kibilika** when quoted the case of 35 **Admiralty Commissioners Vs. SS Susqehanna** [1950] 1 ALL ER 392, where it was stated that:

> *"If the damage be general, then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question."*

The same position was also stated in the case of **Anthony Ngoo & Another Vs. Kitinda Maro,** Civil Appeal No. 25/2014 (CAT-unreported) when observed that:

> *"general damages are those presumed to be direct or probable consequences of the act complained of".*

The reason behind the above principle of the law is, it is in the Court's discretion to grant or not, after considering the circumstances under which plaintiff was subjected to and the type or nature of the complained of tort or action. The aim is to put a party who has suffered as a result of the breach or tortious act in nearly the same position that he would have been had the

other party not broken the contract or committed tort to him. (**restitutio in integrum**)

In the case at hand, the complained of tortious act is the 1st defendant's act of driving his motor vehicle carelessly, negligently and in a high speed in highway road, without exercising care to other road users as result knocked the plaintiff's motor vehicle and suffered it damages, the fact which is not disputed by the 1st defendant. In a bid to convince this court to award him the claimed general damages, the Plaintiff (PW1) told the Court that, he bought the vehicle for family use, thus due to its involvement in the accident he and his family were no longer enjoying its service since 2015 to date. It does not need a deep investigation to learn that the plaintiff suffered and was mentally disturbed due to the said incident. Being denied of use of his car no doubt he has to look for other alternative transport for himself and his family, hence entitled to be compensated through general damages. All the above considered in my assessment Tshs. 5,000,000/= will suffices to meet the end of justice to the plaintiff.

All said and done, the plaintiff's case against the 2nd and 3rd defendant is hereby dismissed without costs. As regard to the plaintiff the judgment is entered in his favour to the extent indicated as hereunder:

1. The 1st defendant shall repair the plaintiff's motor vehicle in the recommendable garage or pay all the repair costs of damaged parts of the vehicle as indicated in the Police vehicle inspection report within three months from the date of this judgment or in the alternative compensate him with the motor vehicle purchase price to the tune of Tshs. 14,000,000/- in lieu of repair of the vehicle.
2. The 1st defendant shall pay the Plaintiff Tshs. 5,000,000/- as general damage.
3. The 1st defendant to pay for the costs of this suit.

It is so ordered.

DATED at Dar Es Salaam this 12th day of August, 2022.

E. E. KAKOLAKI

JUDGE

12/08/2022.

The Judgment has been delivered at Dar es Salaam today 12th day of August, 2022 in the presence of Mr. Frank Maiko, advocate for the Plaintiffs, Mr. Twahil Burhan advocate for the 1st Defendant who is also holding brief for Ms. Hosana Mgeni, State Attorney for the 2nd and 3rd Defendants and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
12/08/2022.