

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO. 168 OF 2022

*(Originated from the decision of the District Court of Ilala at Kinyerezi in
Civil Case No. 60 of 2020)*

BETWEEN

**ALLY SAID LILANGALA (Administrator of the estate of the late
Yahaya Said Lilangala) APPELLANT**

VERSUS

AJA BUILDING CONTRACTORS LTD.....RESPONDENT

JUDGMENT

Date of Last Order: 08/11/2023

Date of Judgment: 16/11/2023

MWAKAPEJE, J.:

One Ally Said Lilangala (Administration of the estate of the late Yahaya Said Lilangala being aggrieved by the whole decision and Orders of the District Court of Ilala at Kinyerezi in Civil case No. 60/2020 has preferred this appeal to this Court.

His grounds of appeal are thus;

1. The learned trial Magistrate erred in law and fact when she held that the respondent was not vicariously liable for the death of Yahaya Said Lilangala
2. That the lead trial Magistrate erred in law and fact when she held that the Respondent is not liable for both specified and general damages
3. The trial Magistrate erred in law and she held that the deceased Yahaya Said Lilangala was not an employee of the respondent.
4. The trial Magistrate erred in law and fact when she ordered costs to the respondent while being aware that the appellant sued in forma pauperis.

The appellant therefore prays to this Court to order as follows:

1. That the trial Court's Judgement and orders be quashed and set aside
2. That the appeal be upheld
3. That the honourable Court declare the deceased employee of the respondent

4. That the respondent be ordered to pay general damages which shall be determined by the Court.
5. Any other relief (s) the honourable Court may deem fit and fair to grant

In this Appeal, the Appellant was represented by Mr Samwel Silaida Advocate under the umbrella of the Legal Assistance and Social Welfare Organization of Tanzania. On the other hand, the Respondent was represented by Mr Msawanga, Advocate.

Briefly before considering the grounds of the appeal, the background of the appeal at hand way back to 2011. On 26 April 2011 the appellant's brother Yahaya Said Lilangala when working on the 08th floor of the building which was being constructed by the Respondent fell and lost his life. The Respondent thereafter took the body of the deceased to Muhimbili National Hospital where burial expenses.

The deceased left behind a spouse, three issues and other relatives entirely dependent on him. The appellant as Administrator of the estate of the late Yahaya Said Lilangala took the responsibility of taking good care of the deceased family. It is from this background that the Appellant decided to approach the Respondent for compensation. When the Respondent refuted that is when the appellant decided to sue

for compensation in the District Court of Ilala in Civil Case No. 20 of 2020. However, the said Court dismissed this suit and ordered him to pay Costs, hence this appeal after he lost in the District Court.

On the hearing date, Mr. Samwel Advocate for the appellant in his submission combined the 1st and 3rd grounds of appeal. He was of the view that according to the law of Tanzania and according to Section 15(1) of the Employment and Labour Relations Act, Cap. 366 the Employer has to prove whether an employee is his employee or not.

The trial Magistrate erred in law and fact by not grasping this point as to the relation between the deceased and the Respondent. According to him, it was a misdirection on the part of the magistrate to rule out that there was no clear evidence. That the defendant was vicariously liable for the deceased's death while the latter was the defendant's site and that it was not proved that the deceased was acting in the course of his employment.

Mr. Samwel thought that it was from this finding that the deceased was disqualified from being a worker of the Company. He further stated let the trial Magistrate Court did not take into consideration the fact that the Respondent paid **Tshs 1,200,000/=** as burial expenses and that he was paid **Tshs 440,000/=** as terminal

benefits by the order of the High Court. He wondered why the respondent bothered much about the affairs of the deceased if the same was not his employer.

On the 2nd ground of appeal MR. Samwel was of the view that it was not hard to show the plaint preferred by the applicant was *informa pauperis*. According to the plaint, the appellant pleaded Tshs. 50,000,000/= as general damages. He however thought that since specific damages resulted from the defendant's tortious acts and since the appellant could not produce any evidence for the expenses used he dropped it and remained with general damages for which this Court could give a consideration.

This is because the deceased left behind a spouse, issues and other relatives entirely depending on the Appellant. He therefore prayed for the mercy of this Court to award general damages as will deem fit.

Lastly, he believed that the Magistrate erred in law and fact by ordering costs against the appellant who was sued *informa pauperis*. The appellant prays for this order to be quashed and set aside. In these circumstances, he therefore prayed to the Court to enter judgment in this favour.

On the other hand, Mr Iddi, counsel for the Respondent, on the first ground argued that what the counsel for the appellant presented including the testimony of the appellant was hearsay since they were not present at the incident. The fact that the Respondent took the body to Muhimbili National Hospital and covered burial expenses never meant that the deceased was the employee of the Respondent. These actions were on a human basis i.e. payment of **Tshs 1,200,000/=** was not compensation. On the issues of **Tshs 440,000/=** as terminal benefits, there was no evidence tendered in Court indicating the same.

According to Mr Iddi the mentioning and using of the Employment and Labour Relations Act, Cap. 366 was immaterial in the case at hand since the same was handled as a Civil Case and not a labour matter. Therefore Section 15 (1) of the Employment and Labour Relations Acts does not apply in a civil case such as this which was instituted in the District Court.

He therefore concluded that it is a principle of law that he who alleges must prove and the said proof in Civil suits is on the balance of probabilities as decided a decided in the case of **Direction Moshi Municipal Council Vs John Ambros Mwase, Civil Appeal No. 245/2017 CAT (Arusha)** and **Hemed Said Vs Mared Mbilu (1954)**

TLR 113. According to the cases it was held that the proof in civil cases is the balance of probabilities and therefore the stronger evidence between the parties will be considered. It was the evidence of PW1 (Appellant) that he knew nothing as to the relationship between the deceased and the Respondent and he failed to prove the same. He referred this Court to Halsbury Law of England 4th Ed. Vol XVI paragraph 743 it was stated that;

"in order to render the employer liable for the employee's act, it is necessary to show that the employer in doing the act which occasioned injury was acting in the cause of employment"

He stated that the death of the deceased was an independent act and was not connected to the employment. Therefore there existed no relationship between them at the time of the incident.

On the second ground of appeal, Mr Idd believed that since the appellant failed to justify payment of specific and general damages. And since the Court did not grant what it has not been asked the contention is baseless and should be dismissed.

On the 3rd ground of appeal, Mr Idd reiterated when he submitted that the deceased was not an employee of the Respondent. Lastly, on the issue of cost, Mr Idd stated that in the trial Court, there was no evidence indicating that the appellant sued *informa pauperis* as the same was well represented by Mr. Samwel who is representing him in this appeal. Hence it was not correct for the trial court to order costs against the Appellant. In the end, he prayed that the matter be dismissed with costs as the same is hopeless.

On his rejoinder, Mr. Samwel reiterated what he stated in his submission in Chief hence he was of the view that the Appellant is entitled to compensation.

Having heard both parties, the question this Court asked itself is whether the appellant's claims are justifiable. I will address the grounds of appeal as they were presented in line with the submissions of the parties herein, however, I will determine the 1st and 3rd grounds of appeal together.

On the first and third grounds of appeal, the Appellant wished the Respondent could be held vicariously liable for the death of his brother on the material date and be declared an employee of the Respondent. In determining this ground, one has to note that vicarious liability is

often applied in the context of torts where certain relationships exist. In Black's Law Dictionary, Henry Campbell Black, 1990 defines Vicarious Liability as:

*"The imposition of liability on one person for the actionable conduct of another, **based solely on a relationship between the two persons.** Indirect or imputed legal responsibility for acts of another; for example, the liability of an employer for the acts of an employee."*

It is trite law therefore that, for one to claim, they must make sure that there is a legal relationship between the parties. In addition, it has to be proved that the person being held vicariously liable should have some level of control or authority over the act. On this topic in a celebrated case of **Machame Kaskazini Corporation Limited (Lambo Estate) v. Aikaeli Mbowe [1984] TLR 70**, it was stated that:

*"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 G employee was engaged, not on his employer's business, but on 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 performed, since he is in the H position of a stranger." [Emphasis supplied]

In short, it is right to say that, liability is imposed based on the relationship and the actions of the employee or agent. Now looking at the facts of the case at hand, evidence shows that the appellant holds the respondent liable for the death of his brother at the construction site. However, he failed to prove the relationship the two had for the Respondent to be liable.

I managed to peep into the trial court's proceedings, the appellant did not at any material time provide any tangible evidence that his brother (deceased) was related to the Respondent in a manner. One should know better that it is a principle of law that proof should always

come from the one alleging (Section 110 of the Evidence Act, Cap 6 [R.E 2019]). The same provides that:

*"110. (1) Whoever desires any Court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts **must prove that those facts exist.***

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person"

The onus of proof therefore lies on the plaintiff bearing in mind that the standard of proof in civil cases is on the balance of probabilities. See the cases of **Godfrey Sayi Vs. Anna Siame Mary Mndoiwa, Civil Appeal No. 114 of 2012 (unreported); and Berelia Karangirangi Vs. Asteria Nyalwambwa, Civil Appeal No. 237 of 2017 (CAT-unreported)** where it was stated that:

*".....it is pertinent to state the principle governing proof of cases in civil suits. **The general rule is that, he who alleges must prove.** ...It is similarly that in civil proceedings, **the party with legal burden also bears***

the evidential burden and the standard in each case is on the balance of probabilities” [Emphasis Supplied]

Now in the case at hand, when cross-examined on the relationship between the Respondent and the deceased, the Appellant stated:

“I have no proof to show that the deceased was employed by the defendant”

Since he was the one alleging the fact that the Respondent employed his brother, and he had no proof of that fact, he cannot therefore claim otherwise. I wish not to agree with the learned Counsel for the Appellant that it was the duty of the employer to prove that he employed the deceased as far as section 15 of the Employment and Labour Relations Act, Cap 366. This section applies to the obligation the employer has to an employee where the relationship has already been defined and not in the circumstances of this appeal. To me, the trial court was right in its findings. This ground therefore fails.

Concerning the second ground, it goes without saying that if one fails to prove the relationship between the parties how could there be specific and general damages? It should also be pointed out here that special damages must be specifically pleaded and proved. In proving

special damages, documentary evidence must be produced to prove the alleged loss. See the case of **Anthony Ngoo and Another versus Kitinda Kimaro; Civil Appeal No. 25 of 2014: Court of Appeal of Tanzania at Arusha (Unreported)**. Further, in the case of **Masolele General Agencies v. African Inland Church Tanzania (1994) TLR 192** it was stated that:

*"special damages, being exceptional in their character, must be pleaded **specifically and strictly proved**. That is, once a claim for a specific item is made, **that claim must be strictly proved else there would be no difference between a specific claim and a general one.**[Emphasis Supplied].*

In the case at hand, the Appellant never produced anything to prove what he was alleging. This fact also was supported by the Counsel for the Applicant he then dropped it and remained with general damages. This, however, must be justified. See **Anthony Ngoo and Another** (Supra). In the circumstances of this appeal, there was no justification for the trial court neither is there in this court to grant general damages. Therefore this ground fails as well.

In the fourth ground of appeal, the appellant faults the trial court in awarding costs while the same sued in forma pauperis. It is a principle of civil litigation that the successful party is entitled to costs unless he is guilty of misconduct or there is some other good cause for not awarding costs to him (See Mulla's the Code of Civil Procedure, 12th Edition of 1953, p. 150). However, there are cases where legal aid recipients are to be protected from having to pay the costs of the opposing party if they lose a case. The principle here is to ensure that individuals with limited financial means can access the justice system without fear of facing significant financial burdens. The Legal Aid Act of Tanzania laid some fundamental principles as to costs to a legally aided person. Section 31 provides that:

*"31.-(1) where an aided person receives legal aid for civil proceedings and loses the case, the **court shall not award** an order of costs against the aided person, **unless there are exceptional circumstances.***

(2) In determining whether there are exceptional circumstances under subsection (1), the court may take into account any of the following by the aided person-

(a) Conduct that causes the other party to incur unnecessary costs;

(b) Unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution;

(c) Misleading or deceitful conduct; or

(d) Other conduct that abuses the processes of the court.

(3) Where costs are awarded against the aided person, the legal aid provider shall not be liable for payment of such costs.” [Emphasis Supplied]

In the appeal at hand, of course, the respondent was of the view that there was no documentary proof that the appellant sued in forma pauperis. Indeed, unlike in this appeal, there was no document filed in the trial court, but as I went through the records of the trial court proceedings, I found that the Appellant informed the Court that he was being represented. For instance, on 21 October 2020, the Appellant informed the trial court that he depended on legal aid to argue his case. It was also noted on 23 March 2021 that he was being represented by

the Legal and Human Rights Center and on 30 March 2023 the Counsel for the Respondent informed the trial court that:

".....the plaintiff being a lay person does not know what to do and in the 1st PCT, I pray for adjournment so that the plaintiff can consult his lawyer"

To me, this is enough evidence to prove that the Appellant had legal aid services in the prosecution of his case in the trial court. It was therefore the duty of the trial magistrate to consider whether, under the circumstances of section 31(2) of the Legal Aid Act, costs were tenable, which she did not. In the circumstances, this ground succeeds.

In the end, this appeal is partly allowed to the extent that costs awarded in the trial court are set aside. The appeal, however, fails in all the remaining grounds of appeal. No order as to costs for reasons advanced herein.

It is so ordered.

G.V. MWAKAPEJE
JUDGE
16/11/2023

Right to appeal explained.

Court: Judgment is delivered in Court this 16th day of November 2023 in the presence of Mr. Samwel Silanda learned advocate for the Appellant and the Republic.




G.V. MWAKAPEJE
JUDGE
16/11/2023