THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB-REGISTRY

AT MBEYA

CIVIL APPEAL NO. 15 OF 2023

(Originating from the Court of Resident Magistrate of Mbeya at Mbeya in Civil Case No. 40 of 2019)

WILLIAM ADAM MWAKYELU.....APPELLANT

VERSUS

BARAKA JOHN MWAISANILA.....1ST RESPONDENT

CHRISTIAN FRANK MWAISEMBA.....2ND RESPONDENT

SANLAM GENERAL INSURANCE.....3RD RESPONDENT

JUDGMENT

Date of Last Order: 05/10/2023
Date of Judgment: 10/01/2024

NDUNGURU, J.

This is the first appeal. The appellant WILLIAM ADAM MWAKYELU is challenging the decision of the Court of Resident Magistrate of Mbeya at Mbeya which ordered him and CHRISTIAN FRANK MWAISEMBA (2nd respondent) to pay Tshs. 250,000/= as specific damages and 20,000,000/= as general damages to BARAKA JOHN MWAISANILA (the 1st respondent) for the injury he sustained in an accident caused by the appellant's motor vehicle.

Brief facts of the case are that; the appellant was the owner of the passenger motor vehicle with registration No. T 155 BSG make Toyota Coaster. The 2nd respondent was employed to drive the said motor vehicle and it was insured by SANLAM GENERAL INSURANCE (T) LTD (3rd respondent) under third party risk insurance. On 17/12/2018 the motor vehicle got accident at number one area on the Mbeya-Tukuyu-Kyela road. It was alleged that some passenger including the 1st respondent were injured in that accident. Also that, as the result of injury, the 1st respondent was incapacitated as he could not engage in his economic activities as he used to. For that the 1st respondent unsuccessfully demanded compensation from 3rd respondent. In the event he decided to institute the suit against the appellant/2nd defendant, 2nd respondent/1st defendant and the 3rd respondent/3rd defendant together and severally claiming for among other reliefs; payment of Tshs. 150,000,000/= as specific damages and Tshs. 400,000,000/= as general damages.

The claims were vehemently disputed by the appellant and the 3rd respondent. While the appellant disputed that 1st respondent/plaintiff was not among the passengers who got accident involved his motor vehicle, the 3rd respondent disputed the claim that she was liable to

compensate the plaintiff as the insurer of the motor vehicle. The 3rd respondent contended that the accident was caused by unauthorized person that is a driver who had no driving licence thus, that insurance policy does not cover such accidents.

At the end of the trial, however, the trial court found the appellant and the 2nd respondent liable to compensate the 1st respondent as I have hinted before. Dissatisfied, the appellant filed the instant appeal raising six (6) grounds of appeal as follows:

1. *That the trial court erred in law and facts by holding that the second defendant is liable to compensate the plaintiff.*
2. *That the trial court erred in law and facts by entertaining the matter out of the scheduled speed track.*
3. *That the trial court erred in law and fact for excluding the third defendant from liability without sufficient reason.*
4. *That the trial court erred in law and facts by awarding the plaintiff Tshs. 20,000,000/= as general damages without reasonable justification.*
5. *That the trial court proceedings contain irregularities and illegalities on the face of the record*

6. *That the trial court erred in law and fact by relying on the weak evidence hence reached to unjust decision.*

Basing on the above grounds, the appellant prayed for the appeal to be allowed and the decision be quashed with costs.

The appeal was disposed of by way of written submissions. Ms. Zawadi Erasto, learned advocate represented the appellant while on the other side Mr. Christopher Sayi Mbuya learned advocate represented the 1st respondent whereas Ms. Mary Mgaya, also learned advocate represented the 3rd respondent. The 2nd respondent opted to enter no appearance though being duly served.

Submitting in support of the appeal, advocate Erasto abandoned the 2nd and 5th ground of appeal. She combined the 4th and 6th grounds and argued them together that trial court erred to decide in favour of the 1st respondent while he failed to prove his case. She contended that the 1st respondent did not prove if he was involved in the accident as he did not tender a bus ticket nor a loss report or any proof that he was admitted and hospitalized.

Then that the PF3 tendered by the 1st respondent was filled after two days of the accident which is doubtful if he really involved in the accident. The counsel argued also that the PF3 and the oral evidence of

1st respondent were contradicting as that when the 1st respondent claimed that he was injured on the right leg but the exhibit showed that it was paraplegia. Further that 1st respondent and PW2 contradicted that while the former said that he was admitted on 19/12/2018 to 3/1/2019 the latter said that he was admitted for more than 10 months.

Ms. Erasto went on submitting that the appellant's evidence was strong as he told the trial court that he visited Rungwe District Hospital and Mbeya Zonal Referral hospital after the accident but he did not find the 1st respondent to be one of the victims. She further submitted that the evidence of PW3 was against the rule of parties are bound by their pleadings. She gave the reason that since it was not stated in the plaint that PW3 was the one who helped to take the 1st respondent to the hospital the testimony of PW3 on that account should have been disregarded. Then that the trial court used exhibit 10 which was neither tendered nor admitted in evidence against the requirement of Order XIII rule 7 (2) of the CPC.

As regards to 1st and 3rd ground of appeal the learned counsel submitted that the trial court erred to hold the appellant liable under the doctrine of vicarious liability while there was no evidence that he authorized a driver without licence to drive the motor vehicle. According

to her had the trial court considered that the appellant prohibited the act of unqualified driver it would have not found him liable.

Ms. Erasto learned counsel added that there was no proof that the accident occurred in the cause of employment of the 2nd respondent. That for the appellant to be vicariously liable there was supposed to be a proof that the employee was executing his duty and functions faithfully. But in the instant case 2nd respondent handled the motor vehicle to unqualified driver contrary to the employment agreement. To reinforce her argument, she cited the case of **Salim Kabora vs Tanesco Limited and others,** civil Appeal No. 55 of 2014 Court of Appeal at Dar es Salaam (unreported).

She also complained that the trial court sailed into error when failed to hold the 3rd respondent liable and did not assign reason for so doing. She concluded by praying to allow the appeal, quash and set aside the judgment and decree of the trial court. She also prayed for costs.

In reply, counsel for the 1st respondent argued that the trial court was light in its decision of awarding Tshs. 20,000,000/= as general damages to the 1st respondent. That is because, it gave reasons for its award and that there was ample evidence that the 1st respondent

involved in car accident and got serious injury. According to him, the 1st respondent did not tender bus ticket due to the injury he sustained as the result the ticket got lost.

Counsel also argued that PW3 supported the evidence of the 1st respondent that he involved in the accident and that it was PW3 who investigated the incidence and helped to take the 1st respondent to the hospital.

The 1st respondent's counsel then faulted the account by the appellant's advocate that the evidence of PW3 did not form part of the pleadings. As to the complaint that PF3 was filled on 19/12/2018 instead of 17/12/2018 he contended that it was due to the reason testified by PW3 that they first took the 1st respondent to Rungwe District Hospital before he was transferred two days later. Thus, that the discrepancies did not mean that the 1st respondent was not injured in the accident.

On the complaint that the trial court had no justification of the award of general damages. Counsel submitted that the trial court in awarding general damages considered age of the 1st respondent as he was only 37 years old, the permanent disability he sustained and the income he used to generate from his activities and the fact that he has dependants, his children and his mother.

According to the counsel, the trial court adhered to the requirements of awarding general damages as established in the case of **Saruji Cooperation vs African Marble Company** [2004] TLR 135. Also, that due to the permanent incapacitation the 1st respondent cannot earn money which he used to earn before the injury.

Mr. Mbuya challenged the account by Ms. Erasto that the appellant did not see the 1st respondent to be among the injured persons in the accident as was neither found at Rungwe hospital nor at Mbeya Referal hospital. That there was no any evidence to support his claim.

As to the contention that exhibit P10 was not on record Mr. Mbuya requested this court to find the same to be typing error and that what is important is the existence of the judgment which is the subject of this appeal.

Mr. Mbuya further contended that there was no contradiction of evidence since of the 1st respondent as he pleaded in the plaint that he was admitted to Mbeya Zonal Referal Hospital on 19/12/2018 and discharged on 3/1/2019 and that the surgery was conducted on 26/12/2018. That the said contradiction of PW2 was a typing error of the proceedings. Mr Mbuya referred this court to the evidence of PW1, PW2 and PW3 which talked about the same story.

Mr. Mbuya continued that the receipt tendered by the 1st respondent showed that it was issued after a week of his injury because treatment is the process which is not mandatorily the receipt to be issued on the very day of the incidence or on the day of attending to the hospital. Thus, that the receipt dated 24/12/2018 was just one of the other medical treatment the 1st respondent undergone.

As to the fist ground of appeal, Mr. Mbuya argued that it was proper for the trial court to hold the appellant liable to pay compensation since he was the owner of the motor vehicle which caused incapacitation of the 1st respondent. Also that the appellant himself admitted in his testimony that the accident was caused by his driver. That the driver said that the cause of accident was break failure hence, the appellant has to shoulder the burden for his negligence of not repairing the motor vehicle. According to him the appellant was properly held liable under the doctrine of vicarious liability.

As to the third 3 ground of appeal, Mr. Mbuya supported the complaint by the appellant that the 3rd respondent being the insurer of the motor vehicle which involved in accident was supposed to be held liable in compensating the 1st respondent. He argued that the act of the 3rd respondent to ask about medical examination report of the 1st

respondent and the fact that the appellant tendered cover note of the insurance were proof that the 3rd respondent was liable to compensate the 1st respondent under the third party insurance policy.

At the end the respondent prayed for dismissal of the appeal and grant of costs.

Ms. Mgaya for the 3rd respondent submitted in respect of the 3rd ground of appeal only arguing that the trial court was correct to exonerate the 3rd respondent from the liability since the accident was caused by an unqualified driver which was against the law.

In rejoinder, Ms. Erasto essentially reiterated his submissions in chief.

Having considered the grounds of appeal, the rival submissions by counsel for the parties, the pertinent issue for determination is whether the instant appeal has merits. I will resolve that issue by going through the complaints raised in the grounds of appeal following the manner they were argued by the advocates for the parties.

Starting with the complaint in the 4th and 6th grounds of appeal that the 1st respondent/the plaintiff in the trial court did not prove his case and that there was no justification on the awarded general

damages. On that complaint it was the view of Mr. Mbuya for the 1st respondent that the trial court was correct to decide in favour of the 1st respondent. On my side, since the complaint relates to the evaluation of evidence, I am bound to revisit the evidence adduced by the parties in the trial court and come to my own conclusion.

In performing this noble duty, as correctly argued by Ms. Erasto, the general principle is that, he who alleges must prove. This is per section 110 of the Evidence Act, Cap 6 R.E 2022 and many cases including the case of **Kwiga Masa v. Samwel Mtubatwa** [1989] TLR 103. Also, it is the settled law that in civil cases the standard of prove is on the balance of probability - section 3 (2) (b) of the Evidence Act. The latter entails that the court will uphold the evidence and decide in favour of a party whose evidence is weightier than the other; see **Hemed Said vs Mohamedi Mbilu** [1986] TLR 113, **Ikizu Secondary School vs. Sarawe Village Council,** Civil Appeal No. 163 of 2016 (unreported) and the case of **Scania Tanzania Limited vs. Gilbert Wilson Mapanda**, Commercial Case No. 180 of 2002 (unreported) where *'balance of probabilities'* was ascribed to mean that:

"A court is satisfied an event occurred if it considers that on evidence, the occurrence of the event is more likely than not."

In the instant matter, it was upon the 1st respondent to prove that he was among the passengers who were injured in the accident which occurred 17/12/2018 involved the appellant's motor vehicle. He was also constrained to prove that he was hospitalized and medically treated. According to the appellant and his counsel the 1st respondent's proof that he was a passenger in the motor vehicle was supposed to be by producing a bus ticket. Also that he himself (that is the appellant) after the accident made a follow up to the hospitals but found that the 1st respondent was not among the victims.

Regarding this pertinent issue, after keenly revisited the evidence adduced by the 1st respondent as PW1, by the doctor (PW2) who attended him at Mbeya Zona Referral Hospital and PW3 who investigated the accident and assisted to send the injured persons to the hospital. I find the 1st respondent's evidence probable than not that he was among the passengers who were injured in the accident which involved the appellant's motor vehicle on 17/12/2018.

The complaint by the appellant that the bus ticket was not tendered and that the PF3 (exhibit P1) was not filed on the same date of the incident they are unmaintainable. This is because, the 1st respondent pleaded in the plaint and gave evidence that he became unconscious as the result of the accident and that he was firstly taken to Rungwe District Hospital then after two days, that is on 19/12/2018 he was transferred to Mbeya Zonal Referral Hospital. This very evidence was also adduced by PW3.

Under that situation, I agree with Mr. Mbuya that it was impracticable for the 1st respondent to keep bus ticket and that the reason why exhibit P2 was filled on 19/12/2018 instead of 17/12/2018 was justified.

In addition, the account by the appellant that he made a follow up himself and that he was told that the 1st respondent was neither among the victims who were taken to Rungwe Hospital nor to Mbeya Referral hospital is nothing than hearsay evidence. This is because, all what he told the court was the information he received from other persons who were never disclosed or called as witnesses.

Another complaint by the appellant and the argument by Ms. Erasto is that the trial court was not justified in awarding general damages of Tshs. 20,000,000/= to the 1st respondent. On his side, Mr. Mbuya was of the view that the trial court was proper.

I find it incumbent to restate the principle regarding awarding of general damages by the trial courts. Unlike specific damages which need be specifically pleaded and strictly proved, as a general rule general damages are awarded at the discretion of the court, exercised judiciously. See **RENI International Company Limited vs Geita Gold Mine Limited,** Civil Appeal No. 453 of 2019 CAT at Dodoma (unreported) and **Cooper Motors Corporation Ltd vs Moshi/Arusha Occupational Health Services** [1990] TLR 96.

That being the law, appellate courts like this one in the instant matter, rarely interferes with that discretion. That was the observation in the **Cooper Motors Corporation Ltd case** (supra). Appellate court may nevertheless do so with reasons; see **Reliance Insurance Company Ltd & Two Others v. Festo Mgomapayo**, Civil Appeal No. 23 of 2019 CAT (unreported) and the case of **The Cooper Motors Corporation Ltd vs Moshi/Arusha Occupational Health Services** (supra). In the latter case the CAT had this to say:

"Before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as taking into account some irrelevant factor or leaving out of account some relevant on); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage;"

Deriving from the above, I hastily hold that the trial court in the instant matter did not apply any wrong principle of law. It is indicated in the impugned judgment that, it considered the circumstance such as incapacitation of the 1st respondent as there was evidence by PW2 that the 1st respondent was affected by the accident in his neural and that once neural is affected it cannot return in its normal condition. There was also the 1st respondent's testimony that he sometimes loose conscious and he cannot stand for so long or do tough works. All these were taken into consideration by the trial court which I find no justifiable reason to fault. In the circumstances, I find the general damages of Tshs. 20,000,000/= awarded to the 1st respondent reasonable and justifiable.

The next issue for determination is who was supposed to be held liable to compensate the 1st respondent. It appears in this appeal that, both; the appellant and the 1st respondent are at one that the 3rd respondent being the insurer of the motor vehicle which involved in the accident was liable to compensate the 1st respondent. On her part, the 3rd respondent does not dispute to be the insurer of the appellant's motor vehicle which involved in the accident. She does also not dispute on the fact that under the third party risk insurance the insurer is liable to compensate a person injured in an accident caused by a motor vehicle which is under their insurance.

However, the 3rd respondent denies the responsibility in this matter for the reason that the cause of accident was caused by an unlicensed driver which is the unauthorized act. Her stance is the same reason why the trial court exonerate her from the liability.

On my side, I am a bit different from the reasons advanced by the trial court in exonerating the 3rd respondent from the liability and the reasons advanced by the learned counsel for the 3rd respondent in this appeal. This is because, it is not automatically open for a third party to sue the insurance company, except when there is statutory right to sue or where he has obtained a judgment against the insured. This is in

accordance with section 10 (1) the Motor Vehicle Insurance Act, Cap. 169 R.E 2002. The logic behind is that insurance is hinged on the contractual principle which binds parties to the contract.

In this case it is my view that if the appellant wanted the 3rd respondent to be liable to the compensation the 1st respondent he would have applied for third party procedure where in the cause of hearing of the suit the appellant would have adduced evidence regarding the nature of the policy as far as the act of allowing unlicensed driver. This is so because, in the referred law, the Motor Vehicle Insurance Act does not provide for standard insurance policy of which the court cannot decide without the insurance policy the 3rd respondent undertook to indemnify. Owing to that reason though different from that of the trial court I find it was proper to exclude the 3rd respondent from the liability of compensating the 1st respondent.

That being said, the remaining issue is whether the trial court was proper to hold the appellant liable under the tort of vicarious liability. According the Ms. Erasto, the trial court erred to hold the appellant liable since the act of the 2nd respondent of allowing unqualified and unlicensed driver who caused the accident was out of employment agreement and that the 2nd respondent executed his duty unfaithfully.

On his part, advocate Mbuya was of the view that since the appellant was the owner of the motor vehicle and that it was alleged by the 2nd respondent to PW3 that the cause of the accident was due to break failure, the appellant was thus liable for his negligence of not making sure that the motor vehicle was in good condition.

On my part, I find it crucial to briefly recount what vicarious liability entails. **Black's Law Dictionary**, Henry Campbell Black, 1990 defines Vicarious Liability to mean:

> "*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.*"

This branch of tortious liability has had a wider scope in its applicability across jurisdictions. In our case, the Court of Appeal of Tanzania had an opportunity of propounding a principle on how vicarious liability can apply. This was in the case of **Machame Kaskazini Corporation Limited (Lambo Estate) v. Aikaeli Mbowe** [1984] TLR 70, wherein it was held as follows:

"In order to render the employer liable for the employee's act if 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 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 position of a stranger."

It follows therefore that in order a person to be vicariously liable there should be the existence of employer – employee relationship. And there should be a proof that the act which caused injury occurred when the employee was acting in the cause of his employment. Whereas, if the act which caused injury was an independent act unconnected with the employee's employment, the employer is not liable.

In the instant case under consideration, it was undisputed that through exhibit P2, the 2nd respondent admitted before Rungwe District Court in Traffic case No. 1 of 2019 that the accident occurred when the motor vehicle was driven by one Vasco Lotti Mwaijande who did not have a driving licence. However, the accident occurred when the motor vehicle was transporting passengers from Mbeya to Kyela via Tukuyu. The appellant did not say if the route on which the accident occurred was unauthorized one nor that the 2nd respondent handled the motor vehicle to the unqualified driver for his own benefit.

It is thus, that the basic duty of the 2nd respondent was to drive passenger along Mbeya-Kyela Road. And on the material date the motor vehicle was heading to Kyela from Mbeya which means it was in the authorized route but with unauthorized mode that is the driver whom the appellant did not hire and he did not even know. Further, the appellant gave evidence that he had prohibited the 2nd respondent from allowing another person to drive the motor vehicle.

The fact that the 2nd respondent who was the employee of the appellant was entrusted with the duty of driving the motor vehicle to transport passengers and the fact that on the occurrence of the accident the motor vehicle was carrying passengers while it was driven by

another unlicensed driver. In my concerted view the accident occurred in the cause 2nd respondent employment. It cannot be considered that the 2nd respondent was performing an independent act unconnected with his employment. Therefore, the doctrine of vicarious liability in this matter was properly applied by the trial court and I find no reason to fault it.

In the end, I find the entire appeal lacking in merit. I therefore dismiss it with costs.

It is so ordered.

D.B. NDUNGURU,

JUDGE

10/01/2024