IN THE HIGH COURT OF TANZANIA

IN THE SUB-REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CIVIL APPEAL NO. 19 OF 2023

(Arising from Civil case No. 189 of 2015 of the Resident Magistrate Court of Kisutu at Kisutu)

KHALIFA RASHIDI MZEE ..... 1ST APPELLANT

MWAJUMA SAID KAMBANGWA.....2ND APPELLANT

VERSUS

AMOS MSAGALA.....1ST RESPONDENT

GTZ OFFICE DAR ES SALAAM.....2ND RESPONDENT

JUDGMENT

Date of the Last Order: 14/12/2023

Date of judgment: 12/03/2024

DING'OHI, J;

In this appeal, the appellants were aggrieved by the decision of the Resident Magistrate Court of Kisutu at Kisutu in Civil case No 189 of 2015 which found the 1st respondent herein liable for the tort allegedly committed against the appellants and thus required to pay compensation to them. The 2nd respondent was exonerated from being vicariously liable for the tort committed by the 1st respondent.

The historical background leading to this matter is that on 22/6/211 at about 10:30 at Makondeko Mparange Kilwa road, the 1st Respondent when on the course of employment, was driving a Motor vehicle with Reg. No. DFP 1489 make Toyota Land Cruiser alleged to be the property of the 2nd respondent. It was established that at the said material time and place, the 1st respondent while driving the said car, as aforesaid, was involved in the accident, in that he knocked one Rashid Khalifa who died instantly.

The 1st respondent was taken and charged in the District Court of Kibiti District for dangerous driving. As he pleaded guilty to the charge, he was accordingly convicted and sentenced to pay a fine of Tshs. 100,000/= or serve 12 months in jail. The appellants who are the parents of the deceased person, Rashidi Khalifa, sued the respondents for a claim of Tsh. 13,000,000/= being special damage for the funeral expenses and pain suffered, loss of future expectations as a result of the untimely death of their beloved son. In its decision, the trial court found that the appellants failed to prove the suit against the respondents. The reason for the decision was that the appellants failed to prove that the 2nd respondent was an employee of the 1st respondent. The trial court therefore could not find the 2nd Respondent vicariously liable for the tortious acts committed by the 1st

Respondent. In the end, as said, it exonerated the 2nd respondent from tortious liability.

The appellants felt unhappy with what the trial court decided against them. They made this appeal raising the following points of complaints;

1. *That, the trial Magistrate grossly misdirected himself on both point of law and fact in holding that, the 2nd respondent cannot be held vicariously liable for the tortious liability of the 1st respondent in the course of his employment thus contradicting himself with his own finding that the 1st Respondent was legally an employee of the 2nd respondent.*
2. *That, the learned trial Magistrate wrongly directed that, the specific and general damages awarded to the appellants should be paid by the 1st respondent instead of the 2nd respondent.*
3. *That, the trial Magistrate grossly erred in law and in fact for his failure not to take into account the cardinal principle on vicarious liability held by the 2nd respondent against the 1st respondent committing a tort in the course of employment.*

4. *That had the learned trial Magistrate carefully taken into account the totality of the evidence adduced at the trial he would have found that the 1st respondent was exonerated from liability.*

Thus, the appellants prayed this appeal be allowed in that the trial court judgment be quashed and set aside

At the hearing of this appeal, the appellants were represented by Mr. Ambrose Malamsha, the learned Advocate. The Respondents had the services of Mr. Evold Mushi, the learned Advocate. The appeal was ordered to be disposed of by way of written submission.

Arguing in support of the appeal, Mr. Malamsha opted to consolidate 1st and 3rd grounds of appeal and argued them together. In his submission, the learned advocate went on to explain what the term "vicarious liability" means per the definition provided in the **Oxford Dictionary of Law, 5th Ed, Oxford University Press, 2002** on page 525;

"*a Legal liability imposed on one person for tort 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.*"

To bolster his arguments, He went on to refer to the case **K.K Security Tanzania Limited vs Richard John Buswelu**, Civil Appeal No. 73 of 2020, and the case of **Lazaro vs Mgomera** (1986-1989) 1 EA 302

Mr. Malamsha also cemented his position with the decision of the Court of Appeal of Tanzania in the cases of **North Mara Gold Mine Limited vs Emmanuel Mwita Magesa,** (Civil Appeal No. 271 of 2019), **Machame Kaskazini Corporation Limited (Lambo Estate) vs Aikael Mbowe,** (1984) TLR 70 in which the position held in the case **Marsh vs Moores** [1949] KB 2018 as well as in the case of **Canadian Pacific Railway vs Lockhart** [1942] A.C 591 supported the submissions.

In **Machame kaskazini Corporation Limited** (supra); it was observed *inter alia* that:

"*It is a question of fact whether unauthorised act by a servant is within, or outside the scope of his employment.*

Simon was not engaged in his employer's business at the material time; the visit to his relative had absolutely no connection with his employment; his driving the vehicle was an unauthorised act outside the scope of his employment."

In line with the above authorities, the learned advocate contended that the trial court failed to rule out that, the 1st Respondent was not an employee of the 2nd Respondent. According to the learned advocate, during the hearing at the trial, the 2nd Respondent conceded that the 1st respondent was his employee.

On the 2nd ground of appeal, the learned advocate submitted that the trial court went wrong when it directed that general damages claimed by the appellants should be paid by the 1st Respondent instead of the 2nd Respondent. Mr. Malamsha challenged that decision by the trial court. He contended that the 2nd respondent was vicariously liable under the doctrine of vicarious liability which holds the master liable for the acts committed by his employee after taking into consideration that the acts were done in the course of employment.

In reply, Mr. Avold Mushi argued that the motor vehicle with Registration Number DFP 1489 Land Cruiser was not the property of the 2nd respondent. Rather, it is the property of the Government of Tanzania and the 1st Respondent was not an employee of the 2nd Respondent.

He went on to submit that, under the circumstances, the 2nd respondent cannot be held vicariously liable for the tortious acts committed by the first

respondent. The appellants have to prove that the 1st respondent was an employee of the 2nd respondent. According to the learned advocate, that duty was not discharged by the appellants.

In response to the 3 and 4 grounds of appeal, the learned advocate argued that the trial magistrate was correctly directed that the specific and general damages awarded to the appellants should be paid by the 1st respondent instead of the 2nd respondent. That is because, according to the learned advocate, the appellant failed to prove that the motor vehicle allegedly caused the accident was the property of the 2nd respondent. He also failed to prove that the 1st respondent caused an accident while he was in the course of employment.

He went on to submit that the trial magistrate was correct to take into recognizance the cardinal principle of vicarious liability because 1st respondent did not appear in the trial court to prove that he was an employee of the 2nd respondent. He cited the case of **Machame Kaskazini Corporation Ltd vs Aikael Mbowe** (1984) TLR 70, where the principle of vicarious liability was well settled. For that, he prayed that this court be pleased to dismiss the appeal with costs.

Having carefully gone through the trial court's record, grounds of appeal, and submissions by both sides, the central issue for determination is whether this appeal has merit. I will be brief and straightforward.

A convenient starting point is to consider under what circumstances can an employer be liable for the conduct of the employee. In **Rev. Christopher Mtikila v. The Editor, Business Times & Augustine Lyatonga Mrema** [1993] TLR 60. The doctrine of vicarious liability was widely discussed by Samatta, J (as he then was). It was observed *inter alia* that;

> *"The doctrine of vicarious liability, whereby the master or principal is liable for tortious acts or omissions of his servant or agent, committed in the course of the servant's or agent's employment or agency, being part of the common law, is undoubtedly, part of the law of this country."*

It is not insignificant to state that, in the instant appeal the relevant issue to be resolved is whether the 2nd Respondent is liable for the acts done by the 1st Respondent under the principle of vicarious liability. That is because the advocate for the 2nd Respondent has disputed the existence of the employment relationship between the 1st and 2nd Respondents.

In the book of **Sarkar's Laws of Evidence.** 18th Edition, published by Lexis Nexis, page 1896 it stated:

> *"... the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is an ancient rule founded on consideration of good sense and should not be departed from without strong reason .... Until such burden is discharged the other party is not required to be called upon to prove his case. The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..."*

Buying the foregoing analysis from Sarkar's Laws of Evidence I am of the view that since the 1st Respondent did not show up in civil case no 189 of 2015 before the trial court to testify as to whether he was an employee of

the 2nd Respondent, the *onus probandi* was for the appellants to prove that the car with registration No. DFP 1489 makes Toyota Land Cruiser was owned by the 2nd Respondent. Failure to prove the ownership of the motor vehicle that allegedly caused the accident, the tort of vicarious liability can not stand against the 2nd Respondent.

It goes therefore that the appellants have failed to prove the tort of vicarious liability against the 2nd Respondent to meet the principles well evaluated in the case of **Rev. Christopher Mtikila** (supra).

In the upshot, the appeal lacks merit. It is hereby dismissed. Owing to the circumstances of this case, parties are to bear their respective costs.

Order accordingly.

Dated at Dar es Salaam this 12th March 2024.

S. R. DING'OHI

JUDGE

12/03/2024