IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., KITUSI, J.A. And MDEMU, J.A.)

CIVIL APPEAL NO. 183 OF 2020

BENITHO THADEI CHENGULA ..... APPELLANT

VERSUS

ABDULAHI MOHAMED ISMAIL
(Father and Administrator of the Estate
of the late **Mariam Abdulahi Mohamed Ismail**) ..... **RESPONDENT**

(Appeal from Judgment and Decree of the High Court of Tanzania, at Dar es Salaam)

(Mlyambina, J.)

dated the 26th day of August, 2019
in
Civil Case No. 92 of 2014

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JUDGMENT OF THE COURT

16th & 23rd August, 2023

KITUSI, J.A.:

The suit from which this appeal arises was based on a tragic incident. On 16th May, 2013, the respondent's daughter one Mariam Abdulahi Mohamed Ismail, was proceeding to school on foot, using a route that took her through a site where the appellant's four storey house was being constructed. When she was passing by the building, a piece of timber with a nail sticking from it fell on the girl's head from the top floor. There was no dispute that the girl died as a result of that incident.

The respondent sued, alleging that the incident was a result of negligence on the part of the appellant and two other persons not presently parties. The respondent pleaded, and there was no dispute that, the appellant had engaged Kilem Engineering Co. Ltd the first defendant to construct his house, with Mewa Consulting Engineering Company the third defendant, being the consultant. The appellant was cited as the second defendant while the Municipal Council of Ilala was impleaded as the fourth defendant for having issued to the appellant, the requisite building permit.

The nature of the alleged negligence was that the appellant, second and third defendants failed or omitted to take reasonable measures to protect people passing by under the house, which duty they owed to members of the general public including Mariam Abdallah Mohamed Ismail, henceforth, the deceased.

There was no dispute again that at the material time, construction had stopped for some months, yet a woman known as Oliver had found her way to the top floor of the unfinished house from where she threw the lethal piece of timber. The respondent claimed that at the material time Oliver had been working for the first defendant, on the basis of which he alleged the company to be vicariously liable. On the other hand, the first defendant disputed being Oliver's employer. Mathew

Cosmas Kimaro (DW1) who testified on behalf of the first defendant stated that to the best of his recollection, Oliver was the appellant's relative who used to hang around at the site with the appellant's sister to provide food services to casual labourers. DW1 conceded that the wire mesh which would have prevented objects from falling and hitting passersby had been worn out, a fact which had been communicated to the appellant but he had not taken any step yet. He also testified that, the appellant had assumed management of the site because as alluded to, construction work had stopped. The appellant did not contradict that fact nor the fact that the security guards manning the building were hired and controlled by him.

That story was materially supported by Juma Hussein Msonge (DW3) a consultant working for the third defendant. He stated that, since Oliver was not an employee of the first and/or third defendants, liability for her negligent act must be attributed to the person who gave her access to the building.

The High Court was satisfied that, Oliver's access and entry into the building was facilitated by the appellant's hired security guards on the basis of which it held him liable for Oliver's negligence despite the fact that at the time of the incident he was away on a business trip to

China. It cleared from liability the first, third and fourth defendants which perhaps explains why they are not parties here.

The respondent had asked for the following reliefs from the High Court; payment of Shillings one hundred million being funeral costs; Shillings two hundred million, punitive damages and shillings seven hundred million, general damages. The learned trial judge took cognizance of the *"psychological, mental torture and shock to the plaintiff and family"* and awarded him shillings twenty million for funeral costs and shillings one hundred million being general damages, with costs. It awarded interest from the date of judgment till full payment.

This appeal demonstrates the appellant's grievance with that decision. He had raised a total of six grounds but abandoned two of them, that is, the third ground that had sought to challenge the trial judge's finding that the Labour Institution Act, 2014 applies in the relationship between him and the first defendant and; the fourth ground that wrongly assumed that the court's answer to the second issue relating to negligence, was in the negative.

We need to clarify the above position a bit. It occurred to us and the appellant's counsel Mr. Reginald Shirima agreed, that the court's finding that the relationship between the appellant and the first

respondent was governed by the Labour Institutions Act though likely to be wrong, was inconsequential because it did not form the basis of the final decision, so pursuing that ground of appeal would only be academic. As for the fourth ground, it was built on a wrong premise that the court's finding that the first third and fourth defendants were not negligent covered the appellant too whereas it did not. That is the reason the two grounds were abandoned.

The remaining grounds of appeal are reproduced under:

1. *That the learned trial Judge erred in law and in fact by entertaining the suit which the court had no jurisdiction.*
2. *That the learned trial Judge erred in law and in fact by entertaining the suit which the plaintiff had no capacity to sue.*
5 *That the learned trial Judge erred in law and in fact by holding that one Oliver was not the work woman of the 1st Defendant and that the security guard was supposed not to allow her in.*
6 *That the learned trial Judge erred in law and in fact by condemning the Appellant to pay funeral costs and general damages to the Respondent.*

In the course of arguing the appeal Mr. Shirima abandoned the fifth ground of appeal too after conceding that the ground cannot be entertained in the absence of the first defendant who was not served

with the notice of appeal in terms of rule 84 of the Tanzania Court of Appeal Rules, 2009. He therefore argued the remaining three grounds, in support of the appeal and Mr. Mashaka Ngole, learned advocate for the respondent argued in opposition. The issue of jurisdiction and locus standi forming the first and second grounds, being fundamental, were addressed first.

Mr. Shirima submitted that, the pecuniary jurisdiction of a court is determined by the amount prayed in special damages, a settled principle with which Mr. Ngole readily agreed. Certainly, the learned counsel are correct as the position in the case of **China Friendship Textile Co. Ltd v. Our Lady of the Usambara Sisters**, Civil Appeal No. 84 of 2002 is clear on that.

In this case the respondent pleaded special damages amounting to TZS 100 million so that should be our basis for determining the court's pecuniary jurisdiction. Mr. Shirima's argument is that in 2014 when the suit was filed, the pecuniary jurisdiction of the High Court was above TZS 100 million. He pointed out that in terms of section 40 (2) (b) of the Magistrates' Court Act, (MCA) it is the District Court which had the requisite pecuniary jurisdiction on the suit. In essence, the learned counsel submitted that, the High Court lacked pecuniary jurisdiction to try that case which ought to have been filed at the District Court, the

lowest court to entertain the suit, as per section 13 of the Civil Procedure Code (CPC).

Mr. Ngole took a different view and maintained that the High Court had jurisdiction. He referred to two amendments of the laws that affected pecuniary jurisdiction of the District Court. The first is that of 2016 followed by that of 2019. He then submitted that in 2014 the applicable version of the MCA was the Revised Laws of 2002 which set the pecuniary jurisdiction of the District Court at Shillings 3 million. On this basis, he argued that, shillings 100 million was well above the pecuniary jurisdiction of the District Court. The learned counsel submitted further that, no provision has been cited that ousts the general jurisdiction of the High Court. Mr. Shirima's rejoinder was that at the time of filing the suit, the jurisdiction of the District Court was above one hundred shillings.

Did the District Court have jurisdiction to entertain a claim whose value was shillings 100 million in 2014?

It seems to us that section 40 (2) of the MCA has undergone three amendments from 1991 to 2016 affecting the pecuniary jurisdiction of the District Court for claims other than immovable property, that is, vide Act No. 27 of 1991 which raised the pecuniary jurisdiction from TZS 200,000 to TZS 10 million; Act No. 25 of 2002 which raised the amount

to TZS 100 million and; Act No. 3 of 2016 which raised the amount to TZS 200 million.

Since in 2002 the pecuniary jurisdiction of the District Court for claims other than immovable property was TZS 100 million, and the next amendment that changed that amount came in 2016 vide Act No. 3 of 2016, it is only logical to conclude that in 2014 the pecuniary jurisdiction of the District Court was TZS 100 million. This means that the District Court had jurisdiction over the matter.

The immediate question that follows is whether in view of the above, the High Court had no jurisdiction over the suit worth TZS 100 million. Mr. Ngole has argued that there is no express ouster of the jurisdiction of the High Court. We note that, Act No. 4 of 2016 amended section 13 of the CPC by adding a proviso to read as follows:-

> *"Every suit shall be instituted in the court of the lowest grade competent to try it and, for the purpose of this section a court of resident magistrate and a district court shall be deemed to be courts of the same grade:*
>
> ***Provided that the provisions of this section shall not be construed to oust the general jurisdiction of the High Court."***

The general jurisdiction of the High Court is stipulated by Article 108 of the Constitution of the United Republic, 1977 (the Constitution).

We ask again whether the finding that the District Court had jurisdiction presupposes that the jurisdiction of the High Court had been ousted. In **Francis Andrew v. Kamyn Industries (T) Ltd** [1986] TLR 31, the High Court dismissed the suit claiming TZS 14,549 because the pecuniary jurisdiction of the court at that time was TZS 20,000. In another case of **Ahmed Ismail v. Juma Rajabu** [1985] TLR 204 the High Court proceeded with hearing of a suit that had been filed within Tanga registry instead of Arusha registry because, in its opinion, the error had not occasioned a miscarriage of justice.

In our view, Mr. Ngole's argument that there is no express ouster of jurisdiction of the High Court is worth considering in the circumstances of this case. Article 108 of the Constitution and section 7 of the CPC confer the High Court with general jurisdiction except on matters for which the jurisdiction of the court is expressly ousted. These are such as matters involving disputes over Energy and Water Utilities Regulatory Authority (EWURA). See **Salim O. Kobora v. Tanesco Ltd & Others** Civil Appeal No. 55 of 2014 (unreported), or cases involving claims under the Taxi Revenue Acts. See, **Tanzania Revenue Authority v. Tango Transport Company Ltd** Civil Appeal No. 84 of 2009 (unreported)] and cases in which the original jurisdiction of the High Court is expressly ousted. See the case of **John Sangawe v. Rau**

River Village Council [1992] TLR 90, where the Import of section 63 (1) of the MCA was discussed. That section expressly ousts the High Court's original jurisdiction by providing:

> *"Subject to the provisions of any law for the time being in force where jurisdiction in respect of the same proceedings is conferred on different courts, each court shall have a concurrent jurisdiction therein.*
>
> *Provide that no civil proceedings in respect of marriage, guardianship or inheritance under customary law, or the incidents thereof, and no civil proceedings in respect of immovable property, other than proceedings relating to land held on a government lease, or a right of occupancy granted under the Land Ordinance or proceedings under section 22 or 23 of the Land Ordinance shall be commenced in any court or unless the High Court gives leave for such proceedings to be commenced in some other court."*

In the **Sangawe case** the High Court entertained a claim for right to immovable property held under customary law. The Court nullified the proceedings, and proceeded to refer to its previous decision in Civil Appeal No. 25 of 1989:

"We held that the High Court has no original jurisdiction in the matters mentioned above and cannot therefore order such proceedings to commence in itself. Our conclusion on this point is supported by the view expressed by this court in the case of ***Frank M. Marealle v. Paul Kyauka Njau*** *[1982] T.L.R. p. 32."*

We think the rationale or policy behind the provisions of section 63 (1) which deprive the High Court of original jurisdiction in these [matters is to] involve the community at the grass roots level, that the matters are better dealt with first by courts which are closer to the people than the High Court."

In the instant case we are more concerned with what we consider to be the justice of the case and it is our considered view that the error of instituting it in the High Court instead of the District Court did not occasion a miscarriage of justice as it did not prejudice any of the parties. Besides, since section 13 of the CPC was amended two years later by Act No. 4 of 2016 by adding the proviso whose effect is to render the present objection regarding jurisdiction to be redundant, we shall not uphold the first ground of appeal. In our view, doing otherwise will serve no useful purpose other than historical. It will just reduce our decision to a mockery as it was cautioned by the High Court in the case

of **Vidyadhar Girdharal Chavda v. The Director of Immigration & Others** [1995] T.L.R 125, which we adopt. We therefore dismiss the first ground of appeal.

The second ground of appeal challenges the High Court for having entertained the suit that was preferred by the respondent who was not an administrator of the victim's estate. Mr. Shirima submitted that the suit could not be preferred under O.XXX1 of the CPC which covers suits by next friends on behalf of minors because he appreciated the fact that the said provision is relevant to suits involving a minor who is surviving. Mr. Ngole was also resigned and submitted that O.XXX1 of the CPC does not apply to the case at hand.

Attention of counsel was brought to the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310, especially sections 3 and 4 which provide:

> *"3. If the death of any person is caused by the wrongful act of any person and the wrongful act is such as would, if death had not ensued, have entitled the person injured thereby to maintain an action recover damages in respect thereof the person who would have been liable if death had not ensured shall be liable to an action for damages, notwithstanding the death of the person injured, and although the*

death was caused under such circumstances as would amount in law to a criminal offence.

4. *Every action brought under the provisions of this Part shall be for the benefit of the dependants of the person whose death has been so caused, and shall be brought either by and in the name of the executor or administrator of the person deceased or by and in the name or names of all or any of the defendants (if more than one) of the person deceased."*

However, when the learned counsel addressed us, it became obvious that we were still at a cross road because the respondent who is a parent of the deceased is not covered by those provisions for the reason that he is neither an executor, administrator of the estate or a dependant. It would appear that both under O.XXXI of the CPC and sections 3 and 4 of Cap. 310 it is difficulty for a parent to maintain an action against a person whose wrongdoing causes death of his child.

Beyond our jurisdiction, we came across some relevant information contained in an article titled **Evidence: Death by Wrongful Act: Mitigation of Damages** by G.H.G, published in California Law Review (*https//www.jstor.org/stable/3474589*, dated 18.8.2023), the author shows that a similar legal regime existed in America in the past,

resulting in what he calls *"Cold blooded attitude of wrongdoers"* who reached a point of saying, *"...it is cheaper to kill a man in an accident than to injure him and let him live..."* We wonder if it is correct for our laws to leave a wrongdoer go scot - free just because his wrongdoing has resulted into death of a minor who has neither dependants nor an estate to be administered.

In California, laws were subsequently changed to address the wrongdoers' indifference to deaths. In England, the Fatal Accidents Act, 1976, Cap. 30 provides for right of action for a wrongful act that causes death in the following terms:-

> *1 (1) If death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.*
>
> *(2) Every such action shall be for the benefit of the dependants of the person ("the deceased") whose death has been so caused.*
>
> *(3) In this Act "dependant" means-*

(a) the wife or husband of the deceased,

(b) ***any person who is a parent or grandparent of the deceased,***

(c) any person who is, or is the issue of, a brother, sister, uncle or aunt of the deceased." (Emphasis ours).

Inspired by the above, we agree with the learned judge that the trauma and anguish of losing a child entitles a parent to maintain an action against a wrongdoer or else it will be cheaper to cause someone's death through a wrongful act than to injure him and let him live. Our position is strengthened by the principle that where there is a wrong, there is a remedy (**ub jus ibi remedium**). See the case of **Robert Mhando & Another v. Registered Trustees of St. Augustine University of Tanzania,** Civil Appeal No. 44 of 2020 (unreported). Consequently, we dismiss the second ground of appeal.

The last ground of appeal is also worth our while. It challenges the award of special damages for burial costs and general damages. Mr. Shirima submitted briefly that there was no strict proof of special damages as required by law and further that the trial judge did not rationalize the award of TZS 100 million as general damages. In response, Mr. Ngole pointed out that the last ground of appeal challenges the award of damages while the submissions by Mr. Shirima address the quantum. He submitted that award of general damages is at

the discretion of the trial court, and that TZS 100 million that was awarded is within that discretion.

It is an established principle that special damages must be specifically pleaded and strictly proved as correctly argued by Mr. Shirima. See **Judge – in-Charge High Court at Arusha and the Attorney General v. N.I.N Munuo Ng'uni** [2004] T.L.R 44. In this case no such proof came forth, such that even Mr. Ngole could not muster any material to impress us that there was any proof. Therefore, the award of TZS 20 million as special damages is set aside because it did not proceed on any proof.

We turn to general damages. Much as award of general damages is at the discretion of the trial court as correctly argued by Mr. Ngole, that does not mean the trial court can award them arbitrarily. There must be some basis for the award as it was said in **The Attorney General v. Roseleen Kombe (as the Administratrix of the late Lieutenant General Imran Hussein Kombe, deceased)** [2005] T.L.R. 208.

As we alluded to earlier, the trial court took into account the psychological, mental torture and shock. In the case of **Sisti Marishay (suing as next friend of Emmanuel Didas) v. The Board of Trustees – Muhimbili Orthopaedic Institute (MOI) & 2 Others,**

Civil Case No. 129 of 2012 (unreported), a case where the hospital wrongly amputated a patient's limb, the High Court was faced with the task of determining what 'just compensation' was in that case. In the course of deliberations, the learned judge reproduced the following passage from the case of **Concord of India Insurance Co. Ltd v. Nirmala Devi** (1979 4 SCC 369:

> *"The determination of quantum must be liberal, not niggardly since the law values life and limb in a free country in generous scales".*

With respect, we adopt that position as expressed by the High Court and echo the observation that the law values life. It should be noted that the need for replacing the protective wire mesh which might have prevented falling objects from reaching the ground at the site, was earlier brought to the attention of the appellant but he ignored it. In our view, this fatal omission was directly connected to the appellant.

In the end, we are satisfied that the trial judge's consideration of shock and psychological torture to the family of the deceased minor was enough to justify his award of general damages which he estimated at TZS 100 million. In our re-evaluation of the evidence, we have discussed how the appellant ignored the warning on the need to replace the wire mesh. This part of the last ground of appeal has no merit and stands dismissed.

All said except for the award of special damages, which we have set aside, the appeal is dismissed with costs.

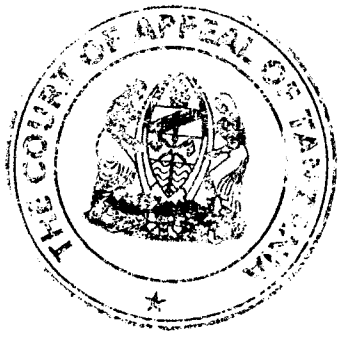
DATED at **DAR ES SALAAM** this 22nd day of August, 2023.

S.E.A. MUGASHA
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of August, 2023 in the presence of Mr. Hemed Nassoro, learned Counsel holding brief for Mr. Reginald Shirima, learned Counsel for the Appellant and also for Mr. Mashaka Ngole, learned counsel for the Respondent, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL