IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUGASHA, J.A., KEREFU, J.A. And KIHWELO, J.A.)

CIVIL APPEAL NO. 271 OF 2019

NORTH MARA GOLD MINE LIMITED.....APPELLANT

VERSUS

EMMANUEL MWITA MAGESA .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Gwae, J.)

dated the 8th day of November, 2018
in
Civil Appeal No. 43 of 2016
.....

JUDGMENT OF THE COURT

13th & 18th July, 2022

KIHWELO, J.A.:

This is the second appeal by the appellant, North Mara Gold Mine Limited, which is sturdily challenging the High Court (Gwae, J.) by its judgment dated 8.11.2018 which upheld the decision of the District Court of Tarime that awarded the respondent TZS. 40,000,000.00 as general damages for the injuries sustained to the respondent by the alleged appellant's employees.

The facts of this appeal are quite simple and straight forward but in order to appreciate the issues of contention in this matter, we find it apt to begin with the essential background of the case.

In the District Court of Tarime at Tarime (the trial court), the respondent sued the appellant, claiming TZS. 95,000,000.00 being compensation for the injuries sustained by the alleged appellant's security guards who violently attacked the respondent and thereby causing him severe injuries. The respondent further, claimed TZS. 4,878,000.00 being refund for hospital treatment charges he incurred at Shirati KMT Council Designated Hospital from 3.01.2015 to 2.02.2015.

The essence of the respondent's suit as it was pleaded in the plaint is that, on 3.01.2015 the respondent who later testified before the trial court as PW1, was coming back from his daily chores, while being ridden on a motorcycle by Chacha Masicho (PW2). Along the road that travel through the appellant's premises, he encountered what he believes to be three appellant's security guards who were in the appellant's uniforms and they were chasing up some youths from the mine site area. Suddenly, the three security guards ambushed the respondent and started beating him with

sticks but also kicked him with their boots on various parts of his body and thus, causing him severe body pain and injury.

A little bit later, the respondent who by then was unconscious was taken to Nyamongo Police Station by (PW2), a motorcycle rider and others who did not testify before the trial court. At the police station, he was given PF3 (exhibit P3) and later was rushed to the nearby hospital at Kirati KMT Council Designated Hospital for immediate treatment and one Jongo Machage (PW3), a medical doctor treated him by performing surgery and found out that, PW1's liver was damaged something which caused internal bleeding. The respondent was admitted for two weeks for further medical treatment and later he was discharged.

As the respondent's situation was not improving, and with the support of the appellant, he was referred to Bugando Hospital for further treatment. He accordingly received the requisite treatment at Bugando Hospital. Previously, before being taken to Bugando Hospital, the respondent registered a formal complaint with the appellant (exhibit P1) who promised to work on it. However, later, the appellant rebuffed the demand. Accordingly, the respondent approached the trial court claiming for reliefs as hinted above.

In its written statement of defence, the appellant gallantly denied the respondent's claim. It averred that, her alleged security officers neither attacked nor injured the respondent and that all the respondent's claims were malicious and baseless. The appellant also denied any admission of the respondent's claim, and that the complaint was registered with the appellant's Community Relations Office as a matter of procedure.

It was further averred by the appellant that, her decision to conduct medical check-up of the respondent at her clinic and the decision to refer him to Bugando Hospital for further diagnosis was done on merely humanitarian grounds and as a gesture of good neighbourhood to the surrounding community. On that basis, the appellant prayed that the suit be dismissed with costs.

At the commencement of the trial, three issues were framed for determination by the court. **One**, whether the plaintiff was injured by the defendant's employees. **Two**, whether the plaintiff suffered any damage due to the injuries and **three**, to what reliefs are the parties entitled to.

In seeking to prove his claim, the respondent lined up three witnesses and produced three pieces of documentary exhibits. On the adversary side,

the appellant produced three witnesses but did not tender any documentary exhibit.

In her judgment, the learned trial Magistrate found out that, it was proven through the evidence of PW1 and PW2 that, it was the appellant's security guards who caused injuries to the respondent and that they were identified by their uniforms and helmets they put on that particular day. The learned trial Magistrate also found out that the conduct of the appellant of not giving feedback to the respondent on the complaint registered and coupled with the support that the appellant gave to the respondent, amounted to admission of liability. She also took into account that the appellant did not produce a single witness from the neighbourhood who has ever benefited from the gesture of humanitarian that the appellant claimed to have done to the respondent. She also answered in the affirmative the second issue and finally ordered the appellant to pay the respondent as hinted before.

Unamused, the appellant approached the High Court by way of appeal and upon hearing the parties on merit, it dismissed the appeal. The High Court Judge, like the trial court, found it proven upon the evidence of PW1 and PW2 that, it was the appellant's security guards who inflicted injuries on

the respondent thinking that he was among the trespassers in the mining area who were being chased. According to the High Court Judge, the appellant's security guards were not only identified by their dress code only but also the evidence that they were the ones who were chasing people from the appellant's mining area. In his holding, the High Court Judge found the appellant vicariously liable for the deeds of his security guards which he held that the appellant cannot escape as such deeds were done in the course of the employment. He therefore, found that the amount of TZS. 40,000,000.00 awarded by the trial court to the respondent was not excessive bearing in mind the extent of the injuries the respondent sustained and the reasons assigned by the learned trial Magistrate. This is what precipitated the instant appeal.

The appellant has filed this appeal which is grounded upon five (5) points of grievance, namely:

1. *That, the High Court erred in fact in holding that the respondent was assaulted by the appellant's employees.*
2. *That, the High Court erred in fact and in law in holding that the unidentified assaulters were performing duties of the appellant.*

3. *That, the High Court erred in fact in holding that the police of mining were the appellant's security guards in the absence of evidence to that effect.*
4. *That, the High Court erred in fact and in law in holding that the appellant's failure to document the investigation amounted to admission of liability.*
5. *That, the High Court erred in fact and in law in failing to hold that the award of TZS. 40,000,000.00 as general damages was excessive.*

When, eventually, the matter was placed before us for hearing on 13th July, 2022 the appellant was represented by Mr. Faustin Anton Malongo, learned advocate and the respondent had the services of Mr. Deocles Rutahindurwa together with Ms. Happyness Robert, both learned advocates. Counsel for the parties, prayed to adopt the written submissions which were lodged earlier on in terms of Rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009 (the Rules). They further prayed to adopt the list of authorities they filed earlier in terms of Rule 34 of the Rules. However, we hasten to remark that, it will not be possible to recite each and every fact comprised in the submissions but we can only allude to those which are conveniently relevant to the determination of the matter before us.

Mr. Malongo prefaced his submission by contending that the instant appeal raises five issues namely, **one**, whether the respondent was assaulted by the appellant's employees, **two**, whether the unidentified assaulters were performing duties of the appellant, **three**, whether the police of mining were the appellant's security guards, **four**, whether the appellant's failure to document the investigation amounted to admission of liability and **five**, whether the award of TZS. 40,000,000.00 as general damages was excessive. He further, submitted that, the burden of proving the allegations in the plaint was on the respondent and cited section 110 (1) and (2) of the Evidence Act, [Cap. 6 R.E. 2019] (the Evidence Act).

In highlighting the written submissions, Mr. Malongo started arguing the first ground of appeal by contending that, based upon the evidence which was presented before the trial court it is clear that, the respondent did not identify those who assaulted him. He further, faulted the learned High Court Judge for arriving to the conclusion which was not supported by evidence on record. To support his proposition, he referred us to pages 104, 105 and 106 of the record of appeal and contended that there is nowhere in the record of the trial court where it is indicated that the security guards of the mine were involved in chasing trespassers, but on the contrary the said

guards were not identified and neither PW1 nor PW2 did mention about the trespassers, Mr. Malongo argued.

Mr. Malongo further, while referring to pages 33 and 35 of the record of appeal, challenged the learned High Court Judge for arriving to the conclusion that there was evidence of dress code alleged worn by the said security guards of the appellant, something which according to him was not supported by any evidence from the trial court. He argued that, PW1 and PW2 merely mentioned that the said attackers wore helmets and glasses which in any case they were not proved to be the dress code of the appellant's security guards. He rounded up his submission by arguing that as there was no evidence to prove that the respondent was attacked by the appellant's security guards, the first ground has merit.

Arguing the second ground of appeal, Mr. Malongo was brief and focused. He contended that, it was erroneous and misleading for the learned High Court Judge to hold that the unidentified attackers were performing duties of the appellant and that the appellant cannot escape from the liability under the doctrine of vicarious liability. To support his argument, he referred us to pages 106 and 107 of the record of appeal as well as the case of **Lazaro v. Mgomera** [1986-1989] EA 302 which was cited by the learned

High Court Judge. In his view, Mr. Malongo argued that the learned High Court Judge's holding was made under the assumptions that the alleged security guards attacked the respondent mistakenly believing that he was one of the trespassers they were after, something which is disputed as there was no evidence on record to that effect, let alone the fact that the respondent or his witnesses testified to prove it. He finally, argued that there was no scintilla of evidence to prove that the alleged unidentified attackers were performing duties of the appellant as there was nothing to connect the alleged attackers and the appellant in the first place and therefore he contended that this ground too has merit.

In relation to the third ground of appeal Mr. Malongo was fairly very brief and faulted the learned High Court Judge for holding that the police of the mining were the appellant's security guards while there was no evidence on record to support that holding. He referred us to pages 31 and 106 of the record of appeal and argued that this ground of appeal has merit.

As regards to the fourth ground of appeal, the learned counsel submitted that, the learned High Court Judge erred in holding that, failure to document the investigation amounted to admission of liability while referring to the holding of the High Court at page 109 of the record of appeal.

He argued further, while citing section 19 of the Evidence Act, that there is nowhere on the record where the appellant expressly or orally admitted liability. He further contended that, whatever assistance was extended by the appellant to the respondent was done so on mere humanitarian grounds and not anything else, and the appellant did not undertake to document the investigation as there is no law or binding policy obliging the appellant to do so. Mr. Malongo therefore, argued that this ground of appeal has merit.

On the fifth and final ground of appeal, Mr. Malongo faulted the learned High Court Judge for his failure to find and hold that the amount of TZS. 40,000,000.00 as general damages was excessive. He further discussed at considerable length, while referring to exhibit P3 and the testimony of the respondent at page 31 of the record of appeal that, the learned High Court Judge did not properly direct its mind in arriving at the conclusion on whether the trial court applied a wrong principle of law in awarding the amount of general damages considering the fact that the respondent was a mere manual worker who did not provide evidence of his income and was advised to do light duties for six months. He cited **Stanbic Bank Tanzania Limited v. Abercrombie & Kent (T) Limited**, Civil Appeal No. 21 of 2001 and **Peter Joseph Kilibika and Another v. Patrick Aloyce Mlingi**, Civil

Appeal No. 37 of 2009 (both unreported). He concluded by submitting that this ground of appeal has merit and therefore, the appeal should be allowed with costs.

In reply the respondent prefaced his written submissions with an abridged background of the appeal which for obvious and practical reasons we will not recite. He further reminded us that, this being the second appeal we should not disturb the concurrent findings of the two courts below unless it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice or violation of some basic principles of law or practice. To facilitate an application of his proposition, he cited a number of our previous decisions in **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores v. A.H. Jariwala t/a Zanzibar Hotel** [1980] TLR 31, **Edwin Isdori Elias v. Serikali ya Mapinduzi Zanzibar** [2004] TLR 297, **Musa Mwaikunda V Republic** [2006] TLR 387, **Maria Fred v. Machungu Kibotena**, Civil Appeal No. 78 of 2005 and **Samwel Kimaro v. Hidaya Didas**, Civil Appeal No. 271 of 2018 (both unreported).

Submitting in response to the first ground of appeal the respondent was brief and to the point, and contended that the evidence of PW1 and PW2 was conspicuously clear in that it was the appellant's security guards

who attacked the respondent and no one else. Illustrating further, Mr. Rutahindurwa referred us to pages 31, 33, 34 and 35 of the record of appeal and submitted that, the respondent ably proved that it was the appellant's security guards who attacked him and therefore, the trial court as well as the learned High Court Judge were undeniably right in arriving at the conclusion that they did and therefore this Court should not disturb the concurrent findings of the two courts below as there is no basis for doing so. He therefore contended that this ground of appeal has no merit and therefore should be dismissed.

The respondent argued the second, third and fourth grounds of appeal conjointly and contended that, the respondent through the testimony of PW1 and PW2 were able to clearly demonstrate that it was the appellant's security guards who attacked the respondent, and they did that in the course of the appellant's employment and therefore, there is no way the appellant can exonerate itself from the liability under the doctrine of vicarious liability. To bolster his submission, the learned counsel cited **Rev. Christopher Mtikila v. The Editor, Business Times & Augustine Lyatonga Mrema** [1993] TLR 60 and **Lazaro v. Mgomera** (supra).

The learned counsel, in reply to the argument that the appellant extended a helping hand to the respondent on sheer humanitarian grounds and without any admission of liability, he opposed this line of argument and went on to submit, while referring to pages 34, 38, 39 and 40 of the record of appeal that the totality of the conduct of the appellant suggests nothing other than admission of liability. Illustrating, he referred to the conduct of summoning the respondent to the appellant's office, taking care of the medical check-up of the respondent at the appellant's clinic, shouldering all the responsibilities of transferring and treating the respondent at Bugando Hospital in Mwanza.

Upon being prompted by the Court on whether the appellant acted upon the request of the respondent who was in dire need of medical treatment and following the advise of PW2 as conspicuously seen at page 34 of the record of appeal, Mr. Rutahindurwa insistently argued that, the conduct of the appellant throughout is a clear manifestation that the appellant admitted his liability.

Finally, the learned counsel argued that the amount of TZS. 40,000,000.00 which was awarded as general damages was not excessive considering the circumstances surrounding the claim. He further contended

that, general damages are meant to put the injured party or a person who has suffered damage in the same position he would have been had he had not suffered damage. To support his proposition, he cited the cases of **P.M. Jonathan v. Athuman Khalfan** [1980] TLR 190, **Razia Jaffer Ali v. Ahmed Mohamed Ali Seweji and Others** [2006] TLR 433 and **Peter Joseph Kilibika** (supra). The learned counsel, rounded up by contending that, the learned High Court Judge found out that the trial Magistrate properly directed her mind and based upon the principles of awarding damages she awarded TZS.40,000,000.00 which was commensurate to the extent of the injuries the respondent sustained. He thus, argued that, this ground of appeal too has no merit and therefore, entreated us to dismiss the entire appeal with costs.

In rejoinder submission Mr. Malongo reiterated his earlier submission and argued that the appellant did not admit liability and that whatever the appellant did in helping the respondent was merely done on humanitarian grounds as a gesture of good neighbourhood to the surrounding community to which the appellant company has duty in fulfilling its corporate social responsibility.

It is now our duty to determine the appeal by considering the competing arguments made by the learned counsel for the parties in line with the grounds of appeal. However, before doing that we find it appropriate in the circumstances of the case to preface our deliberation with the basic tenets which will guide us in determining the appeal.

The first one, relates to the court sitting on a second appeal. As a general rule and as rightly submitted by both learned counsel, the second appellate court should be reluctant to interfere with concurrent findings of the two courts below except in cases where it is obvious that the findings are based on misdirection or misapprehension of evidence or violation of some principles of law or procedure, or have occasioned a miscarriage of justice. There is a considerable body of case law in this. See, for instance, **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores** (supra), **Neli Manase Foya v. Damian Mlinga** [2005] TLR 167, **Martin Kikombe v. Emmanuel Kunyumba**, Civil Appeal No. 201 of 2017 and **Jafari Mohamed v. Republic,** Criminal Appeal No. 112 of 2006 (both unreported), in the latter case, we said the following:

> *"An appellate court, like this one, will only interfere with such concurrent findings of fact only if it is satisfied that "they are on the face of it unreasonable*

or perverse" leading to a miscarriage of justice, or there have been a misapprehension of evidence or a violation of some principle of law: see, for instance, Peters v Sunday Post Ltd. [1958] E.A. 424: ***Daniel Nguru and Four Others v. Republic,*** *Criminal Appeal No. 178 of 2004 (unreported)"*

Similarly, in the case of **Neli Manase Foya** (supra) we had the following to say:

"...It has often been stated that a second appellate court should be reluctant to interfere with a finding of fact by a trial court, more so where a first appellate court has concurred with such a finding of fact. The District Court, which was the first appellate court, concurred with the findings of fact by the Primary Court. So, did the High Court itself, which considered and evaluated the evidence before it and was satisfied that there was evidence upon which both the lower courts could make concurrent findings of fact."

The second principle relates to burden of proof and standard of proof. It is a cardinal principle of law that, in civil cases, the burden of proof lies on the party who alleges anything in his favour. We are fortified in this view by the provisions of sections 110 and 111 of the Evidence Act, which among others state:

"110-(1) Whoever, desires any court to give judgment as to any legal right or liability dependent 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.

111. The burden of proof in any suit lies on that person who would fail if no evidence were given on either side."

Ordinarily, in civil proceedings a party who alleges anything in his favour also bears the evidential burden and the standard of proof is on the balance of probabilities which means that, the court will sustain and uphold such evidence which is more credible compared to the other on a particular fact to be proved. There is, in this regard a long line of authorities to that effect, if we may just cite few, **Peters v Sunday Post Ltd** (supra) and **Stanslaus Rugaba Kasusura and Another v. Phares Kabuye** [1982] TLR 338.

We shall be guided by the above principles in the course of determination of this matter.

Having read and heard the submissions from each side, we propose to approach the appeal generally, more so, as some if not all the grounds of complaint are interrelated and dependent upon each other and therefore, we think, in order to appreciate this appeal, we need to answer two questions mainly, **one**, whether the alleged attackers were identified and **two**, whether the appellant is vicariously liable.

Starting with the issue of identification of the assailants, the learned counsel for the appellant has submitted at considerable length that neither the respondent who testified as PW1 nor his witness PW2 testified to have identified the attackers as the security guards of the appellant. In our opinion, we find considerable merit in the submission by the learned counsel for the appellant as indeed, the record of appeal bears out that PW1 and PW2 did not identify the attackers. For the sake of clarity, and for completeness of records we will let records of appeal at pages 33, 34 and 104 speak for itself.

PW1 at page 33 testified in part that:

> *"I did not identify them, they beaten me by using sticks (sic). I did not indent hem (sic) as they had the cap (helmet) and black glasses."*

On the other hand, PW2 at page 34 testified in part that:

> *"At about 1430hrs we left from the area where we were building, we passed through near Mining area, we reached a place the road was rough I dropped Emmanuel and went on to weight front (sic). I heard yowe and so a people (sic) beating Emmanuel I was puzzled, I went back to the area of scene as I saw the Police of the Mining beating him, when the said Police so we coming (sic) back they ran away."*

The learned High Court Judge in his judgment held in part at page 104:

> *"I have keenly looked at the evidence of the respondent (PW1) as well as that of* ***Chacha Masicho*** *(PW2) a motorcyclist who was propelling the motorcycle on the material date. Both PW1 and PW2 had glaringly testified that the security guards of the mine were chasing the mine trespassers from the inside and abruptly when they met the "****PW2****" they started beating him till he became unconscious."*

Quite clearly, the excerpt above underscores the fact that the alleged attackers were not identified as security guards of the appellant as the trial court found, unfortunately, the learned High Court Judge, he fell hook, line,

and sinker and went on upholding that finding. To say the least, the submission by the learned counsel for the appellant has merit.

We have further examined thoroughly the record of appeal, and as rightly submitted by Mr. Malongo we have no any flicker of doubt that, surprisingly, and for an obscure cause, the learned High Court Judge held that the Police of the mine were chasing mine trespassers from the inside but this fact was not backed by any evidence on record and as such, it is based on, extraneous matter.

Thus, while it may be perfectly correct to say that there were people who attacked the respondent, it is not correct to say that PW1 and PW2 identified the attackers in the first place, let alone associating those attackers with the appellant as its employees. We have given due regard to the submission by Mr. Rutahindurwa but we find ourselves unable to buy his invitation to find that the alleged attackers were identified by PW1 and PW2 as employees of the appellant. The respondent did not prove the case before the trial court to the required standard and therefore it was erroneous and misleading for the learned High Court Judge to hold that the attackers were identified by PW1 and PW2. If we may pause here for a moment, we shall,

at a later stage of our judgment, revert to this disquieting aspect to determine its consequences.

We will next examine the issue on whether the appellant was vicarious liable. Now, as it can be clearly seen, Mr. Rutahindurwa has strongly argued that, the conduct of the appellant subsequent to the attack of the respondent is what made the appellant vicariously liable.

Even if we assume, for the sake of argument, that the attackers were identified and that they were employees of the appellant which is not the case in the instant appeal, the next sticking question to resolve which would have been another toll order for the respondent would be whether their conduct of attacking the respondent was in the course of their employment. A convenient starting point is to consider under what circumstances can an employer be liable for the conduct of the employee. In the case **Rev. Christopher Mtikila** (supra) which was cited by Mr. Rutahindurwa and in which we seek inspiration, the High Court discussed at considerable length the doctrine of vicarious liability, where 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, being part of the common law, is undoubtedly, part of the law of this country. In the case of **Machame**

Kaskazini Corporation Limited (Lambo Estate) v. Aikaeli Mbowe [1984] TLR 70 at page 73 we lucidly discussed the applicability of this universal principle when faced with analogous situation and borrowing a passage from the case of **Marsh v. Moores** [1949] 2 KB 208 at 215 in which we took inspiration it was held:

> *"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, in the **Canadian Pacific Railway v. Lockhart** [1942] A.C. 591 cited in **Marsh v. Moores** (supra) while referring to a passage in *Halsbury's Laws of England 4th Edition Vol. 16* paragraph 743 it is 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 performed, 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 its surreptitiously, and is therefore, as regards his employer, trespasser."

It is not insignificant to state that, in the instant appeal as earlier on observed, it was not proved that the alleged attackers were identified; and furthermore, even if they were identified by the respondent, still the next issue to resolve would have been whether the said attackers had connection with the appellant in the sense that they were employees of the appellant; and finally, even if it would have been established that, the attackers were employees of the appellant yet the other issue which would have to be resolved through evidence is whether they acted in the course of the

appellant's employment in line with the principles stated in the cases cited above.

In view of what we have endeavored to explain above, we are satisfied that the appellant was not vicariously liable for the injury of the respondent.

In the upshot, and based upon the foregoing, we find that there was clear misapprehension of evidence by the two courts below and therefore the appeal has merit and we allow it. Given the circumstances of this case, each party to bear own costs.

DATED at **MWANZA** this 18th day of July, 2022.

S. E.A. MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The judgment delivered this 18th day of July, 2022 in the presence of Mr. Faustin Anton Malongo, learned counsel for the appellant and Mr. Steven Mhoja who holds brief for Mr. Deocles Rutahindurwa and Ms. Happyness Robert, learned counsel for the respondent, is hereby certified as a true copy of the original.

H. P. Ndesamburo
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL