IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

CORAM: LILA, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CIVIL APPEAL NO. 307 OF 2023

UNIVERSITY OF IRINGA..... APPELLANT

VERSUS

DAUD MWAKYEMBE ..... RESPONDENT

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

(Mlyambina, J.)

dated the 14th December, 2021

in

Civil Appeal No. 03 of 2018

.....

JUDGMENT OF THE COURT

11th March & 24th June, 2024

MASHAKA, J.A.:

The appellant, University of Iringa is challenging the decision of the High Court of Tanzania at Iringa which had reversed the decision of the Resident Magistrates' Court of Iringa in favour of the respondent. The High Court, in effect held that the appellant was liable for breach of duty of care which caused harm to the respondent. It condemned her and the other three defendants who are not parties to this appeal to pay the claimed specific damages, general damages and costs of the suit to be shared on equal proportion among the four defendants who were

before the trial court. Dissatisfied, the appellant now assails the decision.

As discerned from the record of appeal, before the Resident Magistrates' Court (the trial court), the respondent, Daud Mwakyembe who was a first-year student of the appellant sued Mwinyi Omari (the 1st defendant), Karumika Nelson Ngaluhura (2nd defendant), Upendo Travellers Coach (3rd defendant), and the University of Iringa (the appellant), for breach of duty of care which caused serious harm to him. In his amended plaint, the respondent claimed for specific damages of TZS. 107,200,000.00, general damages to the tune of TZS. 2,000,000,000.00, interest at 32% of the total sum from the date of the accident to the date of judgment, interest at court rate from the date of judgment to the date of its total satisfaction of the decreed amount, costs of the suit, and other reliefs.

The background leading to the suit on which this appeal is founded is explained by the respondent who testified as PW1 in Civil Case No. 43 of 2016. PW1 told the trial court that the 1st defendant a driver of a bus owned by the 2nd defendant commonly known and belonging to Upendo Travellers Coach, the 3rd defendant a bus company operating a number of buses among them, the subject bus with

registration number T 741 BMP make Scania, negligently caused an accident which injured PW1 and other passengers. PW1 suffered injuries causing amputation of his right hand and sustained a head injury which affected his memory and capacity to think beyond repair.

According to PW1, the cause of the accident was negligent driving and speeding as the 1st defendant was unfamiliar with the road and allowed the passengers to board beyond the capacity of the bus. He alleged breach of duty on the part of the driver which is vicariously imputed to the owner of the vehicle.

Almas Twaha Msuya (PW2), Joyce Malekela (PW3), Johanis Laizer (PW4), Christina Chaula (PW5) and Hanifa Pamagila (PW6) supported the evidence of PW1 in relation to the cause and occurrence of the accident in respect of the bus Upendo Travellers Coach.

The appellant, an academic institution was impleaded for breach of duty of care as a guardian to its students who were travelling to Ruaha National Park (the RNP) for a study tour on 3rd June, 2016 and eventually were involved in the bus accident. It was PW1's pleading that under the statutory duty, of the University of Iringa organised the trip to the RNP as part of the study syllabus for the Tourism students requiring those undertaking certificate, diploma, and degree to attend. It was

PW1's contention that, the appellant did not put in place measures for the safety and well-being of the students, including transport safety, instead the students were left to find their own means of transport to attend the study tour. Knowing that it had a duty to take care of the students' affairs, and being fully aware of the inadequacy of means of transport, the appellant breached its duty of care by not organising a safe and reliable transport and or assigning the dean of the students or his/her representative to travel with the students in the public transport.

It was PW1's belief that the presence of such a person would have assisted in controlling the owner of the bus or the driver by either reminding him not to overload, not to overspeed, or drive carefully. It was further averred that his presence would have also provided immediate first aid assistance when the accident occurred and would have extended to prevent the hospital from amputating his right arm or seeking his consent before the amputation.

The appellant in her written statement of defence denied to have registered the students in the RNP for study tour. It also averred that she did not at any time cause bodily or mental harm to the respondent and the accident occurred not in the appellant's premises hence it could not have immediate physical means to evacuate the injured students.

At the end, the trial court held the 1st, 2nd, and 3rd defendants had a duty of care towards the respondent hence liable for breach of duty of care and ordered them to pay reliefs in full as claimed by the respondent. The appellant was not held liable for breach of the duty of care. Dissatisfied, the respondent appealed to the High Court against the decision of the trial court for failure to hold the appellant liable for the breach of care.

The High Court reversed the decision of the trial court and held that the respondent managed to prove that the appellant breached her duty too and was thus liable to indemnify the respondent. The finding of the first appellate court was based on its interpretation of section 50(1)(2) and (8) of the Universities Act, 2005 (the Act) that it imposes a statutory duty to the appellant towards the respondent. It also condemned the appellant to share the awarded specific damages, general damages and costs in equal portions with the other defendants. As earlier stated, this appeal to the Court is against that decision.

The appellant's memorandum of appeal has raised four grounds that:

> *"1. The Appellate Court erred in law and facts by interpreting wrongly section 50(1), (2) and*

(8) of the Universities Act, 2005 which imposes a statutory duty to the appellant without considering the plaint and evidence on record;

2. *The Appellate Court erred in law and facts by allowing the respondent to urge (sic) or be heard in support of any ground of objection not set forth in the memorandum of appeal without leave of the High Court;*
3. *The Appellate Court erred in law and facts by awarding specific damages not proved; and*
4. *The Appellate Court erred in law and fact for resting its decision on the grounds not set in the memorandum of appeal without affording the Appellant sufficient opportunity to contest the case on the grounds."*

During hearing before us, Mr. Rutebuka Samson Anthony, learned advocate represented the appellant, and the respondent enjoyed the services of Dr. Ashery Fred Utamwa, learned advocate.

Mr. Anthony adopted the written submissions he had filed in compliance with rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). In amplifying his submissions, opening with ground one, the learned counsel submitted that, the first appellate court

wrongly interpreted the provision of section 50(1), (2) and (8) of the Act and if condoned or allowed to stand would lead to absurdity because with such interpretation, each student of the appellant would be demanding to be escorted by the Dean of Students in the course of their daily activities, just because of the purported unlimited duty of care.

It was Mr. Anthony's contention that, the law does not impose a duty on the academic institution to compel the Dean to escort or accompany students to a tour. He argued that what was necessary was to provide a person who would supervise the students at the RNP. He as well argued that, the Parliament when enacting the law did not intend to cover such disasters. So, the omission by the appellant to accompany the students to the said tour, to ensure reliable and safe transport, and to manage them during the whole of the Ruaha tour does not amount to a breach of duty under section 50 (8) of the Act. Thus, the first appellate court failed to distinguish between the statutory duty and just a duty of care as the said provision does not impose any duty to the Dean to escort or accompany the University students who were going for the tour.

On the second and fourth grounds, the learned counsel argued that the respondent before the High Court was granted leave to amend

the memorandum of appeal which contained three grounds of appeal remained with one ground. However, the respondent argued on all the grounds which were not raised in the amended memorandum of appeal without obtaining leave of the court contrary under Order XXXIX rule 1(2) and 2 of the Civil Procedure Code, Cap 33 R.E. 2019 (the CPC). It was the learned counsel's argument that the High Court was wrong to hear the appeal on a ground not stated in the memorandum of appeal, referring us to the case of **Consolidated Holding Corporation v. Nyakato Soap Industries Ltd**, Civil Appeal No. 58 of 2000 (unreported).

On ground three, Mr. Anthony submitted that, the High Court awarded specific damages to the tune of TZS. 107,000,000.00 but the same was not strictly proved, as the amount which was proved by the respondent was TZS. 9,083,502.98 and if the appellant is to be held liable then it is only to that extent. He supported his position with the decision in the case of **Strabag International (GMBH) v. Adinani Sabuni**, Civil Appeal No. 241 of 2018 (unreported).

In reply, Dr. Utamwa as well prayed to adopt the written submissions he had earlier on filed pursuant to rule 106(7) of the Rules, resisting the appeal. In respect of ground one, Dr. Utamwa supports the

findings of the first appellate court that it correctly interpreted the provisions of section 50(1), (2) and (8) of the Act. Expounding his position, he argued that the law imposes a duty to an institution to establish an office of the Dean, which would be responsible for controlling, supervising, and monitoring the conduct of the students wherever the University conducts its activities, be it at the campus or outside. He contended that the law is very clear and there is no any ambiguity whatsoever, bolstering his position with the case of **Commissioner General Tanzania Revenue Authority v. African Barrick Gold Plc**, Civil Appeal No. 11 of 2020 (unreported), where the Court held:

> *"When the language of a statute is plain, words are clear and unambiguous and gives only one meaning, then the effect should be given to that plain meaning only and one should not go in for construction of the statute..."*

He further argued that, the statutory duty of care was explained in the case of **Caparo Industries Plc v. Dickman** (1990) 2 AC 605 in the book titled **Winfield & Jolowicz, TORT, Sweet & Maxwell, 19th Edition, South Asian Edition, 2015** at pages 91 to 95 in which three

elements have to be proved, namely; foreseeability, proximity, fair, just and reasonable.

He argued that, the evidence clearly portrays that the accident and the injury was foreseeable. That the bus was overloaded with passengers and luggage, other passengers were standing as all the seats were occupied. Also, the bus was loaded with bags of cement and iron sheets placed in the passenger's cabin. He emphasized that the danger was foreseeable as the bus was not roadworthy as it had passed by a garage for repairs before commencing the journey and nothing was done. Likewise, the driver was not familiar with the road. On the second test of proximity, the learned counsel argued that the relationship between the appellant and respondent was very close. On the third test of fair, just and reasonable, it was Dr. Utamwa's argument that the law imposes duty of care to all universities, as the appellant was required to have a machinery in place to ensure that student affairs on that study tour were monitored, coordinated, controlled and facilitated in compliance with section 50 (8) of the Act.

On grounds two and four, Dr. Utamwa concedes to the appellant's complaint. However, he submitted that, both the memoranda (the former one and the amended one) though different they were very

synonymous. Though, he maintained that his submission in chief was with respect to the amended memorandum of appeal and in the same way was the appellant's reply submissions. He argued that, even if there was any procedural irregularity, the appellant is required to show how such irregularity prejudiced her and occasioned a miscarriage of justice. He bolstered his argument with the case of **Stanley Murithi Mwaura v. Republic,** Criminal Appeal No. 144 of 2019 (unreported).

On ground three, it is the argument of Dr. Utamwa that this is a new ground as the same was not determined by the first appellate court hence it contravenes with the dictates of law as stated in the case of **Menald Wenela v. The Director of Public Prosecutions,** Criminal Appeal No. 336 of 2018 (unreported). Dr. Utamwa therefore prayed to the Court to dismiss the appeal.

In his brief rejoinder, Mr. Anthony reiterated his submission in chief and cemented that the definition of campus under section 3 of the Act does not cover the scene of the accident at Ipwasi area as argued by Dr. Utamwa. In respect of ground three, although he conceded that the said ground is a new ground which was not discussed by the first appellate court, he implored the Court to consider it in this first appeal.

We have carefully traversed and examined all the arguments for and against the appeal and the record of appeal and we would like to dispose of the second and fourth grounds regarding the complaint that, following the grant of leave to amend the memorandum of appeal, the respondent who remained with the sole ground wrongly argued three grounds of appeal which were no longer in the memorandum of appeal. We understand that an appellant may not argue grounds of appeal other than those appearing on the memorandum of appeal without leave of the Court. However, we subscribe to the submissions by Dr. Utamwa that his submissions were focused on the amended memorandum of appeal and the appellant's reply submissions were with respect to the amended memorandum of appeal. That aside the first appellate court only determined the remaining sole ground of complaint and as such, there was no miscarriage of justice. The issue at stake was whether or not the appellant had the duty of care on the cause and occurrence of the accident and injuries sustained by the respondent.

Next is the main controversy between the parties and the essence of the first ground of appeal is centred on the proper interpretation of section 50(1), (2) and (8) of the Act. That the first appellate court wrongly interpreted the said provision holding that it imposes a statutory

duty of care to the appellant without considering the amended plaint and the evidence on record. That argument is strongly refuted by Mr. Utamwa that the appellant owes a duty of care to the respondent and that necessitates us to reproduce section 50 (1), (2) and (8) of the Act which reads:

> *"(1) An institution shall provide under its enabling legal instrument for an office of a person of integrity and outstanding experience and capability of student administration or counselling to be responsible for the proper, effective and efficient administration of the affairs of the students of the institution.*
>
> *(2) The designation of the holder of the office under subsection (1) shall in the case of a university accredited to offer degree programmes and confer degrees, be the Dean of Students or equivalent designation.*
>
> *(8) For the purposes of this section the administration of the affairs of the students of the institution shall include establishment of and overseeing the machinery for monitoring, coordinating, regulating, controlling and facilitating the general conduct of students* ***on the campus or***

campuses of the institution, the institution's branches and any other place where the affairs of the institution in which its students are involved may take place, be conducted or extended to or where the residence of its students is established, provided, organised or overseen by the institution." *[Emphasis added]*

From the above excerpt, it is a requirement for any university to establish an office of the dean who will be responsible for the proper, effective and efficient administration of the affairs of the students of the institution. It further specifies the administration of affairs of the students to include the establishment of an overseeing machinery as explained above. In our interpretation of the above provisions and in particular the bolded expression, the duty of care is limited to dealings of the students while in campus or in branches of the institutions and may be extended to other places like where the residence of its students is established, organised or overseen by the institution.

While, the respondent argued that the provision imposes on the University a duty of care upon the students and that such duty exists even when the students are outside the campus in pursuit of their

studies, the appellant is of the view that such interpretation would be casting the net too wide beyond the import of the provision. Both parties agreed on the point that in determining the issue of whether the appellant had a duty of care on the students, the place upon which the duty has to be exercised is pivotal.

Relevant to what we will be discussing, it is apposite we start by looking at the pleadings of the litigants against the argument that the study tour was a do or die trip for its attendance carrying 10 marks in their examination results as argued by Dr. Utamwa. We have thoroughly gone through the pleadings and evidence adduced at the trial court, the claim above was not pleaded. Paragraph 10 of the amended plaint which could have been relevant to the claim, does not disclose the issue of do or die trip carrying 10 marks. It stated:

> *"Paragraph 10. Under that statutory duty, the University devised a trip to Ruaha National Park as part of the study syllabus for the said Tourism students and finally arranged the trip, but all such arrangements were unilaterally imposed and enforced by nobody but the university itself. The students had no alternative but to obey and attend the pre-decided distant program."*

At paragraph 12 of the said plaint, it stated:

> *"That, consequent to the loose state of affairs, some students had to hire a private car, while others had to use normal public even if the same could be foreseeably dangerous and risky; reaching the final destination on that day, was mandatory. Otherwise, failure to attend a one-day study program on the following day in the National Park would have negative and irreparable repercussions to their academic study and results. The plaintiff was among those who used the public bus."*

From the excerpts above, it was pleaded that the trip was a one-day study tour to Ruaha National Park as part of the syllabus for the Tourism students. However, we are of the opinion that the respondent was duty bound to prove that fact on the required standard since the same was objected by the appellant as gleaned at paragraph 13 of her written statement of defence.

We are mindful of the common principle that parties are bound by their pleadings. In **Martin Fredrick Rajab v. Ilemela Municipal Council & Another** (Civil Appeal 197 of 2019) [2022] TZCA 434 (18 July 2022) (unreported), we firmly emphasised that it is a cardinal principle of the law of civil procedure founded upon prudence that parties are bound by their pleadings and thus, no party is allowed to

depart or present a case contrary to the pleadings. In addition, there was no issue framed in that regard. For that position we are compelled to hold that the argument that the trip was a do or die undertaking is unfounded.

Still, that does not negate the fact that the respondent and other students had a study tour to the RNP, and that takes us to determine whether the appellant had a duty of care and whether she is liable for breach of that duty on the injuries suffered by the respondent while on the way to the RNP.

The crux of our determination would be on the principles of tort, duty of care and its applicability. It would thus be relevant to restate what we stated in **Winfred Mkumbwa v. SBC Tanzania Limited** (Civil Appeal No. 150 of 2018) [2019] TZCA 685 (29 October 2019) (unreported) where we were inspired by the book titled **The Principles of Tort Law, 4th Edition, Vivienne Harpwood, Cavendish Publishing Limited, 2000** at page 25, that:

> *"The first matter to be proved is that the defendant owed a duty of care to the claimant. Unless it is possible to establish this in the particular circumstances of the case, there will be no point in considering whether a particular act*

or omission which has resulted in harm was negligent.... The existence of a duty of care depends upon oversight/ proximity and other complex factors. ***It should be noted that in the vast majority of negligence cases there is no dispute about the existence of a duty of care."***

In the light of the above excerpt and subscribing to the submissions by Dr. Utamwa supporting the case of **Caparo Industries Plc v. Dickman** (supra), in this case there is a dispute about the existence of a duty of care. In the endeavour to proving tortious liability based on duty of care, these three elements have to be proved; namely, foreseeability, proximity and fair, just and reasonable.

The issue of proximity was well discussed in **Heaven v. Pender** (1883) 11 QBD 503 that a duty to take due care arises when the person or property of one is in such proximity to the person or property of another that, if due care is not taken, damage might be done by the one to the other. It further held:

"I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that

the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act."

This notion of proximity was also discussed in the book of **The Principles of Tort Law, 4th Edition, Vivienne Harpwood, Cavendish Publishing Limited 2000** at page 22, when analysing Lord Atkin's neighbour principle in the case of **Donoghue v. Stevenson** [1932] AC 532 and insisted on the direct effect of one's action or omission to the neighbour or another person that:

"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when directing my mind to the acts or omissions which are called in question."

Now, what is gathered from the excerpts above is that, for a proximity rule to apply, the act or omission of a wrongdoer should directly affect the victim. It may thus be said, the rule would not apply when there is an intervention of a third party. That being the case, we

will see whether the act of the appellant requiring Tourism students to attend the said study tour at RNP directly affected the respondent or was there any intervention by another person. In that regard, we are mindful of the principles of the tort law in that some actions or omission are not direct or, to use the proper phrase, are too remote or not foreseeable. We are supported by what is discussed in the book titled **Tort Law Text, Cases and Materials, 3rd Edition, Jenny Steele** at page 186 when discussing the scope of liability or remoteness of the damage.

The scope of liability or remoteness or directness of the action or omission is governed by three questions; **one**, is whether the full extent of the damage is fairly attributable to the defendant's breach of duty or other tortious intervention? **Two**, is the damage a direct consequence of the defendant's breach, or has the chain of causation been broken? That is whether there was a new cause. And **three**, even if the defendant's breach is a condition of the damage suffered, so that it satisfies the "but for" test, is it a cause of that damage?

Guided by the above propounded principles in line with the facts at hand, the answer to the above questions is in the negative as we shall demonstrate. It is common to both parties that the respondent suffered

damage due to an accident which was not caused by the appellant. Nonetheless, the appellant is blamed on the basis that she had a statutory duty of organising transport to the RNP for the study tour or provide a person to travel with the students in the public bus which was involved in an accident, to monitor and control the driver in terms of section 50(1), (2) and (8) of the Act. But then, the cause of that accident, as asserted by the respondent was that the bus was not roadworthy, the driver was not familiar to the road to the RNP, the driver was driving recklessly and the bus was overloaded in terms of passengers and luggage. Taking into account that the bus was operating as a public transport carrying other adult passengers like PW5 and PW6 who could have protested to the driver, the defect of the bus, the driver's negligent and reckless driving and overloading the bus directly caused the accident at Ipwasi area. The acts of the driver affected directly the respondent a passenger in the said bus causing bodily and or mental harm. The driver of the bus carrying passengers had a statutory duty of care towards the passengers which he failed to observe by not considering the safety of the passengers hence causing the accident. Further, the appellant was not the employer of the driver nor owner of the bus to be held liable for breach of duty of care towards the

respondent. It makes the damage not fairly attributable to the breach of duty of care by the appellant.

On the second test of reasonable foreseeability, it was established in **Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound No 1)** (1959) 61 SR (NSW) 688, that the defendant charterer of a ship negligently spilt oil. The oil floated on the surface of the water in Sydney Harbour. The oil was ignited by some molten metal falling from the plaintiff's wharf, where welding operations were being carried out, onto cotton waste floating in the water which acted as a wick. The resulting fire extensively damaged the plaintiff's wharf. The flashpoint of the oil was 170°C and would not normally have ignited on the water. The court found that the defendants were not negligent, because the kind of damage which resulted was not a reasonably foreseeable result of an oil spillage.

In view of the above position, the argument of Dr. Utamwa that the accident was foreseeable by the appellant is unfounded. The appellant only arranged the study tour, he did not foresee that the students would board a defective bus, driven by a driver who was not familiar with the route to the RNP and likely get involved in the accident. It is the respondent who made a choice to board a bus which was

defective, it was overloaded with passengers and luggage along the aisle of the bus, the driver was driving at high speed, he was not familiar with the road and had exceeded the number of passengers in the bus to that route. In his evidence, the respondent stated that was the last bus for the day meaning there were other buses available before he decided to board the defective bus. It was incumbent on the respondent to opt out and not to board the bus with such deplorable conditions and he contributed to the negligence. The appellant could not foresee that the bus was not roadworthy taking into account other students arrived at the study tour destination by arranging own means of transport. The appellant could not foresee the kind of danger that was likely to happen.

On the last test of fair, just and reasonable, we agree with the argument of Dr. Utamwa that the law imposes duty to the universities to make sure that the student affairs are monitored controlled and facilitated in compliance with the law. However, we do not agree with his contention that, the appellant was supposed to assign the Dean or its representative to be in the bus escorting the students to the RNP. The liability of the appellant is limited to the campus, or branches of the institutions or any other place in the dealings of the university where its students may take place. Dr. Utamwa insisted that, that place could have

also been in the said bus, while Mr. Anthony resisted the argument and asserted that would be proved to absurdity, as students would claim damages for any danger they mighty encounter when they go or come from the university, so long as they claim they were going to attend their studies, which line of argument we agree with. We think Dr. Utamwa overstretched the interpretation of the word 'campus' envisaged under section 50 (8) of the Act and in the process misconstrued the words 'in any other place 'to include public transport. This goes without belabouring to define what a campus is for it may be irrelevant at this juncture, given the stance we have taken. In that context, the duty of care should be limited to direct action or omission of the appellant only where there was no intervention of another person and, in a reasonable man's test, the damage should have been foreseeable, fair, reasonable and just which was not the case on the part of the appellant.

From the analysis above, it is our considered view that the respondent's claim on tortious liability does not meet the test required rendering the case not established on the balance of probabilities that the appellant had a duty of care to the respondent at the time of occurrence of the accident. Having determined ground one, we find it suffices to dispose of the appeal.

In the event, this appeal succeeds, with the end result that the judgment of the High Court in relation to the appellant is quashed, and its orders set aside. Although the judgment of the District Court appears to be failing short for not apportioning damages, we have no material upon which to intervene and make necessary orders. We leave it as it is.

No order as to costs.

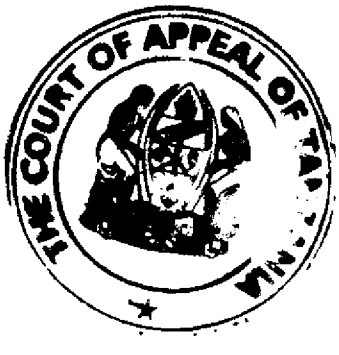
DATED at **DAR ES SALAAM** this 20th day of June, 2024.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

Judgment delivered this 24th day of June, 2024 in the presence of Mr. Samson Rutebuka, learned counsel for the Appellant and Dr. Asher Utamwa, learned counsel for the Respondent through video Conference at Iringa High Court, is hereby certified as a true copy of the original.



J. J. KAMALA
DEPUTY REGISTRAR
COURT OF APPEAL